Chapter 10 - Marginalised workers

Some workers have particular needs

10.1 Ensuring that a workforce is well informed and motivated about discrimination issues greatly assists in the prevention of discrimination. It is important, therefore, for employers to take all appropriate steps to ensure that the information provided to employees is accurate and tailored to the needs and demographics of the particular workforce. For example, workplaces with employees from linguistically and culturally diverse backgrounds or with a disability need to take particular care to ensure all employees are aware of their rights and responsibilities in relation to pregnancy at work.

10.2 Employers of part time and casual employees should ensure training and policy information is equally accessible to all workers. Good management practices such as this also assist employers to discharge liability should allegations of discrimination be made.[1] Employers also need to be aware of the particular needs of different groups of employees in relation to managing and accommodating pregnancy at work, ensuring reasonable steps are taken to meet those needs.[2]

10.3 The Guidelines on managing pregnancy and potential pregnancy at work will provide general advice on assessing a workplace to ensure that practices, procedures and policies in relation to the management of pregnancy and potential pregnancy are appropriately focused and take account of the particular characteristics of the workforce.

10.4 This chapter examines the needs and circumstances of some groups of employees in managing pregnancy and potential pregnancy at work. Special provisions are needed for some groups of workers because of a lack of clarity in relation to their employment status or because of structural barriers which present particular challenges for managing pregnancy or potential pregnancy at work. Structural barriers that prevent access to rights by these workers are also discussed.

Casual employees

10.5 Casual employees are employed under contract although there may be little, if any, written contract between the employer and the casual employee. A casual contract imposes no obligation on either party to continue the relationship. Each period of hiring is distinct and any continuing relationship does not mean that under the law there is a continuing contract.

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[1] Employers may be directly liable for discrimination under s 14 *Sex Discrimination Act 1984* (Cth). They may be vicariously liable for harassment under s 28B *Sex Discrimination Act 1984* (Cth) . Vicarious liability arises under s106 *Sex Discrimination Act 1984* (Cth). See paras 5.33 – 5.36.
[2] See ch 12.

10.6 Casuals do not have the same rights and entitlements as permanent employees, and many are in more temporary employment than other employees. As a result, pregnant or potentially pregnant casual employees are a category of female employee that may be particularly vulnerable to discrimination. Managing pregnant or potentially pregnant casual employees in a non-discriminatory manner may also present particular challenges.

Trends in casualisation

10.7 The number of casual employees in the Australian workforce has increased substantially from 15.8% in 1984 to approximately 25% in 1997.[3] Amongst OECD countries, only Spain has a higher proportion of temporary workers.[4]

10.8 A significantly larger proportion of women than men are employed as casuals. Approximately 60% of all casuals are women.[5] The following breakdown of employment status by gender reflects this.

Table 10.1 Employment status of the Australian workforce by gender

Employment Status	Women Employed		Men Employed	
	1995 %	1998 %	1995 %	1998 %
Permanent Full-time	54.3	49.7	81.1	74.9
Permanent Part-time	17.3	18.3	2.2	2.5
Total Permanent	**71.6**	**68.0**	**83.3**	**77.4**
Casual Full-time	4.8	5.0	9.2	11.4
Casual Part-time	23.6	27.0	7.6	11.1
Total Casual	**28.4**	**32.0**	**16.7**	**22.6**
Total	**100%**	**100%**	**100%**	**100%**

Source: *Working Arrangements Australia* cat no 6342.0.40.001 in Australian Bureau of Statistics and Office for the Status of Women *Australian Women's Yearbook 1997* ABS Canberra, 72 for 1995 figures. Unpublished data prepared by Australian Bureau of Statistics for HREOC from *Employee Earnings, Benefits and Trade Union Membership Survey* for 1998 figures. Note: data have been rounded.

10.9 Statistics also reflect that casual employment is found in all industry sectors. In 1996, the industry divisions with the highest casual densities were

[3] Australian Bureau of Statistics *Weekly Earnings of Employees* (Distribution) ABS Canberra 1998 cat no 6310.0. See also New South Wales Government (Submission no 99).
[4] J Burgess and I Campbell "Casual Employment in Australia: Growth, Characteristics - A bridge or a trap?" (1998) 9 *Economic and Labour Relations Review* 41.
[5] Australian Bureau of Statistics *Weekly Earnings of Employees* (Distribution) ABS Canberra 1998 cat no 6310.0. See also New South Wales Government (Submission no 99).

accommodation, cafes and restaurants (56 %); agriculture, forestry and fishing (53.9%); cultural and recreational services (46.7%) and retail trade (44.4%).[6]

Table 10.2 Employment status for selected occupations by gender in the Australian workforce

Selected Occupation Groups	Full Time (a)	Part Time (a)	Casual (b)
Managers and Administrators			
% of Women	5.1	2.5	1.0
% of Men	10.6	4.6	5.3
Professionals			
% of Women	24.3	13.7	10.9
% of Men	17.3	11.3	12.5
Associate Professionals			
% of Women	12.2	4.7	4.8
% of Men	12.7	5.8	6.2
Trades Persons and Related Workers			
% of Women	3.2	2.7	2.3
% of Men	22.7	8.8	16.4
Advanced Clerical and Service Workers			
% of Women	8.8	8.9	6.9
% of Men	1.0	1.0	0.8
Intermediate Clerical, Sales and Service Workers			
% of Women	27.6	29.5	28.7
% of Men	8.5	10.4	7.8
Intermediate Production and Transport Workers			
% of Women	3.1	2.0	2.6
% of Men	14.1	13.1	16.4
Elementary Clerical, Sales and Service Workers			
% of Women	9.5	24.4	29.0
% of Men	4.3	19.6	12.6
Labourers and Related Workers			
% of Women	6.3	11.6	13.8
% of Men	8.9	25.6	22.1
Total			
Women	**100%**	**100%**	**100%**
Men	**100%**	**100%**	**100%**

Source: Prepared by Australian Bureau of Statistics for HREOC from (a) *Labour Force* cat no 6203.0; (b) Unpublished data prepared by Australian Bureau of Statistics for HREOC from *Employee Earnings, Benefits and Trade Union Membership Survey*. Note data have been rounded.

[6] Australian Bureau of Statistics *Trade Union Members Australia* ABS 1996 cat no 6325.0; and unpublished data from ABS Weekly *Earning of Employees* (Distribution) ABS Canberra 1998 in J Burgess and I Campbell "Casual Employment in Australia: Growth, Characteristics - A bridge or a trap?" (1998) 9 *Economic and Labour Relations Review* 41.

10.10 A study undertaken in 1984 of a range of private and public sector employers found that 26% of the employers sampled stated that they had changed their employment patterns since the introduction of maternity leave. The most common change found was in the use of more female casual staff (41%). Some 11% stated that they were employing fewer women in their child bearing years.[7] This study is now significantly dated and no similar studies have been undertaken subsequently to indicate changes in attitude and employment practice. However, even if non-discriminatory practices have been pursued since then, an historical trend towards discrimination is unlikely to have been redressed.

10.11 Submissions to the inquiry made by trade unions provided information on the trend in casualisation of particular industries. The Queensland Nurses' Union noted that

> [t]here has been a significant increase in casualisation of the nursing workforce in recent years, especially in sectors such as aged care. This is consistent with the trend towards increasing casualisation in the broader workforce. The impact of this increased casualisation has been increased job insecurity and decreased financial stability for the nurses affected.[8]

10.12 Other submissions agreed.

> Increased casualisation of the workforce was identified as an issue having an important effect on women with the potential to get pregnant. This form of employment, which has affected all areas of the ASU's coverage and has increased rapidly over the last few years, offers significantly less protection to pregnant employees.[9]

> [A] TAFE organiser with the NSW Teachers Federation…stated that currently over 50% of TAFE teaching hours are casualised. TAFE employs over 18,000 casual teachers, many of whom are women. Permanent teachers are in a minority – approximately 7,000. These part-time teachers are severely disadvantaged in their working conditions and obviously the insecurity of income is a big factor. The lack of access to maternity leave severely exacerbates this situation.[10]

10.13 There is a range of views as to why casual employment has grown in recent years in Australia. Based on an analysis of the Australian Workplace Industrial Relations Survey (AWIRS) data, Wooden concludes that there are four principal reasons.

- Changes in the industrial composition of employment favouring industries where casual employment is widespread.
- A reduction in levels of unionisation, weakening the ability of unions to resist the introduction by employers of casual employment.

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[7] H Glezer *Maternity Leave in Australia*: *Employee and employer experience - Report of a Survey* Australian Institute of Family Studies Melbourne 1988, 107.
[8] Queensland Nurses' Union (Submission no 37).
[9] Australian Services Union (Submission no 85).
[10] New South Wales Teachers Federation (Submission no 70).

- The gradual privatisation of many areas of employment formerly dominated by the public sector where casual employment has traditionally been avoided.
- A marked growth in the incidence of casual employment at new workplaces and firms.[11]

10.14 Wooden notes that it would be helpful to understand the factors behind the last conclusion. However, AWIRS data did not enable conclusions to be made on the sources of behavioural change.[12]

10.15 The Australian Chamber of Commerce and Industry considered the following reasons to have caused the increase in casualisation.

> The changing nature of contracts of employment is an extremely complex issue, reflecting in our view for example cost pressures from inappropriate increases in real award wages (5% in real terms in the last two safety net decisions, in 1997 and 1998), and other reasons. The size of recent safety net increases has had a clearly deleterious effect on full-time employment growth which is extremely small compared with part-time employment growth. The solution is to be found in real wage restraint.[13]

The rights of casual employees

10.16 Casual employees are not legally entitled to maternity leave under federal or state/territory workplace relations law, irrespective of length of service.[14]

10.17 Casual employees are also excluded from making a complaint of unfair dismissal or unlawful termination under the *Workplace Relations Act 1996* (Cth), if they have been employed for less than twelve months.[15]

10.18 Under the *Sex Discrimination Act 1984* (Cth) (the SD Act), however, employment is defined to include temporary employment.[16] Thus casuals, as temporary employees, have the same rights as other employees under the SD Act.

10.19 Discussions in focus groups undertaken for this inquiry and comments in submissions have indicated that casual employees and employers of casuals lack

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[11] M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 25.
[12] M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 25.
[13] Australian Chamber of Commerce and Industry (Submission no 84).
[14] Some casual employees may be entitled to a period of maternity leave under state or federal awards, legislation or agreements. For example, the *Factories Shops and Industries Act* 1962 (NSW) requires all employees, including casuals, to take a period of six weeks unpaid leave after the birth of a child. The New South Wales Government has indicated that it intends to introduce maternity leave rights for casual employees: New South Wales Government (Submission no 99). The Queensland Government is also attempting to introduce paid maternity leave for long term casual employees: M Hele "Bill to help protect workers in marginal jobs" *Courier Mail* 9 June 1999, 15.
[15] regs 30B(1)(d) and 30B(3) Workplace Relations Regulations 1996 (Cth).
[16] s 4 *Sex Discrimination Act 1984* (Cth).

sufficient knowledge of their rights and responsibilities.[17] Some employees and employers assume that, as rights are limited under industrial relations legislation, rights will also be limited under anti-discrimination legislation.[18]

10.20 To understand properly the rights of casual employees, a thorough understanding of industrial relations law as well as anti-discrimination law is required. Many employers and employees enter into a relationship which they classify as a casual relationship, although the law classifies it as an ongoing contract of employment.

Problems of classification

10.21 The term "casual" has no strict legal definition. It is not defined in anti-discrimination or industrial relations legislation.[19] However, the courts have defined casual employment to refer to employment that is informal, irregular and uncertain.[20] Each shift undertaken by a casual employee is a separate contract of employment. In effect, when a shift is finished, the employment relationship is finished. Thus, there can be no "dismissal" of a casual employee as with other employees on a continuing contract. A casual employee does not have continuity of service with an employer and each work period is a distinct contract which ends at the end of the period of service.

10.22 Casual employment normally involves employment for fewer hours than the normal full-time working week, arranged in a non-regular pattern.[21] Many awards provide for a pay loading for casual employees of 15-20% of the normal weekly rate and this loading seeks to compensate the casual for the lack of normal employment benefits.[22] Casual employees are paid by the hour and no significant period of notice is required by law to be given by either party.

10.23 Whether or not the employment characteristics in a particular situation constitute casual employment must be determined by the individual facts present including the nature of the work, the way in which the wages are paid, the amount of wages and the period of time over which the employment extends.[23]

10.24 In a recent case before the Australian Industrial Relations Commission which questioned the right of casual employees to redundancy payments, the Full

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[17] Australian Reproductive Health Alliance (Submission no 22); Australia Post (Submission no 44); Community and Public Sector Union (Submission no 53).
[18] Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32); Top End Women's Legal Service (Submission no 89).
[19] sch 14 *Workplace Relations Act 1996* (Cth) provides that employees are entitled to 52 weeks maternity leave subject to length of service, notice periods and information and documentation. Item 2 sch 14 excludes casuals from maternity leave rights. However, a casual employee is not defined in the schedule and thus an employee would be entitled to argue that they have been incorrectly classified: Department of Employment, Workplace Relations and Small Business (Submission no 83).
[20] *Reed v Blue Line Cruises Ltd* (1996) 41 AILR 3-456.
[21] CCH Australia Ltd *Recruitment and Termination Guide* CCH Sydney 1998, 22-000.
[22] s 89A(2)(k) *Workplace Relations Act 1966* (Cth).
[23] *Stoker v Wortham* (1919) 1 KB 499, 503-4; *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545, 565.

Bench held that the claim should be considered on the basis of the nature of the actual employment arrangements under which the casuals are employed, not on the fact that they are titled casuals.[24]

10.25 Classification difficulties arise when a casual employee becomes a "regular" casual employee. Casual employment which is regular and continuing may be difficult or inappropriate to classify as "informal, irregular and uncertain". The Industrial Relations Court has held that once a casual employee exceeded a six month period of regular and systematic employment there was a prima facie presumption that it would be reasonable to expect continuity of that employment, albeit on a casual basis, unless there is objective evidence to negate such an expectation.[25]

10.26 When the actual picture of the workforce is examined, it is very difficult to define casuals with any certainty. The legal definition, employees' and employers' literal understanding and the actual practice of employing casuals sometimes appear to be quite at odds. Difficulties also arise due to significant variation in awards. Some awards give employers considerable freedom to designate regular employees as casuals.[26] However, the recent *Award Simplification Decision* merely referred to a casual employee as "an employee engaged as such".[27]

10.27 Submissions to this inquiry asserted that misclassification of casuals is common.[28] One trade union made the following comments.

> One example is the case of Ms S, a teacher who had been teaching…as a Casual Supply teacher for the two years continuously. Her teaching load was 4 days 4 hours and 15 minutes. This is half an hour short of a full-time teacher's load. Ms S applied for maternity leave payment but was denied on the basis that she was a casual teacher who had not taught a full load…
>
> This situation creates a serious anomaly between teachers who have been employed as casual supply teachers for two, three or four days per week and have received no maternity leave entitlement compared to permanent part-time teachers who may be employed for the same period of time and receive full pro-rata payment as well as right of return to their former position.[29]

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[24] *Australian Municipal, Administrative, Clerical and Services Union v Auscript* (1998) 43 AILR 3-756.
[25] *Forbes v Ori Enterprises Pty Ltd* (1995) AILR 3-277. See also *Metals and Engineering Workers Union, WA v Centurion Industries Ltd* (1996) 40 AILR 3-756; *Berwick v San Remo Macaroni Company Pty Ltd* (1986) AILR 515.
[26] M Wooden *The Changing Nature of Employment Arrangement*s Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998; Australian Chamber of Commerce and Industry (Submission no 84).
[27] Australian Industrial Relations Commission *Award Simplification Decision* 23 December 1997, Print P7500.
[28] New South Wales Government (Submission no 99); Australian Manufacturing Workers Union (Submission no 57); Anti-Discrimination Commission of Queensland (Submission no 68); New South Wales Teachers Federation (Submission no 70).
[29] New South Wales Teachers Federation (Submission no 70).

10.28 The Human Rights and Equal Opportunity Commission (HREOC) understands that these are not isolated situations and that there may be a significant number of employees in Australia who are classified as casual by their employers but may not fit the definition of casual under employment law. Incorrect, often oral, employment categorisation denies employees access to entitlements of maternity leave and the right to return to work after pregnancy and dismissal remedies under workplace relations laws. This has a significant impact on pregnant or potentially pregnant employees and their ability to earn a living.

The nature of casual work

10.29 The Business Council of Australia submission highlighted the issues and stated that

> [i]t should be realised, however, that so-called "casual work" is not, ipso facto, always short term, unwanted or inherently insecure work, or work with no rights and entitlements.[30]

10.30 Statistical studies add to the debate by showing that casual employment is not always short term. A 1997 Australian Bureau of Statistics Report indicated that one third of all casuals are employed as casuals for over 12 months.[31] The AWIRS survey indicated that almost 50% of casual employees surveyed in the study were in jobs that had lasted over two years.[32]

10.31 There appear to be many reasons why employees take on casual employment and many reasons why employers offer it. In addition to employees' reasons of financial need and lack of employment opportunities for other forms of more permanent or secure work, some employees choose casual work due to other commitments they may have. The submission from the Affirmative Action Agency stated that

> [m]any women undertake part-time and casual work because it allows them to more readily balance work and family. However, unless provided for via a formal or informal workplace agreement, casual employment does not usually provide for paid or unpaid maternity leave….Agency experience indicates that casual employees also have the least access to training and career development opportunities.[33]

10.32 The study by Wooden extends to examining the question of whether casual jobs are necessarily "bad". Based on the AWIRS survey, Wooden concluded that casual employees are relatively low-paid, are less likely to receive structured training provided by the employer and typically do not have much influence

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[30] Business Council of Australia (Submission no 52). See also Australian Bureau of Statistics *Part-time, Casual and Temporary Employment, New South Wales* ABS Sydney 1998 cat no 6247.1.
[31] Cited in J Burgess and I Campbell "Casual Employment in Australia: growth, characteristics - A bridge or a trap?" (1998) 9 *Economic and Labour Relations Review* 31, 46.
[32] A Morehead et al *Changes At Work: The 1995 Australian Workplace Industrial Relations Survey* Longman South Melbourne 1997. See also M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 10.
[33] Affirmative Action Agency (Submission no 76).

over organisational decision-making processes. However, 70% of the casual employees surveyed reported being happy with the hours they worked.[34]

10.33 Given the high number of casual employees and the significant proportion that are employed in long term casual employment, there appears to be no reason why long term casual employees should not have access to the same rights as other employees, including maternity leave.

Difficulties faced by casuals

10.34 Many submissions to the inquiry discussed the difficulties faced by casuals due to a lack of knowledge of anti-discrimination rights, the lack of maternity leave rights, restricted access to industrial relations remedies when employed for less than 12 months and general feelings of job insecurity.

10.35 The submission from the South Australian Equal Opportunity Commissioner stated that

> [i]n my experience, employers are often not aware that casual employees can lodge complaints of discrimination on the grounds of pregnancy if their hours of work are reduced once the employer becomes aware of the pregnancy….Often employers will simply argue that because the complainant is employed on a casual basis then their hours can be varied at will. Whilst that is true, we often have to explain that the complainant is arguing that one of the reasons her hours were varied "at will" was the fact she was pregnant, and that would be an unlawful consideration.[35]

10.36 This experience is similar to those encountered by trade unions and advisory organisations detailed for this inquiry.

> A number of women in the hospitality industry have reported that they go to great lengths not to let their employer know they are pregnant because they fear that they will be put off immediately, and have their hours reduced or not be given overtime.[36]

> Maria was employed casually as a receptionist in the personal services industry. After 11 months in the job, she became pregnant. When she was five months pregnant, she needed some time off from work to see her doctor about the pregnancy. Although she gave her employer two weeks notice of her unavailability on the day of her appointment, her employer threatened to sack her if she did not turn up at work on that day. Just two weeks later Maria was dismissed.[37]

> Casual/contract employees are less likely to be aware of their rights under either anti-discrimination or industrial legislation. They are likely to believe that they have fewer rights than permanent employees. Even if they are aware of their rights, the vulnerability to dismissal or reduction of hours which attaches to casual employment means that they are less likely to seek to enforce their rights.[38]

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[34] M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 11-12.
[35] Office of the Commissioner for Equal Opportunity South Australia (Submission no 79).
[36] Australian Council of Trade Unions, Queensland Branch (Submission no 50).
[37] Job Watch Inc (Submission no 60).
[38] Community and Public Sector Union (Submission no 53).

10.37 HREOC notes that casual work is sometimes the favoured option for employees. The flexibility of casual work can provide many benefits when it comes to managing family responsibilities. However, the high number of regular casuals, particularly female casuals, in the Australian workforce is of concern. Due to the lack of solid data, speculative comment is the only option, but based on the concerns documented for this inquiry, it appears there are employers using casual employment status to avoid the rights and responsibilities associated with pregnant employees.

Conclusion

10.38 This inquiry has demonstrated that significant issues exist in relation to pregnant and potentially pregnant casual employees. There is some lack of awareness regarding the rights of casual employees and the legal obligations of employers who employ casual employees. In particular, widespread ignorance of the appropriate classification of casual employees is at times creating a situation where employees are regarded as casuals when they are in fact legally considered ongoing employees.

10.39 Several of the issues raised by the inquiry indicate a lack of adequate statistical research and academic analysis. HREOC encourages further study in this area, particularly with respect to the tension between the need to provide flexibility in the workplace, when casual work can be a good option, and the need for protection for employees, where casual work is used to avoid industrial relations and anti-discrimination laws and obligations.

Pregnancy Guidelines 15: That the Guidelines provide clarification about the definition of casual employment and the rights and responsibilities of casual employees and employers of casuals.

Recommendation 25: That the *Workplace Relations Act 1996* (Cth) be amended to extend unpaid maternity leave to casual employees employed for over 12 months.

Recommendation 26: That state governments extend unpaid maternity leave rights to casual employees employed for over 12 months under their respective legislation.

Short term contracts

10.40 Concerns regarding the rights of pregnant and potentially pregnant employees on short term contracts were raised in submissions and in consultations. Short term contracts are generally for a duration of less than 12 months. The use of these contracts is particularly an issue when a person is employed on a series of short term contracts, with each term intended to be a new term independent of the previous term. This practice disadvantages women who need to demonstrate continuity of employment for maternity leave. In addition, the instability of short term contracts has been cited as a factor which discourages

women from having children.[39] Employees on short term contracts are also vulnerable to termination of employment because of their pregnancy.

10.41 The SD Act makes it unlawful for a contract to be terminated or not renewed on the basis of pregnancy or potential pregnancy.[40] In addition, an employee on a short term contract may have access to protection under unfair dismissal and unlawful termination laws under the *Workplace Relations Act 1996* (Cth) if the contract is terminated due to pregnancy.[41]

10.42 Difficulties arise in relation to maternity leave rights for employees on short term contracts. Eligibility for maternity leave depends on the circumstances of employment. [42]

10.43 Submissions indicated a lack of knowledge of the rights and responsibilities of employees on short term contracts.[43]

> Katrina was a permanent full time employee in the design industry. She was employed under a [series of] year long fixed term contract[s]. After five years of service with the same employer, Katrina informed her boss that she was 2 months pregnant. She requested that she take maternity leave….Her employer refused, saying that contract workers do not get maternity leave and added that if anyone was to be dismissed, she would be the "first to go".[44]

> [A] young contract teacher…was contacted by phone by an officer from the education department and asked of her availability for contract work (as is usual practice). She indicated her availability to take up contract teaching work. She verbally accepted the contract. She then stated that she would need to take accouchement leave part way through the tenure of the contract. The offer of contract was then withdrawn on the basis "that it would cause too much disruption to the school to have another contract teacher come in and complete the tenure".[45]

10.44 In relation to a genuine short term contract which exists to fill a time-bound position, there is no expectation of employment beyond the end of its term. The relationship with the employer ends when the contract ends. Therefore, it is generally not possible for an employer to ensure a position upon return from maternity leave if the contract has expired at that time.

10.45 Termination of employment because of the need for leave may not amount to discrimination if the interruption to the work means that the terms of the contract are not able to be fulfilled. This may be the case where a short term task needs to be completed within the contract period.

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[39] Australian Education Union, South Australian Branch (Submission no 42).
[40] s 16 *Sex Discrimination Act 1984* (Cth). See also ch 4.
[41] See paras 8.107 – 8.117.
[42] See paras 12.24 – 12.26.
[43] Australian Education Union, South Australian Branch (Submission no 42); Confidential (Submission no 54); Job Watch Inc (Submission no 60).
[44] Job Watch Inc (Submission no 60).
[45] Australian Education Union, South Australia Branch (Submission no 42).

10.46 However, of concern to HREOC is the practice of employment on a series of short term contracts in positions of employment which are suitable for continuing employment. Where these contracts expire at the end of each term and are replaced by a new contract, the effect may be to make employees vulnerable to discrimination on the basis of pregnancy.

10.47 Where an employer is using short term contracts to avoid the rights of pregnant or potentially pregnant employees, such as reappointment or maternity leave, the employer may be in breach of section 16 of the SD Act which makes it unlawful for a principal to discriminate against a contract worker in the terms or conditions of employment or by subjecting the contract worker to any other detriment.

10.48 Very little research has been undertaken on how widespread short term contracts are, or of the characteristics of such employment. A study undertaken by Wooden based on the data collected by the AWIRS survey in 1995, concluded that persons in fixed term employment compared with those in permanent employment are more likely to be female; much more likely to be young (under 25 years of age); and much more likely to have a university-based education.[46] This study also found that industries with a higher incidence of fixed term contracts included education (up to 20% of employees), property and business services, personal and other services, government administration and health and community services.[47]

10.49 It appears that there is a lack of awareness of the rights and responsibilities relating to employees on short term contracts particularly if the employee is pregnant and is unable to complete the term of the contract, or is refused a renewal of the contract on the basis that she is pregnant. The Guidelines will provide assistance and clarification with these issues.

Pregnancy Guidelines 16: That the Guidelines provide assistance and clarification regarding the rights and responsibilities of employees on short term contracts.

Indigenous women

10.50 Submissions to and consultations during the inquiry showed that Indigenous women can face difficulties managing pregnancy and potential pregnancy at work due to institutional racial issues and cultural needs which affect their knowledge and enforcement of their maternity and anti-discrimination rights.[48]

[46] M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 27-28.
[47] M Wooden *The Changing Nature of Employment Arrangements* Discussion Paper Series No 5 National Institute of Labour Studies Flinders University Adelaide 1998, 33.
[48] See also R Norris "Human Rights and Wrongs: Indigenous employment past, present and future" (1998) 17(2) *Social Alternatives* 28 which discusses the lower levels of employment and greater employment disadvantages faced by Indigenous Australians compared with non-Indigenous Australians.

10.51 Information gathered from submissions and during consultations specifically indicated that many Aboriginal and Torres Strait Islander women are not aware of anti-discrimination laws covering pregnancy and potential pregnancy, nor about maternity leave rights and entitlements.[49] In addition, one submission noted that many Indigenous women were reticent to assert their legal rights and reticent to approach management to discuss matters of concern.[50]

10.52 The Working Women's Centres stated in their submission that

> [e]xperiences related to the NT WWC by Aboriginal and Torres Strait Islander women are that some are completely unaware of their rights to maternity leave. In fact they resign when they become pregnant because they believe there is nothing else they can do. The centre has heard of some cases where women have terminated the pregnancy rather than lose their job….A culturally appropriate education campaign needs to be developed and organised to explain their rights to Aboriginal and Torres Strait Islander women.[51]

10.53 HREOC recognises that Indigenous communities are diverse and understands that cultural practices vary from community to community. Issues also vary according to the geographical location of the employee and that of their community. Cultural norms or conditions within certain Indigenous communities make it difficult for Indigenous employees to comply with employment conditions.

> Aboriginal members have unique problems in relationship to maternity leave. The available conditions do not take into consideration their unique cultural obligations. Aboriginal female teachers are predominantly the main income provider to their families and the restrictive paid maternity leave requirement has the real potential to cause financial hardship for these families.…It is common for these members to need to return home for the birth of their child. Under current conditions those electing to do so would have to use part of their unpaid maternity leave and hence reduce their options when returning to work.[52]

> Women from traditional families go home to have their child. They want to die where they are born, so they also want to have their baby where they were born. However, there is often pressure to give birth in the hospitals.[53]

10.54 Health issues are also of concern. The high incidence of diabetes and other health concerns amongst Indigenous women means that some Indigenous employees require additional sick leave during their pregnancy. For Indigenous women in remote or isolated locations, any illness which may be serious requires both time and travel, which again may require additional sick leave.[54]

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[49] Tranby College (Focus Group, 8 February 1999); New South Wales Government (Submission no 99).
[50] New South Wales Government (Submission no 99).
[51] Working Women's Centres (Submission no 88).
[52] New South Wales Teachers Federation (Submission no 70); Tranby College (Focus Group 8 February 1999).
[53] Central Australian Women's Legal Service (Focus Group, 25 February 1999).
[54] Working Womens Centres (Submission no 88); Tranby College (Focus Group, 8 February 1999).

10.55 Inquiries undertaken by HREOC indicated that the distribution of information on pregnancy discrimination was not a priority amongst Indigenous organisations. While knowledge of race discrimination laws was good, knowledge of sex discrimination laws was less prominent. Even less prominent was the understanding of the intersection between race and sex discrimination.

10.56 Consultations with Indigenous community organisations, which are significant employers of Aboriginal and Torres Strait Islander people, also raised issues concerning pregnancy and potential pregnancy. The nature of work and funding undertaken by community organisations can make it difficult to respond to pregnancy issues.[55] The Secretariat of the National Aboriginal Community Controlled Health Organisation submitted that

> …the Secretariat, like many Aboriginal community organisations, has little base on-going funding. Most positions are made possible through funding agreements reached with funding bodies. These agreements specify outcomes, time lines and costs for the position being funded. They form a contractual obligation between the employer, for example the NACCHO Secretariat, and the funding body, which is usually the Commonwealth Department of Health. Where an employee is legally entitled to take maternity leave, obviously the employer is legally obliged to grant this leave. However, the employer is also legally obliged to meet the contractual obligations to which it has become a party through the funding arrangements.[56]

10.57 Many Indigenous women are engaged in the Community Development Employment Projects scheme. People engaged in that scheme are considered to be employees for the purpose of all employment related legislation, including the SD Act and the *Workplace Relations Act 1996* (Cth).[57] As a result, Indigenous women working under this scheme have the full protection of the SD Act in relation to their work.

10.58 HREOC supports the production of culturally specific material for Indigenous employees regarding pregnancy and potential pregnancy rights and responsibilities. This material should refer to cultural practices and needs. Feedback from Indigenous employees indicated that current resource material on these issues was too complex and alienating, which had the effect of further discouraging Indigenous women from seeking information and taking action to enforce their rights.[58]

Pregnancy Guidelines 17: That the Guidelines address particular discrimination issues that can arise for pregnant or potentially pregnant Indigenous employees and assist employees' and employers' awareness of the need for sensitivity and individual discussion regarding cultural practices.

[55] Tranby College (Focus Group, 8 February 1999).
[56] National Aboriginal Community Controlled Health Organisation (Submission no 96).
[57] Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101). See also para 5.31.
[58] Tranby College (Focus Group, 8 February 1999); Central Australian Women's Legal Service (Focus Group, 25 February 1999); New South Wales Government (Submission no 99).

Recommendation 27: That the Department of Employment, Workplace Relations and Small Business establish a working party including the Aboriginal and Torres Strait Islander Commission, HREOC and the Working Women's Centres, to be responsible for the creation of culturally specific education material on pregnancy and potential pregnancy discrimination in the workplace for Indigenous women, and formulate an effective distribution program for the material produced.

Women living in rural and remote areas

10.59 Geographical isolation creates particular needs and difficulties for pregnant and potentially pregnant employees which employees in urban areas tend not to experience. Submissions to the inquiry indicated that the needs of women in rural and remote areas have a strong effect on their employment and on rural employers. The time constraints of this inquiry prevented HREOC from undertaking a full investigation into these issues. However, the comments received point clearly to a number of issues and indicate the necessity for further research and action in this area.

10.60 One of the greatest issues facing employees in rural and remote areas is a lack of access to antenatal services. Rural and remote employees who are pregnant must travel considerable distances to access antenatal services. This can be expensive and may cause disruption in the workplace for both the employee and the employer.[59] The Australian Education Union cited these difficulties as a reason why women educators of child bearing age often choose not to accept work in rural and remote communities.

> This not only denies the children in these communities from accessing their skills and experience it also disadvantages many women where country service has historically been a requirement to access further promotional opportunities.[60]

10.61 Long distance travel, which may occur when attending medical appointments, or in travelling from home to work, can be difficult for women in later stages of pregnancy. Driving for extended periods can be uncomfortable and may be dangerous if road and communication conditions are inadequate.[61] Public transport is often scarce.[62]

> A pregnant lawyer working in a country area found it difficult to keep travelling the long distances required to perform her job effectively, so she stopped work. She suggested that she could have kept working had Internet facilities been available in the area.[63]

> Dairy Farmer – her excellent GP is only 20 minutes away, but her specialist was 2 hours one way, meaning a four hour round trip plus waiting time in the surgery. This meant a full

[59] Australian Women in Agriculture (Submission no 55); Agriculture, Fisheries and Forestry-Australia (Submission no 65); Australian Education Union, South Australian Branch (Submission no 87); Western Australian Equal Opportunity Commissioner (Submission no 100); Darwin Chamber of Commerce and Industry (Consultation, 26 February 1999).
[60] Australian Education Union, South Australian Branch (Submission no 87).
[61] Agriculture, Fisheries and Forestry-Australia (Submission no 65).
[62] Australian Women in Agriculture (Submission no 55).
[63] Agriculture, Fisheries and Forestry-Australia (Submission no 65).

day away from work, as the time factor didn't fit in between milkings. Therefore apart from the cost of travel a relief milker had to be employed. A very expensive day out.[64]

Just the worry about if anything went wrong. I would have to go to Perth and then I might leave everyone in the lurch.[65]

Just the heat, and the worry if the car breaks down or something.[66]

10.62 The economic reality of rural and remote work also impacts on pregnant or potentially pregnant employees.

Factors such as the use of casual or seasonal positions for rural work, the increasing use of contracts for on-farm and off-farm work and depressed rural commodity prices, may put pressure on employees and employers affect conditions of pregnant and potentially pregnant employees.[67]

10.63 One example given was of agricultural enterprises which find it increasingly hard to reduce farm costs.

This has resulted in women taking on greater responsibility for farm work, which would previously have been done by employed farm labour. It may result in women performing tasks which are not advisable whilst pregnant, for example heavy manual tasks, using chemicals and travelling long distances.[68]

10.64 Due to difficult economic circumstances in rural and remote areas, many women seek non-farm work to supplement farm income.

With agricultural incomes declining and farm debt increasing, there are many more women who seek off farm employment to substitute the family income, many of these are because of economic necessity, many women have a university degree and are invaluable to the workforce. There needs to be appropriate employment conditions and support systems in place in rural communities to enable these women to be employed.[69]

10.65 These factors tend to be associated with the reality of living in geographically isolated areas and require a long term commitment from government, industry and local residents to achieve long term change. However, as submissions to the inquiry indicated, there are some short term practical solutions which would assist pregnant employees in rural and remote areas. One submission suggested

- the provision of antenatal classes via satellite technology into the homes of rural and remote women;

[64] Agriculture, Fisheries and Forestry-Australia (Submission no 65).
[65] Western Australian Equal Opportunity Commissioner (Submission no 100).
[66] Western Australian Equal Opportunity Commissioner (Submission no 100).
[67] Australian Women in Agriculture (Submission no 55).
[68] Agriculture, Fisheries and Forestry-Australia (Submission no 65). The submission noted that women's contribution to Australian farm output is approximately $4 billion annually: Rural Industries Research and Development Corporation and the Department of Primary Industries and Energy *Missed Opportunities: Harnessing the potential of women in Australian agriculture* Department of Primary Industries and Energy Canberra 1998, 1.
[69] Australian Women in Agriculture (Submission no 55).

- childcare in rural and remote areas for pregnant employees;
- nationwide mobile phone services for pregnant employees in remote areas who are required to travel;
- availability of doctors by phone or video-link where they are not available within a reasonable radius of the employee's workplace.[70]

10.66 Other barriers facing rural and remote employees who are pregnant or potentially pregnant have more to do with attitude than economics. A recent study by the Rural Women's Unit of the then Department of Primary Industries and Energy acknowledged that entrenched conservative community attitudes are a barrier to women's participation in the sector.[71] These attitudes may prevent pregnant or potentially pregnant women from seeking or obtaining employment and many are discouraged from reporting pregnancy and potential pregnancy discrimination at work.[72]

> A recent example is that of a long-term temporary employee of Queensland Health working in a remote location was unable to secure permanent employment there because she was pregnant. Permanent positions were available but, until our intervention, they were not going to offer this to her. This is even more remarkable given the difficulty that management experience recruiting nurses to this remote location.[73]

> [I]t is too hard to pin point. This is the Pilbara. Things are different here, and anyway things were okay really. Look, there are just little things, you know. Like pregnant women should be at home, but mostly people are joking. It still hurts, but they think that it's all right to make those kinds of statements. If you retaliate too much they reckon they are right, you are too emotional and should be at home.[74]

10.67 Consultations in the Northern Territory indicated that a large proportion of the working population is transient and will move towns according to seasonal work.[75] Some felt that this created a "disposable mentality" amongst employers and a lack of knowledge of rights amongst employees.[76]

10.68 Rural and remote employers are subject to anti-discrimination laws in the same manner as other employers. The prevalence of discriminatory attitudes against women in rural and remote areas highlights the need for education to bring about attitudinal change about women's roles in these communities.[77]

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[70] Australian Women in Agriculture (Submission no 55).
[71] Rural Industries Research and Development Corporation and the Department of Primary Industries and Energy *Missed Opportunities: Harnessing the potential of women in Australian agriculture*, Department of Primary Industries and Energy Canberra 1998; Agriculture, Fisheries and Forestry-Australia (Submission no 65).
[72] Australian Education Union, South Australian Branch (Submission no 87).
[73] Queensland Nurses' Union (Submission no 37).
[74] Western Australian Equal Opportunity Commissioner (Submission no 100).
[75] Northern Territory Chamber of Commerce and Industry (Consultation, 26 February 1999).
[76] Top End Women's Legal Centre (Consultation, 26 February 1999).
[77] Agriculture, Fisheries and Forestry-Australia (Submission no 65); Western Australian Equal Opportunity Commissioner (Submission no 100).

Recommendation 28: That the Departments of Agriculture, Fisheries and Forestry - Australia and of Transport and Regional Services, in consultation with the Office of the Status of Women and the Aboriginal and Torres Strait Islander Commission, jointly provide education and services in rural and remote areas to assist pregnant and potentially pregnant employees and their employers. In particular, the provision of improved communication facilities and medical information should be a priority.

Pregnancy Guidelines 18: That the Guidelines address the discrimination issues facing pregnant and potentially pregnant employees and employers in rural and remote areas.

Adolescent and school aged employees

10.69 Adolescent and school aged employees face particular challenges in the workplace which may affect their rights and responsibilities in relation to pregnancy and potential pregnancy. Some of these young women are at school or TAFE and working casually or part time.

10.70 Youth and lack of workplace experience tend to result in limited awareness of anti-discrimination laws. For adolescent and school aged women who are pregnant, these factors are exacerbated by difficulties associated with completing school or training, obtaining employment, working part time or casually and combating community prejudices.

10.71 A 1996 study of pregnant teenagers in Western Sydney highlighted the difficult circumstances faced by young women looking for and remaining in work.[78] The study found that common experiences amongst the teenagers surveyed included a fear of being judged by those around them, a lack of knowledge about discrimination and the law, a failure by employers to provide them with information on their maternity entitlements and a feeling of powerlessness about enforcing their rights. One woman interviewed stated "…because I was pregnant I wasn't kept on after my traineeship finished, except on a casual basis".[79] When asked about discriminatory treatment, another replied "I didn't know who to go to, and if I'd complained it wouldn't have made any difference".[80]

10.72 Similar conclusions were reached in a 1999 research paper by Probert and Macdonald.[81] They found that, while the experience of motherhood can sharply increase young women's commitment to education and career development, a

[78] J Milne-Holme *Pregnant Futures* Women's Employment, Education and Training Advisory Group Project AGPS Canberra 1996.
[79] J Milne-Holme *Pregnant Futures* Women's Employment, Education and Training Advisory Group Project AGPS Canberra 1996, 121.
[80] J Milne-Holme *Pregnant Futures* Women's Employment, Education and Training Advisory Group Project AGPS Canberra 1996, 122.
[81] B Probert and F Macdonald "Young Women: Poles of experience in work and parenting" in *Australia's Young Adults: The deepening divide* Dusseldorp Skills Forum Sydney 1999.

narrow range of opportunities and support systems often meant that they were "at risk".

> We must be able to provide a range of alternative pathways rather than simply trying to prevent young women having babies very young. There are dangers in focussing on the future for these young women rather than on their present needs.…We will not be able to secure better futures for young women without recognising the reality of their lives and responding to their needs as mothers and workers in constructive ways rather than seeing their decisions and lives as the problem.[82]

10.73 Some discussions and submissions to this inquiry focused on pregnancy, employment and schooling. Although not within the terms of this inquiry, it is impossible to separate issues of access to education and training from employment for pregnant employees of school age. In addition, education and training fundamentally affect longer term opportunities for young employees and their knowledge of their rights and responsibilities regarding pregnancy and potential pregnancy.

> Young pregnant women report that they are discouraged from completing their education and or training both overtly by formal or informal exclusion and indirectly through the non provision of services, inflexible practices, negative attitudes or failure to recognise the needs of young pregnant women. There appears to be a general failure to promote the acceptance and encouragement within the community of the principle of equity of young men and young women. Furthermore, it appears that such attitudes are rife within the Education system…[83]

> 16 year old pregnant woman, family very supportive, enrolled in Work Skills for Youth program. Although she did not have any problems with students or teachers, the young woman internalised the values of the wider society and felt too ashamed to continue with the course. She recently had her baby and follow up procedures indicate that she may return to study when the child is older (no time frame was indicated).[84]

10.74 The Albert Park Flexi School, which provides training and employment support to pregnant school aged women, pinpointed some of the difficulties such women face. In particular, it referred in its submission to attitudes which exclude school aged pregnant women from school and employment, failure by schools to accommodate pregnancy and therefore force the woman to leave school, poor vocational guidance or failure to provide work experience due to the pregnancy, increased sexual harassment and increased feelings of vulnerability and uncertainty.[85]

10.75 These views were echoed by the Australian Education Union, whose members had expressed concerns about the way that the school system treated pregnant school aged women. Research by the Australian Education Union indicated that many strategies that had been developed with state and territory governments

[82] J Milne-Holme *Pregnant Futures* Women's Employment, Education and Training Advisory Group Project AGPS Canberra 1996.
[83] Albert Park Flexi School (Submission no 27).
[84] Albert Park Flexi School (Submission no 27).
[85] Albert Park Flexi School (Submission no 27).

to deal with this issue have been discontinued due to lack of resources, lack of commitment or lack of policy support.[86]

10.76 Consultations undertaken by HREOC with school students, many of whom had part-time or casual jobs, demonstrated a wide variation in the understanding of discrimination issues relating to pregnancy. Understanding of potential pregnancy discrimination in employment was low, while understanding of pregnancy discrimination was average. Interestingly, the knowledge about pregnancy and potential pregnancy discrimination detailed by students had been gained largely from television, particularly American serials and Australian dramas.[87]

10.77 HREOC has a general position that human rights education, in particular an understanding of rights and responsibilities associated with employment and citizenship, should be developed as part of school curricula. Adolescents need to understand the rights and responsibilities that are essential to the transition from school to work, including education regarding pregnancy and potential pregnancy discrimination. HREOC supports the development of school age specific material, similar to the publication *Girls' Rights at Work!* by Job Watch Inc.[88]

10.78 However, the provision of such information will be most effective if schools themselves are aware of their obligations towards pregnant women of school age. Although it is unlawful for an educational authority to discriminate against a person on the ground of their pregnancy or potential pregnancy,[89] submissions indicated that such discrimination is not uncommon.[90] The denial of education to a pregnant school aged woman has been shown to result in a young mother at risk of poverty, unemployment, low self esteem and limited opportunities.[91] HREOC considers it important to undertake further research and education in order to pursue these matters; they deserve attention.

Recommendation 29: That the Department for Education, Training and Youth Affairs, in consultation with the Sex Discrimination Commissioner, develop a pamphlet on the *Sex Discrimination Act 1984* (Cth) for all Year 9 to Year 12 students covering their rights and responsibilities at school, while in vocational education programs and in casual or part time work.

[86] Australian Education Union, South Australian Branch (Submission no 87).
[87] Mt Isa High School (Focus Group, 2 November 1998).
[88] O Barron *Girls' Rights at Work* Job Watch Inc Melbourne 1997.
[89] s 21 *Sex Discrimination Act 1984* (Cth).
[90] Albert Park Flexi School (Submission no 27); Australian Education Union, South Australian Branch (Submission no 87).
[91] Albert Park Flexi School (Submission no 27); Australian Education Union, South Australian Branch (Submission no 87); B Probert and F Macdonald "Young Women: Poles of experience in work and parenting" *Australia's Young Adults: The deepening divide* Dusseldorp Skills Forum Sydney 1999; J Milne-Holme *Pregnant Futures* Women's Employment, Education and Training Advisory Group Project AGPS Canberra 1996.

Recommendation 30: That the Department of Education, Training and Youth Affairs produce material in consultation with the Sex Discrimination Commissioner providing advice and assistance for managing pregnancy at school.

Women working as apprentices or trainees

10.79 As young members of the workforce who are in the process of obtaining qualifications and training, apprentices and trainees are vulnerable to discrimination on the grounds of pregnancy and potential pregnancy.[92] Consultations undertaken and submissions received as part of this inquiry indicated that discrimination against apprentices and trainees is a significant issue.[93]

10.80 Apprentices and trainees are often young people, recently out of school, sometimes facing limited opportunities in a competitive workforce. Female apprentices and trainees can find themselves in male dominated industries where management is unfamiliar with practical management of pregnancy and potential pregnancy issues and discrimination law.

10.81 Consultations and submissions indicated limited knowledge of anti-discrimination laws amongst pregnant or potentially pregnant apprentices and trainees, as well as a fear of speaking out against behaviour which they perceived to be inappropriate. Fear of speaking out reflected a belief that they would lose their jobs and extended to situations where pregnant employees found themselves at risk from exposure to chemicals and unsafe practices.

> Most people are afraid to say something, this is a problem at work, lots of people didn't want to admit it, that it goes on, there's no-one to stand by you, there is a fear of not being heard.[94]

> [about potential pregnancy]…we are powerless in the interview, we don't have the job, when it's at the last stage of the series of interviews then it's your loss, you've been discriminated [against] but you've lost.[95]

10.82 Some participants in consultations noted that they had received training about discrimination in their workplace, others at school but not the workplace.[96] One submission told of attempts by an equal opportunity officer at a TAFE college to deal with discriminatory attitudes in her workplace so that a pregnant apprentice could be allowed to complete her apprenticeship.[97]

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[92] The *Sex Discrimination Act 1984* (Cth) covers apprentices and paid trainees. It may also cover unpaid trainees in some circumstances: see paras 5.25 – 5.31.
[93] New South Wales Government (Submission no 99).
[94] Retail Group Training and Employment Ltd (Focus Group, 23 February 1999).
[95] Retail Group Training and Employment Ltd (Focus Group, 23 February 1999).
[96] Retail Group Training and Employment Ltd (Focus Group, 23 February 1999); TAFE Queensland and Group Training Australia (Focus Group, 10 March 1999).
[97] Australian Women in Agriculture (Submission no 55).

10.83 HREOC received several stories of pregnancy and potential pregnancy discrimination suffered by apprentices or trainees.[98]

> Most women in the group had been told directly at some stage in their working lives "it's a waste giving you an apprenticeship 'cos you're going to get pregnant".[99]

> Diana is a first year cabinet making apprentice. She re-located from the regions after doing her pre-vocational course. She was told directly by employers that they wouldn't take her as an apprentice because she was a girl and she might get pregnant.[100]

10.84 A small group training survey done in 1997 on why women were not completing apprenticeships showed that a significant percentage of women left by mutual agreement due to pregnancy.[101] This result corresponds with the views of the Albert Park Flexi School which stated it considered that very few training providers and institutions adequately cater to the needs of pregnant young women. It appears that part of the training culture is that women leave apprenticeships when they get pregnant.

10.85 A survey conducted for this inquiry of employees at a major construction site in Queensland regarding pregnant and potentially pregnant apprentices revealed widespread discriminatory attitudes. Of the 49 respondents

- 45% said if they were a trade employer they would be less likely to employ a tradeswoman or female apprentice of child bearing age;
- 47% said the possibility of an apprentice becoming pregnant would affect their decision to employ a female;
- 20% were of the opinion that on becoming pregnant an apprentice should be made to discontinue her apprenticeship; and
- 22% thought it was a waste of time for a woman to do an apprenticeship if she has future plans to have children.[102]

10.86 HREOC considers that education on pregnancy and potential pregnancy rights is an essential part of any apprenticeship or vocational training course. Such education ensures awareness and understanding by apprentices and trainees of their rights and responsibilities and advises of suitable responses to inappropriate behaviour in the workplace. Discussions with apprentices and trainees during the inquiry indicated that, in their view, group training companies are not doing anything proactive to assist. One positive example of an appropriate publication for educational use is *New Apprentices, Your Rights* by Job Watch Inc. It presents accurate information in a format which appeals to young people.[103]

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[98] J Cox (Submission no 6).
[99] TAFE Queensland and Group Training Australia (Focus Group, 10 March 1999).
[100] TAFE Queensland and Group Training Australia (Focus Group, 10 March 1999).
[101] TAFE Queensland and Group Training Australia (Focus Group, 10 March 1999).
[102] Group Training Australia (Submission no 108). The respondents to the survey consisted of male and female trade and non-trade employees.
[103] J Anderson *New Apprentices, Your Rights* Job Watch Inc Melbourne 1999.

10.87 It is also important for training institutions, group training companies, host employers and direct employers of apprentices and trainees to be aware that discrimination on the grounds of pregnancy and potential pregnancy is unlawful. HREOC is of the view that group training companies, Industry Training Advisory Boards and the Australian National Training Authority could all contribute in order to increase awareness.

Recommendation 31: That the Chief Executive Officer of the Australian National Training Authority work with the Sex Discrimination Commissioner to develop a strategy to inform policy about the circumstances of pregnant and potentially pregnant apprentices and trainees.

Recommendation 32: That Group Training Australia, in consultation with the Sex Discrimination Commissioner, develop an information sheet to advise all apprentices, trainees and host employers of the law regarding pregnancy and potential pregnancy discrimination.

Pregnancy Guidelines 19: That the Guidelines address the particular steps that need to be taken by employers to ensure that women entering the workforce for the first time are well informed of their rights and responsibilities under the *Sex Discrimination Act 1984* (Cth), particularly in relation to pregnancy and potential pregnancy.

Pregnancy Guidelines 20: That the Guidelines address specific issues regarding discrimination on the ground of pregnancy and potential pregnancy for apprentices and trainees.

Women in non-traditional families

10.88 Some pregnant employees who are single, in de facto or same sex relationships appear to suffer discrimination in the workplace due to social attitudes. The right to be free from discrimination on the basis of pregnancy or potential pregnancy applies to all employees, irrespective of sexuality or marital status.

10.89 Harassment of, or hostility towards, pregnant or potentially pregnant employees based on the employee's sexuality or marital status may be considered to be sex-based harassment and could be unlawful under the SD Act.

Pregnancy Guidelines 21: That the Guidelines provide assistance to workplace participants in appropriate workplace management of the pregnancies of women in non-traditional families.

Women from culturally and linguistically diverse backgrounds

10.90 There are many factors that may create difficulties or barriers for women from culturally and linguistically diverse backgrounds who are pregnant or potentially pregnant. These include English language proficiency, cultural differences, migrant status, skills and qualifications recognition and a lack of

awareness of procedures and services in Australia.[104] For some women from culturally and linguistically diverse backgrounds, particularly refugee women, these factors may include a fear of government or police, which may prevent them from seeking information about their rights and enforcing these rights.[105]

10.91 These factors may limit the employment opportunities and choices of women from culturally and linguistically diverse backgrounds, a high proportion of whom work in industries with lower wages, less flexible employment conditions and, low security.[106] Women from culturally and linguistically diverse backgrounds are represented in large numbers in manufacturing industries, including outwork employment, where support during pregnancy, such as options for lighter duties, may not be available.[107] The submission of the Australian Liquor, Hospitality and Miscellaneous Workers Union stated a large proportion of their members are women from culturally and linguistically diverse backgrounds and in some industries, such as contract cleaning and housekeeping in hotels, it is women from culturally and linguistically diverse backgrounds working part time who form the overwhelming majority of the workforce.[108]

10.92 A project undertaken by the New South Wales Indo-China Chinese Association found that, on average, 60.7% of Chinese women interviewed had no knowledge of agencies that offer assistance in work-related discrimination issues.[109]

10.93 Consultations with community organisations that provide support to women from culturally and linguistically diverse backgrounds strongly indicated the need for strategic action to educate and empower these women about their rights in relation to pregnancy and potential pregnancy. Community workers felt that education campaigns directed at the mainstream English speaking culture often failed to reach women from different cultural or linguistic backgrounds.[110] In their experience, pregnancy and potential pregnancy discrimination is rife in workplaces with a high migrant workforce component, such as factories.

> They think that they need to speak English to get information about their rights.[111]

[104] Department of Immigration and Multicultural Affairs (Submission no 28); Townsville Community Legal Service (Submission no 78); New South Wales Government (Submission no 99).
[105] Immigrant Women's Speakout (Focus Group, 22 February 1999).
[106] Department of Immigration and Multicultural Affairs (Submission no 28); New South Wales Government (Submission no 99).
[107] Department of Immigration and Multicultural Affairs (Submission no 28); New South Wales Government (Submission no 99).
[108] Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32).
[109] W Tse *Women and Paid Work Project – Recommendation report on work-related issues of Chinese women* NSW Department for Women Sydney 1997, 13.
[110] Immigrant Women's Speakout (Focus Group, 22 February 1999); Women in Industry and Community Health (Consultation 3 March 1999).
[111] Immigrant Women's Speakout (Focus Group, 22 February 1999).

10.94 Employees tend not to seek advice unless they are able to obtain it in their own language. Since the Working Women's Centre in Parramatta, New South Wales, appointed a case worker fluent in Mandarin, inquiries regarding discrimination from Chinese speaking employees has increased substantially.[112] However, inquiries from women from other significant ethnic groups in the area such as Arabic and Vietnamese women, still remain low, perhaps due to the absence of a case worker who speaks those languages.

10.95 Community groups often provide links between government and ethnic communities. The lack of resources by these organisations severely hampered efforts by HREOC to consult with a wide range of migrant and refugee organisations. Most had no funding to undertake policy or consultative work.[113] HREOC considers it important that these organisations are adequately resourced to enable them to provide advice and assistance to women from culturally and linguistically diverse backgrounds. Clearly, many of the most vulnerable women in relation to this inquiry come from culturally and linguistically diverse backgrounds.

10.96 It is important that employers who employ women of child bearing age from culturally and linguistically diverse backgrounds take particular care to ensure that all employees are aware of their rights and obligations in managing pregnancy and potential pregnancy at work. Information should be provided in forms that are appropriate for the particular workplace. This may not only prevent discrimination on the grounds of pregnancy or potential pregnancy but help employers to discharge their vicarious liability under the SD Act.[114]

Pregnancy Guidelines 22: That the Guidelines provide assistance to all workplace participants about the particular issues faced by some women of culturally and linguistically diverse backgrounds. The Guidelines should address particular steps that need to be taken to ensure that women from such backgrounds are well informed of their rights and obligations under the *Sex Discrimination Act 1984* (Cth), particularly in relation to pregnancy and potential pregnancy.

Recommendation 33: That the Department of Immigration and Multicultural Affairs translate the Guidelines into six major community languages.

Women with disabilities

10.97 HREOC is aware that some women with a disability who are pregnant or potentially pregnant may have distinct experiences and perspectives. An attitude often prevails that women with certain types of disabilities are not or should not be involved in a reproductive life. These attitudes may result in hostile responses to a pregnant worker with a disability, or a failure to accommodate their needs.

[112] Immigrant Women's Speakout (Focus Group, 22 February 1999).
[113] Immigrant Women's Speakout (Focus Group, 22 February 1999); Women in Industry and Community Health (Focus Group, 3 March 1997).
[114] s 106 *Sex Discrimination Act 1984* (Cth). See paras 5.33 – 5.36.

10.98 Some examples of particular problems that women with disabilities may face were provided in a government submission.

> - Women with pre-existing back injuries, for example, who may ordinarily be able to comply with requirements to stand for long periods or lift objects, may face difficulties at work when their condition is exacerbated by pregnancy. The [New South Wales Anti-Discrimination Board] has dealt with a number of cases concerning such situations.
> - Women whose disabilities have necessitated some degree of adjustment of work duties may encounter difficulties with their employers when their pregnancy requires (or is assumed to require) further adjustments of duties.
> - Women with intellectual disabilities in general often face considerable pressure to terminate their pregnancy. Women in this group who continue with their pregnancy may need more time off work to deal with the requirement of the pregnancy or of child rearing.[115]

Pregnancy Guidelines 23: That the Guidelines provide assistance to workplace participants in appropriately managing the pregnancies of women with disabilities.

Partner's issues

10.99 Pregnancy rarely involves or affects only the pregnant woman. Often, the woman's partner is also involved in the process of the pregnancy. As the primary support person, a partner can include the pregnant woman's spouse, de facto partner, lesbian partner, close friend, parent or other family member. The support of the partner is not just important for the pregnant woman, but often an important and valuable experience for the partner. In particular, the involvement of men in the pregnancy process is vital to changing cultural attitudes that box pregnancy as the total responsibility of the woman, rather than an experience to be valued by all those concerned.[116]

10.100 The inquiry was alerted to workplace policies and practices that do not accommodate the needs of partners in the pregnancy process. Partners may require leave to attend medical appointments, and antenatal classes with a pregnant woman. In later stages of pregnancy, it may be important that the partner is available to assist the pregnant woman with transport to appointments. Leave may also be required at the time of the birth.

10.101 The *Workplace Relations Act 1996* (Cth) provides one week's unpaid paternity leave for an employee to attend the birth of a child of his spouse.[117] However, submissions and consultations indicated that many workplaces have cultures

[115] New South Wales Government (Submission no 99).
[116] Department of Family and Community Services *Fitting Fathers into Families: Men and the fatherhood role in contemporary Australia* DFCS Canberra 1999.
[117] cl 13(a) sch 14 *Workplace Relations Act 1996* (Cth). A spouse is defined as a person of the opposite sex to the employee who lives with the employee in a marriage-like relationship, although not legally married to the employee: cl 2 sch 14 *Workplace Relations Act 1996* (Cth).

that discourage men from taking such leave.[118] Again the inquiry highlighted situations where an award or policy is accommodating but the employee decides not to utilise available options because of the workplace culture.

10.102 While the provisions of the SD Act do not require employers to give leave for such purposes, dismissal of an employee for taking leave to attend such appointments may amount to unlawful discrimination on the ground of family responsibilities.[119] Anti-discrimination legislation in some states and territories extends unlawful discrimination provisions to cover family responsibilities in other situations.[120]

10.103 While some awards may also provide partners with special leave to attend medical appointments during the pregnancy, several submissions indicated that a greater awareness and support for partner's rights is required.[121]

> Australian workplace cultures still make it hard for men to ask for time off to support their partners with their pregnancies, even if there are provisions in awards and policies. Some men have reported that they were dismissed from their jobs because they attended the birth of a child. Attitudinal change is required so that it is more socially acceptable for partners to support their pregnant partner.[122]

10.104 The Shop, Distributive and Allied Employees' Association felt that Family Leave provisions have not been successful in allowing workers paid leave for family commitments because of eligibility requirements such as "unforeseen family circumstances", "24 hours notice" or "for immediate family members", which limit access to the leave. It stated that it

> …has had complaints from members regarding spouses being denied access to leave to attend medical appointments with their wives. In most instances paid leave would not be available except in an emergency.…We currently have a dispute with a Retail Company which maintains that a father attending the birth of his child is not entitled to Family Leave because the birth was not "unforeseen" even though its timing was not predictable.[123]

10.105 A member of the Communications Electrical Plumbing Union commented

> I wish to take leave for when my wife has a baby but it has been denied to me because other staff are on leave at the time.[124]

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[118] Community and Public Sector Union (Submission no 53); Australian Council of Trade Unions, (Submission no 59).
[119] s 7A *Sex Discrimination Act 1984* (Cth).
[120] s 6 *Equal Opportunity Act 1995* (Vic); s 7(1) *Anti-Discrimination Act 1991* (Qld); part IIA *Equal Opportunity Act 1984* (WA); s 7(1) *Anti-Discrimination Act 1991* (ACT); s 19(1) *Anti-Discrimination Act 1992* (NT).
[121] Community and Public Sector Union (Submission no 53); Australian Council of Trade Unions (Submission no 59); Shop Distributive and Allied Employees' Association (Submission no 74); Agriculture, Fisheries and Forestry-Australia (Submission no 77); Townsville Community Legal Service (Submission no 78).
[122] Women's Electoral Lobby Australia (Submission no 97).
[123] Shop Distributive and Allied Employees' Association (Submission no 74).
[124] Communications Electrical Plumbing Union (Submission no 63).

10.106 However some employers realise the benefits to their employees of workplace policies that accommodate partners' needs. The submission by Families At Work stated that

> …a growing number of employers…make provisions for partners of pregnant women. These provisions may take the form of family leave, where the employee is able to make their own decision on how their leave is to be taken. The employee is then able to take leave to attend antenatal classes or doctors appointments….Other initiatives could include the provision of flexible working hours, time in lieu, compressed working week or access to unpaid leave.[125]

10.107 The federal Department of Immigration and Multicultural Affairs has established a family leave program in its certified agreement which allows staff to take up to five days paid leave a year to care for partners or family members. Partners include same sex partners. This leave can be used to care for partners who are pregnant.[126]

10.108 Also raised in submissions was the issue of male fertility. The focus of safety in the workplace often concerns female fertility or the safety of a pregnant employee. Male fertility is rarely, if ever, given the same attention. A research paper by Dr Hall submitted to the inquiry noted that

> [m]ale fertility is affected by a number of substances used in certain industries. It is now recognised that genetic damage to the offspring can be mediated through the male, as well as the female; results may be spontaneous abortion, or abnormalities in the children. Chemicals that have been implicated include ethylene dibromide, lead, cadmium, hexachlorobenzene, hexachlorcyclohexane, dieldrin, and many others. Ionising radiation has similar effects. Work in very hot conditions can also reduce sperm production.[127]

10.109 The issue of damage to the reproductive potential of male employees is an issue that deserves attention in relation to occupational health and safety.

10.110 The role of partners in a pregnancy is an important one that should be supported in the workplace to avoid discrimination and accommodate the family commitments of employees. It is encouraging that some employers are including partners' issues in family friendly policies but more work is needed to ensure the policies become practical reality.

Recommendation 34: That Recommendations 22 and 23 include consideration of male partners' reproductive health.

[125] Families At Work (Submission no 40).
[126] Department of Immigration and Multicultural Affairs (Submission no 28).
[127] M Hall (Submission no 10). See also ch 9.

Chapter 11 - Advertising and recruitment

Introduction

11.1 Discrimination that prevents women from entering or moving within the workforce operates as a barrier to women's full access to the benefits of workforce participation and impedes the redress of historical workforce gender imbalances. Instances raised during the inquiry revealed that stereotyping of the capacities and inclinations of female job applicants who were pregnant or potentially pregnant affected their ability to obtain work and promotions. The following submission reflected views commonly put to the inquiry.

> The reality for most pregnant women applying for jobs is that they are not employed. There is such a pervasive view that pregnant women are somehow "exploiting the system" if they even dare apply for a job when they are about to take leave to have a child, that women themselves rarely put the issue to the test.[128]

11.2 Inquiry consultations and complaints before the Sex Discrimination Commissioner indicated that female job applicants, junior and senior, are asked discriminatory questions, such as what their future intentions are with respect to having a family. The questions asked by some employers and recruitment agencies appear to assume that becoming pregnant in itself adversely affects their work, and that the potential to become pregnant can do so even prior to the event.

> It is very difficult to gauge the extent of direct discrimination that women experience as a result of their pregnancies and assumptions that they may decide to have children at some stage (ie, potential pregnancy). In the case of discrimination occurring in recruitment practices, it is likely that much goes unreported, due to the conclusions women draw between their experiences and the management of the employer. Stories collected from women in a range of industries indicate that, where this type of discrimination has been experienced, they have decided against pursuing it because they wouldn't want to work there anyway.[129]

11.3 Evidence also emerged during the inquiry of employer resistance to hiring pregnant or potentially pregnant women because of concerns about interruptions to work. Maternity leave, in most circumstances unpaid, is established as an important industrial entitlement. The existence of this entitlement and the possibility that it may be utilised becomes the reason for denial of employment in some cases. It became apparent that possibilities and hypothetical situations became the basis for decisions about women's livelihood. This issue irritated many women who took part in the inquiry. However, there was evidence that a small number of employers had moved beyond this.

> When I employed a senior woman who was three months pregnant into the corporate environment there were a number of raised eyebrows. While she was the best candidate it

[128] United Trades and Labour Council of South Australia (Submission 102).
[129] Women's Electoral Lobby Australia (Submission no 97).

hadn't been done at management level before and culturally it was a bit of a shock. She performed well in her job during her pregnancy. She accessed paid maternity leave, she came back part-time, then full-time and has since been promoted. Employing her wasn't an outrageous thing to do – the big hurdle was dealing with the stereotypes that surround pregnant employees. The stereotypes, perceptions and the personal values and beliefs of others are problematic, not the pregnant woman; what she is, is the best candidate based on merit and therefore the right person for the job. This incident gave the culture a nudge and we continue to progress.[130]

11.4 This chapter looks at the provisions of the *Sex Discrimination Act 1984* (Cth) (SD Act) that make discrimination in advertising and recruitment unlawful. State/territory legislation and relevant cases are discussed together with the experiences raised in submissions.

11.5 Many women noted that it was difficult for a job applicant to prove rejection for discriminatory reasons, despite strong suspicion. This chapter discusses the importance of transparent recruitment processes: the need for recruiters to be able to account for their "merit based" decisions.

Advertising Employment

11.6 It is unlawful to discriminate against a woman on the ground of pregnancy or potential pregnancy in the arrangements made for the purpose of determining who should be offered employment.[131]

11.7 In addition, the SD Act makes it an offence to publish or display an advertisement or notice (for example for a position of employment) that indicates, or could reasonably be understood as indicating, an intention to discriminate. It also makes it an offence to cause or permit such an advertisement or notice to be published or displayed.[132]

11.8 An advertisement or notice is broadly defined under the SD Act to include public or privately distributed notices in a wide variety of forms and by a wide variety of mediums.[133]

11.9 The newspaper that publishes an advertisement, the employer who authorises the terms of the advertisement and the recruitment agency that writes and places the advertisement all have a responsibility to comply with the SD Act.

11.10 Laws prohibiting discrimination in advertising and recruitment apply to external situations where employers are seeking new employees. They also apply to internal recruitment situations, for example where current employees are considered for promotion, transfer or a new position with the same employer,

[130] D Bevan Vice President and Director of Employee Relations, McDonalds Australia Ltd (Personal consultation with Sex Discrimination Commissioner, 1 April 1999).
[131] s 14(1)(a) *Sex Discrimination Act 1984* (Cth).
[132] s 86 *Sex Discrimination Act 1984* (Cth). See also s 15(1)(a) *Sex Discrimination Act 1984* (Cth).
[133] The definition of "advertisement" in s 86(2) *Sex Discrimination Act 1984* (Cth) is very broad and would include advertising on the Internet.

or within one of a number of companies falling under the umbrella of a multinational.

11.11 Job advertisements often include information about where interested people can obtain further information or application forms. The SD Act makes it unlawful to seek information (whether by way of completing a form or otherwise) where that information is sought in connection with or for the purposes of committing an unlawful act of discrimination. An example would be during a pre-employment medical examination where a urine sample is utilised for a pregnancy test. It is also unlawful to seek information from a pregnant or potentially pregnant applicant where that information, in similar circumstances, would not be sought from someone who was not pregnant or potentially pregnant, for example if young women who inquire about an advertised job are asked if they intend to have children in the next couple of years.[134]

11.12 Breaches of the SD Act and a wealth of anecdotal information about inappropriate recruitment questions women are asked, led to the Human Rights and Equal Opportunity Commission (HREOC) recently producing a brochure entitled *The Sex Discrimination Act: Guidelines for writing and publishing recruitment advertisements*. Available from HREOC or through the HREOC website, this brochure covers all grounds itemised under the SD Act but can be utilised with particular reference to pregnancy and potential pregnancy.

Discriminatory advertising as an offence and a ground of complaint

11.13 In South Australia[135] and Victoria[136] discriminatory advertising is an offence.

11.14 In Western Australia,[137] Tasmania[138] and the ACT,[139] discriminatory advertising is not an offence but a matter about which a complaint may be made.

11.15 As a result of the exemption in the New South Wales Act which allows discrimination against pregnant women in recruitment, advertising that indicates an intention to discriminate on the ground of pregnancy is not an offence or a matter on which a complaint may be brought.[140] This exemption is discussed at paras 7.30 – 7.32.

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[134] s 27 *Sex Discrimination Act 1984* (Cth).
[135] s 103(1) *Equal Opportunity Act 1984* (SA). It is a defence to a prosecution to prove that the defendant believed on reasonable grounds that the publication did not indicate an intention to do an unlawful act: s 103(2).
[136] s 195 *Equal Opportunity Act 1995* (Vic). It is a defence to a prosecution to prove that the defendant took reasonable precautions and exercised due diligence to prevent the publication or display: s 196. Proceedings for an offence may be brought by the Equal Opportunity Commission: s 197.
[137] s 68 *Equal Opportunity Act 1984* (WA).
[138] s 19(1) *Sex Discrimination Act 1994* (Tas).
[139] s 69 *Discrimination Act 1991* (ACT).
[140] This exemption provides that it is not discrimination to fail to provide employment to a woman if, at the date of the interview or application for a position, the woman was pregnant: s 25(1A) *Anti-Discrimination Act 1977* (NSW).

11.16 Queensland and the Northern Territory, on the other hand, provide that discriminatory advertising can be dealt with either as an offence or by a complaint brought under those Acts.[141]

11.17 Despite the fact that complaints about discriminatory advertising may be made under the SD Act, in practice, complaints are rarely made. This may be in part because a complainant must show a particular connection to the advertisement that is the subject of the complaint.[142] Prosecutions for discriminatory advertisements have not been made to date under the SD Act. As the Queensland Anti-Discrimination Commissioner noted,

> [i]n practice prosecution functions in anti-discrimination jurisdictions tend to be rarely used...[143]

11.18 Nevertheless, in HREOC's view it is important that a very clear message be sent that advertising that discriminates or demonstrates an intention to discriminate on the ground of pregnancy or potential pregnancy is unacceptable. Specifically documenting discriminatory advertising as an offence in the SD Act has helped to clarify the law for business and industry, setting clear guidelines for recruitment practices. Provisions prohibiting discriminatory advertising

> …are particularly important in the area of employment. An employer can limit the types of persons that might respond to an advertisement for a job vacancy by the wording of that advertisement.[144]

11.19 HREOC considers, however, that the SD Act needs to be amended to make clear that complaints may be brought in relation to discriminatory advertising notwithstanding that the complainant is not a person directly affected by the advertisement. For example this would enable the complainant to be an educational institution, working women's centre, community legal centre or employee representative with a concern about a particular job advertisement

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[141] In Queensland, breach of the provision dealing with discriminatory advertisements can be dealt with as an offence or by a complaint brought under the Act – s 127(1) *Anti-Discrimination Act 1991* (Qld) makes discriminatory advertising an offence, and complaints may be brought for contraventions of the Act ("contravention" is defined (in s 4) to include the discriminatory advertising section). If it is dealt with as an offence, the defendant has an excuse if the defendant took reasonable precautions to prevent the publication or display happening: s 127(3)*Anti-Discrimination Act 1991* (Qld). If it is dealt with by complaint, it is a defence if the respondent proves, on the balance of probabilities, that the respondent took reasonable precautions to prevent the publication or display happening: s 127(2)*Anti-Discrimination Act 1991* (Qld).

In the Northern Territory, discriminatory advertising is both an offence (s 109(1) *Anti-Discrimination Act 1992* (NT) and a matter in respect of which a complaint may be made (s 25 *Anti-Discrimination Act 1992* (NT). However, a prosecution is not to be commenced or continued if a complaint has been made in respect of the advertisement and the complaint has lapsed, been withdrawn or dismissed, or the person alleged to have committed the offence has complied with an agreement or order made in respect of the complaint: s 109(2) *Anti-Discrimination Act 1992* (NT).

[142] s 50 *Sex Discrimination Act 1984* (Cth).

[143] Anti-Discrimination Commission Queensland (Submission no 68).

[144] CCH Australia Ltd *Australian and New Zealand Equal Opportunity Law and Practice* Vol 1 CCH Australia Ltd Sydney 1990, para 28-450.

that appears to exclude or discourage pregnant or potentially pregnant women from applying.

Recommendation 35: That Attorney-General amend the *Sex Discrimination Act 1984* (Cth) to make clear that a complaint about a discriminatory advertisement may be made under section 14(1)(a) of the Act notwithstanding that the complainant is not a person directly affected by the advertisement.

Employment agencies

11.20 The SD Act defines an employment agency as

> …any person who or body that, whether for payment or not, assists persons to find employment or other work or assists employers to find employees or workers…[145]

11.21 This would include recruitment companies, labour hire firms and "temp" agencies in most cases.

11.22 The SD Act makes it unlawful for an employment or recruitment agency to discriminate against a person on the ground of pregnancy or potential pregnancy by refusing to provide the person with any of its services, in the terms and conditions on which it offers to provide the person with any of its services or in the manner in which it provides the person with any of its services.[146]

11.23 All state/territory anti-discrimination legislation applies in a similar way.[147]

> Most business units recruit through external agencies as the process becomes increasingly complex and time consuming. As a national organisation we need to ensure the recruitment agencies we work with are aware of their state and federal responsibilities.[148]

11.24 If an employment or recruitment agency engages in unlawful activity, it would be liable under the SD Act and the relevant state/territory legislation, even

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[145] s 4 *Sex Discrimination Act 1984* (Cth).
[146] s 20 *Sex Discrimination Act 1984* (Cth).
[147] s 30 *Anti-Discrimination Act 1977* (NSW); s 23 *Anti-Discrimination Act 1991* (Qld); s 17 *Equal Opportunity Act 1984* (WA); s 17 *Discrimination Act 1991* (ACT) which also provides that it is discrimination to subject the person to any detriment; s 34 *Anti-Discrimination Act 1992* (NT); s 5 *Equal Opportunity Act 1995* (Vic); s 39 *Equal Opportunity Act 1984* (SA) which concerns discrimination in the provision of goods and services; s 3(definition of employment) and s 21 *Sex Discrimination Act 1994* (Tas).
[148] ConfidentialA 1996 survey of recruitment practices within Australian firms found that "[t]here are few obvious relationships with the gender composition of the workforce and the choice of recruitment method. The notable exception is use of private employment agencies when recruiting for white-collar jobs. In such instances, agency use is found to be relatively uncommon in those workplaces where the proportion of women in the workforce is high (75% or more)": M Wooden and D Harding, "Recruitment Practices in the Private Sector: Results from a national survey of employers" 36(2*) Asia Pacific Journal of Human Resources* 1998 73-87 at 83.

though it may have been acting on behalf of another person or organisation.[149] However, it is unlikely that an agency would be held liable for discriminatory decisions made by the employer, where the recruitment processes followed by the agency were non-discriminatory. For example, if an agency pursued non-discriminatory recruitment processes and provided the client with a shortlist of candidates, the agency would not be responsible for a final decision that was discriminatory. On the other hand, if the agency is engaged to oversee the employment process in its entirety and does not pay sufficient attention to ensuring that the process is conducted in a non-discriminatory way, the agency may be held to be jointly liable for any discrimination that occurs. [150]

11.25 The person or organisation using an agency to advertise and search for and/or interview prospective staff on their behalf may also be vicariously liable for discriminatory treatment or selection of those prospective staff by the agency. The SD Act provides that an employer or principal may be vicariously liable for the discriminatory actions of employees or agents, unless the employer or principal took all reasonable steps to prevent the employee or agent from doing the discriminatory acts.[151]

11.26 However, an employer engaging temporary staff[152] from a temporary staff agency or labour hire firm cannot be held liable for any discriminatory treatment in the arrangements that agency or labour hire firm makes in relation to the people placed on its books, unless the employer has in some way influenced the composition of those books. Instead the employer's obligation, when deciding whether to accept the services of any woman proposed by that agency, is not to discriminate against her on the ground of pregnancy or potential pregnancy.

11.27 In its submission to the inquiry, a major employer expressed concern about practices adopted by recruitment agencies that have been unaware of, and clearly failed to comply with, the requirements of federal and state/territory legislation.[153] In particular, it saw a need to focus on how outsourced selection and recruitment processes were managed. [154]

11.28 Where selection and recruitment processes are outsourced, employers still bear responsibility for ensuring that they are conducted in a non-discriminatory manner.

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[149] This may also be the case for recruitment and employment where the contracting organisation is off-shore and providing instructions from an office off-shore.
[150] s 105 *Sex Discrimination Act 1984* (Cth) provides that a "person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 or 2 of Part II shall, for the purposes of this Act, be taken also to have done the act".
[151] s 106 *Sex Discrimination Act 1984* (Cth).
[152] *Sex Discrimination Act 1984* (Cth) applies to all employment categories, including casual workers, seasonal workers and outworkers: see ch 5.
[153] Australia Post (Submission no 44).
[154] Australia Post (Submission no 44). See also para 5.13.

The employment selection process

11.29 The SD Act makes it unlawful for an employer to discriminate against a person on the ground of pregnancy or potential pregnancy in the processes for selection for employment.[155] Employment includes trainee positions, appointment of independent contractors, agents and casual employees.

11.30 State legislation makes similar provision.[156]

11.31 These processes include seeking applications, the method of selecting applicants for interview, the conduct of the interview and the selection of successful applicants.

11.32 In *Harrison v Tong Sen & Co Pty Ltd*, the Commonwealth Employment Service referred a pregnant woman for a job vacancy in a food store. She was interviewed by a director of the company owning the store who offered her the job, which the woman accepted. When the director was informed that the new employee was pregnant, the director withdrew the offer of employment as the floors were too slippery. The woman lodged a complaint under the SD Act which was upheld. She was found to have been dismissed because of her pregnancy. Assuming slippery floors were a legitimate issue of concern then they should be addressed as an occupational health and safety issue for all employees and customers, and dealt with accordingly. [157]

11.33 Individual contributions made during inquiry focus groups illustrated employer and employee views about pregnancy and the employment selection process. In particular, there were references to assumptions upon which decisions were seen to be made.

> Interviewers often assume that a candidate may be pregnant or may become pregnant.[158]

> The higher education sector is under enormous economic pressure. If they are employing someone and have a choice between two candidates, they would not select a woman if there was a risk that she could become pregnant and take maternity leave. They couldn't afford it.[159]

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[155] s 14(1) *Sex Discrimination Act 1984* (Cth) is concerned with arrangements for offering employment, determining who should be offered employment and the terms and conditions on which employment is offered. Similar provisions are made in s 15(1) for commission agents and s 17(1) for existing and proposed partnerships. See also s 106 *Sex Discrimination Act 1984* (Cth) which provides for the liability of a person for the actions of their employee or agent.

[156] s 25(1) *Anti-Discrimination Act 1977* (NSW); s 14(1) *Anti-Discrimination Act 1991* (Qld); s 11(1) *Equal Opportunity Act 1984* (WA); s 10(1) *Discrimination Act 1991* (ACT); s 31(1) *Anti-Discrimination Act 1992* (NT); s 13 *Equal Opportunity Act 1995* (Vic); s 30(1) *Equal Opportunity Act 1984* (SA). Tasmania has no direct provision but the general provisions relating to discrimination in employment would cover this situation: s 3(definition of employment) and s 21 *Sex Discrimination Act 1994* (Tas).

[157] *Harrison v Tong Sen & Co Pty Ltd* (1996) EOC 92-847.

[158] Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).

[159] Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).

11.34 Such practices deny qualified women candidates access to employment.

> A woman who was seven months pregnant was promoted from a part-time position to full-time. Other staff were overheard making judgements such as "she shouldn't be able to get that job, it would be better off going to a young bloke". In this case the manager had to speak to all staff and explain that although it was fine to have their own personal views, they shouldn't be shared with anyone else in the workplace, or made public.[160]

11.35 The New South Wales *Anti-Discrimination Act 1977* provides that it is not unlawful discrimination to fail to provide employment to a woman if, at the date of the interview or application for a position, the woman was pregnant.[161] However, the more recent SD Act, which does not provide for such an exemption, applies to most recruitment processes in New South Wales.[162] The New South Wales exemption would apply only in the very limited areas where the SD Act does not apply, for example in New South Wales State Government employment.

11.36 This inconsistency was raised in submissions and consultations. It became clear some employers did not understand, or were not aware of the fact that federal legislation takes precedence over state legislation such as the New South Wales *Anti-Discrimination Act 1977* when an inconsistency arises.[163]

> Employers who seek to rely on the exception contained in the NSW Act to refuse to employ, or to terminate, a woman who was pregnant at the job interview would be leaving themselves open to a complaint being lodged under the federal Act. This situation renders the NSW provision useless to employers. [164]

11.37 Recognising the difficulties associated with inconsistencies, the New South Wales Anti-Discrimination Board in its May 1994 submission to the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977* (NSW), when referring to sections 25(1A) and 25(2A) of the Act, said

> [t]he Board believes that the exceptions for employing pregnant women should be removed…[165]

11.38 At the date of writing this report, the New South Wales Law Reform Commission was finalising the report of its review. Accordingly, it is not yet known whether the Commission will recommend the changes suggested by the Anti-Discrimination Board. HREOC considers the exception should be removed, and that doing so would clarify and simplify the current situation for

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[160] Confidential (Focus Group, 16 February 1999).
[161] s 25(1A) *Anti-Discrimination Act 1977* (NSW).
[162] See paras 7.2 – 7.5 for a discussion of the interaction of the legislation.
[163] See paras 7.2 – 7.5.
[164] Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).
[165] New South Wales Anti-Discrimination Board *Balancing the Act: Submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977* (NSW) NSW ADB Sydney 1994, 63. The submission was also annexed as Appendix 11 to the New South Wales Government submission to this inquiry (Submission no 99).

employers unclear about the operations of inconsistent federal and state legislation.

11.39 Recruitment of the most qualified candidate for each job is an important management concern. Recruitment processes should ensure potential candidates understand the specific requirements of the job and assess and test them on their capacity to perform. If a pregnant woman is legitimately not able to perform the requirements of the job, then it is not discrimination to refuse her the job. What the SD Act prevents is the employer making discriminatory assumptions and decisions without having undertaken appropriate assessment/testing of the candidate. Some submissions to the inquiry recognised this difference.

> The IT industry has put in place recruitment strategies to attract skilled employees – for which there is a high demand. Managers sometimes ask HR professionals "how can I employ a pregnant woman when I have a two year project". It seems managers do not feel able to ask how long the candidate plans to be away on maternity leave.[166]

11.40 It should be noted that many women do not utilise the standard 52 weeks maternity leave, particularly as it is unpaid. Some women start to work from home or share parental entitlements with a partner and return to work full time after a few months. This is decided by the individual woman. There is no standard amount of time taken, only a standard amount of time available. To assume maternity leave will be 52 weeks is naïve, disadvantageous and far removed from the reality of women's choices.[167]

11.41 Other submissions made similar comments.

> During an interview you should clearly point out all the duties required of the position. For example, if required to work longer hours at times or shift work. You don't ask inappropriate questions, rather point out the tasks in full and be absolutely clear about it.[168]

> The employer's only concern should be whether the pregnant woman is able to perform the job. If so, she should be selected on merit.[169]

> A six months pregnant employee applied for an internally advertised position. Following up rumours, her manager confronted someone on the interview panel "is it the fact she is six months pregnant that you don't want her in this job? She may not be capable of doing those duties immediately, but in the longer term she is the best person for the job".[170]

11.42 Under the SD Act, discrimination against those who are pregnant or potentially pregnant during recruitment has been unlawful for many years. The inquiry has

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[166] Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).
[167] See also paras 12.7 – 12.10.
[168] Confidential (Focus Group, 16 February 1999).
[169] New South Wales Anti-Discrimination Board *Balancing the Act – A Submission to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977* (NSW) NSW ADB Sydney 1994, 63. The submission was also annexed as Appendix 11 to the New South Wales Government submission to this inquiry (Submission no 99).
[170] Confidential (Focus Group, 16 February 1999).

demonstrated some employers and employment and recruitment agencies have a limited understanding of this and the way in which federal and state/territory legislation operate. In such an important area, this inadequate understanding presents a significant limitation on the capacity of pregnant and potentially pregnant women to access employment opportunities.

Pregnancy Guidelines 24: That the Guidelines make clear the legal responsibilities of employers and employment and recruitment agencies in recruitment processes and demonstrate the way in which federal and state/territory legislation can operate together.

Questions at interview

11.43 Submissions and consultations to the inquiry brought to the fore that many questions asked at interview may prove to be discriminatory in context and utilised for inappropriate decision making. Such questions include asking whether the applicant intends to have children in the future or, more specifically, a second child.

11.44 A trade union submission, reflecting anecdotal evidence to the inquiry, reported that

> [w]omen are still encountering employers and potential employers who want to know, when hiring or promoting, whether the woman intends having children. This may be as blatant as asking "Are you planning on having a family?" to the more general "Where do you see yourself in five years time?". As one member said: "There's no way you'd say you hope to be settled down, with a family. You tell them you're aiming for the top, and hope to have worked your way up the ranks."
>
> Many workers agreed that, although employers by and large knew they shouldn't be asking such questions, it was still a common occurrence for them to sneak in the "Are you planning on having children?" question. They were relying either on the employee's ignorance of the fact that they weren't entitled to ask such questions, or their desire for the job. Most employees who knew the question wasn't allowable agreed they would not reply "I thought asking that type of question was potentially discriminatory" for fear of being branded a troublemaker. As one worker said: "If that was your response, you know straight away they'd draw a red line through your name."[171]

11.45 Another submission noted that

> [w]omen often ask whether they are obliged to tell a potential employer that they are pregnant or planning a pregnancy soon. The fact is that because of continuing widespread reluctance to employ pregnant women it would be advisable not to tell until the job offer has been secured. Otherwise it will generally be impossible to prove that the reason she was not offered a position she is qualified for is pregnancy discrimination.[172]

11.46 Applicants report finding these questions disturbing. Often unsure how to answer them or what the intent of the question is, applicants note that their

[171] Labor Council of NSW (Submission no 41).
[172] Women's Legal Services Network (Submission no 94).

interview performance can suffer because they are caught off guard or become suspicious. If such questions are asked and applicants are not successful, they tend to conclude that pregnancy or potential pregnancy was a factor in their lack of success, giving rise to the possibility of a claim of discrimination.

11.47 The Women's Legal Services Network submission noted that

> [w]omen often ask whether they are obliged to tell a potential employer that they are pregnant or planning a pregnancy…because of continuing widespread reluctance to employ pregnant women it would be advisable not to tell until the job offer has been secured. Otherwise it will generally be almost impossible for a woman to prove that the reason she was not offered a position she is qualified for is pregnancy discrimination.[173]

11.48 In the *C & Ors v Australian Telecommunications Corporation* case,[174] three female applicants for cadetships complained about intimidatory questions at interview, including put-downs and topics of arguable relevance being broached in an insensitive and peculiar way. For example, applicants were asked how they felt about working in a male dominated field. When one applicant replied that it would not worry her, the interviewers clearly indicated their scepticism. When the interviews of male applicants were reviewed there was evidence that they were different in nature and content. Male applicants had no concerns as to the content and style of their interviews. The HREOC Hearing Commissioner said that it was not possible to reach a conclusion on whether the applicants would otherwise have been likely to succeed at the interview but it was appropriate to order monetary compensation for emotional distress. The complaint was upheld and damages awarded to the applicants.

11.49 The Council for Equal Opportunity in Employment Ltd advised that

> [m]ost selection panels are aware of the discrimination implications of asking questions regarding potential pregnancy so the ploy now is to "casually discuss" the likelihood of pregnancy after interviewing the women.[175]

11.50 The Sex Discrimination Commissioner is constantly alerted to tactics such as this and a variety of others in her daily work. The inquiry confirmed much of the anecdotal data the Commissioner receives with respect to recruitment.

11.51 It should be noted that while there remains some uncertainty about the way in which sections 14 and 27 of the SD Act apply to job interview questions, it is clear that section 14(1)(a),[176] particularly when read with section 27,[177] is wide enough to cover job interview questioning.

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[173] Women's Legal Services Network (Submission no 94). See also Council for Equal Opportunity in Employment Ltd (Submission no 104).
[174] *C & Ors v Australian Telecommunications Corporation* (1992) EOC 92-437.
[175] Council for Equal Opportunity in Employment Ltd (Submission no 104).
[176] s 14(1)(a) provides that it is unlawful for an employer to discriminate in the arrangements made for the purpose of determining who should be offered employment.
[177] s 27(1) provides, in relation to pregnancy and potential pregnancy, that in circumstances where it would be unlawful to discriminate against a person, it is also unlawful to request or require the person

11.52 Section 27 of the SD Act states that, where it would be unlawful for a person to discriminate on the ground of pregnancy or potential pregnancy in doing a particular act, it is also unlawful to request or require information, in connection with the doing of that unlawful act, that would not be requested or required of a person who was not pregnant or potentially pregnant. It is intended to prohibit asking discriminatory questions. However, information sought in application forms only becomes unlawful if it can be connected to the possibility of an act of discrimination under another provision.

11.53 Section 27 could be perceived, as no doubt it was originally intended, as a section that adds little to the SD Act other than to clarify that each of the primary prohibitions on discrimination, such as employment and provision of goods and services, also prohibit discriminatory questions. As indicated by inquiry submissions, while parties to the recruitment and employment relationship may understand that discriminatory recruitment questioning is not permissible, far fewer understand the parameters of the prohibition.

11.54 The requirement in section 27 for the information to be sought "in connection with or for the purposes of committing an unlawful act of discrimination" is unclear. It may mean that the section is not activated until after the act of discrimination has been committed, or becomes likely to be committed, or it may cover discriminatory questioning in connection with an area of unlawful discrimination rather than an identifiable act.

11.55 The inquiry has demonstrated that it is not obvious to a casual reader that the SD Act may prohibit questions at interview about pregnancy or potential pregnancy. Nor is it clear how appropriate information may be obtained where there may be legitimate occupational health and safety issues.

11.56 More general information and specific examples about what may and may not be asked at job interviews is necessary, but legal guidance on this issue is difficult to provide, given the limited number of cases pursued formally and uncertainty about the requirement in section 27 for the information to be sought "in connection with or for the purposes of committing an unlawful act of discrimination".

11.57 An amendment to the SD Act is needed to clarify the existing provisions. Such an amendment will aid all parties by simplifying and confirming the intent of the section.

11.58 Non-discriminatory employment selection processes are crucial for ensuring that discrimination is eliminated. Processes need to be transparent and fair; they should operate so as to eliminate as far as possible any doubt about whether discrimination actually occurred. Irrelevant questions about pregnancy or potential pregnancy need to be removed from the process. A clear legislative

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to provide information that persons who are not pregnant or potentially pregnant would not be asked to provide.

provision, and information about its application will assist with this. Also, the Guidelines should cover what kind of information can be elicited at interview and via application forms, and in what circumstances.

Pregnancy Guidelines 25: That the Guidelines provide examples of non-discriminatory questions for use at interview to elicit information legitimately required of applicants who are pregnant or potentially pregnant.

Recommendation 36: That the Attorney-General clarify section 27 of the *Sex Discrimination Act 1984* (Cth) by the insertion of a specific provision that prohibits the asking of questions (whether orally or in writing) which might reasonably be understood as intended to elicit information about whether or when a woman intends to become pregnant and/or her intentions in relation to meeting her current or pending family responsibilities.

Medical examinations

11.59 It is generally read that it would be discriminatory under section 14 of the SD Act to require an applicant to undergo a pregnancy test as part of a pre-employment medical examination (either with or without permission). However, some medical information about a pregnancy may validly be sought[178] where the employer has a responsibility to address occupational health and safety aspects of a particular job, provided that the information, once received, is not used in a discriminatory manner.[179]

11.60 Section 27(2) of the SD Act provides that it is not unlawful for a person to request or require a person who is pregnant to provide medical information concerning the pregnancy.

11.61 There are situations where it may not be discriminatory to refuse employment, promotion or transfer where a medical report says that the pregnant applicant is not able to perform the proposed work. However, reasonable accommodation should be considered as discussed further in Chapter 12.

11.62 The case of *McCarthy v Metropolitan (Perth) Passenger Transport Trust (Transperth)*[180] shows the dangers of relying on a medical assessment that is itself discriminatory.

11.63 In that case, the complainant, a bus driver, moved to Perth and applied for a job with Transperth. At her medical test, she told the doctor she was three months pregnant and he commented that she would not fit behind the steering wheel. Her blood pressure was normal and her general health was good. The doctor told her she was overweight and said "…when you have the bubby and lose the weight, come back and see me".

[178] s 27 *Sex Discrimination Act 1984* (Cth).
[179] See paras 9.16 – 9.31 for a discussion of medical advice in an occupational health and safety context.
[180] *McCarthy v Metropolitan (Perth) Passenger Transport Trust (Transperth)* (1993) EOC 92-478.

11.64 The applicant passed the aptitude test and driving appraisal but was told that she had failed the medical test. The personnel officer told her that when she had had the baby and lost 25 kilos she should come back to see her. No alternative medical opinion was sought and the applicant was not advised that she had a right of appeal and could seek a second medical opinion.

11.65 The Western Australian Equal Opportunity Tribunal found that the applicant's pregnancy was a significant if not major factor in the doctor's assessment of her as unfit to perform the duties of a bus operator; other factors were not determinative. Had she not been pregnant, the doctor would have passed her as medically fit and, in view of the applicant's good health, there was no proper basis on which the doctor could conclude that her pregnancy would affect her capacity to do the work. The Tribunal found that the evidence failed to establish that the employer had taken all reasonable steps to prevent the doctor unlawfully discriminating on the ground of pregnancy against applicants for employment. The employer was also responsible for the personnel officer refusing employment to the applicant. The personnel officer was plainly not aware of the requirements of the Western Australian Act.

11.66 HREOC considers that a reading of section 27 of the SD Act may lead to the inappropriate conclusion that it is not unlawful to discriminate in relation to medical examinations of pregnant women at the recruitment stage. Legal clarification of this point would be useful for employers, employment and recruitment agencies and medical practitioners.

Recommendation 37: That the Attorney-General amend *Sex Discrimination Act 1984* (Cth) to clarify that it is unlawful to discriminate in medical examinations of pregnant women during recruitment processes.

Pregnancy Guidelines 26: That the Guidelines note that, while it is appropriate to ask a pregnant job applicant to undergo a medical examination, any such medical examination should be undertaken with a view to addressing occupational health and safety concerns and should not in itself lead to, or exacerbate, discrimination on the ground of pregnancy.

Chapter 12 – Accommodating pregnancy in the workplace

Rights and responsibilities of employees and employers

12.1 A successful relationship between an employer and employee is one of mutual respect where both parties recognise and adhere to their rights and responsibilities. Difficulties do arise however when the legal parameters of conduct are unclear, or where different laws overlap or are perceived to conflict.

12.2 Where workplace issues have unclear legal parameters or where the legal parameters fall short of employer and employee needs, the inquiry evidenced some employers moving beyond the basic legal requirement utilising creative and flexible solutions.

12.3 This chapter focuses on specific issues concerning pregnancy and potential pregnancy that arise in the workplace, examining major concerns and difficulties employees and employers face. It highlights the concerns raised in submissions and consultations, determining where employees and employers require clarification and guidance. The Guidelines will outline the law, provide practical suggestions and examples of sound flexible and creative management of workplace pregnancy.

Informing the employer of the intention to take maternity leave

12.4 Pregnant employees have an obligation to inform their employer of the intention to take maternity leave. The period of minimum notice for maternity leave, to be given by an employee, is determined by federal and state/territory workplace relations laws, awards and agreements. The *Workplace Relations Act 1996* (Cth) provisions are minimum entitlements and are intended to supplement, not override, award entitlements and other legislation.

12.5 The *Workplace Relations Act 1996* (Cth), requires notice regarding the employee's intention to take maternity leave to be given in the form of a medical certificate ten weeks prior to the expected date of confinement.[181] Similar provisions exist in many federal award provisions. For example, the clause was discussed by the Australian Industrial Relations Commission in the *Award Simplification Decision* in December 199. It provides that notice of the expected date of confinement must be given ten weeks prior to that confinement, and that notice of the date of commencement of maternity leave must be given at least four weeks prior to the commencement of that leave.[182]

[181] sch 14(3)(2) *Workplace Relations Act 1996* (Cth).
[182] Australian Industrial Relations Commission Print Q7500. This clause was inserted into the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award* 1998 by order Print Q5597 on 15 September 1998.

12.6 The notification period required under state and territory law varies.[183]

12.7 While it is the responsibility of employees to apply for maternity leave if they wish to access it, it should be noted that there is no obligation to actually take maternity leave.

12.8 Employees may take part or all of any accrued annual leave or long service leave instead of, or as well as, unpaid maternity leave.[184] If employees plan to take any leave that is maternity leave, they should provide a doctor's certificate confirming the pregnancy and the expected date of birth, prior to taking the maternity leave. [185] Where the relevant legislation or award requires that the employee leave a specified time before the expected date of birth, a medical certificate may be required for the employee to continue working after that date.[186]

12.9 Submissions to the inquiry indicated that early notification of an employee's intention to take maternity leave allows an employer adequate time to accommodate the pregnancy and plan for the temporary absence of the employee.

> [E]mployers have stated that managing their workforce has been made easier if pregnant employees are able to inform them of their needs and plans to allow for strategic planning.[187]

12.10 Other submissions indicated strong employee reluctance to provide early notification, if any at all. Some employees, particularly contract workers, indicated that they concealed their pregnancy for as long as possible, because they feared pregnancy discrimination. This reluctance was evidenced by a variety of employees, including senior professional women, some of whom were adamant that being pregnant was their personal business, that it had nothing to do with their employer nor had any impact on how they did their jobs. These women highlighted the fact that there was no requirement to tell

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[183] For example, s 58(1) *Industrial Relations Act 1996* (NSW) requires a pregnant employee to give four weeks written notice of her intention to take maternity leave and the proposed dates of the leave; sch 5(2) *Industrial and Employee Relations Act 1994* (SA) and s 33(2) *Minimum Conditions of Employment Act 1993* (WA) require the employee to give ten weeks written notice of their intention to take maternity leave.

[184] See for example, s 7(1) *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). See also paras 12.21 – 12.22.

[185] Under legislation, the total period of leave cannot extend beyond a maximum period of 52 weeks. See for example, s 170KA(3) and sch 14(4) *Workplace Relations Act 1996* (Cth); s 62 *Industrial Relations Act 1996* (NSW); cl 5(6) *Industrial and Employee Relations Act 1994* (SA); s 33 *Minimum Conditions of Employment Act 1993* (WA); s 163 *Workplace Relations Act 1997* (Qld). However, legislation provides minimum entitlements and more generous entitlements may be set by awards, agreements, workplace policies and other instruments.

[186] See for example, sch 14(3)(2) *Workplace Relations Act 1996* (Cth); s 58(c) *Industrial Relations Act 1996* (NSW); sch 5(4) *Industrial and Employee Relations Act 1994* (SA); s 35 *Minimum Conditions of Employment Act 1993* (WA).

[187] Retailers Association of Queensland (Submission no 39).

the employer about the pregnancy if they were not taking maternity leave and planned to have their babies on paid annual leave or long service leave.[188]

> The CPSU survey results have highlighted that discrimination during pregnancy and potential pregnancy is still regularly occurring in the workplace. Employees felt "gagged" and "secretive" about their pregnancies due to approaching contract renewals or forthcoming selection processes for promotion. In one case an employee was advised by the Chairperson of a selection panel to "formally withdraw from the selection process and not apply" due to her pregnancy.[189]

> Job Watch's experience after assisting many women with the problems they face on revealing pregnancy to their employer has lead us to advise women not to tell the employer until they have to, ie: when they have to apply for maternity leave.[190]

12.11 One submission from an employer organisation expressed some of the difficulties associated with notification of maternity leave.

> There have also been a number of instances where an employee has initially indicated her intention not to take maternity leave and then has changed her mind at the last minute. This scenario poses all manner of difficulties for small business operators with regards to staff arrangements and relief work.[191]

12.12 Another submission noted that

> [s]mall business is often in limbo awaiting an employee's decision on if, and when, she will return to work. Further to this, it is very hard to attract short-term staff.[192]

12.13 The employer should ensure that all women employees are made aware of their legal right to maternity leave at the time of employment.[193] The need to give the employer notice is also something that should be covered if the employee is taking maternity leave. Provision of this information is essential. Line managers also need to be well versed in the relevant rights and responsibilities.

12.14 Submissions to this inquiry indicated that some employers do not inform their employees about their rights and responsibilities with respect to maternity leave and pregnancy.[194] The inquiry indicated that in some cases, the employer was not aware of what these rights and responsibilities were. In other instances, employers had the information but it had not been disseminated to employees. The Guidelines are intended to make the relevant information easily available and accessible to all.

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[188] See paras 12.21 – 12.22.
[189] Community and Public Sector Union (Submission no 53).
[190] Job Watch Inc (Submission no 60).
[191] Pharmacy Guild of Australia, Queensland Branch (Submission no 16).
[192] Business Women's Consultative Council, Northern Territory (Submission no 29).
[193] In New South Wales the employer has a legal obligation to inform the employee: s 67(1) *Industrial Relations Act 1996* (NSW).
[194] Australian Nursing Federation (Submission no 45); Finance Sector Union of Australia (Submission no 51).

12.15 When granting maternity leave and making the necessary arrangements, it is unlawful for employers to discriminate against pregnant employees in a direct or indirect manner.

12.16 The inquiry evidenced that some employers have formulated pregnancy policies in order to overcome confusion and discriminatory practice.

> One month before an employee is due to go on maternity leave, she is contacted by head office who tell her what to expect in terms of keeping in touch and about returning to work. Myer Grace Brothers intend to conduct interviews at store level with post implementation monitoring to determine the success of this policy.[195]

12.17 The formulation of well informed policies and their distribution amongst employees is the key to avoiding discriminatory practices. However, care must be taken by employers to ensure that policies are clear and accurate, as well as distributed to all parties to the employment relationship, being employees, supervisors, internal medical advisers and employee representatives.

12.18 The Human Rights and Equal Opportunity Commission (HREOC) is of the considered view, based on the findings of this inquiry, that employees will inform their employers about their pregnancy and decision to take maternity leave in a timely manner if they feel there is no risk or pending disadvantage likely. If, on the other hand, employees do not feel comfortable about sharing the information or, based on others' experience, have reason to fear doing so, then it is more likely that management will only be given exact notice and minimum detail.

Pregnancy Guidelines 27: That the Guidelines provide information regarding the rights and responsibilities of pregnant employees seeking to access maternity leave and the rights and responsibilities of employers in relation to arranging for maternity leave.

Negotiating maternity leave

12.19 Some legislative restrictions exist on the length of time pregnant employees who are taking maternity leave may work prior to birth. For example, federal public servants are required to commence maternity leave six weeks before the date of confinement unless a doctor certifies they are fit to work longer.[196] Similar restrictions may also be imposed by awards or workplace agreements.

12.20 HREOC is of the opinion that a requirement for a pregnant employee who is willing and able to do her job to commence maternity leave at a specified time, may be discriminatory.[197] This could also include a requirement that prevents an

[195] Coles Myer Ltd (Consultation, 18 September 1998). See also Westpac Banking Corporation (Submission no 66).
[196] ss 6 & 7 *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). A similar provision exists in s 34 *Minimum Conditions of Employment Act 1993* (WA).
[197] Human Rights and Equal Opportunity Commission *Report on Review of Awards: Direct discrimination* (Unpublished Working Paper) HREOC Sydney 1994, 10. HREOC notes that an action under an award would be exempt under s 40(1)(e) *Sex Discrimination Act 1984* (Cth). However, the

employee from working close to the date of the birth unless she presents a medical certificate to indicate she is fit to work. Such provisions exist in awards and agreements, as well as in legislation under some state/territory laws.[198] Whether the requirement is discriminatory will depend on the circumstances of the situation, including for example, the occupational health and safety issues of the work, the ease of obtaining a medical certificate and whether it would be reasonable to expect that a pregnant employee could continue working in the position beyond the date specified for the commencement of maternity leave.

12.21 During formal and informal consultations, several accounts from professional women identified that they, due to workplace culture, and in order to protect their roles, felt personally compelled to take annual or long service leave rather than maternity leave to have their babies. Some women also made the decision because they would be financially compensated rather than being on unpaid maternity leave and were in a position to retain their benefits such as superannuation, death and disability cover and company car.

> …I took accrued annual leave rather than maternity leave to have my children…the major reason was to ensure that I was not disadvantaged by having the children and in a position to continue on in my normal job. I felt that to have taken maternity leave could easily have compromised both of these things. Taking annual leave instead of maternity leave was a strategy to protect myself and my job….By taking annual leave it was highly unlikely that someone would be put in my role and the organisation certainly couldn't require me to take another role that for convenience (or other reasons) was labelled an equivalent job. Some senior women take long service leave rather than maternity leave for the same reasons.
>
> I was culturally aware enough to know that it would be smart to protect my position; I had seen women go on maternity leave and lose their jobs to their replacements. I had also seen people sidelined, or their roles altered (ie decreased), restructured, or made redundant when on maternity leave. I was not prepared to have this happen because I had decided to have children.[199]

12.22 It should be noted that workplace culture that deters women from taking maternity leave may well constitute direct or indirect discrimination.

12.23 One submission requested that clarification was required regarding when an employee had a right to access maternity leave.

> Both federal and state maternity leave provisions provide an entitlement of up to 12 months maternity leave where an employee has 12 months continuous service with the employer. The situation is not at all clear, however, in respect of employees who do not have the required 12 months continuous service. In those circumstances, it appears the employer cannot terminate the employee or expect the employee to resign, as either of these course of action may constitute a breach of both termination and equal opportunity laws.[200]

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action could be the subject of a complaint under s 50A *Sex Discrimination Act 1984* (Cth): see paras 8.94 – 8.106.

[198] See for example, *Factories Shops and Industries Act 1962* (NSW).

[199] Confidential, Manager, Australian Multinational (Personal consultation with Sex Discrimination Commissioner, 4 June 1999).

[200] Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).

12.24 At a federal level, the right to maternity leave encapsulated in schedule 14 of the *Workplace Relations Act 1996* (Cth) requires an employer to grant an employee maternity leave if (among other things), it is reasonable to expect that she will complete, or she has completed, a period of at least 12 months continuous service with the employer when she provides 10 weeks written notice of the estimated date of birth.[201] This provision is a minimum entitlement and does not override maternity leave entitlements under other federal and state/territory legislation and awards or under the case law.[202]

12.25 In a 1997 decision of the New South Wales Industrial Relations Commission, it was found that a woman who had been denied unpaid leave by reason of her pregnancy had been unfairly dismissed.[203] This was based on the reason that it is unlawful to dismiss an employee on the basis of pregnancy. However, in this case, the finding was made despite the fact that she had been employed for less than twelve months and, as a consequence, was not entitled to parental leave under the New South Wales *Industrial Relations Act* 1996.[204] This case, as a decision of a single member at the state level which was overturned by the Full Bench of the Commission, cannot be said to set a firm legal precedent, and whether or not a future court or commission will follow the decision is uncertain.

12.26 HREOC agrees with the submission of the federal Department of Employment, Workplace Relations and Small Business,

> [a]t best, the cases require employers to treat their employees fairly by
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> - considering the employee's access to forms of leave other than maternity leave (such as leave without pay);
> - holding discussions with the employee concerning a reasonable period of absence having regard to the needs of both the employer and the employee; and
> - if leave is refused, providing the employee with reasons why the employer is unable to grant leave without pay or why it is impracticable to examine other options.[205]

The obligation to accommodate and its limits

12.27 During the period of pregnancy, the changing needs and body shape of pregnant employees may mean that an employer needs to vary an employee's tasks, conditions of employment or the employee's work environment in order to accommodate the pregnancy. This is not always the case, however, and should not be assumed. Where necessary and reasonable, pregnant employees

[201] sch 14 cl 3(2)(h) *Workplace Relations Act 1996* (Cth).
[202] Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).
[203] *Henderson v Rural Lands Protection Board* (1997) 74 IR 142. The Full Bench of the Commission *by consent* overturned the decision of the Commissioner in this case. This is highly irregular. However, the decision is still persuasive authority and its legal reasoning has not been challenged.
[204] See also *Stojanovic v The Commonwealth Club Limited* (unreported AIRC No AI267R of 1994).
[205] Department of Employment, Workplace Relations and Small Business Supplementary Submission (Submission no 101).

may be entitled to be provided with alternate equipment and/or work environments, where necessary to ensure that their health, safety and welfare at work are protected.[206]

12.28 When complying with the obligation to accommodate pregnancy at work, employers must be aware of occupational health and safety requirements, as well as the prohibition on discrimination against pregnant employees.

12.29 A failure to accommodate pregnant employees could amount to unlawful discrimination under several provisions of the *Sex Discrimination Act 1984* (Cth) (the SD Act). For example, an employment requirement or practice which does not accommodate pregnancy may amount to less favourable treatment of pregnant employees and therefore constitute direct discrimination.[207] It may also have the effect of disadvantaging pregnant employees and therefore constitute indirect discrimination.[208] Employers with pregnant employees should make some reasonable accommodation in the workplace to meet the needs of the pregnant or potentially pregnant employees.[209]

12.30 In instances where occupational health and safety risks to pregnant employees cannot be controlled or eliminated, the employer may need to transfer pregnant employees to an alternative job. Under the SD Act, any transfer must be done in a way that does not discriminate against pregnant employees. For example, the transfer should not result in loss of opportunities for promotion, training, financial loss, extra travel time or expose them to harassment by fellow workers.

12.31 Some maternity leave legislation requires an employer to consider such a transfer on the production of a medical certificate.[210] That legislation also provides that the woman be returned to her original job upon her return from maternity leave or an equivalent available position if her original job has ceased.[211]

12.32 Submissions to the inquiry indicated that the transfers to safer duties may cause difficulties in some workplaces.[212] One submission to the inquiry suggested that, in some industries,

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[206] See for example s 16 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) and s 15 *Occupational Health and Safety Act 1983* (NSW) that require the provision of systems of work and plant (including equipment, appliances and machinery) which are safe and without risks to health. See also s 19 *Occupational Health, Safety and Welfare Act 1986* (SA); s 19 *Occupational Health and Safety Act 1984* (WA); s 27 *Occupational Health and Safety Act 1989* (ACT).
[207] s 5(1) *Sex Discrimination Act 1984* (Cth). See paras 4.27 – 4.28.
[208] s 5(2) *Sex Discrimination Act 1984* (Cth). See paras 4.29 – 4.39.
[209] Unless a particular exemption applies to that employment, such as those listed in ch 5.
[210] cl 7 sch 1A *Workplace Relations Act 1996* (Cth) (which also applies to territory and Victorian workers); s 70 *Industrial Relations Act 1996* (NSW); s172 *Workplace Relations Act 1997* (Qld).
[211] cl 14 sch 1A *Workplace Relations Act 1996* (Cth) (which also applies to territory and Victorian workers); s 66 *Industrial Relations Act 1996* (NSW); s171 *Workplace Relations Act 1997* (Qld); s 38 *Minimum Conditions of Employment Act 1993* (WA).
[212] See paras 12.47 – 12.50.

> …one should not expect any understanding of "reasonable accommodation" or that it was likely that it would happen. There would be little consideration given to the fact that the woman could still possibly do her job; even if she could, it would be assumed she couldn't.[213]

12.33 In South Australia, the discrimination in employment provisions do not apply to discrimination against a woman on the ground of pregnancy if

> (a) the discrimination is based on the fact that the woman is not, or would not be, able
> (i) to perform adequately, and without endangering herself, the unborn child or other persons, the work genuinely and reasonably required of her;
> or
> (ii) to respond adequately to situations of emergency that should reasonably be anticipated in connection with her duties…[214]

12.34 The Northern Territory and Tasmanian legislation, unlike the SD Act, has provisions dealing with accommodations to be made for pregnant employees. In the Northern Territory it is unlawful to fail to accommodate a special need that a person has because of an attribute such as pregnancy[215] unless that person would require special services and facilities and it is unreasonable to require these to be provided.[216] In Tasmania, a person may discriminate against a woman on the ground of pregnancy if the woman requires special services and facilities the supply of which would impose unjustifiable hardship.[217]

12.35 Under the SD Act there are, on occasion, legitimate circumstances where there are no alternative tasks and a transfer is not possible. In such circumstances there may be a need for the employer to require pregnant employees to commence maternity leave or take extended leave without pay. It may also be lawful to terminate the employment contract on rare occasions, where the employee is no longer able to meet the terms and conditions of the position.[218] However, in such circumstances, employers would be well advised to ensure that they have adequate documentation to demonstrate that no other alternative existed for the employee.

12.36 In some cases, simple solutions for issues that initially seem difficult, may produce results beneficial to both the employee and the employer. The following comments were collected in the submission by the Western Australian Equal Opportunity Commissioner.

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[213] Mandy Keilor, Managing Director, Keilor Constructions and The Source (Personal Consultation with Sex Discrimination Commissioner, 19 March 1999).
[214] s 34(3) *Equal Opportunity Act 1984* (SA).
[215] s 24 *Anti-Discrimination Act 1992* (NT).
[216] s 58 *Anti-Discrimination Act 1992* (NT).
[217] s 27 *Sex Discrimination Act 1994* (Tas).
[218] See for example, *Parker v North Queensland Animal Refuge Inc* Queensland Anti-Discrimination Tribunal H65 of 1996.

> I put a comfortable lounge chair in my office. It was a simple way of accommodating my special needs.[219]

> One woman…had to resign because she needed a day sleep and she had high blood pressure. But when she handed in her notice and explained to her boss, he modified the environment to accommodate her.[220]

> I tried to do all the usual things and continued to carry heavy things. My colleagues would make me put them down and carried things for me.[221]

12.37 One employer organisation suggested that the inquiry review discrimination provisions in the SD Act to further define the parameters of "reasonable accommodation". It asserted that

> [i]n practice, it would have to be extremely difficult, if not impossible, for any tribunal to stand in the shoes of the employer and make decisions on the basic structure of work organisation. It would seem to be extremely difficult for anti-discrimination law to seek to regulate such issues through general prohibitions which are then sought to be applied, on a case by case application…of very general principles.[222]

12.38 HREOC is of the view that attempts to further define the parameters of "reasonable accommodation" would not be in the interest of business or other parties. The concept of reasonable accommodation affords business a greater degree of flexibility by allowing each case to be considered on its merits. Business and industry often argue it is best served when it can make decisions based on the situations and circumstances unique to its demographic and environment. In order to satisfy legal requirements, employers should be satisfied that decisions concerning the limits of accommodation for each pregnant employee are reasonable on the basis of all the objective circumstances of the case.[223] Making decisions based on the reasonableness of the circumstances is a normal part of everyday business practice. The alternative, which would require HREOC to presume it could appropriately cover all relevant circumstances through a predetermined list, could easily create an unnecessary and cumbersome burden on business.

12.39 HREOC is also firmly of the view that decisions taken in consultation and co-operation with the individual employee concerned, will assist in producing a reasonable outcome; no two pregnancies are the same and people need to be managed as individuals.

12.40 It is not considered that further definition of the legislation would be useful at this stage. However, the Guidelines will provide practical advice about a range of issues that should be considered in such decisions.

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[219] Western Australian Equal Opportunity Commissioner (Submission no 100).
[220] Western Australian Equal Opportunity Commissioner (Submission no 100).
[221] Western Australian Equal Opportunity Commissioner (Submission no 100).
[222] Australian Chamber of Commerce and Industry (Submission no 84).
[223] See paras 4.44; 13.75 – 13.81 for a discussion of the onus of proof in indirect discrimination cases. See also paras 6.24 – 6.25.

Specific accommodations

12.41 Inquiry submissions and consultations raised a number of issues concerning the obligation to accommodate pregnant employees. Many instances reflected a lack of information in the workplace about pregnant employees' rights and responsibilities. Some submissions raised difficulties associated with accommodating pregnant employees while others provided information on creative solutions which employers had implemented in their own workplaces.

12.42 HREOC acknowledges that there are, on occasion, difficulties associated with accommodating pregnant employees. HREOC is therefore satisfied with the SD Act which now provides for a variety of outcomes. In its present form, the SD Act provides for employees and circumstances to be treated individually. A solution that is successful for one employee, in one workplace or one industry may be inappropriate for another.[224]

12.43 Another difficulty submissions referred to was the attitudes of fellow employees. Consultations during the inquiry revealed that accommodating a pregnant employee sometimes caused resentment amongst other staff who see the pregnant employee as receiving favoured treatment.[225]

> Sometimes OH&S policies cause problems. For example in one workplace employees work in a cold storage area where the temperature is -30°C. As freezer suits are not made in maternity sizes, pregnant staff are moved to the chill storage area where the temperature is 3°C. Employees working in the freezer area are paid higher wages, but pregnant staff moved to the chill area are retained on this higher wage level. As a result male workers complain.[226]

> When I employed a senior woman who was three months pregnant into the corporate environment there were a number of raised eyebrows. While she was the best candidate it hadn't been done at management level before and culturally it was a bit of a shock. She performed well in her job during her pregnancy. She accessed paid maternity leave, she came back part-time, then full-time and has been since promoted. Employing her wasn't an outrageous thing to do - the big hurdle was dealing with the stereotypes that surround pregnant employees. The stereotypes, perceptions and the personal values and beliefs of others are problematic, not the pregnant woman; what she is, is the best candidate based on merit and therefore the right person for the job. This incident gave the culture a nudge and we continue to progress.[227]

12.44 It is the legal and ethical duty of the employer to ensure that all staff are aware of their rights and responsibilities and the policies of the organisation. This includes issues concerning victimisation and occupational health and safety.

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[224] Retailers Association of Queensland (Submission no 39).
[225] Labor Council of NSW (Submission no 41); Australia Post (Submission no 44); Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).
[226] Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).
[227] D Bevan, Vice President and Director of Employee Relations, McDonalds Australia Ltd (Personal Consultation with Sex Discrimination Commissioner, 1 April 1999).

12.45 Submissions pointed to the fact that some organisations recognised that good accommodation policies and practices assist in the retention of good employees.

> The Department's current practices are that the post manages the pregnancy of Australian-based staff in the same way as if the staff member were not overseas. The only variation is where the staff member may need to be removed from the post to ensure adequate medical attention is received. The financial and management difficulties of pregnancy and overseas work is accepted as part of the risk management of posting skilled and talented women overseas and the Department has been able to respond flexibly to the demands of the situation.[228]

12.46 The following sections will canvass some of the main topics of concern that were raised. The Guidelines will also address these topics by outlining legal obligations, suggestions for accommodation and sound management examples.

Transfer to alternative duties

12.47 The specific obligation to transfer a pregnant employee to alternative duties wherever possible arises from discrimination law.[229]

12.48 Submissions and consultations indicated that, while some organisations have well developed policies on the availability of alternative duties, others find it difficult to provide alternative duties for pregnant employees. Those with well developed policies tended to be organisations with a large number of employees and a variety of tasks available for employees.[230] Submissions that asserted it was difficult to provide alternative duties were generally from smaller organisations with few employees and a limited range of tasks.[231] But this was not always the case, as other submissions indicated that the difficulty lay in the attitude of the manager rather than the size of the organisation.[232]

> [T]he major decider for satisfaction or non-satisfaction tended to be where and for whom the woman worked at the time. Some supervisors were innovative and supportive and others made it extremely difficult for the woman. Good supervisors tended to ensure the woman continued to use her skills and to feel that she was contributing to the

[228] Department of Immigration and Multicultural Affairs (Submission no 28).
[229] See also cl 32.8 *Award Simplification Decision* Australian Industrial Relations Commission December 1997 Print Q7500. This clause was inserted into the *Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award* 1998 by order Print Q5597 on 15 September 1998.
[230] Victoria Police (Submission no 13); Australian Federal Police, Northern Region (Submission no 17); South Australia Police (Submission no 58); Westpac Banking Corporation (Submission no 66).
[231] N Ozanne (Submission no 9); Confidential (Submission no 11); Pharmacy Guild of Australia, Queensland Branch (Submission no 16); Confidential (Submission no 23); Business Women's Consultative Council, Northern Territory (Submission no 29); Retailers Association of Queensland (Submission no 39). The particular position of small business in accommodating pregnancy is discussed at paras 12.101 – 12.110.
[232] Queensland Police Service (Submission no 26); Department of Immigration and Multicultural Affairs (Submission no 28); Labor Council of NSW (Submission no 41); Westpac Banking Corporation (Submission no 66).

> workplace….One of the underlying problems for many women was the attitude of their supervisors towards pregnant women...[233]

> I strongly believe that the most important aspect [for a positive experience of pregnancy at work] is the overall attitude of the immediate supervisor and manager regarding women being on maternity leave.[234]

12.49 A significant number of submissions discussed the difficulty pregnant employees experienced in being transferred, in situations where it would seem reasonable to expect an employer to have a policy and a range of options available in relation to alternative duties.

> It is not uncommon for nurses to experience difficulties in securing transfer to "safe duties" during pregnancy. The view of management who actively resist assisting nurses to transfer to other duties is that the pregnant nurse must be able to perform all the usual duties expected of a nurse.[235]

> The usual duties of nurses can include the handling of teratogenic (harmful to the foetus) substances, lifting and the performance of shift work. Management usually readily acknowledges that a nurse should not work with dangerous chemicals or other agents (such as x-ray equipment and cytotoxic drugs) during pregnancy and therefore transfer is usually facilitated. However, it is when issues such as working of night duty or the ability to lift need to be addressed that resistance is met.[236]

12.50 The inquiry has identified that many organisations are starting to come to terms with these issues but there remains a need to explore all the options available with respect to alternative duties. Where alternative duties legitimately do not exist, it may be necessary for the employee to take leave until they are able to recommence their duties. However, HREOC has been alerted to the fact that some employers conclude that alternative duties do not exist without proper examination of the situation or as a means to simply remove the pregnant employee. The Guidelines will assist employers in conducting a proper examination.

Seating

12.51 The issue of seating being provided for pregnant employees is one that was frequently raised during the course of this inquiry. In fact, there were many

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[233] Australian Federal Police, Central Office (Submission no 18).
[234] Department of Immigration and Multicultural Affairs (Submission no 28).
[235] Queensland Nurses' Union (Submission no 37).
[236] Australian Nursing Federation (Submission no 45). A study of pregnancy outcomes for nurses reported that "[s]everal studies show that working in health care services was associated with a high pregnancy loss, possibly due to exposure to hazardous chemicals and to mental and physical stress inherent in the work itself. They may also be at an advantage...as they have access to better health services, have better knowledge regarding the positive health practices etc.": SR De A Seneviratne and DN Fernando "Influence of Work on Pregnancy Outcome" (1994) 45 *International Journal of Gynecology and Obstretrics* 35 at 39. See also AP Koemeester, JPJ Broersen and PE Treffers "Physical Work Load and Gestational Age at Delivery" (1995) 52 *Occupational and Environmental Medicine* 5, 313-315 which concluded that the duration of high physical workload (ie a combination of walking, standing, lifting, stooping and squatting without sitting) of pregnant nurses should be limited to no more than two hours a day.

stories of employers refusing to actually provide seating in reasonable circumstances.[237]

> One woman who worked in a factory on an 11pm to 7am shift was on her feet the whole time, not allowed to have a stool (which would have made her task easier) and was told, "If you can't hack it, leave".[238]

12.52 One case brought to HREOC's attention by a trade union resulted in a pregnant woman making a claim against a car manufacturing company that repeatedly refused to provide her with seating. Employed to sew car seat covers, she was doing a task which previously been performed seated, but due to expected productivity improvements, a process of standing to operate the machines was introduced. During her pregnancy, the employee provided her employer with four medical certificates and two WorkCover certificates requesting seating due to bleeding and extreme pain. However, the employee was not offered seating or alternative duties and it was suggested that she go home. Unable to afford this option, the employee continued to work. Seven months into the pregnancy, the employee collapsed at work; her son was born by Caesarean, seven weeks premature with an underdeveloped heart. A complaint was brought before the Anti-Discrimination Tribunal of Victoria and was settled prior to hearing.[239]

12.53 A submission to the inquiry by a major retailer pointed out that

> [t]he provision of seating at checkouts for employees (non-pregnant) has been consistently referenced within ergonomic literature as being a less than preferred option. Particular comments in relation to seated work at checkouts: "check out operators who predominantly work in a sitting position have a high prevalence of upper back and upper limb complaints" And where a "cashier was standing, muscle activity on all levels of load were lower for the cashier than when they were sitting".[240]

12.54 As no two pregnancies are the same, decisions about whether seating should be provided are best made after consultations with the employee and upon medical advice. Information submitted to the inquiry was disturbing on many fronts with anecdotes such as those cited emerging from a variety of Australian workplaces. This is especially so where a simple accommodation could assist the employee to continue her employment. Failure to provide seating when it is reasonably available in relation to the duties of the employee, may well be discriminatory and in breach of the SD Act. It also has the potential to endanger the health of the employee and her unborn child.

Toilet breaks

[237] Communications Electrical Plumbing Union (Submission 63); Shop, Distributive and Allied Employees' Association (Submission no 74).
[238] Labor Council of NSW (Submission no 41).
[239] Australian Manufacturing Workers Union, National Office (Submission no 57).
[240] Confidential (Submission no 47). That submission cited the following references: C Diniz and M Ferreira Jr "Musculo-skeletal Symptoms and Fatigue in Market Checkout Operators" *Premus '95 Conference* Montreal Canada; K Lannersten and K Harms-Rindahl "Neck and Shoulder Muscle Activity during Work with Different Cash Register Systems" (1990) 33(1) *Ergonomics* 49, 65

12.55 The physical changes pregnant women experience may well mean that some women need increased access to toilet breaks. This appears to have created difficulties in some workplaces, with pregnant women actually being denied access, whether they need to urinate or vomit.

> In the wine industry in South Australia, particularly in vineyard work, toilet facilities are few and far between. The employer arranges for employees to be picked up from the vineyards for toilet breaks. They are normally contacted by two way radio when a worker needs a break. A number of pregnant women have complained to the union that due to the need to go to the toilet more often, when they contact the manager and require a toilet break, the employer will often refuse to send the transport and women are told to do what the men do and use the paddocks, a situation which has caused them considerable distress.[241]

> The need for increased toilet breaks has been identified by pregnant women, especially in workplaces where these breaks are limited or monitored or where toilets are situated some distance from their workstation [as an issue]. The taking of an increased number of such breaks can expose pregnant women to detriment ranging from harassment and embarrassment to disciplinary measures.[242]

12.56 An unreasonable denial of adequate toilet breaks to a pregnant employee may amount to discrimination under the SD Act.

Rosters

12.57 Rostering of pregnant employees arose as a contentious issue during the inquiry. In particular, an unexpected change in working hours to a shorter or longer shift without consultation with the employee, or the placement of the employee on night duty when this may affect the health of the employee, were raised as issues during the inquiry. On most occasions there was a feeling that tactics such as an unexpected increase in the hours or unexpected decrease in the hours were employed to encourage the pregnant worker to leave.

> An area that is often the source of contention is the working of night duty by pregnant nurses....This is due not only to intransigence on behalf of nurse management (because of the rostering problems that this may present) but also at times resentment from other nurses (given that night duty is an unpopular shift). It has been known for pregnant nurses to be transferred away from their preferred area of practice to enable the non-working of night duty. A number of nurses have been forced to proceed on maternity leave early due to their inability to continue to work night duty.[243]

12.58 It is the duty of the employer to create a safe workplace for pregnant employees. This may require an employer to accommodate the needs of the pregnant employee in the rostering process, including the removal of the employee from night duty if it is requested.

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[241] Australian Liquor, Hospitality and Miscellaneous Workers Union (Submission no 32).
[242] Community and Public Sector Union (Submission no 53).
[243] Queensland Nurses' Union (Submission no 37).

12.59 HREOC heard of instances where the rosters of a pregnant employee were changed to create a more difficult work environment. Such actions may also amount to discrimination under the SD Act.

> He put me on a 3 shift roster while I was 7 months pregnant. When I complained I was told that if I couldn't handle the 11-7 morning shift I wasn't up to the job and should leave.[244]

12.60 HREOC was also informed of the efforts of many employers who attempt to accommodate the needs of their pregnant staff in rostering systems when possible.[245] In particular, some organisations had introduced rostering processes which prevent discrimination from occurring.[246]

Other issues

12.61 Other issues or suggestions were raised during the inquiry regarding accommodation of pregnant employees. In particular, concerns were raised that inadequate information exists about the effect of radiation from scanners and screen based equipment, as well as certain chemical substances.[247] Without adequate information it is difficult to establish good employment practices for women employees.

12.62 It was also noted that employers who require their employees to wear uniforms should make arrangements for maternity uniforms or provide suitable alternative arrangements.[248] The Queensland Police Service told the inquiry that

> [t]he Police Service Award-State provides…that pregnant police officers are entitled to apply for a clothing allowance should their police uniform become uncomfortable or ill-fitting. The production of a medical certificate confirming the pregnancy is required in order to access this allowance.[249]

12.63 The body temperature of pregnant women tends to increase more rapidly than that of women who are not pregnant.[250] Therefore, pregnant women should have access to drinking water while working.

12.64 Many of these issues are discussed in the *Draft Code of Practice and Guidelines on Pregnancy and Work* produced by WorkCover New South Wales.[251] The Guidelines will also give practical advice and assistance in accommodating workplace pregnancy.

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[244] Australian Manufacturing Workers' Union, Sydney Office (Submission no 35).
[245] For example, Shop, Distributive and Allied Employees' Association (Submission no 74); Coles Myer (Consultation, 18 September 1998).
[246] For example, Coles Myer (Consultation, 18 September 1998).
[247] Shop, Distributive and Allied Employee's Association (Submission no 74).
[248] Public Service Association of New South Wales (Submission no 92); New South Wales Government (Submission no 99).
[249] Queensland Police Service (Submission no 26).
[250] Shop, Distributive and Allied Employees' Association (Consultation, 2 September 1999).
[251] WorkCover New South Wales *Draft Code of Practice and Guidelines on Pregnancy and Work* WorkCover NSW Sydney 1998. This Draft Code was developed by a Working Party comprising representatives of WorkCover NSW, the NSW Department of Industrial Relations, NSW Department

Pregnancy Guidelines 28: That the Guidelines provide practical assistance to employers in accommodating workplace pregnancy.

Sick leave

12.65 Pregnant employees who become ill during pregnancy are entitled to at least the same sick leave entitlements as other employees. Pregnant employees are also bound by the same obligations as other employees in relation to sick leave such as the provision of medical certificates and sick leave qualifying periods. Some legislation makes provision for unpaid special maternity leave prior to the birth where a medical practitioner certifies it to be necessary.[252]

12.66 Discrimination on the basis of pregnancy against employees who become sick during pregnancy is unlawful. Pregnant employees are entitled to use sick leave to attend regular prenatal medical appointments or special appointments associated with pregnancy complications subject to the same conditions that apply to sick leave generally. Any restriction on the use of sick leave to attend these appointments, or restrictions on actually attending the appointments could amount to discriminatory treatment for the purposes of the SD Act.[253]

12.67 If an issue relating to excessive sick leave emerges, anti-discrimination legislation requires that each individual case be considered according to the particular circumstances of the situation. Excessive sick leave should be dealt with as with other such cases, in a non-discriminatory manner.[254] Submissions indicated a need to clarify the rights and responsibilities in a range of cases, particularly in relation to excessive sick leave.[255] The Guidelines will provide assistance on this issue.

12.68 Another issue that arose during the inquiry is the extent to which sick leave may be used after the birth of a child. In principle, if employees are unable to work due to illness, they should be entitled to sick leave, irrespective of whether or not they are pregnant or have a child. The birth of a child does not, by itself, constitute an illness and does not provide an entitlement to sick leave. However, in some circumstances, a pregnant employee or an employee who has just given birth, may also be sick. The availability of sick leave in this situation will depend largely on the relevant legislation, awards and agreements covering the workplace. It also depends on how closely the illness and the pregnancy are connected. A recent decision in the South Australian Industrial Relations Commission indicated that if a pregnant employee becomes ill and, as a result,

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for Women, the NSW Anti-Discrimination Board, Australian Business Limited and the Labor Council of NSW. At the date of publishing this report, the WorkCover NSW was seeking comments on the Draft Code.

[252] See for example, sch 1(10) *Workplace Relations Act 1996* (Cth); s 71 *Industrial Relations Act 1996* (NSW).

[253] See also s170CK(2)(a) *Workplace Relations Act 1996* (Cth) which prohibits the dismissal by reason of a temporary absence from work because of illness.

[254] See also s 170CK(2)(a) *Workplace Relations Act 1996* (Cth).

[255] See for example, Queensland Chamber of Commerce and Industry (Submission no 5).

the child is born prematurely, the employee may be able to claim sick leave until the child is able to leave hospital, and then commence maternity leave.[256] One employer submission indicated that the ability of employees to take sick leave while on maternity leave was based on normal "fitness for duty" criteria, which had been incorporated into its maternity leave policy.[257]

12.69 Some submissions and consultations referred to workplace cultures that impacted on the employee so as to make the pregnant employee feel that to take sick leave would reflect on their inadequacy as an employee.

> There is a feeling in work places that we must not ask for special concessions when pregnant. Some women are just afraid to, knowing that it will count against them. Others do not ask for concessions as a matter of principle. They feel that they have to prove that they can keep up with the boys. Any overt reference to their "femaleness" would be an admission of failure. But the fact is…[w]e are the ones who get fat, sick and tired. In a truly egalitarian workplace we would not have to hide this.[258]

12.70 This type of workplace culture appears to be exacerbated by an ignorance or misunderstanding as to the rights of pregnant employees to sick leave. The Guidelines will assist in clarifying these rights.

Pregnancy Guidelines 29: That Guidelines provide practical assistance on the use of sick leave during pregnancy.

Miscarriage, termination, still birth or death of a new born child

12.71 Discrimination against employees who decide to terminate their pregnancy or employees who suffer miscarriage or still birth, is prohibited under pregnancy discrimination provisions in federal and state/territory legislation.[259] Where a pregnancy has ended by termination, employees are entitled to sick leave.[260] The medical certificate validating the leave need not specify the type of medical complication.

12.72 Where a pregnancy has ended due to miscarriage or still birth,[261] employers may be entitled to cancel maternity leave if it has not commenced, or limit the leave

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[256] *SA Commission for Catholic Schools v Association of Non-Government Education Employees SA* Unreported IRC No. 387 of 1998, 31 March 1999.
[257] Australian Federal Police, Central Office (Submission no 18).
[258] C Sherry (Submission no 30).
[259] Protection is provided under provisions which prohibit pregnancy and sex discrimination: s 7 *Sex Discrimination Act 1984* (Cth); s 24(1B) *Anti-Discrimination Act 1977* (NSW); s 35 *Equal Opportunity Act 1984* (SA); s 10 *Equal Opportunity Act 1984* (WA); s 7 *Discrimination Act 1991* (ACT); s 7 *Anti-Discrimination Act 1991* (Qld); s 19 *Anti-Discrimination Act 1992* (NT); s *16 Sex Discrimination Act 1994* (Tas); s 6 *Equal Opportunity Act 1995* (Vic).
[260] Subject to meeting eligibility requirements under the relevant legislation, award or agreement.
[261] "Still birth" is defined in state/territory legislation, generally to be a child of at least 20 weeks gestation, or who weighed at least 400 grams at birth or delivery and who has not exhibited any sign of respiration or heartbeat, or other sign of life after birth: s 4(1) *Births, Deaths and Marriages Registration Act 1997* (ACT); s 4 *Births, Deaths and Marriages Registration Act 1996* (NT); s 4(1) *Births, Deaths and Marriages Registration Act 1995* (NSW); s 5(2)(b) *Registration of Births, Deaths and Marriages Act 1962* (Qld); s 5 *Births, Deaths and Marriages Registration Act 1996* (SA); s 1A(1)

if it has already commenced.[262] However, special maternity leave may be available, subject to the provision of a medical certificate, before returning to work.[263]

12.73 Difficulties may be caused in the workplace if there is no awareness of an employee's rights in circumstances relating to termination, miscarriage and still birth.

> Having to face a very traumatic, private occasion so publicly was cited as a problem, especially when workers had to ring anonymous people like, for instance, the pay office, to find out about rights and entitlements and tell their story all over again so close to the event, when many could hardly bear talking about it with close friends and family.[264]

12.74 A submission by an individual who had experienced a still birth, expressed concern that there was an inadequate guarantee of leave in these circumstances.[265] Extended leave after such an event is at the discretion of an employer. However, any discrimination, including the denial of entitlements, by the employer due to the still birth or the pregnancy, is unlawful under the SD Act.

12.75 While there was evidence of workplaces that were not supportive in such cases, there were other comments that demonstrated very supportive work environments.

> My rights were upheld with stillborn baby at 24 weeks - allowed maternity/bereavement leave. Department supportive and flexible.[266]

12.76 The inquiry evidenced the need for greater awareness amongst employees and employers, of their rights and responsibilities in the event of pregnancy termination, miscarriage, still birth or death of a new born child.

Pregnancy Guidelines 30: That the Guidelines provide practical assistance to employees and employers in relation to miscarriage, pregnancy termination, still birth or the death of a newborn child.

The role of medical advice

12.77 Many pregnant employees rely on advice provided by external medical practitioners when it comes to providing their employers with information to manage pregnancy at work. Advice about managing pregnancy in the

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Registration of Births and Deaths Act 1895 (Tas); s 3 *Perinatal Registry Act 1994* (Tas); s 4 *Births, Deaths and Marriages Registration Act 1996* (Vic); ss 3 and 22 *Registration of Births, Deaths and Marriages Act 1961* (WA).

[262] cl 10 sch 14 *Workplace Relations Act 1996* (Cth). In New South Wales, an application for maternity leave is automatically cancelled if an employee miscarries before she starts her maternity leave: s 61(1)(b) *Industrial Relations Act 1996* (NSW).

[263] sch 1(10) *Workplace Relations Act 1996* (Cth).

[264] Labor Council of NSW (Submission no 41).

[265] C Sherry (Submission no 30).

[266] Community and Public Sector Union (Submission no 53).

workplace may be provided by nurses, health care workers, midwives, general practitioners, specialist obstetricians and gynaecologists, among others. In-house medical advisers and doctors employed by companies and other organisations also provide advice to pregnant employees within the company, and advice to the employer.

12.78 Workplace relations legislation, such as schedule 14 of the *Workplace Relations Act 1996* (Cth), enshrines a role for external medical advice by requiring a medical certificate when an employee formally informs an employer of her intention to take maternity leave. Medical certificates may also be required when an employee needs to transfer to safe or light duties or where special maternity leave is required. The SD Act states that it is not unlawful to request or require a person who is pregnant to provide medical information concerning the pregnancy.[267] Medical advisers therefore play a significant role in the management of an employee's pregnancy.

12.79 HREOC acknowledges the comments made by the Australian Medical Association that

> [i]t [is] not a doctor's role to have all the facts on legislation changes. Medical practitioners [are] responsible for medical advice and need to refer patients to experts for legal or industrial advice.[268]

12.80 However, HREOC, having considered contributions to the inquiry, is of the view that it is important for medical practitioners to at least be aware of the basic legal rights and responsibilities of pregnant employees when providing advice, as well as the legal rights and responsibilities of the employer managing the pregnant employee. Such awareness can only help to ensure effective and appropriate medical advice.

12.81 The main concern expressed in consultations and submissions in relation to medical advice was the inadequacy of the information provided in medical certificates.[269] Particular comments addressed uncertainty of the definition of the phrase "light duties".

> It is estimated that 9 out of 10 medical certificates from doctors stated the pregnant employee should be on light duties – in most cases it is necessary to go back to the doctor and get them to specify exactly what is meant by light duties. As most lifting tasks are now containerised into loads of 7 kg (tray), 12-13 kg (large letters) and 16 kg (bags) breaking duties up in terms of weight allowed to lift is easier.[270]

12.82 Employers and employer organisations particularly felt that medical certificates should address the actual duties or role of the employee.

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[267] s 27(2) *Sex Discrimination Act 1984* (Cth).
[268] Australian Medical Association Limited (Submission no 33).
[269] Pharmacy Guild of Australia, Queensland Branch (Submission no 16); Queensland Nurses' Union (Submission no 37); Confidential (Submission no 47); Anti-Discrimination Commission Queensland (Submission no 68).
[270] Confidential (Focus Group, 16 February 1999).

> External medical advisers…may not be fully aware of the conditions of employment, specific hazards involved, or the legislative responsibilities of employers when assessing pregnant employees' fitness for work. It is considered that their role should be to manage the clinical and social aspects of the pregnancy and to liaise with employers regarding employment (fitness for duty) related matters.[271]

> Too often vague medical certificates are provided with no information regarding the anticipated length of absence. Medical practitioners quite often also make a diagnosis about the employee without any knowledge of the employee's job or workplace and then also will not entertain any discussions with employers. A system of reporting and liaison must be encouraged.[272]

12.83 HREOC is of the view that it is important for medical practitioners to make themselves available to liaise with employers, with the agreement of their patients. The use of an information sheet detailing the employee's duties, produced by an employer and completed by the medical practitioner in conjunction with his or her patient would also prove advantageous. This information sheet could contain information about both current duties and possible alternative duties.

12.84 An information sheet of this kind is currently used by the Queensland Police Service. It asks the medical practitioner to tick a list of requirements if they apply to the employee, including the following.

- Not to engage in direct offender contact such as chasing, restraining or apprehending offenders, prisoner escorts, arrest processing.
- Not to engage in any form of rescue task.
- Not to travel at high speeds in police vehicles.
- Not to be in attendance at hazardous chemical incidents or fires.
- Not to perform activities requiring the lifting of heavy objects.
- Not to perform shift work.
- Not to perform work that involves contact with chemicals on a daily basis such as in ammunition (lead content) and chemical areas such as photographics and scientifics.
- Any other requirements.[273]

12.85 HREOC encourages employers to develop simple, job specific information sheets for doctors. Information sheets should be compiled in a manner that is non-discriminatory and refrain from asking for information that could result in discriminatory outcomes, concentrating on occupational health and safety criteria. The information sheet would of course need to be competed based on legitimate medical data and in consultation with the pregnant employee.

12.86 The use of in-house medical advisers, to clarify medical information about employees, met with specific criticism during the inquiry.

> We are very strongly of the belief that where organisations do have an in-house medical adviser that it is not their role to manage the pregnancy in any way. Management of

[271] Australia Post (Submission no 44).
[272] Retailers Association of Queensland (Submission no 39).
[273] Queensland Police Service (Submission no 26).

> pregnancy is a highly individual and specialised affair. It is the responsibility of the woman and her personal medical practitioner to make any necessary decisions regarding the mother and baby's health.[274]

12.87 Concern was expressed that in-house medical advisers had a conflict of interest as they were retained by the employer.[275]

> The role of the patients' doctors is to advise the pregnant woman on how to manage an individual pregnancy….This role should not be compromised by anyone who may not have her best interests as their prime objective, eg a health care professional employed by a corporation. Employers must accept the individualised advice of a patient's medical practitioner in pregnancy related issues such as when to cease work, when to recommence work and whether full usual duties can be continued throughout the pregnancy.[276]

12.88 In consultations during the inquiry, some employers acknowledged their reluctance to use in-house doctors for pregnancy advice due to these concerns.

> Company doctors are not often used with pregnancy but are used with workers compensation and rehabilitation cases. Staff usually want to rely on their own doctor as their pregnancy is not a work related issue.[277]

12.89 A publication by the Victorian Equal Opportunity Commission titled *Pre-Employment Medical Testing Guidelines for Doctors* provides assistance for in-house or external doctors who are called upon by companies to perform pre-employment medicals.[278] These must be performed in a non discriminatory manner. The publication states that

> …health practitioners should only inquire as to and test those aspects of the job applicant's health that are strictly job related and confined to the inherent requirements of the employment.

12.90 It would generally be unlawful discrimination for a potential employee to be tested for pregnancy in a pre-employment medical examination.

Recommendation 38: That the federal Department of Health and Aged Care and the Australian Medical Association, in consultation with the Sex Discrimination Commissioner, develop a strategy to assist medical practitioners provide advice that contributes to the appropriate management of pregnancy at work.

Pregnancy Guidelines 31: That the Guidelines provide practical assistance to employers, employees and medical advisers on the proper role of medical advice in managing pregnancy at work.

[274] Shop, Distributive and Allied Employees' Association (Submission no 74).
[275] L Marteau (Submission no 7); Families At Work (Submission no 40); Community and Public Sector Union (Submission no 53); Shop, Distributive and Allied Employees' Association (Submission no 74).
[276] Australian Medical Association Limited (Submission no 33).
[277] Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).
[278] Equal Opportunity Commission Victoria *Pre-Employment Medical Testing Guidelines for Doctors* EOCV 1996 Melbourne.

Fertility treatment and adoption

12.91 Discrimination against employees on the basis that they are undertaking fertility treatment, such as in-vitro fertilisation, is prohibited under potential pregnancy anti-discrimination legislation.[279] This would include, for example, an employer's refusal to grant sick leave to attend medical appointments for fertility treatment, or a denial of training or promotional opportunities on the basis that it is likely that an employee will become pregnant due to the fertility treatment.

12.92 A submission from a trade union shared the following experiences of its members.

> One woman was harangued by her employer when she presented a medical certificate for sick leave and the employer recognised the name of the doctor as someone who worked as an IVF specialist. The problem, as the employer saw it, was that pregnancy was "a gift from God", and the woman should be denied any leave connected with interfering with "God's will". Another was told she had made a choice to go on IVF treatment and the employer was not going to pay for her choice.[280]

12.93 The Guidelines will provide advice and assistance on the rights and responsibilities of employers and female employees under discrimination law in relation to fertility treatment.

12.94 Legislative provisions relating to pregnancy discrimination do not cover adoption. However, some types of discrimination against employees who have adopted or plan to adopt children would be unlawful discrimination on the ground of family responsibilities.[281] Workplace relations laws, awards and agreements may also provide for special adoption leave to attend interviews or examinations for adoption purposes[282] and adoption leave at the time of placement.[283]

12.95 Consultations and submissions expressed some concern that employees in the process of adopting a child do not have the same protection from discrimination as a pregnant employee. A submission from a woman who had adopted a child while she was an employee noted that

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[279] See definition of potential pregnancy in s 4 *Sex Discrimination Act 1984* (Cth).
[280] Labor Council of NSW (Submission no 41).
[281] It is unlawful to discriminate against an employee on the grounds of family responsibilities: s 7A *Sex Discrimination Act 1984* (Cth) in relation to dismissal only. See also s 7(1)(e) *Discrimination Act 1991* (ACT); s 7(1)(d) *Anti-Discrimination Act 1991* (Qld); Part IIA *Equal Opportunity Act 1984* (WA); s 19(1)(g) *Anti-Discrimination Act 1992* (NT).
[282] For example, s 72 *Industrial Relations Act 1996* (NSW).
[283] s 170KA *Workplace Relations Act 1996* (Cth); s 55(4) *Industrial Relations Act 1996* (NSW); sch 5 *Industrial and Employee Relations Act 1994* (SA); s 33(1) *Minimum Conditions of Employment Act 1993* (WA).

> [a]lthough this issue affects only a very small number of workers it is, in my experience, handled extremely badly due to this very fact of occurring few and far between and no-one knows what their rights and responsibilities are...[284]

12.96 For example, while it is unlawful to deny promotional opportunities, harass or employee benefits due to her pregnancy, the SD Act does not protect an employee who is adopting a child from such treatment.

> While some employers provide paid leave for adoption as for the birth of a child, in many instances this is on a "grace and favour basis". In one instance a woman was told that adoption was a lifestyle choice for which the employer should not pay, while another woman was told to write a letter to the School Board showing that she really needed the six weeks allowance.[285]

12.97 The adoption process can be time consuming and require time off work for information seminars, lengthy interviews, the need to gather documentation which is only available during business hours, medical examinations and where the child is born overseas, the need to travel overseas at short notice.[286]

> The way that legislation relating to maternity leave is worded assumes that the mother-to-be can give at least two weeks notice to her employer regarding when she will require maternity leave. This is not always possible. Often the adopting parents are notified two days ahead of the adoption.[287]

> Adoption is an uncertain experience. Employees are required to inform their employer but often they are only given one to three days notice. Overseas adoptions sometimes require the new parents to go overseas to take up residency.[288]

12.98 The inquiry received evidence that some organisations had introduced entitlements to accommodate adoption. For example, a submission from a federal government department indicated that it had, as part of its certified agreement, introduced 5 days paid leave and up to 66 weeks of unpaid leave for employees who had assumed responsibility for an adopted or long term foster child.[289]

12.99 Support was expressed for extending anti-discrimination provisions to employees who are intending to, or are in the process of, adopting a child.[290] HREOC considers that it is appropriate and important to extend the provisions of the SD Act to protect such employees to a similar extent to which pregnant and potentially pregnant employees are currently protected.

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[284] Australian Taxation Office (Submission no 49).
[285] Independent Education Union of Australia (Submission no 75).
[286] See Shop, Distributive and Allied Employees' Association (Submission no 74).
[287] Shop Distributive and Allied Employees' Association (Consultation, 2 September 1998).
[288] Labor Council of NSW (Focus Group, 1 February 1999).
[289] Department of Immigration and Multicultural Affairs (Submission no 28).
[290] Labor Council of NSW (Submission no 41); Australian Taxation Office (Submission no 49); Shop, Distributive and Allied Employees' Association (Submission no 74); Independent Education Union of Australia (Submission no 75); Townsville Community Legal Service (Submission no 78).

12.100 The extension of the provisions in the SD Act which prohibit discrimination on the ground of family responsibilities would be an appropriate section to incorporate this protection.[291]

Recommendation 39: That the Attorney-General amend the *Sex Discrimination Act 1984* (Cth) to include protection for employees who intend to, or are in the process of, adopting a child, from discrimination on this basis.

The needs of small business

12.101 Interestingly, some submissions indicated that accommodating pregnancy in the workplace poses more difficulty for small businesses than large businesses.[292] Others asserted that pregnancy and maternity leave are managed well in small business environments, providing increased flexibility. A number of submissions and consultations reflected a level of confusion regarding the application of the SD Act and state/territory anti-discrimination legislation to small businesses.

12.102 The New South Wales *Anti-Discrimination Act 1977* exempts businesses from pregnancy discrimination laws where the number of persons employed by the employer does not exceed five.[293] The Victorian *Equal Opportunity Act 1995* also exempts businesses with less than five employees.[294] There is no exemption in the SD Act for employment by small businesses.[295] Many workplace participants would be unaware that, although small businesses may be exempt from anti-discrimination legislation in New South Wales and Victoria, the provisions of the SD Act still apply.

12.103 The submission from the New South Wales Government noted that, in part, the small business exemption was included in the New South Wales Act over 20 years ago because it was considered that coverage of small businesses by the New South Wales Act could require them to provide separate toilet facilities.[296] The submission went on to say that the New South Wales Anti-Discrimination Board had noted that "…a high proportion of sex discrimination complaints it receives are against small business employers".[297]

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[291] s 7A *Sex Discrimination Act 1984* (Cth).

[292] N Ozanne (Submission no 9); Confidential (Submission no 11); Pharmacy Guild of Australia, Queensland Branch (Submission no 16); Confidential (Submission no 23); Business Women's Consultative Council, Northern Territory (Submission no 29); Retailers Association of Queensland (Submission no 39); Victorian Automobile Chamber of Commerce (Submission no 69).

[293] Excluding any persons employed within the employer's private household: s 25(3)(b) *Anti-Discrimination Act 1977* (NSW).

[294] s 21 *Equal Opportunity Act 1995* (Vic). This also provides that the exemption for no more than the equivalent of 5 full time employees is calculated as excluding relatives of the employer.

[295] See paras 7.34 – 7.39. See also para 5.10 – 5.14: partnerships with fewer than six partners are not prevented from discriminating when choosing new partners (s 17 *Sex Discrimination Act 1984* (Cth)) but are not able to discriminate in choosing staff.

[296] New South Wales Government (Submission no 99). See New South Wales Parliament Legislative Assembly, Hansard, 23 November 1976, p 3340.

[297] New South Wales Government (Submission no 99).

12.104 Other submissions referred to the fact that small businesses have less flexibility and less resources within which to make changes to accommodate a pregnant employee. The number of staff within the business are few, so that a total restructure of other positions may be required to accommodate a pregnancy, causing discontent amongst other staff.[298]

12.105 One employer organisation stated that many of its small business members pointed out that

> …simply by virtue of the smaller size of their workforce, they often experience practical problems with pregnancy related issues at the workplace. For example, the taking of maternity leave often requires a small employer to employee an employee for a position that will only exist for one year whilst another employee takes maternity leave. Often it takes this period of one year to fully train the employee in all of the facets of the business, prior to the other employee returning.[299]

12.106 However, the same employer organisation noted that, while some small businesses encounter difficulties, others benefit from the experience.

> Reciprocally a number of employers have also indicated that they have been able to build a strong team of trained employees by virtue of the extra training that can occur whilst employees are on maternity leave and via the return of experienced staff (after maternity leave) to either their original position or part time or casual positions. A large number of retail employers have advised that by providing flexible arrangements for re-entry to the workforce to their staff they have been rewarded by being able to retain committed, experienced employees.[300]

12.107 HREOC acknowledges that some small businesses feel they face greater challenges in finding solutions to pregnancy accommodation and maternity leave concerns, compared to larger businesses. However, this was not a consistent view among all businesses that presented views to the inquiry.

12.108 In any event, an employer's obligation to accommodate a pregnant employee does not require the creation of a new position, or the retention of an employee who is a poor performer. As noted at para 12.35, there are occasions when it would be legitimate to terminate the employment of a pregnant employee. Employers are required to ensure that the workplace is safe for all employees, be they pregnant or not and to make management decisions in a non-discriminatory manner.

12.109 The starting point in this debate is that it is a right not a privilege for women in Australia to work while pregnant. The rights to work and to be free from discrimination on the basis of pregnancy or potential pregnancy are fundamental human rights enshrined within Australian law in accordance with international agreements ratified by Australia.

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[298] Pharmacy Guild of Australia, Queensland Branch (Submission no 16); Australian Business and Newcastle and Hunter Business Chamber Women's Forum (Submission no 90).
[299] Retailers Association of Queensland (Submission no 39).
[300] Retailers Association of Queensland (Submission no 39).

12.110 HREOC considers that the Guidelines will assist businesses of all variety and size in their efforts to accommodate pregnant employees.

Pregnancy Guidelines 32: That the Guidelines provide practical assistance particularly aimed at small business employers and employees in managing pregnancy at work and adequately accommodating the pregnancy.

Harassment and inappropriate behaviour

12.111 Consultations and submissions to the inquiry indicated that harassment and inappropriate behaviour towards pregnant employees in the workplace is not uncommon.[301] Such behaviour may come from fellow employees, the employer or employees acting on behalf of the employer, such as managers and supervisors.

> There is a great deal of badgering of women regarding whether they should continue working, whether they are doing the best/right thing by their baby and negative comments about their ability to return to work.…Women also experience a number of personal comments made about their change of body shape as well as comments such as "I know what you've been up to".…Pregnant women often experience well meaning but insensitive treatment such as people touching their stomachs which they can find irritating and intrusive.[302]

> There is a young man in the department who has referred to me as used goods.[303]

> I couldn't stand everyone always talking about my size.[304]

> They took bets on whether I would come back to work.[305]

> Perceptions are powerful and I was only too aware of the perceptions that surrounded pregnancy in my working environment. For example people automatically slotted you into categories such as you were on the "mummy track" or that you weren't interested in a "serious career" or they simply assumed, and often voiced, that they didn't think you would come back. When I was pregnant…everybody felt they had the right to know and had a right to discuss it - I didn't actually think it was anyone's place to discuss my private life and circumstances.[306]

12.112 Behaviour towards pregnant employees at work that is inappropriate or distressing may amount to discrimination and harassment where the behaviour is by reason of the pregnancy, and results in less favourable treatment towards a pregnant employee or the pregnant employee has been found to have been

[301] Confidential (Submission no 31); Confidential (Submission no 38); Australian Education Union, South Australian Branch (Submission no 42); Community and Public Sector Union (Submission no 53); Australian Council of Trade Unions (Submission no 59); Shop, Distributive and Allied Employees' Association (Submission no 74); Working Women's Centres (Submission no 88).
[302] Shop, Distributive and Allied Employees' Association (Submission no 74).
[303] Finance Sector Union of Australia (Submission no 51).
[304] Finance Sector Union of Australia (Submission no 51).
[305] Finance Sector Union of Australia (Submission no 51).
[306] Confidential, Manager, Australian multinational (Personal Consultation with Sex Discrimination Commissioner, 4 June 1999).

disadvantaged by the behaviour. Examples of such inappropriate behaviour include constant references to the pregnancy, touching of employees' stomachs, badgering about the ability to cope with the work load, or constantly questioning pregnant employees whether they "really" intend to come back to work.

12.113 In such cases, the employer could be directly liable for discrimination on the ground of pregnancy.

12.114 Inappropriate behaviour of a sexual nature that may be directed at pregnant employees is also unlawful under sexual harassment prohibitions in all federal and state/territory anti-discrimination legislation.[307] In such cases the person who harasses may be found to be directly liable. The employer may also be held vicariously responsible for the acts of other employees who have engaged in the behaviour, unless the employer can demonstrate that all reasonable steps were taken to prevent employees from engaging in such behaviour.[308] To this extent, the employer has a responsibility to make other employees aware of the kind of treatment that is appropriate and inappropriate.

12.115 Submissions indicated that some employers are actively implementing policies and programs to prevent harassment and inappropriate behaviour toward pregnant and potentially pregnant employees in the workplace.[309] The Workplace Behaviour Strategy of one federal government department

> …takes the position that harassment or inappropriate behaviour in the Department is not tolerated. Included in the examples of harassment, relevant to pregnant or potentially pregnant employees is: "stereotypical assumptions about the group to which a person may belong,…calculated exclusion of a person or group from normal conversations, work assignments, etc…and the enforcement of so-called social or cultural norms in the workplace".[310]

Pregnancy Guidelines 33: That the Guidelines provide assistance to employees and employers in preventing unlawful harassment of pregnant and potentially pregnant employees.

[307] div 3 Pt II *Sex Discrimination Act 1984* (Cth); s 22A *Anti-Discrimination Act 1977* (NSW); s 85 *Equal Opportunity Act 1995* (Vic); ss 118-120 *Anti-Discrimination Act 1991* (Qld); s 17 *Sex Discrimination Act 1994* (Tas); s 87(11) *Equal Opportunity Act 1984* (SA); s 24 *Equal Opportunity Act 1984* (WA); s 58 *Discrimination Act 1991* (ACT); s 22 *Anti-Discrimination Act 1992* (NT). For a detailed discussion of sexual harassment issues, see Human Rights and Equal Opportunity Commission *Sexual Harassment: A code of practice* HREOC Sydney 1996.
[308] s 106 *Sex Discrimination Act 1984* (Cth).
[309] Department of Immigration and Multicultural Affairs (Submission no 28); Australia Post (Submission no 44); Affirmative Action Agency (Submission no 76).
[310] Department of Immigration and Multicultural Affairs (Submission no 28).

Chapter 13 - Grievance and complaints procedures

Introduction

13.1 A person who considers that she has suffered discrimination on the basis of pregnancy or potential pregnancy at work can ask that her grievance be dealt with internally by her employer. As an alternative, or at any stage if she is not satisfied with the way her grievance is dealt with by her employer, she may bring a complaint under the *Sex Discrimination Act 1984* (Cth) (the SD Act) or state/territory anti-discrimination legislation. In some cases, federal or state workplace relations legislation may also provide an avenue of redress for concerns relating to discrimination on the ground of pregnancy or potential pregnancy.

13.2 One submission listed the requirements for a good complaints procedure as

> …easily accessible, understandable, inexpensive, quick, effective, and consistent in different jurisdictions.[311]

13.3 While all of these factors can influence the choice of which legislative regime to make a complaint, some factors are more significant than others. This chapter examines the various complaints and grievance procedures available to an employee who has suffered discrimination on the basis of pregnancy or potential pregnancy.

Employers' internal processes

13.4 The SD Act makes employers legally responsible for providing a workplace that is free from unlawful discrimination and harassment. One important step for employers in discharging that legal responsibility is to ensure that they have some form of internal procedures for resolving discrimination and harassment grievances.

13.5 The SD Act provides that employers are directly liable for the discrimination that occurs in their workplace.[312] Employers may also be vicariously liable for acts of their employees that could be considered as sex-based harassment for the purposes of the SD Act, unless they have taken all reasonable steps to prevent that harassment.[313] This requires more than just simply producing written policies, there is also a duty to communicate these policies effectively to all employees and members of management, a responsibility for promulgating the policies and taking remedial action when the policy has been breached.[314]

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[311] Australian Reproductive Health Alliance (Submission no 22).
[312] s 14 *Sex Discrimination Act 1984* (Cth).
[313] s 106 *Sex Discrimination Act 1984* (Cth): a person who causes, instructs, induces, aids or permits another person to do an act which is unlawful shall be taken also to have done the act.
[314] See *Evans v Lee and Anor* (1996) EOC 92-822 at 79,056. In that case a bank was held vicariously liable for the actions of its bank manager who sexually harassed a female customer.

13.6 The SD Act does not discuss the existence or nature of the responsibility of employers to have internal grievance procedures; rather the usefulness of doing so has been established by case law.

13.7 In *Kolavo v Ainsworth Nominees and Anor*, the New South Wales Equal Opportunity Tribunal found that the failure by an employer

> …"to adequately and promptly" investigate the complaint of the complainant caused her to believe that it was not taken seriously by the employer. This was unlawful discrimination for the purposes of sec 25(2) of the [New South Wales *Anti-Discrimination Act 1977*]. The failure to investigate a complaint regarding a condition of employment activated sec 25(2)(a). Further, sec 25(2)(b) was activated because the employer had denied the complainant employee the normal employment benefit of a proper grievance-hearing procedure.[315]

13.8 There are many other benefits associated with ensuring that discrimination does not occur and this inquiry highlighted that some employers were now recognising the benefits of preventing discrimination and the resultant costs. Business concerns about these issues in relation to pregnancy and maternity are illustrated in the instructions to supervisors and managers issued by Australia Post earlier this year.

> Legal obligations aside, it is sound management practice to ensure that pregnant employees are provided with appropriate assistance for a number of reasons. It not only eliminates risks of compensation claims, but also reinforces their value in their workplace. It also demonstrates our willingness to have them continue to work for Australia Post after their absence on maternity leave. Given our concern about high turnover rates in some States and the resultant costs in training replacement staff, and loss of expertise, all managers and supervisors should be actively encouraging the return to work of staff after maternity leave. Studies in the broader community have demonstrated a correlation between the manner in which a woman is treated at work whilst pregnant with her decision to resume or not after the birth.[316]

13.9 The costs to business of grievances and complaints may be threefold.

- Administration costs including legal costs, expenses involved in travel and out of office attendances, payment of salaries while staff are engaged in dispute resolution and related overhead costs.

- Hidden costs including the diversion of management focus, decrease in productivity, lost opportunities, bad publicity, stress, impact of decreased staff morale and staff turnover costs where staff react to the existence of complaints and grievances (and how they are or are not handled) by leaving the workplace.

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[315] *Kolavo v Ainsworth Nominees and Anor* (1994) EOC 92-576 at 77,151 in which an employee had made a complaint of racial and sexual harassment against her immediate supervisor and had subsequently been dismissed without prior warning.

[316] Australia Post *Guidelines for the Supervision of Pregnant Staff* Supervisors/Managers Brochure Australia Post 1999.

- Costs associated with a finding of discrimination by an external tribunal including payment of damages or compensation.

13.10 The Australian Competition and Consumer Commission reflected on employers' processes when addressing dispute avoidance and resolution in a recent publication called *Benchmarks for Dispute Avoidance and Resolution - A guide: Round table on small and large business disputes*.

> A company that actively avoids conflict will practise aggressive conflict avoidance. This means that raising problems is encouraged and that as soon as an issue arises, either through correspondence, telephone conversations or through some other means, the company will respond. This is because of a policy of responding promptly to such issues.[317]

13.11 Drawing from this it is fair to say that ways to minimise the cost to business of discrimination include preventative measures, early action when a dispute arises and using timely, simple and accessible processes to resolve disputes.

Use of internal processes

13.12 While many awards and agreements include grievance or complaints procedures that can be utilised for discrimination complaints,[318] the Community and Public Sector Union submission noted that, even where grievance procedures were established in awards or agreements, "…sometimes it is not clear to employees that the procedures can be used to assist in resolving matters relating to their treatment during pregnancy".[319] Another trade union submission noted that

> [g]iven the generally poor understanding of the companies' policies regarding discrimination and the lack of procedures in place to deal with issues of discrimination, most cases are dealt with on an ad hoc basis broadly following the grievance procedures in the industrial award or agreement.[320]

13.13 The inquiry found a wide variance in the responses of employers to internal grievances concerning pregnancy and potential pregnancy discrimination.

13.14 It is clear that some employers take a professional, even proactive, approach to dealing with grievances, seeing them as an opportunity to address issues of discrimination fairly and effectively, while recognising the benefits of a timely, satisfactory resolution that also has educative value.

13.15 Large employers now tend to have information booklets printed for employees. One such booklet provided to the Human Rights and Equal Opportunity

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[317] Australian Competition and Consumer Commission *Benchmarks for Dispute Avoidance and Resolution - A guide: Round table on small and large business disputes* ACCC Sydney 1997, 24. This report is mainly concerned with disputes external to the company.
[318] Allowable in awards under s 89A(2)(p*) Workplace Relations Act 1996* (Cth). See also Community and Public Sector Union (Submission no 53).
[319] Community and Public Sector Union (Submission no 53).
[320] Shop, Distributive and Allied Employees' Association (Submission no 74).

Commission (HREOC) during the inquiry was entitled *Workplace Discrimination: An employee guide*.[321] The booklet explains what discrimination is, what the employee should do if discriminated against and the company's policy, including information on making complaints, and the procedures used to handle complaints. The booklet also notes the employer's responsibility for agents, including sales people, operating on the company's behalf.

13.16 The Community and Public Sector Union noted that

> [f]or these procedures to be effective they must be actioned quickly as there is no point in resolving the issue once the woman has gone on maternity leave. Publicity should be given by the employer that these internal processes are available for matters related to pregnancy and should be used to resolve the matter as soon as possible.[322]

13.17 However, many submissions indicated that, while employers had grievance procedures, their existence did not necessarily mean that they were used or valued.

> Even where such policies exist, dissemination of the information and accompanying appropriate education is generally very poor. [The Shop, Distributive and Allied Employees' Association] survey of members revealed that only one third of members had sighted their company's EEO policy. SDAEA EEO consultations with the major Retail companies have disclosed that some companies are planning to address this issue and are in the process of developing policies and accompanying education programs.
>
> . . .
>
> Understanding of appropriate legislation is also very poor at the store level and specific, documented, comprehensive processes for managing pregnancy in the workplace are generally absent …[323]

13.18 While some organisations have developed formal grievance procedures, the inquiry heard that these are sometimes seen as being unsuccessful, a concern raised by a Community Legal Service.

> In our experience, generally internal dispute resolution processes have been most unsatisfactory. They are often used as a means of silencing women and sweeping the issue under the carpet. They have tended to be carried out in a way to ensure minimum damage to the employer and little or no genuine recognition of the needs of the employee. Many times after complaining employees are then subjected to victimisation for complaining, such as inappropriate subtle harassment and then eased out of the workplace. They are very reliant on the skills, suitability, experience, qualifications of the person facilitating the dispute resolution process.[324]

[321] P&O Australia.
[322] Community and Public Sector Union (Submission no 53).
[323] Shop, Distributive and Allied Employees' Association (Submission no 74).
[324] Townsville Community Legal Service (Submission no 78).

Grievance procedures for small business

13.19 Small businesses are not exempt from the SD Act. In general, small businesses are taken to refer to organisations that employ less than 20 people.

13.20 The majority of complaints of pregnancy discrimination are lodged by women who work in small businesses. A snapshot of open pregnancy complaints in the Sydney Office of HREOC on 3 May 1999 found that 55% of complaints were made against businesses that employ less than 20 people.[325]

13.21 It is appropriate for all businesses, irrespective of the size or type, to have a written policy on discrimination that covers pregnancy and how discrimination grievances are to be handled. However, the reality is that many small businesses do not have any formal policies covering discrimination or harassment. Be it due to lack of anti-discrimination knowledge or a belief that it is unnecessary because of the close working relationship between management and employees, the reality is that small business owners and managers do not see the need for formal policies. As most small businesses do not have specialist human resource practitioners, insufficient attention is in some cases given to the development and implementation of effective procedures for dealing with discrimination and harassment. This is not always the case, however, as evidenced by the policy of one small organisation employing 11 people based in Victoria.[326]

13.22 Small businesses by their very nature have a small management structure. The person or people who own or operate the business generally also work in the same workplace as their employees. A benefit of this close relationship is that a small business operator is able to personally inform all employees about their rights and responsibilities under the SD Act and be a point of contact if a staff member has a complaint. It also means that management is in a good position to take direct action if a complaint is made or they are alerted to a pregnant employee being treated unfairly. A short written discrimination and harassment statement that incorporates pregnancy is a positive way of formalising and communicating the company's ethical and legal position.

13.23 Close working relationships within a small business can also create some disadvantages for pregnant employees. In complaints of pregnancy discrimination made to HREOC against small businesses it is generally the employer who is alleged to have done the discriminatory act. There may be no independent person in authority to whom to take a grievance. HREOC finds that in these circumstances, the pregnant woman often feels that there is nothing she can do to change the decision and leaves her job.

13.24 The experience of HREOC is that small business management plays a critical role in preventing discrimination against pregnant women. Therefore, it is important that small business management are aware of their responsibilities under the SD Act, develop policies and take actions that promote a workplace

[325] See paras 3.30 – 3.39 for more statistics on complaints under the *Sex Discrimination Act 1984* (Cth).
[326] Australians Against Child Abuse (Submission no 109).

free from discrimination and harassment. Employer organisations and small business associations can provide managers with information about the SD Act and assistance in developing policies and grievance procedures.

Pregnancy Guidelines 34: That the Guidelines provide advice and assistance on the management of internal grievances with specific reference to small business.

Issues for larger organisations

13.25 It became apparent during the inquiry that there was a view that some managers in larger organisations seemed to be unaware of workplace pregnancy problems. A particular concern identified during the inquiry was the management of grievances by line managers who were not well versed in internal equal opportunity policies or the expectations of their employer/parent company. This was particularly the case when it came to the management of pregnancy or potential pregnancy issues. In some cases this scenario seemed to reflect the level of commitment made by the employer to what appeared to be a narrow area of workplace concern.

> Some staff have found that the internal grievance channels are not particularly effective, and that it's better to go straight to the top. Few complaints are formalised as the person making the complaint can get lots of flak.[327]

> [u]sually the problem has occurred because a line manager has not followed company policy (this usually occurs because of a lack of understanding of the issues on the part of the manager). This has led to a need for dispute resolution with the organisation keen to reach an outcome suitable to both parties.[328]

13.26 The Queensland Nurses' Union noted that

> … grievance and complaint procedures at the health facility level are of little assistance in resolving issues. It is quite often the case that the matter needs to be referred to outside the facility, usually to "corporate office" or a peak body for intervention. If the grievance can not be resolved at that level then they can be referred to the appropriate external body for conciliation or mediation.[329]

Need for legislative amendment

13.27 It is important to ensure that all parties are aware of the existing requirements of the SD Act and that they work to operate within its terms. On this point HREOC concluded that there is no particular benefit in imposing any further obligation on employers to develop internal grievance procedures particularly relating to discrimination on the ground of pregnancy or potential pregnancy. Encouraging better understanding of the need for, and proper use of, existing mechanisms, and the law, would be of greater assistance.

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[327] Taronga Park Zoo (Focus Group, 2 February 1999).
[328] Families At Work (Submission no 40).
[329] Queensland Nurses' Union (Submission no 37).

13.28 This concern could in part be addressed by issues relating to pregnancy and potential pregnancy discrimination being given greater priority within organisations and ensuring all parties to the employment relationship are aware of their rights and responsibilities under the SD Act. Certainly, submissions to the inquiry concurred with, and are summed up by, the comment that "[e]ffective management training and education are required to ensure that managers are aware of the requirements around maternity leave…"[330]

Pregnancy Guidelines 35: That the Guidelines provide assistance on the establishment, and promotion, of appropriate internal employer mechanisms for handling grievances concerning discrimination on the grounds of pregnancy and potential pregnancy.

Pregnancy Guidelines 36: That the Guidelines focus on the need for employers to clearly indicate their commitment to the prevention and elimination of discrimination on the ground of pregnancy and potential pregnancy.

Access to internal grievance procedures

13.29 There are several examples of grievance resolution mechanisms that can be easily adopted and applied by businesses of all sizes and types.

13.30 The Commonwealth Ombudsman's *A Good Practice Guide for Effective Complaint Handling* identified a number of criteria important in establishing a good complaints system including commitment, fairness, accessibility, responsiveness, effectiveness and openness.[331]

13.31 HREOC's *Sexual Harassment Code of Practice* identified an effective, accessible complaint procedure as one that

- conveys the message that the organisation takes sexual harassment seriously;
- can prevent escalation of a case;
- ensures that complaints are dealt with consistently;
- reduces the likelihood of external agency involvement which can be time consuming, costly and damaging to public image;
- alerts an organisation to patterns of unacceptable conduct and highlights the need for prevention strategies in particular areas;
- reduces the risk of an employer being held liable under the *Sex Discrimination Act* and other anti-discrimination laws.[332]

[330] Families At Work (Submission no 40).
[331] Commonwealth Ombudsman's Office Canberra 1997, 13. While the Guide is concerned with complaint handling within government agencies, these criteria are just as appropriate to workplace complaint handling mechanisms. See also Standards Australia *Complaints Handling* AS 4269-1995 Standards Australia Sydney 1995 (the Australian Standard on complaint handling).
[332] Human Rights and Equal Opportunity Commission *Sexual Harassment: A code of practice* HREOC Sydney 1996, 39.

13.32 These features are equally relevant to procedures designed to handle internal grievances of discrimination on the grounds of pregnancy or potential pregnancy.

13.33 While what would be considered reasonable for a large corporate employer might be different to what would be expected of a small family run business, there is a minimum standard for all employers, and this inquiry has emphasised that all businesses need internal policies and processes to handle grievances.

13.34 An important consideration when establishing policies and grievance procedures is the composition of the workforce. Contractors, commission agents, casuals, outworkers and shift workers may face difficulties in obtaining information, or being able to attend a particular venue for interviews concerning grievances. It has become evident that flexibility in the terms and conditions of work, particularly in relation to time spent participating in grievance procedures need to be considered. For example, outworkers on piece rates may face a considerable financial loss when giving up time to make a complaint or taking time out to attend the venue where it is appropriate to pursue a complaint.

13.35 Other considerations highlighted through consultations included the need to accommodate English language difficulties, both in the distribution of information about procedures and in dealing with grievances.[333]

Pregnancy Guidelines 37: That the Guidelines identify those groups of employees who may have special needs when it comes to accessing effective mechanisms for handling grievances concerning discrimination on the grounds of pregnancy and potential pregnancy internally.

Procedures under the *Sex Discrimination Act 1984*

13.36 One alternative to handling grievances internally is to lodge complaints of discrimination under the SD Act. The SD Act requires the Sex Discrimination Commissioner to investigate and attempt, where appropriate, to resolve complaints of discrimination through a process of conciliation.[334]

13.37 The inquiry found that complainants often selected this option

- when internal grievance procedures do not exist in an organisation; or
- where those procedures have failed to achieve a satisfactory outcome; or
- where the complainant does not feel comfortable in taking or continuing with a grievance internally.

[333] See ch 10 for a discussion of the particular needs of some groups.
[334] s 48(1)(a) *Sex Discrimination Act 1984* (Cth).

Making a complaint

13.38 A complaint of discrimination under the SD Act must be made in writing.[335]

13.39 Some state legislation provides for the relevant state equal opportunity/anti-discrimination Commissioner to assist complainants in various ways. The Victorian Commissioner "…must assist a complainant in formulating [a] complaint".[336] In South Australia, where a complaint is referred to the Equal Opportunity Tribunal, the Commissioner "…must, on the request of the complainant, assist the complainant, personally or by counsel or other representative, in the presentation of the complainant's case to the Tribunal".[337] The Western Australian Act contains a similar provision and also provides that the Western Australian Commissioner may provide financial assistance to the complainant.[338] In Tasmania, the Commissioner "…may provide procedural advice and assistance to any person who requires assistance to make a complaint".[339]

13.40 The SD Act does not make similar provision. However, HREOC staff do assist complainants who have difficulty writing out their complaints and advise respondents who want information on procedures. HREOC also provides general advice to people wishing to prevent complaints arising on ways in which this can be achieved.[340]

13.41 HREOC is concerned that any greater role in providing assistance may be seen by some respondents to favour complainants. This is an impression that should be avoided.

Pregnancy Guidelines 38: That the Guidelines make clear the role of HREOC is to act as a neutral third party in the resolution of complaints but is available to provide information on complaint processes to both complainants and respondents.

[335] s 50(1) *Sex Discrimination Act 1984* (Cth). The Australian Law Reform Commission has recommended that the *Sex Discrimination Act 1984* (Cth) be amended to require help to be given to those needing assistance to write complaints: *Equality Before the Law: Justice for women* Report 69 (1) ALRC Sydney 1994, rec 3.14.
[336] s 106 *Equal Opportunity Act 1995* (Vic).
[337] s 95(9) *Equal Opportunity Act 1984* (SA). The Western Australian Act contains a similar provision and also provides that the Commissioner may provide financial assistance to the complainant: s 93(2) *Equal Opportunity Act 1984* (WA).
[338] s 93(2) *Equal Opportunity Act 1984* (WA).
[339] s 34(2) *Sex Discrimination Act 1994* (Tas).
[340] cl 46P(4) Human Rights Legislation Amendment Bill 1998 (Cth) expressly provides that HREOC should provide assistance to people to reduce a complaint to writing. HREOC considers that this provision would formalise the current arrangements.

Time limits

13.42 The SD Act provides that a complaint should be made within 12 months of the act of discrimination, although the Sex Discrimination Commissioner may accept a complaint made later.[341]

13.43 A submission from a legal centre specialising in employment rights suggested that the time limit for complaints of discrimination on the ground of pregnancy be extended to 2 years to take account of the fact that many women

> …do not take action against their employers or ex-employers because the load they are carrying in relation to being the primary care giver for a child in the first year of its life is stressful enough.[342]

13.44 Another submission noted that

> …there should be an increased time limit for bringing pregnancy and maternity related discrimination complaints. Women who are dealing with pregnancy and then caring for a new baby, with all the changes, pressures and responsibilities that this entails, are often not in a position to take legal action at this time. Whilst prompt complaints are to be encouraged, we consider that it is important to acknowledge the reality of women's lives and ensure they have adequate opportunity to seek redress.[343]

13.45 On the other hand, a state Chamber of Commerce and Industry suggested that

> [t]he time in which a complaint can be made should reflect a realistic time frame to allow an employer to respond….[t]he time in which a complaint be made be 3 months of the act complained of.[344]

13.46 HREOC considers that shortening the time limit as suggested would pose particular difficulties for pregnant complainants. The 12 month time limit enables pregnant complainants to defer lodging a complaint until after the birth if they are concerned that the stress associated with the complaint is a risk while they are pregnant. Lengthening the time limit, on the other hand, presents another set of difficulties, including the gathering of information about an event which happened more than 12 months previously. HREOC regularly deals with this issue in the current 12 month time limit, especially when supervisors or managers and others move on. These complaints are generally harder to resolve.

13.47 HREOC aims to deal with pregnancy discrimination matters as quickly as possible so that matters can be resolved before complainants' circumstances change. However, the SD Act provides a discretion to allow a complaint made

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[341] s 52(2)(c) *Sex Discrimination Act 1984* (Cth).
[342] Job Watch Inc (Submission no 60). An extension to 2 years was also proposed in Women in Industry and Community Health (Focus Group, 3 March 1999).
[343] Women's Legal Services Network (Submission no 94).
[344] Queensland Chamber of Commerce and Industry (Submission no 5).

12 months after an act of discrimination occurs.[345] In practice, the particular difficulties experienced by pregnant women are taken into account in exercising the discretion. This discretion is considered by HREOC to be sufficient to meet any reasonable needs.

13.48 Prompt action is often needed in pregnancy discrimination complaints where the complainant remains in the workforce, particularly when circumstances are likely to change quickly.

> [P]regnancy discrimination often occurs late in the pregnancy and the prospect of satisfactory resolution of complaints is significantly affected by the limited time available to deal with the complaint before the birth and competing demands immediately after.[346]

13.49 In recognition of these concerns, HREOC gives priority to these and other such cases to ensure a better chance that the complaint produces a positive outcome.

Pregnancy Guidelines 39: That the Guidelines explain the existence of the discretion under the *Sex Discrimination Act 1984* (Cth) to accept complaints outside of the 12 month time limit and provide advice about when the Sex Discrimination Commissioner is likely to exercise that discretion.

Conciliation of complaints

13.50 Complaints made under the SD Act which have substance and are within jurisdiction are investigated, with most progressing to a conciliation conference.[347] Conciliation can also occur through holding a tele-conference or negotiating through the conciliator.

13.51 The method of conciliation used by HREOC can be described as statutory conciliation. The National Alternative Dispute Resolution Advisory Council provide a clear definition of this method.

> Statutory conciliation is a process in which the parties to a dispute which has resulted in a complaint under a statute...with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for the terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement which accords with the requirements of that statute.[348]

13.52 The conciliation conference is a meeting that gives the parties to the complaint the opportunity to hold a frank discussion about the matter and attempt to

[345] s 52(2)(c) *Sex Discrimination Act 1984* (Cth). See also s 138 *Anti-Discrimination Act 1991* (Qld) which provides the Queensland Commissioner with a discretion to accept a complaint made after 12 months if the complainant shows good cause.
[346] New South Wales Government (Submission no 99).
[347] ss 52(1) and 55(1) *Sex Discrimination Act 1984* (Cth).
[348] National Alternative Dispute Resolution Advisory Council *Alternative Dispute Resolution Definitions* NADRAC Canberra 1997.

resolve the matter through negotiation. The conference gives the parties the opportunity to resolve the complaint on their own terms.

13.53 During the conference, the role of the conciliator is to conduct the conference in a fair and impartial manner, giving each party an opportunity to present their point of view and assist them in resolving the complaint. The conciliator may make suggestions for terms of settlement, give expert advice on settlement terms and actively encourage the parties to reach an agreement. The conciliator is not an advocate for either party. The conciliator also has a role to uphold the legislation and to ensure that settlement terms are in accordance with the principles of the legislation.

13.54 The settlements that have been agreed upon by parties in conferences conducted by HREOC are wide and varied. Outcomes depend on how the complainant is seeking to resolve the complaint and what the respondent is prepared to offer. Outcomes that have been agreed upon include

- written apologies;
- changes in working conditions or practices;
- development of anti-discrimination, harassment and equal employment opportunity policies;
- reviews of grievance procedures;
- financial compensation.[349]

13.55 Conciliation proceedings are confidential. Anything said or done during the conciliation conference or any post-conference negotiations cannot be used in any further proceedings by the HREOC.

13.56 Since 1986, only 28 complaints of pregnancy and potential pregnancy discrimination in the workplace under the SD Act have gone before a Hearing Commissioner.[350] Over 35% of complaints finalised by HREOC under the SD Act during the last financial year were resolved during the conciliation process and did not proceed any further.[351]

13.57 Where conciliation is unsuccessful or it appears from the outset that the matter will not settle by conciliation, the Sex Discrimination Commissioner may refer it to HREOC for a hearing.[352] In the last financial year, 12% of complaints made to the Sex Discrimination Commissioner were referred for hearing.[353] Those cases that were not resolved through the conciliation process or referred

[349] See also New South Wales Government (Submission no 99) for details of outcomes under *the Anti-Discrimination Act 1977* (NSW).
[350] A further five cases heard concerned maternity leave discrimination.
[351] Human Rights and Equal Opportunity Commission *Annual Report 1997/98* HREOC Sydney 1998, 47.
[352] ss 52(5) and 57(1) *Sex Discrimination Act 1984* (Cth).
[353] Human Rights and Equal Opportunity Commission *Annual Report 1997–98* HREOC Sydney 1998, 47.

for hearing were either withdrawn at the request of the complainant or declined for reasons including insufficient evidence or lack of jurisdiction.[354]

Advantages and disadvantages of conciliation

13.58 HREOC acknowledges that alternative dispute resolution mechanisms, particularly in the area of discrimination and human rights law, have advantages and disadvantages and can be described as a "double-edged sword". While processes such as statutory conciliation provide a more accessible and flexible form of dispute resolution, these processes may mean that areas of public concern and interest may be hidden from public scrutiny and response.

13.59 Astor and Chinkin pointed out that the confidentiality of conciliation

> …can constitute an advantage for complainants, especially those who have complaints which are not easy to speak about in a public forum, or where public revelation itself may produce further discrimination.[355]

13.60 In relation to pregnancy complaints the experience of complaint handling staff at HREOC is that women complaining about pregnancy discrimination in general would rather talk about what has happened to them in the confidential setting of a conciliation conference than provide evidence in a formal hearing process.

13.61 Respondents may also appreciate the confidentiality of conciliation and

> …may be more inclined to be frank about their work practices and to admit that some contravene the law. Changes of practice which remove discrimination systemic to the organisation can be negotiated, potentially avoiding more complaints.[356]

13.62 However, the Australian Law Reform Commission has referred to evidence that "…the confidentiality of conciliation isolates women and further disempowers them..."[357]

13.63 HREOC has taken a number of steps to respond to concerns that conciliation results in the privatisation of disputes.

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[354] Human Rights and Equal Opportunity Commission *Annual Report 1997–98* HREOC Sydney 1998, 36.

[355] H Astor and C Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, 274-275.

[356] H Astor and C Chinkin quote Bryson, who "…notes that he has seen respondents in conciliation face many unpleasant facts about themselves or their business practices and express genuine gratitude for the way they have been dealt with in conciliation": H Astor and C Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, 274-275, referring to D Bryson "Mediator and Advocate: Conciliating human rights complaints" (1990) 1 *Australian Dispute Resolution Journal* 3, 136-42 at 142.

[357] Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69 (1) ALRC Sydney 1994, para 3.92. See also R Graycar and J Morgan *The Hidden Gender of Law* Federation Press Sydney 1990, 101; M Thornton *The Liberal Promise: Anti-discrimination legislation in Australia* Oxford University Press Melbourne 1990.

- There is scope for matters of broad public interest to be referred for a public hearing by HREOC rather than resolved through conciliation. This power is used by the Sex Discrimination Commissioner, where appropriate.
- Confidentiality clauses are not mandatory in conciliation agreements facilitated by HREOC. It is acknowledged, however, that confidentiality clauses are often important to both parties and it is on the basis of the inclusion of these clauses that parties agree to settle. In some conciliation agreements parties have decided not to include a confidentiality clause, as there is mutual benefit of public awareness of settlement terms.
- HREOC has a practice of reporting conciliation outcomes in Annual Reports in a manner that protects the privacy of the parties and the confidentiality of the agreement, while allowing general information about issues and outcomes to reach the public domain.[358] Suitable pregnancy case studies will be included in the Guidelines to be published pursuant to this reference.
- HREOC's complaint handling database includes details of conciliation outcomes. Further work is being undertaken to enable HREOC to produce a register of conciliated outcomes that will be available to the public.

13.64 Other advantages of conciliation are that it is inexpensive, can be speedy and delivered by agencies which are expert and empathetic.[359] Further,

- it maximises the involvement of parties;
- it maximises decision making by parties, as they jointly decide on the result that will resolve the complaint;
- it encourages innovative and flexible solutions that meet the needs of the parties;
- the process is flexible and can accommodate the special needs of the parties;
- it can strengthen continuing relationships;
- it can be empowering for the parties, for example, a woman can feel empowered by sitting across from her employer and telling him or her exactly how she felt when she was dismissed because of her pregnancy;
- it can inform the parties about their rights and responsibilities under the SD Act thereby performing a broader educative role;
- it can result in outcomes that have results which extend beyond the circumstances of the individual complaint, for example, an agreement that includes the development of an anti-discrimination policy will benefit all employees in the workplace and not just the complainant.

13.65 While the conciliation process can produce positive outcomes and be of educative value to the parties involved, HREOC recognises that in some cases the conciliation process is limited in its ability to deal with discrimination beyond the facts of the particular case.

[358] See for example Human Rights and Equal Opportunity Commission *Harsh Realities: Workplace case studies* HREOC Sydney 1999.
[359] H Astor and C Chinkin *Dispute Resolution in Australia* Butterworths Sydney 1992, 274-275.

13.66 Conciliation also has a number of disadvantages.

- It may disadvantage the inarticulate, non-assertive and shy and requires good communication skills. However, individuals who did not possess these communication skills would experience greater disadvantage in the formal hearing process.
- The process is premised on the need to make concessions. Sometimes concessions are not appropriate and should not be made.
- Confidentiality and privacy of settlements can mean no development of the law and no public exposure of the issues.
- There may be power imbalances between the parties which mean that the less powerful participant is unable to negotiate effectively.

13.67 Power imbalance is a barrier for women in general and pregnant women in particular in accessing conciliation processes. Despite significant advances in the position of women in Australian society, women continue to be in an inferior social and financial position compared to men. This inequality is reflected in the complaints of pregnancy discrimination that are made to HREOC. It is usually the case that women lodging complaints under the SD Act are in inferior social situations or subordinate employment relationships to the organisations or respondents that they are complaining about. In the conciliation process female complainants with limited power and financial resources are often required to deal with well-resourced, legally represented organisations. Power imbalances are heightened when women are from minority cultural groups and/or have some form of disability.

13.68 HREOC uses a number of methods to address power imbalances in the conciliation process.

- The manner in which information about the conciliation process is provided will vary depending on the relative needs of the parties. The aim is to ensure that the parties have an equal understanding of what the process entails.
- Parties are provided with information about external resources that may assist them during the process if it seems that such assistance is required to enable equal participation.
- The conciliation process is adapted to ensure that parties are able to participate on substantively equal terms. For example, if one party has difficulties in expressing their position the conciliator may play a more active role in summarising the position of both sides.
- Conciliators ensure that interpreters/aids are available where necessary.
- A key consideration in deciding who can attend the conference is the balance of power between the parties.
- Conciliators control the physical environment to ensure that aspects of the environment will not exacerbate any power imbalance between the parties.

13.69 HREOC considers that the advantages of conciliation as a means of resolving complaints of pregnancy discrimination far outweigh the disadvantages. Conciliation provides women who complain of pregnancy discrimination with a means of achieving results from their complaints without having to make the very personal circumstances of their case public or having to establish that they were discriminated against on the balance of probabilities. A large number of women who make complaints about pregnancy discrimination are no longer in paid employment or are in low paid jobs. In general women who complain of pregnancy discrimination are not legally represented and often lack the emotional or financial resources to pursue their complaint at a public hearing. For these women, conciliation provides an inexpensive, private and informal means of resolving their complaint.

13.70 HREOC recognises the barriers both complainants and respondents may experience in using a conciliation process and is active in taking steps to remove and reduce these barriers.

13.71 Systemic or more widespread discrimination can be dealt with both by the exercise of other HREOC functions[360] and by the dissemination of de-identified material concerning the outcomes of conciliated complaints. One submission noted that the confidentiality of conciliated outcomes "…has restricted access to information about settlements". The submission

> ...welcomes the recent publication by HREOC of "Harsh Realities: Workplace Case Studies" which provides details of settlements reached through conciliation. It is important that employers are made aware of the potential consequences for them of not complying with anti-discrimination law, and that employees have information about the sort of remedies that they might seek.[361]

13.72 Suitable case studies will be included in the Guidelines to be published pursuant to this inquiry.

13.73 Systemic discrimination is a particular area of focus for HREOC. In a recent development, the Final Report of the Regulatory Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 - Unfinished Business: Equity for Women in Australian Workplaces* stated

> [t]he Committee believes there is little remedial action available to the Director [of the Affirmative Action Agency] when possible industry, sector or occupational-wide systemic discrimination is identified through the Agency's activities. The Committee considers it would be beneficial, however, if the Director could refer certain issues of this nature to the Sex Discrimination Commissioner. The Sex Discrimination Commissioner would be able to conduct an inquiry into such issues if, in her or his view, such an inquiry is warranted and feasible.[362]

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[360] See for example s 48 (1)(d), (e), (f), (g) or (ga).
[361] Women's Legal Services Network (Submission no 94).
[362] Department of Employment, Workplace Relations and Small Business *Unfinished Business: Equity for women in Australian workplaces* Final Report of the Regulatory Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* Department of Employment, Workplace Relations and Small Business Canberra 1998, 41.

13.74 The Government's response to that Report said

> [t]he Government notes that there is presently nothing to prevent such referral. The Government may give further consideration to providing an explicit legislative basis for referral. The Government considers that if a legislative basis were to be provided, the Director should be required to consult with the Advisory Board and the Minister for Employment, Workplace Relations and Small Business prior to any referral.[363]

Pregnancy Guidelines 40: That the Guidelines provide suitably de-identified information and case studies from pregnancy discrimination matters conciliated under the *Sex Discrimination Act 1984* (Cth).

Recommendation 40: That the Advisory Board of the Affirmative Action Agency consult the Sex Discrimination Commissioner when developing minimum standards and educative materials to ensure that they reflect the legislative requirements of the *Sex Discrimination Act 1984* (Cth) and legal precedents with particular regard to pregnancy and potential pregnancy.

Recommendation 41: That, in accordance with recommendation 18 of the *Unfinished Business* report, the Director of the Affirmative Action Agency, in consultation with the Advisory Board, and the Sex Discrimination Commissioner develop protocols for the referral of certain systemic, sectoral or occupational sex-based discrimination issues, which may properly be the subject of an inquiry or report, to the Sex Discrimination Commissioner for consideration.

Proving an act was unlawful discrimination

13.75 The burden of proving that an act was unlawful discrimination under the SD Act rests with the complainant.[364]

13.76 However, as discussed at paras 4.40 – 4.45, indirect discrimination is also subject to a reasonableness test, which provides that it is not discrimination if the condition, requirement or practice is reasonable in the circumstances.[365] The person who undertook the act being complained about must show that it was reasonable in the circumstances.[366] This onus was the subject of some criticism in one submission to the inquiry.

> The definition of indirect discrimination...differs from that in federal legislation relating to disability and race in that it is more onerous to the employer...

[363] *Promoting Equal Employment Opportunity For Women* Coalition Government response to the Final Report of the Regulatory Review of the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*, 17 December 1998.
[364] s 7 *Sex Discrimination Act 1984* (Cth). See ch 4 for a discussion of the definitions of discrimination.
[365] s 7B (1) *Sex Discrimination Act 1984* (Cth).
[366] s 7C *Sex Discrimination Act 1984* (Cth).

> Indirect discrimination issues have always been difficult to deal with in practice, and the [onus of proof requirements] simply make the task more difficult not less.[367]

13.77 The *Sex Discrimination Amendment Act 1995*[368] introduced the reasonableness test into legislation and placed the burden of proving the reasonableness of an action on the respondent. The changes were explained by the Explanatory Memorandum to the amending legislation.

> Under the existing test for indirect discrimination, the complainant had to prove, amongst other things, that a requirement or condition was unreasonable in the circumstances.…It is recognised that requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination. It is a particularly onerous burden on the complainant who does not usually have access to the information needed to prove that actions allegedly amounting to indirect discrimination are unreasonable in the circumstances. By contrast, the respondent is likely to have access to the information needed to prove that such action is reasonable in the circumstances. Thus the respondent is better able to bear this burden of proof. For this reason "reasonableness" is provided as a defence to the respondent who must prove the elements of the defence in order to rely on it rather than as an element of the test for indirect discrimination to be proved by the complainant.[369]

13.78 HREOC is satisfied with the operation of the legislation in its current form and does not consider legislative amendments to the reasonableness test with respect to indirect discrimination are warranted.

13.79 The Women's Legal Services Network noted that, particularly for pregnancy discrimination, proving a causal connection between the discriminatory ground and the action of the respondent in causing the disadvantage claimed is difficult.

> Employees often lack the resources to assemble the evidence, witnesses may be unwilling to testify for fear of the consequences for their own jobs. It is easier for an employer to assert eg fluctuating demand, restructuring for economic reasons, or poor performance. Given the power imbalance, the vulnerability of pregnant workers to discrimination and the importance of employment protection for this group, the [Women's Legal Services Network] believes that the onus should be reversed. There should be a presumption of unlawful discrimination if dismissal or other detriment occurs during pregnancy or maternity leave and the employer knew of the pregnancy. In these cases, the onus should be on the employer to rebut the presumption and prove that the action taken was for a reason wholly unconnected with the pregnancy. This reflects the standard applied in the European Union Pregnant Workers Directive and the provisions of CEDAW.[370]

13.80 HREOC recognises the difficulties in some cases of showing the requisite causal connection to prove discrimination. Given the levels of discrimination

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[367] Australian Chamber of Commerce and Industry (Submission no 84).
[368] Act No 165 of 1995.
[369] para 32 Explanatory Memorandum to the Sex Discrimination Amendment Bill 1995, House of Representatives. See also s 109 *Anti-Discrimination Act 1977* (NSW) which provides "[w]here by any provision of this Act or the regulations, conduct is excepted from conduct that is unlawful under this Act or the regulations or that is a contravention of this Act or the regulations, the onus of proving the exception in any inquiry lies upon the respondent".
[370] Women's Legal Services Network (Submission no 14). The European Union Directive is discussed in more detail at paras 6.24 – 6.25.

evidenced as part of the inquiry that go unreported, HREOC is attracted to the provisions of the European Union directive. The European Council Directive on the burden of proof in cases of discrimination based on sex requires members of the European Community to implement in national legislation, the requirement that in cases of direct or indirect sex discrimination, it is for the respondent to prove that there has been no breach of anti-discrimination laws.

13.81 However, it is considered that the SD Act in its current form is adequate and that in reality it is probably being under-utilised because workplace participants are not sufficiently aware of its provisions. It is hoped that this report and the resultant Guidelines will go some way to addressing these concerns. The progress amongst European Union members regarding the implementation of the Directive will be monitored by HREOC and its utility for Australian circumstances will be reviewed. However, at this stage it is considered that any shifting of the burden of proof and accompanying legislative change is not appropriate in the Australian context.

Hearing before HREOC

13.82 Where a complaint is referred for hearing to HREOC, a Hearing Commissioner is appointed to consider the evidence and decide if the SD Act has been breached. A Hearing Commissioner has the power to award damages and make other orders including an order that the respondent should employ, re-employ or promote the complainant.[371] Hearing Commissioners may also dismiss the complaint.[372]

13.83 HREOC, the complainant or a trade union acting on behalf of the complainant may commence proceedings in the Federal Court to enforce a determination made by the Hearing Commissioner in the event that the respondent does not comply with a determination in favour of the complainant.[373]

13.84 The requirement to take further action to enforce determinations in the Federal Court was criticised in a submission to the inquiry from a Legal Service. It was noted that a major impediment to the federal anti-discrimination legislation, including the SD Act

> …is the effects of Brandy's case in the High Court which has yet to be resolved by the Government to the date of writing this submission. TCLS was in the unenviable position of having acted for a client in a sexual harassment case under the SD Act which resulted in a successful judgment for one of the highest awards of general damages. Unenviable because the decision was handed down post Brandy's case and therefore the judgment could not be enforced.

[371] s 81 *Sex Discrimination Act 1984* (Cth).
[372] s 81(1)(a) *Sex Discrimination Act 1984* (Cth).
[373] s 83A *Sex Discrimination Act 1984* (Cth).

> Our client was then forced to issue proceedings in the Federal Court for a hearing de novo with no guarantee that the decision and evidence from the HREOC decision would be accepted by the Court.[374]

13.85 A Bill currently before the Parliament will make substantial changes to the procedures for complaint handling under the SD Act and address the concerns expressed above. Known as the Human Rights Legislation Amendment Bill 1998, the Bill aims to replace the regimes for investigation and conciliation of complaints currently in the racial, sex and disability discrimination legislation with a single uniform scheme to be included in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).[375] It provides that

- the President of HREOC will take over the complaint-handling functions of the Sex Discrimination Commissioner and the other HREOC Commissioners;
- if conciliation of the complaint is unsuccessful or the complaint is terminated by the President for other reasons, the person affected by the discrimination may take the matter to the Federal Court; and
- the Federal Court will be able to make any orders which it considers appropriate, including that the respondent pay damages, or take other action by way of compensation, to the applicant.

13.86 The removal by the Bill of the functions of HREOC to hear and determine complaints represents the Government's final response to the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission.*[376]

Outcome of complaints under the Sex Discrimination Act 1984

13.87 Another area of interest in submissions was the outcome achieved in proceedings under the SD Act and state/territory anti-discrimination legislation.

13.88 Amounts awarded in pregnancy discrimination cases are generally small.

13.89 The Australian Law Reform Commission's Report on *Equality Before the Law: Justice for women*, discussed the importance of more appropriate levels of awards in sex discrimination cases.[377] The Commission recommended that

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[374] Townsville Community Legal Service (Submission no 78).

[375] The Bill was introduced into the House of Representatives on 4 December 1996, was reintroduced in 1998 and, at the time of writing, is before the Senate.

[376] (1995) 183 CLR 245. In that case the High Court found that the scheme for the enforcement of HREOC determinations was invalid because it infringed the principle of the separation of judicial and executive power enshrined in Chapter III of the Constitution. In effect, the High Court found that the act of registering a determination of HREOC with the Federal Court, and having it take effect as an order of that Court, amounted to an attempt to "cloak" the decisions of an administrative body with the judicial power of the Commonwealth.

[377] Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69 (1) ALRC Sydney 1994, paras 3.100-3.104.

HREOC and the Federal Court should have regard to the level of damages in awards at common law or under statute as compensation for loss, injury or damage of a comparable nature, and that these considerations should be referred to specifically in reasons for decisions.[378]

13.90 A number of submissions commented on the level of awards and HREOC is of the view that a regular survey of levels and trends would be useful research in relation to pregnancy discrimination, as well as in relation to other grounds of the SD Act. However, in light of pending legislative changes, no survey is recommended at this stage.

13.91 At present HREOC's powers to make orders include a declaration that the respondent should pay damages by way of compensation for loss or damage suffered as a result of the respondent's conduct.[379] The damage to be compensated includes damage to the complainant's feelings or humiliation suffered by the complainant.[380] The Human Rights Legislation Amendment Bill 1998, at the time of writing before the Senate,[381] contains similar provisions in relation to the orders that the Federal Court might make, although the Federal Court may make any other order it thinks fit.[382]

13.92 In its submission, the Women's Legal Services Network referred to the requirement in the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) of States Parties to provide "…effective protection of women against any act of discrimination".[383] That submission suggested that the SD Act needed to be amended to provide stronger penalties for discrimination.

> There are effectively no sanctions against employers that are found to have discriminated unlawfully, no provision for example for an award of exemplary or punitive damages. The lack of sanctions in the SD Act militates against effective protection from discrimination on grounds of pregnancy and maternity.…The point has been made that "if discrimination legislation is intended to have a normative effect on the community, the awarding of punitive damages would seem a logical means to achieve this" (Carol Andrades, What Price Dignity? Remedies in Australian Anti-Discrimination Law, Research Paper No 13, Department of the Parliamentary Library, 1997-98). [384]

13.93 The submission recommended a range of sanctions be made available, including "…exemplary or punitive damages and/or other sanctions (eg fines, adverse publicity)…" [385] in pregnancy or potential pregnancy discrimination cases.

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[378] Australian Law Reform Commission *Equality Before the Law: Justice for women* Report 69 (1) ALRC Sydney 1994, rec 3.17.
[379] s 81(1)(b)(iv) *Sex Discrimination Act 1984* (Cth).
[380] s 81(4) *Sex Discrimination Act 1984* (Cth).
[381] See paras 13.85 – 13.86.
[382] s 46PO(4) *Human Rights and Equal Opportunity Commission Act 1986* (Cth) as proposed to be inserted by the Human Rights Legislation Amendment Bill 1998 (Cth).
[383] art 2(c) *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980). It also referred to art 11(2)(a).
[384] Women's Legal Services Network (Submission no 14).
[385] Women's Legal Services Network (Submission no 14).

13.94 While HREOC considers that the provisions of the SD Act comply with CEDAW, the spirit and intent of CEDAW would be more effectively met if the SD Act allowed for the imposition of punitive damages. This would send a clear message about the seriousness of discrimination. It would represent a much more obvious sanction than the current range of remedies.

Recommendation 42: That the Attorney-General amend the provisions in relation to award of compensatory damages in the *Sex Discrimination Act 1984* (Cth) to also enable the award of punitive damages.

Offences

13.95 There are some acts of discrimination which are offences under the SD Act. Complaints about such acts are not dealt with by HREOC by way of conciliation. An offence is a criminal act that is prosecuted in the courts and can result in a criminal conviction.

13.96 The SD Act provides that advertising that indicates an intention to discriminate[386] and victimisation of people bringing complaints under the SD Act[387] are offences. There are also a small number of offences that are concerned with obstructing the complaint-handling process, for example failing to provide information[388] and publishing information in contravention of a HREOC direction.[389]

13.97 The offence of discriminatory advertising is discussed further in chapter 11. The other provisions mentioned were not raised in consultations during the inquiry. HREOC does not consider that these provisions have any outstanding relevance in relation to complaints of discrimination on the grounds of pregnancy or potential pregnancy, nor that the provisions need review.

Complaints under state/territory anti-discrimination Acts

13.98 Each state/territory anti-discrimination Act has procedures for lodging complaints.[390] These procedures are similar to those under the SD Act.

13.99 Attempts to resolve complaints by conciliation are made.[391] However, if the attempts are unsuccessful or it appears that complaints cannot be resolved by

[386] s 86 *Sex Discrimination Act 1984* (Cth).
[387] s 94 *Sex Discrimination Act 1984* (Cth).
[388] s 89 *Sex Discrimination Act 1984* (Cth).
[389] s 90 *Sex Discrimination Act 1984* (Cth).
[390] s 88 *Anti-Discrimination Act 1977* (NSW); ss 104 and 105 *Equal Opportunity Act 1995* (Vic); s 134 *Anti-Discrimination Act 1991* (Qld); s 93 *Equal Opportunity Act 1984* (SA); s 83 *Equal Opportunity Act 1984* (WA); s 72 *Discrimination Act 1991* (ACT); ss 32 and 34 *Sex Discrimination Act 1994* (Tas); s 60 *Anti-Discrimination Act 1992* (NT).
[391] s 92 *Anti-Discrimination Act 1977* (NSW); s 112 *Equal Opportunity Act 1995* (Vic); s 158 *Anti-Discrimination Act 1991* (Qld); s 95(3) *Equal Opportunity Act 1984* (SA); s 91 *Equal Opportunity*

conciliation, complaints may be referred to a tribunal or other decision making body.[392] The constitutional restrictions illustrated in the *Brandy* case[393] do not apply in state/territory jurisdictions.

13.100 In circumstances where both the SD Act and a state/territory Act applies, the complainant will have a choice of remedy. As most complainants know little about how the bodies operate, it is likely that accessibility of the remedy will be the significant factor in choosing whether to proceed under the SD Act or the state/territory Act.

13.101 One submission expressed concern about the problem of accessibility with the HREOC office in Sydney.

> There is very little difference between federal and state processes available and both are adequate. The major criticism TCLS can make of HREOC is that it is based in Sydney and therefore not easily accessible.[394]

13.102 Complainants may also prefer to take a complaint to a state/territory agency rather than proceeding to HREOC because of the risk under current arrangements of then having to take their own enforcement proceedings in the Federal Court.[395]

13.103 As discussed in chapter 7 there are some differences between the federal and state/territory Acts. This means that complainants may not always have an opportunity to choose which Act is best for their complaint. For example, a woman wishing to complain about discrimination in New South Wales Government employment cannot bring that complaint under the SD Act and a woman wishing to complain about discrimination by a small business employer (depending on the number of other employees in the business) will only be able to bring such a complaint under the SD Act.[396]

Act 1984 (WA); s 83 *Discrimination Act 1991* (ACT); s 44 *Sex Discrimination Act 1994* (Tas); s 78 *Anti-Discrimination Act 1992* (NT).

[392] s 94 *Anti-Discrimination Act 1997* (NSW); s 113(2) *Equal Opportunity Act 1995* (Vic); s 166 *Anti-Discrimination Act 1991* (Qld); s 95(8) *Equal Opportunity Act 1984* (SA); s 93 *Equal Opportunity Act 1984* (WA); s 91 *Discrimination Act 1991* (ACT); s 48 *Sex Discrimination Act 1994* (Tas); s 83 *Anti-Discrimination Act 1992* (NT). The Northern Territory Act provides one tier only - the Anti-Discrimination Commissioner - who investigates, conciliates, conducts public hearings and makes orders, including for compensation; appeals lie to a Local Court. The amount of damages that may be awarded in some jurisdictions is limited. For example, the New South Wales Administrative Decisions Tribunal may only award up to $40,000 in damages: s 113(1)(b)(i) *Anti-Discrimination Act 1977*.

[393] See paras 13.84 – 13.86.

[394] Townsville Community Legal Service (Submission no 78).

[395] See para 13.84.

[396] See comparison of provisions in table 7.1 at p84.

Proceedings under the *Workplace Relations Act 1996*

13.104 There are two main ways in which the SD Act and *Workplace Relations Act 1996* (Cth) inter-relate.

13.105 First, an employee may bring a complaint under the SD Act about a discriminatory act done in compliance with an award or certified agreement. If the Sex Discrimination Commissioner considers the award or agreement is discriminatory, the Commissioner must refer the award or agreement to the Australian Industrial Relations Commission (AIRC).[397] The AIRC must then convene a hearing to review the award or agreement and determine whether it is discriminatory within the meaning of the SD Act and, if so, what changes are to be made to remove this discrimination.[398]

13.106 Second, under the *Workplace Relations Act 1996* (Cth), an employee (other than certain categories of excluded employees) who is dismissed from employment because of pregnancy may complain to the AIRC that she has been unfairly dismissed.

13.107 The AIRC endeavours to settle matters by conciliation. If unsuccessful, the applicant can then choose to take action in the Federal Court. This is discussed in more detail in Chapter 8.

13.108 A number of submissions noted that complaints made under the federal or state workplace relations legislation are often dealt with more speedily than they would be by anti-discrimination bodies.

13.109 In some jurisdictions, proceeding under workplace relations legislation does not prevent later action under anti-discrimination legislation. The Queensland Anti-Discrimination Commission noted that

> [c]omplainants will often elect to pursue an application under the Queensland Workplace Relations Act first and preserve their right to proceed to the ADCQ afterwards (see ss 153 and 154 of ADA 1991). Their choice depends upon factors such as timing (the QIRC processes can sometimes be quicker but strict time lines for lodging the applications apply), outcome sought (reinstatement vs compensation for damages, stress etc).[399]

13.110 If an unfair dismissal matter is dealt with under the federal *Workplace Relations Act 1996*, there are limitations on taking further proceedings.[400]

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[397] s 50A *Sex Discrimination Act 1984* (Cth).

[398] s 111A *Workplace Relations Act 1996* (Cth). The AIRC is also required to ensure that the new awards it makes and orders affecting awards do not discriminate because of, or for reasons including, sex or pregnancy: s 143(1C)(f) *Workplace Relations Act 1996* (Cth).

[399] Anti-Discrimination Commission Queensland (Submission no 68).

[400] ss 170 HC and 170 HB *Workplace Relations Act 1996* (Cth). This prohibition ceases to apply if the first proceedings have been discontinued by the applicant or have failed for want of jurisdiction. See also paras 7.22 – 7.23; 8.12 – 8.13.

Pregnancy Guidelines 41: That the Guidelines provide some assistance in assessing the appropriateness of the jurisdiction of the Australian Industrial Relations Commission and HREOC for dealing with complaints of discrimination on the ground of pregnancy or potential pregnancy.

Occupational Health and Safety

13.111 Federal occupational health and safety legislation applying to Commonwealth employees,[401] allows Comcare[402] and the Safety, Rehabilitation and Compensation Commission[403] to ensure that the legislation is complied with.[404] A breach of the legislation may result in prosecutions under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* as well as other sanctions. State/territory occupational health and safety laws also provide for compliance monitoring and possible criminal sanctions for a breach of the legislation.[405]

[401] *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth).
[402] Comcare was established under s 68 *Safety, Rehabilitation and Compensation Act 1988* (Cth).
[403] The Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees was established under s 89A *Safety, Rehabilitation and Compensation Act 1988* (Cth).
[404] Pt 4 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth).
[405] For example, ss 29-31AE and 47 *Occupational Health and Safety Act 1983* (NSW); ss 61-68 *Occupational Health and Safety Act 1989* (ACT); ss 42-47, 52 *Occupational Health and Safety Act* 1984 (WA); ss 38 and 58 *Occupational Health, Safety and Welfare Act 1986* (SA).