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Committee Secretary
Standing Committee on Family and Human Services
House of Representatives
Parliament House
CANBERRA ACT 2600

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Dear Sir/Madam

SUBMISSION INTO THE INQUIRY INTO BALANCING WORK AND FAMILY

This submission responds to one of the terms of reference, namely (2) *"making it easier for parents who so wish to return to the paid workforce"*. My submission addresses the legal framework that impacts on the rights of working parents and employers.

For the reasons outlined in this submission, there is a need for clear, simple and uniform laws that set out the rights of employees and employers. The law should provide practical and workable solutions for both working parents and employers. The ability of parents to return to the paid workforce and the employer's ability to facilitate their return, would be enhanced by harmonising State, Territory and Commonwealth industrial and anti-discrimination laws.

The current laws need to be reviewed to address:

- who is entitled to parental leave;
- the duration of parental leave;
- the rights of an employee on returning to work and to their former position;
- returning to part-time work or flexible working arrangements; and
- providing effective remedies for employees when problems arise.

Further, it is important to avoid the trap of assuming that the issue is essentially a women's issue. The legal framework should facilitate *parental responsibilities* in

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relation to juggling work and childcare. The legal provisions should enable men to access flexible working arrangements and men should be encouraged to use such arrangements.

Based on the operation of the Commonwealth *Sex Discrimination Act*, I fear that if the legal framework accommodates only a woman's right to flexible working arrangements, then parenting and flexible working arrangements will be viewed as a "women's issue". The law should not serve to marginalise women, nor should it create an expectation that flexible work is only for women.

This submission addresses the following matters:

1. Relevant legal framework
2. International obligations
3. Parental leave entitlements
4. Returning to work following parental leave
5. Part-time and flexible working arrangements

1. Relevant legislative framework

1.1 There is a myriad of Commonwealth and State laws which regulate employees' rights and employers' obligations with respect to parental leave, carer's/family responsibilities and right to return to work.

1.2 The following laws touch upon the rights of employees to take parental leave, return to their previous position following parental leave and protection against termination of employment and discrimination in employment.

Commonwealth enactments	**Issue addressed**
Workplace Relations Act 1996 (Cth) Part VIA Division 5: sections 170KA to 170KC and Schedule 14 and section 93A.	Parental leave, protection against termination of employment because of pregnancy and absence on parental leave and right to return to the same position. Section 93A provides that in performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to: *(a) preventing discrimination against workers who have family responsibilities; or (b) helping workers to reconcile their employment and family responsibilities.*
Maternity Leave (Commonwealth Employees) Act 1973 (Cth)	Rights of Commonwealth employees.
Sex Discrimination Act 1984 (Cth)	Prohibition on sex, pregnancy and potential pregnancy discrimination in employment generally and for family responsibilities,

	then is a prohibition on termination of employment.
Human Rights and Equal Opportunity Commission Act 1986 (Cth) *Human Rights and Equal Opportunity Commission Regulations* 1989 (Cth).	Limited protection against discrimination in 'employment and occupation' on the ground of sex but not pregnancy or family responsibilities.
State enactments	
Industrial Relations Act 1996 (NSW)	Parental leave, part-time work, the right to return to same position.
Anti-Discrimination Act 1977 (NSW).	Prohibition on sex, pregnancy and carers' responsibility discrimination in employment.
Equal Opportunity Act 1995 (Vic)	Prohibition on sex, pregnancy, breastfeeding, and parental status discrimination in employment.
Industrial Relations Act 1999 (Qld)	Parental leave and the right to return to same position.
Anti Discrimination Act 1991 (Qld)	Prohibition on sex, pregnancy, breastfeeding, parental status and family responsibility discrimination in employment.
Industrial Relations Act 1984 (Tas)	Protection is limited to an employee who is not otherwise covered by an award or registered agreement to minimum conditions, so that in the case of parental leave, the lowest amount of parental leave specified in any award.
Anti Discrimination Act 1998 (Tas)	Prohibition on sex, pregnancy, breastfeeding, parental status and family responsibility discrimination in employment.
Industrial And Employee Relations Act 1994 (SA)	Parental leave, part-time work in lieu of leave, the right to return to same position.
Equal Opportunity Act 1984 (SA)	Prohibition on sex and pregnancy discrimination in employment.
Equal Opportunity Act 1984 (WA)	Prohibition on sex and pregnancy discrimination in employment.
Parental Leave (Private Sector Employees) Act 1992 (ACT)	Parental leave.

Discrimination Act 1991 (ACT)	Prohibition on sex, pregnancy, breastfeeding, parental or carer status and relationship discrimination in employment.
Anti- Discrimination Act 1992 (NT)	Prohibition on sex, pregnancy, breastfeeding, and parenthood discrimination in employment. Also failure to accommodate a special need based on these attributes.

1.4 There is a need to review all of the relevant statutory entitlements to ensure that they operate consistently.

1.5 In addition to the statutory rights, parental leave and flexible working arrangements on return from leave may also be found in the provision of industrial awards, industrial agreements, and workplace policies.

1.6 As a result, the statutory provisions provide the minimum standards, but the rights of employees and the obligations of employers differ from industry to industry and even within a particular workplace.

2. International laws

2.1 The Commonwealth laws rely, in part, on the Commonwealth's external affairs power to give effect to several international human rights treaties.

2.2 The *Workplace Relations Act* relies on ILO 156: *Workers with Family Responsibilities Convention*, 1981 (set out in Schedule 12 of the Act) and ILO Recommendation No. 165: *Workers with Family Responsibilities Recommendation*, 1981.

2.3 The key provisions of ILO 156 are articles 4 and 5, which provide:

> ***Article 4***
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> *With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken-*
>
> *(a) to enable workers with family responsibilities to exercise their right to free choice of employment; and*
>
> *(b) to take account of their needs in terms and conditions of employment and in social security.*
>
> ***Article 5***
>
> *All measures compatible with national conditions and possibilities shall further be taken-*
>
> *(a) to take account of the needs of workers with family responsibilities in community planning; and*
>
> *(b) to develop or promote community services, public or private, such as child-care and family services and facilities.*

2.4 The *Sex Discrimination Act* relies on the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 and ILO 156: *Workers with Family Responsibilities Convention*, 1981 (only with respect to section 7A and 14(3A) of the Act).

2.5 The *Sex Discrimination Act* relies on ILO 156 only to a limited extent in relation to termination of employment. However, it would be possible to expand the scope of this Act to provide rights to men and women with family responsibilities generally beyond just the remuneration of employment.

2.6 There are also specific ILO conventions dealing with maternity leave. These conventions include provision for paid maternity leave and a range of other entitlements: see *Convention concerning the employment of women before and after childbirth,* 1919 (No. 3), *Maternity Protection Convention* (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95) and the most recently the Maternity *Protection Convention*, 2000 (ILO 183) and *Maternity Protection Recommendation*, 2000. Australia is not party to these ILO conventions. If Australia did consider becoming a party to the convention it could provide a source of legislative power for the Commonwealth to enact national standards.

2.7 The *United Nations Convention on the Rights of the Child* is also relevant if these issues are viewed from the perspective of the child's interests. Article 3 of the Convention entrenches the 'best interests' principle where actions involve children. Article 3 provides:

> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
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> *2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
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> *3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*

2.8 I would ask the Committee to consider these internationally recognised standards in relation to the legal framework. In my submission, the Australian laws should reflect the internationally recognized standards. Further, by implementing the international standards, the Commonwealth is in a position to ensure that these important rights are protected on a national basis. This has been done in relation to ILO 156 and the *Workplace Relations Act* but there is scope for extending those protections.

3. Right to parental leave

3.1 In summary, the expression 'parental leave' is an umbrella term covering maternity leave for women (up to 52 weeks leave) and paternity leave for men (either 1 week [short paternity leave] or up to 52 weeks [long paternity leave]).

3.2 All jurisdictions require parental leave to be taken during the child's first year. A *female employee* who gives birth to a child may access maternity leave up to 52 weeks. Maternity leave is not compulsory and an employee cannot be forced to take leave for any particular period of time.[1] A *male employee* whose spouse gives birth to a child may access paternity leave. The paternity leave may involve one week's leave at the time of the birth or a longer period, up to 52 weeks if the male spouse is the primary care-giver during the first year of the child's life. Long paternity leave operates on the basis that the mother is not taking maternity leave at the same time as her spouse takes paternity leave. Parents are only able to take simultaneous parental leave for the week following the birth of the child.

3.3 The statutory rights provide that parental leave is *unpaid* leave taken by either or both parents immediately before and after the birth of a child.

3.4 Parental leave is subject to a number of qualifications with respect to gender, the type of employment, the length of service prior to taking leave and providing proper notice and medical certificates.[2] While the statutory entitlement appears broad and comprehensive, it is not. The following paragraphs note the areas where the current laws are inadequate or problematic.

(1) There are no statutory rights for workers who are not 'employees'. *Employee* for the purpose of the *Workplace Relations Act* includes part-time employees but excludes casual or seasonal employees.[3] Consideration should be given to providing rights to other classes of workers such as casual workers, contractors, commission agents and partners. These workers have rights in relation to anti-discrimination laws but not under the industrial laws. There is a need for consistency between the discrimination and industrial laws in this area.

(2) The employee must have 12 months continuous service before she or he is eligible for parental leave. While there is no obligation on an employer to provide parental leave where the employee has not

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1 The exceptions being where safety concerns exist and the employee may be transferred to a safe position for part of the pregnancy or where no positions are available, the leave may commence prior to the birth of the child.

2 See Schedule 14, clauses 3(2), 14(1) and 15(1) of the *Workplace Relations Act.*

3 *Parental Leave - Casual Employees Test Case* Print 904631, 31 May 2001 at paragraph 8 - the AIRC held that parental leave should extend to an *eligible casual employee* which is *a casual employee employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.*

completed 12 months service, the employer is often placed in a difficult position because the employer must also ensure that he or she does not discriminate against the employee, or terminate an employee because she is pregnant or has family responsibilities. There are inconsistencies between industrial laws and anti discrimination laws on the treatment of employees in these circumstances.

(3) The statutory protections provide rights to heterosexual couples. *Spouse* for the purpose of the State and Commonwealth enactments includes a 'de-facto' spouse but does not include a same-sex partner. Where the family unit has same-sex parents they have no right to simultaneous parental leave. The exclusion of same sex couples is inconsistent with State and Territory anti-discrimination laws.[4]

(4) The current laws are highly prescriptive as to when and how variations are made to the length of parental leave. These laws need to provide certainty for employees and employers while maintaining flexibility.

(5) While the employee may elect the length of leave when applying for parental leave[5], the parental leave cannot extend beyond the year after a child is born unless the employer agrees. In many cases, a family would like the option of each parent using parental leave to care for the child. If each parent were able to access parental leave consecutively, this would provide families with flexibility in their child care arrangements. If, for example, the mother used the first year and when she returned to work the father used his parental leave, the family would be able to use parental leave for two years after the birth of the child. This is not an option under the current provisions.

(6) Parental leave is unpaid. There would be benefits to the parents to have access to paid parental leave in accordance with the ILO Conventions.

(7) The discrimination and industrial laws operate inconsistently as to the treatment of employees on parental leave. Parental leave does not break an employee's continuity of service. However, parental leave is not to be taken into account in calculating an employee's period of service for any purpose, unless there is a specific provision in an award, industrial agreement, contract or agreement. In effect, employees on leave do not accrue other leave entitlements or entitlements to any payments such as superannuation or bonuses. The only qualification to this provision is the operation of discrimination laws. The discrimination laws operate even when the employee is absent from the workplace. The temporary absence from work because of parental leave does not mean that the employer's usual obligations cease. For example, an employee should not be overlooked in relation to bonus payments or other payments made during the time she is on leave.

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4 There is no relevant Commonwealth anti-discrimination law which addresses these circumstances.

5 There is no minimum leave and the maximum statutory entitlement is 52 weeks.

3.5 It is not possible in this short submission to address the inconsistencies between the State and Commonwealth laws and then between the industrial and discrimination laws. Suffice is to say that these inconsistencies create uncertainties for employees and burdens for employers. Ideally, there should be one law which deals with both the industrial and discrimination aspects of parental leave.

4. Returning to work

Returning to the position held by the employee immediately before leave

4.1 An employee is entitled to return to work after parental leave to the position held by the employee immediately before proceeding on leave. An employer who does not make available to an employee a position, to which the employee is entitled, is guilty of an offence in some States.

4.2 However, if the position no longer exists but there are other positions available that the employee is qualified for and is capable of performing, the employee is entitled to be employed in a position as nearly as possible comparable in status and pay to that of the employee's former position. The source of this right is the *Workplace Relations Act* and various State enactments.

4.3 These provisions beg the question – what does 'position' mean? The legislation does not define what 'position' means, so where there is a dispute between the employee and employer about returning to a former position, the question is often resolved by a court. However, while the industrial laws provide the right to return to the former position, the industrial laws do not provide a remedy or means of enforcing the right. In these circumstances, employees have resorted to the discrimination laws to enforce a right to return to the former position, notwithstanding that the discrimination law is not the vehicle by which industrial laws are generally enforced.[6]

4.4 There is a need for the industrial laws to provide remedies for employees where a dispute arises over the position to which an employee returns following parental leave.

Part-time work or flexible working arrangements post parental leave

4.5 As noted above, the industrial laws only provide a right to return to the former position. The industrial laws do not deal with the circumstances of returning to work to a different position or on different terms, such as part-time work. An exception is section 76 of the *Industrial Relations Act 1996 (NSW)*[7] which provides that employees who are covered by NSW industrial instruments may negotiate part-time work with their employers but this is limited to a specific class of employees in New South Wales.

4.6 In the absence of a provision in the relevant award or industrial instrument or contract of employment, an employee cannot demand or expect to be able to

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6 See *Thomson v Orica* (2002) EOC 93-227; (2002) 116 IR 186.

7 see generally Part 5 of the *Industrial Relations Act NSW* and see also the State Part-Time Work Case [1998] NSWIRComm 143 (26 March 1998).

work part-time. There is nothing in either the discrimination or the industrial laws that guarantee an employee a right to return to part-time work or flexible working arrangements following a period of parental leave. So, for example, if the employee was employed on a full-time basis before taking leave, then that is the full-time position to which she is entitled to return.

4.7 In addition to part-time work or reduced hours of work, other aspect of flexible working arrangements may include the allocation of work, shifts and rosters, allocation of annual leave, the opportunity to job share, the location of work, the ability to work from home, and take time off work to attend to various carer's commitments.

4.8 An employee's 'right' to part-time work[8] following parental leave is not automatic. Likewise, there is no right to flexible working arrangements. Any right to work part-time or in a manner that departs from the usual working practices of the employer depends upon a number of factors. These include:

- What policies and/or practices exist in the workplace with respect to part-time work or other flexible arrangements?
- Is the request for part-time work a request for permanent or temporary part-time?
- Is there a relevant industrial agreement guaranteeing part-time or flexible work arrangements?
- Were any representations or promises made by the employer about the availability of part-time work?
- What is the nature of the job and is it a job which can be performed on a part-time basis?
- What are the operational requirements of the employer's business and can part-time work be accommodated?

4.9 Many problems can be overcome if the employer has policies in place which provide a clear statement of whether part-time work will be available, and if part-time work is available, when and how an employee may access part-time work. However, there is no obligation on employers to have such policies in place and the current statutory provisions do not encourage employers to adopt policies and practices which contemplate temporary or permanent flexible working arrangements for their employees.

4.10 Notwithstanding the absence of express rights to part-time or flexible working arrangements, the discrimination laws have been used by employees to challenge employers who refuse part-time work or flexible working arrangements. The employees have argued that an employer's refusal to allow part-time work gives rise to indirect discrimination on the grounds of sex and/or family/carer's responsibilities.

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[8] For the purpose of this discussion, part-time work means working less than the standard full-time hours, job-sharing arrangements or flexible working hours.

4.11 Indirect discrimination is unlawful under anti-discrimination laws. Indirect discrimination generally involves imposing an unreasonable condition or requirement upon an employee. If the employee cannot comply with the condition or requirement because she is woman or because of his or her family responsibilities, but a "substantially higher proportion" of men or employees with family responsibilities can comply, then the imposition of that condition or requirement is unlawful unless it is reasonable in all the circumstances.

4.12 The requirement to work full-time has been treated as a 'condition' or 'requirement' for the purpose of indirect discrimination. Whether the condition or requirement is reasonable is determined on a case by case basis. The first significant decision which found that the requirement to work full-time was indirect discrimination on the ground of sex was *Hickie v Hunt & Hunt* (1998) EOC ¶92-910 decided in March 1998. The case concerned a partner of a law firm who wanted to work three days per week on her return from maternity leave for an extended period of time. The firm did offer part-time work, but considered that the indefinite nature of Ms Hickie's proposed part-time work was not compatible with her responsibilities as a partner.

4.13 At paragraph 6.17.8, Commissioner Evatt said:

> *The statement that he saw her inability to commit to a date for return to full time work as a "major hurdle" is in my view sufficient to establish that he was imposing a condition on Ms Hickie. This statement, his expressed doubt as to whether she could run a practice working three days a week, together with the fact that Ms Hickie felt that Mr Forbes-Smith was pressuring her to return full time, in my view subjected her to a requirement or condition or practice, namely to resume full time work in order to maintain her position.*

4.14 The complaint succeeded because the Commission accepted that the requirement to work full time was likely to disadvantage women compared to men. The Commissioner noted the arguments as follows:

> *6.17.9 The respondent argues that the complainant led no evidence to show that women were likely to be disadvantaged by the requirement or condition, and no statistical evidence to show that more men than women can work five days a week. The Commission, it is submitted, cannot take judicial notice of these matters. Therefore there is no basis for a finding that the requirement would result in such disadvantage.*
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> *6.17.10 Although no statistical data was produced at the hearing, the records produced by Hunt and Hunt suggest that it is predominantly women who seek the opportunity for part time work and that a substantial number of women in the firm have been working on a part time basis.* ***I also infer from general knowledge that women are far more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities.*** *In these circumstances I find that the condition or requirement that Ms Hickie work full-time to maintain her position was a condition or requirement likely to disadvantage women. (emphasis added)*

4.15 This approach has been followed in subsequent cases[9] where courts and tribunals have accepted that women cannot comply with a requirement or condition to work full-time and that a substantially higher proportion of men can comply with a requirement to work full-time. In *Mayer v A.N.S.T.O.* [2003] FMCA 209, the Court found:

> *[The] ... relevant condition or requirement was that the applicant work full-time. Such a condition or requirement is likely to have the effect of disadvantaging women because, as I have noted, women have a greater need for part-time employment than men. That is because only women get pregnant and because women bear the dominant responsibility for child rearing, particularly in the period closely following the birth of a child.*

4.16 On one hand, the discrimination laws have been a means of securing part-time and flexible working arrangements that are not provided by industrial law.

4.17 On the other hand, the discrimination laws do not provide express rights to part-time work. It is case-by-case assessment of whether it is unreasonable to require an employee to work full-time. In this respect, the discrimination laws do not provide certainty for either employee or employer.

4.18 In my experience, resort to discrimination law often involves lengthy and expensive litigation. By the end of the litigation the employment relationship has usually ceased and the opportunity to put in place part-time arrangements has long passed.

4.19 A further problem with relying on discrimination law, particularly the Commonwealth *Sex Discrimination Act*, is that it operates on the basis that it is women who require part-time work. This may be so where women are the primary carers for babies and infants but it is not always the case, particularly for older children. The decisions under the *Sex Discrimination Act*, which unlike the State laws does not provide for discrimination on the ground of family responsibilities, means that the 'right' to part-time or flexible work is only a right which women may claim.

4.20 The *Sex Discrimination Act* should be amended to include discrimination on the ground of family responsibilities in all aspects of employment, not just termination. If the Act was amended it would operate consistently with the *Workplace Relations Act* and most State and Territory discrimination enactments. Unlike the limited operation of the *Sex Discrimination Act*, the *Anti-Discrimination Act* does provide general protections against carer's responsibilities discrimination in the workplace. Further, it would address the important policy consideration of ensuring that the responsibility for child care is borne by the parents, rather than viewed as a mother's responsibility.

4.21 If the Act is amended to include broad coverage for parents or carers, be they men or women, the Act would operate more equitably and be consistent with the underlying international obligations. It would also avoid Courts construing the

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9 *Howe v QANTAS Airways Ltd* [2004] FMCA 242, *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122 at [33], *Mayer v A.N.S.T.O.* [2003] FMCA 209, *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584, *French v Gosford City Council* [2003] NSWADT 273 and *Gardiner v New South Wales Work Cover Authority* [2003] NSWADT 184

legislation in a manner which is inconsistent with the international obligations and the objects of the legislation.

Conclusion

The law regulating parental leave and the rights on return to work is unnecessarily complex. Further, recent case law also illustrates that employees often have expectations about their entitlements which do not always reflect their legal rights. Employers are also frustrated about the uncertainty of the current laws and how to comply with inconsistent industrial and discrimination laws.

Making it easier for parents who so wish to return to the paid workforce will require a review of the current industrial and discrimination laws.

Any review must consider the rights of employees and the interests of employers. Simplicity and certainty should be a key feature of any law and ideally the provisions should operate uniformly across Australia. In my submission, this could be done where the relevant laws:

(1) expand the class of workers who may access parental leave;

(2) provide greater flexibility in when and how parents may take parental leave;

(3) provide clearer rights for employees absent from work because of parental leave;

(4) guarantee a right to return to the former position but also provide an effective legal remedy to enforce the right;

(5) provide statutory rights requiring employers and employees to negotiate changes to employment on return to work to enable part-time or flexible working arrangements to be put in place;

(6) the *Sex Discrimination Act* should be amended to provide protection against discrimination on the ground of family responsibilities generally, not just to termination of employment; and

(7) ensure the Australian laws are consistent with Australia's international human rights obligations.

Thank you for the opportunity to make this submission.

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