

Chapter 14 - Where to from here?

Post-pregnancy issues

- 14.1 The terms of reference for this inquiry focused on the term of pregnancy, as well as potential pregnancy. They did not extend to post-pregnancy issues.
- 14.2 A significant number of submissions and consultations did, however, raise post-pregnancy issues as fundamentally connected to pregnancy. The division between pregnancy and post-pregnancy in relation to discrimination issues was seen as "...an artificial one".¹ Many employees and employers indicated that they also experienced difficulty with laws and practices relating to post-pregnancy, and considered that explanation and clarification of these issues would be of considerable benefit in the workplace.

Our more serious issues relate to the appropriate integration of women police officers after maternity leave and the effects that wishing to combine a career and family have on their career prospects, and to the effects on male police officers who wish to, or have to, take a strong involvement in family issues.²

Comments made by respondents suggest that most difficulties are experienced after the birth of the child, whilst still on leave, and on their return to work.³

Maternity leave issues cannot be separated from pregnancy – pregnancy discrimination occurs because of what happens after the pregnancy ends.⁴

Pregnancy is a workplace issue that starts well before conception and ends long after birth. It is impossible to separate pregnancy and family responsibilities. Anecdotal evidence suggests assumptions that women will resign when they have children are still widespread and continue to form the basis for not hiring women among some employers. Large numbers of women report significant difficulties when they return to work due to the lack of supportive policies and practices in workplaces. Issues like childcare, breastfeeding, flexible working hours and part-time work are still very current issues for most working women.⁵

[H]ow an organisation manages maternity leave may have an impact on how pregnancy and potential pregnancy is treated in the workplace. In this respect, the Inquiry would have benefited from a more fulsome examination of the issues.⁶

It is difficult to separate discrimination that occurs before and after the birth of a child as both are related to the pregnancy and would not have occurred but for the pregnancy. To separate would fragment and diminish the protections provided by the SDA and embodied

¹ Finance Sector Union of Australia (Submission no 51). Also Confidential (Submission no 19); Labor Council of NSW (Submission no 41); Women's Legal Services Network (Submission no 94); Women's Electoral Lobby Australia (Submission no 97).

² Australian Federal Police, Central Office (Submission no 18).

³ Australian Services Union (Submission no 85).

⁴ Council for Equal Opportunity in Employment Ltd (Focus Group, 15 December 1998).

⁵ Women's Electoral Lobby Australia (Submission no 97).

⁶ Affirmative Action Agency (Submission no 76).

in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁷

During the consultative process a large number of organisational representatives stated that they believed that the terms of reference of the inquiry were unnecessarily restrictive. Member company representatives believe that the issues were concentrated more in the areas of return to work for women rather than prior to availing of maternity leave.⁸

- 14.3 The Human Rights and Equal Opportunity Commission (HREOC) acknowledges and agrees with many of the points made. The division between pregnancy and post-pregnancy issues is somewhat artificial. However, pregnancy and potential pregnancy issues were clearly in need of and benefited from the specific and unprecedented attention they were given during this inquiry. Post-pregnancy issues need sustained and close attention and could easily support a separate inquiry.
- 14.4 Submissions and consultations that discussed post-pregnancy issues indicated that the most important issues were breastfeeding, paid maternity leave and return to work situations.
- 14.5 HREOC is pleased to note that considerable work is currently being undertaken throughout Australia regarding family friendly work policies and practices. It is important that such work include return to work after maternity leave as a priority. The Sex Discrimination Commissioner is monitoring developments and it remains a significant priority in work undertaken under the *Sex Discrimination Act 1984* (Cth) (the SD Act).
- 14.6 In relation to breastfeeding, HREOC recognises the fact that because it is not specifically covered as a separate ground under the SD Act, there is some confusion. HREOC receives a number of inquiries about breastfeeding and discriminatory treatment on that basis, which could generally be covered under other sections of the SD Act such as the prohibition on sex discrimination.⁹ To have breastfeeding specified as a separate ground of unlawful discrimination under the SD Act would, however, clarify the situation.

Recommendation 43: That the Attorney-General amend the *Sex Discrimination Act 1984* (Cth) to specifically cover breastfeeding as a ground of unlawful discrimination.

Paid maternity leave

- 14.7 A high level of interest in paid maternity leave and its effect on women with regard to deciding when and whether to have children emerged throughout the inquiry. For these reasons, accompanied by the currency of the issue both nationally and internationally, it is appropriate to discuss broad developments in this area.

⁷ New South Wales Government Submission (Submission no 99).

⁸ Council for Equal Opportunity in Employment Ltd (Submission no 104).

⁹ s 5 *Sex Discrimination Act 1984* (Cth).

- 14.8 The right of employees to 52 weeks unpaid maternity leave originated from the *Maternity Leave Test Case*, handed down by the Australian Conciliation and Arbitration Commission in 1979.¹⁰ In that case, the Commission adopted a model maternity leave clause that became a standard award condition throughout Australian industry.¹¹ The substance of this award clause has since been enacted into workplace relations legislation at the federal and state/territory level,¹² as well as industry specific legislation.¹³ As a result, all Australian employees, as defined under the relevant legislation or awards, are entitled to up to 52 weeks of unpaid maternity leave, once they have 12 months continuous service.¹⁴
- 14.9 The *Maternity Leave Test Case* was an important step in recognising the right of women to work and have a family, a right that, at the time, had become accepted internationally as a fundamental human right. The acceptance of the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) by the United Nations General Assembly in 1979 also resulted in discussion of a right to paid maternity leave as a fundamental human right commenced at an international level.¹⁵
- 14.10 Australia signed CEDAW in 1980 and ratified it in 1983, with two reservations that still stand today.¹⁶ The reservations to article 11(2)(b) concerns the right of women to be able to access paid maternity leave. Article 11(2)(b) requires that
- States Parties shall take all appropriate measures ...to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.¹⁷
- 14.11 Globally, CEDAW currently has 163 signatories. Of these signatories, 157 provide paid maternity leave, including nations from Europe, Asia, Africa, Central and South America and the Pacific. The six nations that do not provide paid maternity leave are Australia, Lesotho, New Zealand, Papua New Guinea, Swaziland and the United States of America. New Zealand is, however, currently in the process of considering the introduction of paid maternity leave for all female employees, in the form of a private member's Bill.

¹⁰ *Maternity Leave Test Case* (1979) AILR 88.

¹¹ CCH Australia *Australian Labour Law Reporter* CCH Australia Ltd Sydney Vol 2 1998, 31-190.

¹² sch 14 *Workplace Relations Act 1996* (Cth); ch 2, pt 4 *Industrial Relations Act 1996* (NSW); sch 1A *Workplace Relations Act 1996* (Cth); pt 3, ch 4 *Workplace Relations Act 1997* (Qld); s 72, sch 5 *Industrial and Employee Relations Act 1994* (SA); div 6, pt 4 *Minimum Conditions of Employment Act 1993* (WA).

¹³ See for example *Maternity Leave (Commonwealth Employees) Act 1973* (Cth); *Parental Leave (Private Sector Employees) Act 1992* (ACT).

¹⁴ See paras 12.19 – 12.26 for a discussion of the negotiation of maternity leave.

¹⁵ *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980). CEDAW was accepted by the United Nations General Assembly on 18 December 1979 but came into force internationally on 3 September 1981.

¹⁶ Reservations allow a signatory country to reserve the right not to comply with a nominated article under the Convention.

¹⁷ art 11(2)(b) *Convention on the Elimination of all Forms of Discrimination Against Women* GA Res 180 (XXXIV 1970), 19 ILM 33 (1980).

14.12 The creation of global standards for the equality of women through national guarantees of paid maternity leave accords with workplace standards set by the International Labour Organisation, particularly its *Maternity Protection Convention 1952* (ILO No 103). This Convention sets standards that aim to ensure that women are able to combine their right to work and to reproduce, safely and with equity. In its recent report on the progress of this Convention in signatory countries, the International Labour Organisation noted that

...maternity protection in the last half century has been marked by progress in law, an evolution in workplace practice and rising social expectations regarding the rights of working women during their child-bearing years. Yet the gains registered have so far failed to resolve the fundamental problem experienced by most, if not all, working women at some point in their professional lives: unequal treatment in employment due to their reproductive role.¹⁸

14.13 The International Labour Organisation considers paid maternity leave an essential element in establishing a process to overcome such unequal treatment.

As an indispensable means of protecting the health of any woman wage-earner and her child, the mother's right to a period of rest when a child is born, together with a guarantee of being able to resume work after the break with adequate means of supporting herself and her family, is the core element of any instrument seeking to reconcile women's procreative role with the demands of paid employment.¹⁹

14.14 ILO No 103 also establishes other standards relating to pregnancy in the workplace and post-birth issues with which Australia does not currently comply or agree.²⁰ HREOC notes that the International Labour Organisation has recently completed a review of ILO No 103 and produced an amended text.²¹ This text is now subject to consultation and is expected to be finalised in July 2000. HREOC welcomes these developments and encourages Australia's active consideration of the amended text with a view to its finalisation and ultimate ratification by Australia.

14.15 A small number of Australian organisations have provided paid maternity leave to their employees. A right to paid maternity leave also exists for all Commonwealth employees²² and for some other employees under awards or certified agreements.²³

¹⁸ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised) 1952 (No 103) and Recommendation 1952 (No 95) Report V(1)* International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 5. See also Women's Legal Services Network (Submission no 94).

¹⁹ International Labour Organisation *Maternity Protection at Work: Revision of the Maternity Protection Convention (Revised) 1952 (No 103) and Recommendation 1952 (No 95) Report V(1)* International Labour Conference [87th: 1999: Geneva Switzerland] 1997, 31.

²⁰ New South Wales Government (Submission no 99).

²¹ National Women's Justice Coalition (Submission no 95).

²² *Maternity Leave (Commonwealth Employees) Act 1973* (Cth).

²³ See Table 8.3.

14.16 Many Australian workers face considerable difficulty from being without their income during maternity leave. HREOC received many submissions on this issue.

As we approach the 21st Century most working women in Australia still do not have access to paid maternity leave...for most women in Australia, motherhood means substantial loss of earning and demotion and insecurity in the world of work.²⁴

No matter how progressive workplace policies and practices are, the condition of twelve month's continuous employment excludes a significant proportion of women from paid maternity leave. In 1994, 24% of employed women had been in their jobs for less than 12 months (ABS, Labour Mobility, February 1994). Furthermore, only 20% of Australian women are currently entitled to paid maternity leave (NWJC Submission to the International Labour Organisation Conference 87th Session, 1999, 3), and only 59% of public sector workplaces and 21% of private sector workplaces offer paid maternity leave (Affirmative Action Agency Annual Report 1997/98).²⁵

The relatively limited application of paid maternity leave in Australia is a strong disadvantage for pregnant women.²⁶

Organisations reporting to the Agency have found that after the introduction of paid maternity leave, retention rates improve....They recognise that there are substantial costs associated with losing an experienced and skilled staff member.²⁷

[t]he availability of paid maternity leave, family friendly policies, flexible work practices does impact on when women return to work, and whether they return full-time or part-time. One survey respondent stated that not having access to paid maternity leave was an issue for her, and she had to return to work much earlier than she wanted to due to her financial needs.²⁸

14.17 In light of these submissions and the findings of this inquiry, HREOC recommends the reservation to article 11(2)(b) of CEDAW be removed. HREOC also urges the federal Government to examine the amended text of ILO No 103. The debate amongst Australians about the management of workplace pregnancy is now starting to include paid maternity leave. It is important for government to stimulate debate and demonstrate leadership in this area.

Recommendation 44: That the federal Government remove its current reservation to article 11(2)(b) of the *Convention on the Elimination of all Forms of Discrimination Against Women* on paid maternity leave.

²⁴ National Women's Justice Coalition (Submission no 95).

²⁵ Women's Electoral Lobby Australia (Submission no 97).

²⁶ Australian Council of Trade Unions (Submission no 59).

²⁷ Affirmative Action Agency (Submission no 76).

²⁸ Women's Electoral Lobby Australia (Submission no 97).

Recommendation 45: That Australian Governments, in particular through the federal Office of the Status of Women and its state/territory counterparts, and state/territory anti-discrimination bodies, encourage broad national debate regarding the amended draft text of ILO No 103 with a view to ratifying and implementing the resultant Convention.

Recommendation 46: That the Minister for Employment, Workplace Relations and Small Business provide funding to the Sex Discrimination Commissioner to undertake economic modelling and analysis of possible paid maternity leave options. The project, to be conducted in consultation with the Department of Employment, Workplace Relations and Small Business, would also involve extensive and close consultations with all relevant interested parties.

List of Submissions

A Chopra	1
Confidential	2
Confidential	3
Australian Mines and Metals Association	4
Queensland Chamber of Commerce and Industry	5
J Cox	6
L Marteau	7
G Woolley	8
N Ozanne	9
M Hall	10
Confidential	11
S Fitzpatrick	12
Victoria Police	13
Confidential	14
L Carrad	15
Pharmacy Guild of Australia, Queensland Branch	16
Australian Federal Police, Northern Region	17
Australian Federal Police, Central Office	18
Confidential	19
Southern Cross University	20
Australian Law Reform Commission	21
Australian Reproductive Health Alliance	22
Confidential	23
M Fawkner	24
Flight Attendants Association of Australia	25
Queensland Police Service	26
Albert Park Flexi School	27

Department of Immigration and Multicultural Affairs	28
Business Women's Consultative Council, Northern Territory	29
C Sherry	30
Confidential	31
Australian Liquor, Hospitality and Miscellaneous Workers Union	32
Australian Medical Association	33
Confidential	34
Australian Manufacturing Workers' Union, Sydney Office	35
Confidential	36
Queensland Nurses' Union	37
Confidential	38
Retailers Association of Queensland	39
Families At Work	40
Labor Council of NSW	41
Australian Education Union, South Australian Branch	42
Australian Mines and Metals Association	43
Australia Post	44
Australian Nursing Federation	45
P Morpeth	46
Confidential	47
ACT Right to Life Association	48
Australian Taxation Office	49
Australian Council of Trade Unions, Queensland Branch	50
Finance Sector Union of Australia	51
Business Council of Australia	52
Community and Public Sector Union	53
Confidential	54
Australian Women in Agriculture	55
H Tuckey	56
Australian Manufacturing Workers Union, National Office	57
South Australia Police	58
Australian Council of Trade Unions	59
Job Watch Inc.	60
Association of Independent Schools of Victoria	61
Women's Action Alliance (Australia)	62
Communications Electrical Plumbing Union	63
Victorian WorkCover Authority	64
Agriculture, Fisheries and Forestry-Australia	65
Westpac Banking Corporation	66

Australian Tax Office (Supplementary Submission)	67
Anti-Discrimination Commission Queensland	68
Victorian Automobile Chamber of Commerce	69
New South Wales Teachers Federation	70
State School Teachers' Union of WA	71
Confidential	72
The Law Society of New South Wales	73
Shop, Distributive and Allied Employees' Association	74
Independent Education Union of Australia	75
Affirmative Action Agency	76
Rural Women's Unit, Agriculture, Fisheries and Forestry-Australia	77
Townsville Community Legal Service	78
Office of the Commissioner for Equal Opportunity, South Australia	79
Lend Lease Employer Systems	80
Women Lawyers Association of New South Wales	81
Premier's Council for Women, New South Wales Government	82
Department of Employment, Workplace Relations and Small Business	83
Australian Chamber of Commerce and Industry	84
Australian Services Union	85
Confidential	86
Australian Education Union	87
Working Women's Centres	88
Top End Women's Legal Service	89
Australian Business and Newcastle and Hunter Business Chamber Women's Forum	90
Confidential	91
Public Service Association of New South Wales	92
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	93
Women's Legal Services Network	94
National Women's Justice Coalition	95
National Aboriginal Community Controlled Health Organisation	96
Women's Electoral Lobby Australia	97
Office of the Status of Women	98
New South Wales Government	99
Western Australian Equal Opportunity Commissioner	100
Department of Employment, Workplace Relations and Small Business, (Supplementary Submission)	101
United Trades and Labor Council of South Australia	102
G Whitehouse	103
Council for Equal Opportunity in Employment Ltd	104

Women Barristers Association	105
Confidential	106
A Dang	107
Group Training Australia – Queensland and Northern Territory Inc	108
Australians Against Child Abuse	109

List of Consultations and Focus Groups

Focus Groups

Australian Council of Trade Unions (18 September 1998).
 Mt Isa High School (2 November 1998).
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 CEOE Ltd Employer Forum (15 December 1998).
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List of Consultations

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 Deanne Bevan, Vice President & Director of Employee Relations, McDonalds Australia Ltd (1 April 1999).
 Karen Walters, Queensland Anti-Discrimination Commissioner (20 May 1999).
 Linda Matthews, South Australian Commissioner for Equal Opportunity (3 June 1999).
 Confidential, Manager, Australian multinational (4 June 1999).
 Jenni Werner, Human Resources Manager, EDS Australia (April 1999).
 Confidential, pregnant supermarket casual employee (11 September 1998).
 Confidential, Personal Assistant (April 1999).
 Cheryl Nairn, Personnel Department, EMAIL Ltd (April 1999).

Consultants

Draft Report Consultants

Margaret Buchanan, The Buchanan Portfolio
 Jenny Earle, Women's Legal Centre Australian Capital Territory
 Phillipa Hall, New South Wales Department for Women
 Reg Hamilton, Australian Chamber of Commerce and Industry
 Rosemary Hunter, Justice Research Centre

Kathy McDermott, Department of Employment, Workplace Relations and Small Business

Issues Paper Working Group

Deanne Bevan, McDonalds Family Restaurants, NSW

Sandy Bird, State School Teachers' Union of Western Australia, WA

Roger Boland, Australian Industry Group, NSW

Therese Bryant, Shop, Distributive and Allied Employee's Association, VIC

Julie Carr, Bankwest, WA

Jenny Earle, Women's Legal Centre, ACT

Maria Dimopoulus, Association of Non-English Speaking Background Women, VIC

Andrea Durbach, Public Interest Advocacy Centre, NSW

Catherine Harris, Affirmative Action Agency, NSW

Judith Himstedt, Queensland Chamber of Commerce, QLD

Rosemary Hunter, Justice Research Centre, NSW

Chris Ronalds, Frederick Jordan Chambers, NSW

Lisa Solomon, Strategic Options, TAS

Rohan Squirchuck, Council for Equal Opportunity in Employment Limited, NSW

Karen Walters, Anti-Discrimination Commissioner, QLD

Nareen Young, Working Women's Centre, NSW

Pregnancy Reference Group (NSW)

Phillipa Hall and Danny Blackman, New South Wales Department for Women

Leah Charlson, Angeline Falk and Janet Kellor, New South Wales Anti-Discrimination Board

Gayle Robson and Shirley Woodland, Women's Equity Bureau New South Wales Department of Industrial Relations

Jude Stoddard and Juliet Corish, New South Wales Premier's Council for Women

Jenepher Surbey, Affirmative Action Agency

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Index

- Aboriginal and Torres Strait Islander Women 5.31, 10.50-10.58
- Adolescent and School aged Employees 10.69-10.78
- Adoption 12.94-12.100
- Advertising (See also Employment; Recruitment)
- liability of newspapers 11.19
 - offences and complaints of discrimination 11.6-11.12, 11.17-11.19
 - state and territory provisions 11.13-11.16
- Affirmative Action Agency
- Sex Discrimination Commissioner and 1.26, 8.93, 8.103-8.104, 13.73-13.74
 - statistics 3.9
 - systemic discrimination 4.51
- Application Forms (See Recruitment)
- Apprentices and Trainees (See Employment Categories)
- Australian Bureau of Statistics (See Statistics)
- Australian Industrial Relations Commission (See also Awards; Certified Agreements; Dismissal from Employment; Employment Categories; Workplace Relations)
- awards and 8.11, 8.14-8.27
 - award simplification and 8.18-8.27, 10.26, 12.5
 - casual workers and 10.24-10.26
 - certified agreements and 8.46-8.49, 8.69-8.70
 - Sex Discrimination Commissioner, HREOC and 8.2, 8.7, 8.10, 8.12- 13, 8.94-8.106, 8.118-8.120, 13.104-13.110
 - unfair/unlawful dismissal 8.107-8.117
- Australian National Training Authority (See Adolescent and School aged Employees; Employment Categories)
- Australian Workplace Agreements (See also Employment Advocate; Maternity Leave; Occupational Health and Safety; No Disadvantage Test; Workplace Relations) 6.6, 8.5, 8.23, 8.56-8.93
- anti-discrimination provisions to be included 8.58-8.59
 - approval by Office of Employment Advocate 8.5, 8.23, 8.60-8.62
 - how they are made 8.5, 8.56-8.62
 - statistics on approvals 8.56
- Australian Workplace Industrial Relations Survey (See Statistics)

Awards (See also Australian Industrial Relations Commission; Exemptions from SD Act; Workplace Relations)

- award simplification 8.18-8.45, 12.15
- generally 8.5, 8.14-8.45
- indirect discrimination in 8.28, 8.43
- maternity leave and 12.4-12.5
- model anti-discrimination clause 8.24-8.27
- Sex Discrimination Commissioner's power to refer discriminatory awards to the AIRC 8.94-8.106

AWIRS (See Statistics)

Breastfeeding (See also Family Friendly Practices) 4.14, 14.6

Casual Workers(See Employment Categories)

CEDAW (See International Conventions)

Certified Agreements (See also Australian Industrial Relations Commission; Exemptions from SD Act; Family Friendly Practices; Maternity Leave; No Disadvantage Test; Workplace Relations)

- approval by AIRC 8.5, 8.46-8.49
- Sex Discrimination Commissioner's power to refer discriminatory certified agreements to the AIRC 8.94-8.106
- statistics tables 8.1-8.3
- ADAM Report 8.54

Children (See Families)

Commission Agents (See Employment Categories)

Commonwealth Laws and Programs, (See also Employment Categories; Work for the Dole Scheme) 5.32

Community Development Employment Projects Scheme (See Employment Categories)

Complaints and Grievances (See also Dismissal from Employment; Employment; Occupational Health and Safety; Onus of Proof; Pregnancy; Statistics; Workplace Relations)

- accessibility of 13.16-13.18, 13.29-13.35, 13.58-13.74, 13.101
- assistance to parties 13.53, 13.39-13.41
- conciliation of complaints 13.50-13.74
- conclusions from levels of complaints 3.11-3.26
- costs of 13.8-13.11
- damages 13.9, 13.82-13.94
- dismissal from employment 13.79, 13.104-110
- harassment 12.111-12.115
- hearing under SD Act 13.36-13.97
- Human Rights Legislation Amendment Bill 1998 (Cth) 13.85-13.86

- internal employer grievance machinery 13.4-13.35
- larger organisations 13.25-13.26
- legislative amendment, need for 13.27-13.28
- outcomes of 13.87-13.94
- power relations in 13.64, 13.66-13.70
- procedures 13.29-13.35, 13.36-13.111
- punitive damages 13.92-13.94
- reasons for not reporting discrimination 3.11-3.26
- requirements for successful procedures 13.29-13.35
- small business and 13.19-13.24
- state/territory pregnancy discrimination complaints 3.40-3.48, 13.98-13.103
- time limits on making complaints 13.42-13.49
- workplace relations 13.109

Constitutional Powers and Limitations 7.2, 7.45, 7.60-7.61, 13.83-13.86
 - Brandy v Human Rights and Equal Opportunity Commission 13.84-13.86

Contract Workers (See Employment Categories)

Culturally and Linguistically Diverse Backgrounds, Women from 10.90-10.96

De facto Relationships 10.99

Definitions

- benefit 5.26-5.29, 6.7-6.12
- casual employment 10.5-10.6, 10.21-10.28
- certain categories of employment 5.1-5.31
- condition, requirement or practice 4.31-4.36
- detriment 6.27-6.39
- direct and indirect discrimination 4.18-4.45
- direct discrimination in Western Australia 7.10
- disadvantage in indirect discrimination 4.37-4.39
- employment 5.25-5.31
- employment agency 11.20-11.21
- indirect discrimination in NSW 7.12-7.15
- less favourable treatment 4.27-4.28
- reasonableness test in indirect discrimination
- special measures 5.63-5.66
- systemic discrimination 4.46-4.51
- terms and conditions of employment 6.6

Demographic Research (See Statistics)

Disabilities, Women with 10.97-10.98

Dismissal from Employment(See also Employment Categories, Workplace Relations)

- casuals 10.17-10.28
- examples of pregnancy discrimination 4.21, 4.23, 6.13-6.26, 10.36
- common area for complaints 6.16-6.23

- SD Act prohibitions 6.13-6.14, 8.117, 10.102
- requirements of Workplace Relations Act 1996(Cth) 8.11, 8.107-8.117
- unfair/unlawful dismissal, remedies 8.107-8.117

Double Dipping (See Duplication of remedies)

Draft Code of Practice and Guidelines on Pregnancy and Work (NSW) 7.67, 9.7, 9.35-9.36

Duplication of Remedies 7.22-7.23, 7.49-7.51, 8.109-8.117, 13.98-13.111

Employment (See also Advertising; Employment Categories; Recruitment)

- access to benefits of (See also Maternity Leave; Family Friendly Practices) 6.4, 6.7-6.12
- employment/recruitment agencies 5.7, 11.1-11.42, 11.46
- promotion or transfer 6.4, 6.10-6.11, 6.40-6.41
- redesign of job to accommodate needs of pregnant worker 9.1-9.70, 12.71-12.64, 12.77-12.90
- severance payments 6.8
- sick leave 12.65-12.71, 12.91-12.92
- subjecting employees to detriment in 6.4, 6.27-6.39
- temporary staff agencies 5.13, 11.21, 11.26
- termination of (See Dismissal from Employment)
- terms and conditions of 6.4, 6.6
- training (See also Employment Categories) 6.8
- transfer to other duties 6.8, 6.40-6.41, 12.30-12.40, 12.47-12.50, 12.78
- uniforms 6.41, 8.72, 12.62

Employment Advocate (See also Australian Workplace Agreements; No Disadvantage Test) 8.5, 8.23, 8.56-8.62, 8.69, 8.86, 8.90-8.93

Employment Agencies (See Employment)

Employment Categories (See also Workplace Relations)

- apprentices and trainees 5.5, 5.28, 10.79-10.87
 - survey of employee attitudes regarding pregnant or potentially pregnant apprentices 10.85
 - Australian National Training Authority 10.87
- casual workers 5.5, 5.8-5.9, 6.4, 10.5-10.39
- commission agents 5.1-5.7, 5.10-5.14, 6.4-6.7, 6.13, 6.27
- contract workers 5.1-5.7, 5.10-5.14, 6.4-6.7, 6.13, 6.17, 6.27
- domestic duties/residential care of children 5.46-5.48, 7.28, table 7.1
- fixed term employment and contract workers 5.1-5.7, 5.10-5.14, 6.4-6.7, 6.13, 6.27, 10.40-10.49
- licensees and franchisees 5.33-5.36
- partnerships 5.10-5.14, table 7.1
- part time employment 5.4, 10.2, 10.8, 10.12-10.15, 10.27, 10.31, 10.76, 10.91, 12.43
- school-aged employees 5.28, 10.69-10.87

- shift work 5.5, 12.49, 12.57-12.60, 12.84
- unpaid (including voluntary) workers 5.6, 5.25-5.31, table 7.1

European Union

- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex 6.24-6.26, 13.79-13.81

Exemptions from the SD Act (See also Workplace Relations)

- ALRC review of 5.38, 5.43, 5.56
- awards and orders of courts, tribunals and HREOC 5.58
- certified agreements 5.58
- domestic duties/residential care of children 5.46-5.48, 7.28, table 7.1
- educational authorities 5.41-5.45, 5.49-5.56, 7.47, table 7.1
- employment in lead industry (See also Lead Industry) 5.60, 9.83-9.84
- generally 5.37-5.38
- genuine occupational qualification 5.57, 9.38-9.47
- HREOC Review of 5.38, 5.43, 5.45, 5.56
- inconsistent legislation 5.44-5.45, 5.58, 7.1-7.7
- inherent requirements of the job 8.8, 8.16-8.17, 8.58, 9.45-9.47
- NSW exemption for recruitment 7.30-7.33, 11.15
- occupational health and safety exemptions in state/territory legislation 9.38-9.47, 12.33-12.35
- religious beliefs/religious schools 5.49-5.56
- rights and privileges connected with pregnancy or childbirth 5.39-5.40
- state/territory government employees (See also States and Territories) 5.41-5.45
- temporary exemptions 5.59-5.62

Families (See also Family Friendly Practices)

- demographic research 2.7, 2.21-2.33
- economic consequences of having 2.34-2.41
- effect of work practices on choices to have children 2.25-2.41
- exemption for domestic duties/residential care of children 5.46-5.48
- fertility rates 2.24
- partners' issues 10.99-10.110

Family Friendly Practices (See also Families; Maternity Leave) 2.16, 2.32, 3.9

- family-friendly provisions in certified agreements 8.52-8.55, 8.75, 8.78, 8.93, tables 8.1-8.3

Fertility

(See also Families; Occupational Health and Safety)

- In-vitro fertilisation 4.14, 12.91-12.93
- fertility treatment and adoption 12.91-12.100

Flexible Work Practices (See Family Friendly Practices)

Forum Shopping (See Duplication of Remedies)

Guidelines

- enforcement of 1.21-1.27
- need for 1.4, 1.19
- overview of 1.20, 1.35
- requirement in Terms of Reference 1.4, 1.18
- statutory power for 1.21-1.25
- workshops proposed 1.26-1.27

Harassment

- a workplace hazard 9.12-9.15
- detriment in employment 6.32, 6.36
- liability for 12.111-12.115
- Sexual Harassment Code of Practice 13.31

Hazards in the Workplace (See Occupational Health and Safety)

Human Rights Legislation Amendment Bill 1998 (See Complaints and Grievance Procedures)

International Conventions(See also European Union)

- Convention on the Elimination of All Forms of Discrimination Against Women 2.3-2.4, 5.44, 5.59, 7.2, 13.92-13.94
- Discrimination (Employment and Occupation) Convention (ILO No 111) 2.5, 8.17
- Maternity Protection at Work: Revision of the Maternity Protection Convention (ILO 103) 9.82, 14.12-14.14, 14.17

Interviews (See Recruitment)

Judges 5.15-5.24

Lead Industry (See also Exemptions from SD Act; Occupational Health and Safety)

- Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd & Others 9.48-9.51

Licensees and Franchisees (See Employment Categories)

Maternity Leave (See also Awards; Family Friendly Practices; Pregnancy)

- awards, AWAs and certified agreements 8.39, 8.91, table 8.1, 12.4-12.5, 12.20
- AWIRS 1995 survey on paid maternity/paternity leave 3.4-3.5
- casuals 10.10-10.11, 10.16, 10.27-10.28, 10.33-10.34
- death of the unborn child 12.72-12.76
- denial or limitation of access to benefits 6.10-6.11
- discrimination in recruitment because of (See also Recruitment) 11.3, 11.33, 11.39-11.40
- medical advice/certificates 12.78
- negotiating maternity leave 12.19-12.26
- obligations of employer 12.13-12.18
- obligation to inform employer about intentions 12.4-12.12
- paid maternity leave 14.7-14.17

- relationship to length of service 12.23-12.26
- short term contracts 10.40-10.47
- small business and 12.101-12.110
- requirements under the Workplace Relations Act 1996(Cth) 12.24, 12.78, 12.5

Medical Advice/Examinations (See also Maternity Leave) 9.16-9.31, 11.59-11.66, 12.77-12.90, 12.92

Members of Parliament 5.15-5.24

Men

- male fertility 10.108-10.110
- need for equal application of laws on work and family 2.11-2.20
- partners of pregnant women 10.99-10.110

Migrant and Refugee Women (See Culturally and Linguistically Diverse Backgrounds, Women of)

Miscarriage, Termination or Still Birth 12.71-12.76

National Occupational Health and Safety Commission (See also Occupational Health and Safety) 9.31, 9.49-9.50, 9.70

No Disadvantage Test (See also Australian Workplace Agreements; Certified Agreements; Workplace Relations) 8.23, 8.48-8.50, 8.70

Non-English Speaking Background, Women from (See Culturally and Linguistically Diverse Backgrounds, Women of)

Non-traditional Families 10.88-10.89

Occupational Health and Safety (See also Exemptions from SD Act; Lead Industry; National Occupational Health and Safety Commission; Pregnancy)

- anti-discrimination laws, relationship with 1.21-1.31, 9.48-9.70, 12.27-
- codes and standards of practice 7.65-7.69, table 7.1, 9.2, 9.35-9.36, 9.49-9.53
- complaints and prosecutions 13.111
- coverage in AWAs 8.57, 8.62
- factors affecting fertility 9.71-9.82
- factors affecting male fertility 10.108-10.110
- generally 9.1-9.84
- NSW Draft Code of Practice and Guidelines on Pregnancy and Work 7.67, 9.35, 12.46, 13.111
- role of doctors 9.16-9.31, 11.59-11.66, 12.77-12.90, 12.92
- rosters 12.57-12.60
- seating 12.51-12.54
- sick leave 12.65-12.70
- small business concerns re accommodating workplace pregnancy 12.101-12.110
- state/territory workplace relations laws 1.29-1.31
- toilet breaks 12.55-12.56

- transfer to other duties 12.47-12.50

Onus of Proof

- in discriminatory advertising complaints and offences 11.9, 11.28
- in indirect discrimination 4.40-4.45, 13.76-13.78

Part time Employment (See Employment Categories)

Partnerships (See Employment Categories)

Partners of Pregnant Women (See also Men) 10.99-10.110

Post-Pregnancy issues

(See Family Friendly Practices; Maternity Leave)

Potential Pregnancy

- definition of 4.1-4.5
- coverage in state/territory anti-discrimination Acts 7.16-7.19

Pregnancy

- characteristics of 4.6-4.17
- complaints of discrimination, statistics 3.27-3.48
- coverage in state/territory anti-discrimination Acts 7.8-7.9
- definition of 4.6-4.17
- discrimination on basis of assumed pregnancy 4.1-4.5
- discrimination on basis of occupational health and safety risks 9.1-9.84, 12.27-12.64
- maternity leave as a characteristic of 4.10-4.17
- miscarriage or other termination of 12.71-12.76
- occupational health and safety provisions relating to 9.1-9.84, 12.27-12.64
- requests for medical information about 5.40, 9.16-9.31, 11.59-11.66, 12.77-12.90, 12.92
- rights and privileges connected with pregnancy or childbirth 5.39-5.40
- sections of SD Act relevant to discrimination on ground of 4.6-4.17

Recruitment (See also Advertising; Employment; Maternity Leave) 4.24, 7.30-7.33, 11.1-11.66

- application forms 11.11, 11.52, 11.58
- interviews 11.20-11.58
- medical examinations connected to 11.59-11.66
- NSW exemption re hiring of pregnant women 7.12-7.15, 11.36-11.38
- questions at interview 11.43-11.58
- selection processes 11.20-11.66

Religious Beliefs and Institutions

(See Exemptions; Workplace Relations)

Research

- need for 3.2-3.3, 3.10

- undertaken during inquiry 1.12-1.17, 3.1-3.10, 3.49-3.51

Rural and Remote Areas 10.59-10.68

Schools (See Adolescent and School Aged Employees; Exemptions)

Sex Discrimination Commissioner (See also Awards; Workplace Relations)

- Affirmative Action Agency and 1.26, 8.93, 8.103-8.104, 13.73-13.74
- Australian Industrial Relations Commission and 8.2, 8.7, 8.10, 8.12-8.13, 8.94-8.106, 8.118-8.120, 13.104-13.110
- consultations during inquiry 1.12-1.17
- role as auditor of workplace relations system 8.90-8.91

Sexual Harassment (See Harassment)

Sick Leave (See Employment)

Single-sex Relationships (See Partners of Pregnant Women)

Small Business

- accommodating workplace pregnancy and 12.101-12.110
- anti-discrimination legislation exemptions 7.34-7.39
- internal complaints/grievance mechanisms, issues concerning 13.19-12.24

Special Measures

- definition 5.63-5.66
- rights and privileges connected with pregnancy or childbirth 5.39-5.40

States and Territories

- complaint-handling under anti-discrimination legislation (See also Complaints and Grievances) 13.98-13.103
- exemptions inconsistent with SD Act 7.2-7.7
- state/territory government employees and SD Act 5.41-5.45
- statistics on pregnancy discrimination complaints 3.40-3.48
- temporary exemptions and 5.62

Statistics (See also Australian Workplace Agreements; Certified Agreements; Maternity Leave)

- Australian Bureau of Statistics 3.6-3.8
- AWIRS 1995 3.4-3.5
- casual employees in the workforce 10.7-10.15
- casual teachers in NSW 10.12
- complaints received 3.11-3.12, 3.27-3.51
- conclusions from levels of complaints 3.11-3.26
- demographic research 2.21-2.33
- extent of discrimination greater than statistics indicate 3.11-3.26
- family-friendly provisions in enterprise agreements 3.9, tables 8.1-8.3
- fertility patterns 2.21-2.33

- HREOC statistics on complaints and inquiries received 1.6-1.7, 3.11-3.12, 3.27-3.51
- lack of 3.2-3.3, 3.29, 3.51
- participation of women in workforce 2.7-2.10
- reasons for not reporting discrimination 3.11-3.26
- state/territory pregnancy discrimination complaints 3.40-3.48
- study of employment of women of child-bearing years 10.10
- study of industry rates of fixed term employment 10.48
- survey of employee attitudes regarding pregnant or potentially pregnant apprentices 10.84-10.85
- survey of private sector awareness of discrimination 3.8-3.9
- survey of recruitment practices in Australian firms 11.23

Statutory Appointees 5.15-5.24

Systemic Discrimination (See also Affirmative Action Agency) 2.11-2.20, 4.46-4.51

Terms of Reference

- and background to inquiry 1.1-1.5
- requirement for Guidelines 1.18

Uniformity of Legislation 7.62-7.69

Unions 8.87-8.88

Unpaid Workers (See Employment Categories)

Vicarious Liability 5.33-5.36, 13.4-13.35

Work for the Dole Scheme (See also Employment Categories) 5.30

Workplace Relations (See also Australian Industrial Relations Commission; Awards; Australian Workplace Agreements; Certified Agreements; Maternity Leave)

- agreements, strengths and weaknesses of process 8.63-8.93
- anti-discrimination laws and 7.51, 7.67, 8.94-8.120
- casual and part-time workers
 - access to unfair/unlawful dismissal remedies 5.8-5.9, 10.17
 - characterisation/classification of 10.21-10.28
- choice of remedies 13.104-13.110
- coverage of Victorian employees 8.14
- coverage of territory employees 8.14
- employee attitudes to workplace reform 8.28-8.45, 8.63-8.93
- exemption for inherent requirement of the job 8.16-8.17
- exemption for religious institutions 5.49-5.46, 8.16
- medical advice/certificates 12.78
- pregnancy discrimination protection 8.8-8.27, 8.46-8.62, 8.107-8.117
- principal object of legislation 8.4-8.5
- role of Australian Industrial Relations Commission 13.104-13.110

- safety net requirements 8.36-8.45
- Sex Discrimination Commissioner and 8.90-8.91
- state/territory workplace relations laws 8.14, 8.51, 8.58, 8.62, 8.112-117
- unfair/unlawful dismissal, remedies 5.8-5.9, 8.107-8.117, 10.17, 13.104-13.110

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