Victorian Gender Equality Strategy

Submission to the Women and Royal Commission Branch, Department of Premier and Cabinet

18 March 2016

Civil Justice Program – Victoria Legal Aid

# About Victoria Legal Aid

Victoria Legal Aid (VLA) is a major provider of legal advocacy, advice and assistance to socially and economically disadvantaged Victorians. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at Courts, Tribunals, prisons and designated mental health services as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service. We also deliver non-legal advocacy services to people receiving compulsory treatment under the *Mental Health Act 2010* (Vic).

## Our specialist practice expertise

We are committed to contributing to both individual and system-wide change that promotes gender equality and reduces the incidence of family violence and sex discrimination. We do so primarily through the provision of family violence and discrimination law services and strategic advocacy.

VLA plays a leading role in the coordination of family violence legal services in Victoria. We provide information, advice and legal representation to women, men and children who are affected by family violence in the State and Commonwealth civil, criminal and family law systems. We provide these services through our network of offices across the state. We also fund private practitioners and community legal centres to deliver family violence legal services. People who have experienced, are experiencing, or are at risk of experiencing family violence are priority clients for Victoria Legal Aid and we are committed to the elimination of family violence in the community.

Our dedicated Equality Law Program provides advice and representation to people experiencing discrimination, harassment and victimisation in all areas, including employment. We assist people with complaints in various jurisdictions, using state and federal anti-discrimination legislation, including the *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic). The services provided by the Equality Law program include phone advice, duty lawyer services, weekly clinic advice sessions and ongoing case work and representation. In 2014-15 VLA provided legal advice in 1,522 discrimination matters and our Legal Help telephone service responded to 4,507 discrimination and employment related queries. About one-third of our legal advices related to sexual harassment, sex discrimination, pregnancy discrimination or parental status discrimination.

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# Executive summary

In order to address gender inequality, Victoria must improve the legal and policy response to the parental responsibilities of workers and sex discrimination in the workplace.

The prevalence of pregnancy discrimination, parental responsibilities discrimination and sexual harassment at work is unacceptably high. One in two (49%) Australian mothers report experiencing workplace discrimination at some point,[[1]](#footnote-1) one-third of women (33%) have been sexually harassed since the age of 15 and a quarter of women (25%) aged 15 years and older have experienced sexual harassment in the workplace in the past five years (based on the legal and behavioural definitions).[[2]](#footnote-2)

The design of the paid parental leave system also has a significant impact on how men and women take up their roles as parents and workers. The current paid parental leave systems presume that the biological mother will be almost exclusively responsible for early childrearing and fail to incentivise men to take-up extended parental leave. This contributes to gendered attitudes about the roles of men and women at home and at work, as well as the low value placed on unpaid caring activities and the degree to which workplaces accommodate these activities.

Discriminatory practices and attitudes explain why women experience a gender pay gap and are significantly underrepresented in leadership roles at work and in the broader community. Repeated studies and large scale surveys confirm that women leave the workforce and are overlooked for promotions (or discount themselves from leadership roles) because of workplace discrimination and unsupportive work practices, not because they choose to tend to their family instead of their job. Our many clients who are forced out of work because of blatant sex discrimination and sexual harassment confirm this.

As well as contributing to poor financial outcomes for women and gender inequality at a macro level, workplace discrimination and sexual harassment also have harmful, long-term impacts on the psychological well-being of many individuals in our community and should therefore be treated as a public health concern warranting immediate attention.

Gender inequality is also correlated with high rates of family violence. Family violence is largely perpetrated by men against women and children and there are lower rates of violence against women in communities with greater gender equality.[[3]](#footnote-3) We therefore recognise the importance of rectifying laws and systems that perpetuate gendered attitudes and permit widespread sex discrimination in order to end violence against women.

This submission identifies some of the laws and systems that are most problematic and recommends reforms to address pregnancy and parental responsibilities discrimination, sexual harassment, family violence discrimination, and gendered paid parental leave schemes, with a view to treating workplace discrimination as a public health issue and improving gender equality. In doing so, we address the following questions contained in the consultation paper:

* What are the most urgent areas of gender inequality that Victoria should tackle first?
* How do we address inequality among the most diverse and disadvantaged groups of women?
* How do we address the pay and superannuation gap for women in Victoria?
* What needs to be done to promote women’s health and wellbeing?
* How do we ensure our objectives over the long-term?
* What strategies do we need to ease the strain of balancing work and caring responsibilities?
* What are the barriers to creating more flexible workplaces?

Our observations and recommendations in this submission are informed by our firsthand experience of assisting those who have suffered discrimination. The impact of discrimination on our clients has been highlighted through numerous de-identified client stories and case studies. Those stories in quotation marks in this submission have been told in the client’s own words and reflect their real experience and perception of discrimination.

# Summary of recommendations

**Recommendation 1:** Re-enact Part 9 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) as it was at 28/04/2010 to empower the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) to more freely investigate breaches of the EO Act, issue enforceable undertakings and improvement notices and apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to enforce compliance with those undertakings and notices.

**Recommendation 2:** Require employers to provide a fact sheet to employees outlining both parties’ rights and obligations relevant to pregnancy, parental leave and family responsibilities when an employee notifies their employer that they are pregnant, they intend to take parental leave or they require accommodation of their family responsibilities.

**Recommendation 3:** Victorian public sector workplace agreements should provide fathers and partners, as well as biological mothers, with an entitlement to non-transferrable extended paid parental leave, which can be used to provide primary care to that person’s child at any time within the child’s first two years. The Victorian Government should specifically fund agencies to provide this entitlement.

**Recommendation 4:** Include “being a victim of family violence or stalking” as a protected attribute in section 6 of the EO Act and impose an explicit obligation on employers to make reasonable adjustments at work that an employee may require because they are a victim of family violence or stalking.

**Recommendation 5:** Include “irrelevant criminal record or allegation” as a protected attribute in section 6 of the EO Act.

**Recommendation 6:** Insert provisions in the EO Act requiring all duty holders to make reasonable adjustments that are required by women because they are pregnant or by their partners who are caring for them.

**Recommendation 7:** The EO Act should be amended so that the burden of proving that the impugned conduct is not unlawful shifts to the respondent once the complainant establishes a prima facie case of discrimination.

**Recommendation 8:** A ‘questionnaire procedure’ should be incorporated prior to conciliation to encourage the early exchange of relevant information.

**Recommendation 9:** The EO Act should expressly protect witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made.

**Recommendation 10:** The EO Act should be amended to enable a Court or Tribunal to order a respondent to pay an applicant damages by way of consolation for personal distress and hurt, reparation for damage to their reputation, and vindication of their reputation, as well as compensation for any loss or damage suffered by the applicant, in line with the principles for damages payments in defamation cases, for the purpose of increasing awards of damages in discrimination cases.

**Recommendation 11:** A costs provision should be inserted into the EO Act which provides that cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

**Recommendation 12:** Amend section 105 of the EO Act to extend the authorising and assisting provision to prohibit “permitting” a contravention, similar to the *Sex Discrimination Act* *1984* (Cth) and other anti-discrimination acts.

**Recommendations 13:** The Victorian Government should undertake a survey to obtain quantitative data on community attitudes and experiences of discrimination and gender inequality to establish a benchmark from which the Victorian Government can measure its attempts to eradicate discrimination and improve gender equality over the long-term. Thereafter, funding should be allocated to conduct prevalence surveys which should be carried out at regular intervals to map Victoria’s progress in reducing discrimination and improving gender inequality.

# Areas of gender inequality that must be addressed

In order to address gender inequality, Victoria must address workplace sex discrimination. Specifically, the most significant issues of workplace gender inequality that we have identified through our discrimination law practice include:

* Pregnancy, parental leave and family responsibilities discrimination;
* Paid parental leave schemes that fail to facilitate a more equal division of caring responsibilities between men and women;
* Sexual harassment;
* Discrimination against victims of family violence; and
* Weak and inadequate protection against discrimination.

This first section of this submission discusses these issues in more detail and why they are so significant. The second section of this submission discusses how these issues can be addressed and remedied. The third section of this submission considers how to measure the impact of these changes and any improvements.

## Pregnancy, parental leave and family responsibilities discrimination

Pregnancy discrimination is a key strategic advocacy issue for VLA due to the prevalence of the issue and the impact on our clients. Our clients experience pregnancy discrimination in a variety of ways:

* Inability to find work while pregnant;
* Dismissal and selection for redundancy during their pregnancy, maternity leave, and on return from maternity leave;
* Diminution of work conditions during the pregnancy and on return from maternity leave;
* Refusal of maternity leave; and
* Refusal to accommodate flexible work conditions on return from maternity leave.

However, it is clear that only a small number of women affected by pregnancy and family responsibilities discrimination seek redress. In 2014-2015 the VEOHRC only received 49 complaints about pregnancy discrimination, and the Australian Human Rights Commission (**AHRC**) only received 136.[[4]](#footnote-4) Trends in our legal practice suggest that the relatively low rate of complaints and contested hearings in relation to pregnancy and family responsibilities discrimination encourages a culture of non-compliance by employers who are typically not pursued for discriminatory practices of this kind, and face minimal repercussions when they are pursued.

A substantial number of our clients experience discrimination either after they have advised their current or prospective employer that they are pregnant or when they seek to return from parental leave. Of the clients who VLA assists with pregnancy and family responsibilities discrimination, a significant number decide not to pursue their complaint due to the stress and uncertainty of taking legal action.

Women who lose their employment because of pregnancy discrimination are left without their expected level of income at the time of the child’s birth. This leads to financial hardship, debt, housing insecurity, and pressure to return to work soon after the baby’s birth. Pregnancy discrimination is therefore an issue that affects VLA priority clients and can create systemic and ongoing financial and social disadvantage for our clients and their children.

The harm caused by pregnancy and family responsibilities discrimination has been well-documented. Sixty-seven percent of mothers who reported pregnancy or parental leave discrimination said it impacted on their level of stress, 44% felt that their self-esteem and confidence suffered, and 33% reported an impact on their mental health more generally.[[5]](#footnote-5) However, the damage extended beyond their personal health to their career and finances. For 42% of these mothers there was a financial impact and 41% felt that the discrimination impacted on their career and job opportunities. [[6]](#footnote-6) One in five (18%) mothers reported that they were effectively frozen out of their job during their pregnancy, parental leave or on return to work, by way of redundancy, restructure, dismissal or a refusal to renew their contract.[[7]](#footnote-7)

Women who have experienced discrimination often find it incredibility difficult to break back into the workforce or to obtain a role at their previous level of seniority or expertise. This can have a long-term impact on a woman’s health and wellbeing, her career and her family’s financial security.

***Antonia’s story – the effects of pregnancy discrimination***

**“**My son is now over two years old, and I still feel the effects of this discrimination. The sadness and anger has permeated every aspect of my life. It has affected me professionally, financially, and socially. I feel like I have lost my confidence and my career. It is very difficult to find a part-time position, that is not a junior role, that allows me to continue to develop my professional skills, with a new organisation.

I have lost my professional network, as I left my workplace one day for what I thought would be a temporary absence, and never returned. Furthermore, because it was my manager who facilitated my discriminatory exit from the workplace, I no longer have a referee to substantiate six years of professional service, all of which affects my future employability. I am no longer in touch with old friends and colleagues and I feel as if I have been banished from the sector, which is the core of my work experience. It is also embarrassing, as I cannot explain to people what happened.

While negotiations about my discrimination complaint were underway, both my husband and I were unemployed. This put a great deal of pressure on our relationship. When you meet someone and make a commitment to building a family life with them and part of the commitment is your financial contribution and earning capacity, you feel like you are letting them down when you cannot provide. It has been the cause of great sorrow and conflict.

As a result of my discrimination, I have lost the earnings I would have received from part-time employment and paid for childcare for a year and a half, to keep the childcare place, in the hope of returning to work or finding new employment. My earning capacity is still reduced as I have not been able to secure part-time work since I left the company, and we are now a single income family. This is something that we never planned for.

I received a great deal of satisfaction from my career, and it was a big part of who I was. I have now had to embrace motherhood full-time, which I often find challenging and isolating. I miss having a professional life with the intellectual stimulation and autonomy that comes with having a career. I should not have had to say goodbye to that part of myself because I decided to have children.**”**

As in Antonia’s case above, the majority of our female clients who experience pregnancy, parental leave or family responsibilities discrimination are the primary carer of their child, so they have no choice but to sacrifice their job and sometimes, ultimately, their career in the face of discriminatory employment practices.

Section two of our submission makes recommendations which, if adopted, would help ensure that:

* Working conditions adequately accommodate pregnancy and childcare needs;
* Pregnancy and family responsibilities discrimination is prevented; and
* Those who experience pregnancy and family responsibilities discrimination are adequately supported.

## Discrimination that prevents fathers from taking up a more equal share of caring responsibilities

Our experience, which is supported by empirical data,[[8]](#footnote-8) is that the large majority of clients who experience workplace discrimination because of their family responsibilities are women. The structure of our paid parental leave schemes contributes to women experiencing disproportionately high rates of workplace discrimination due to being a parent by failing to encourage men to take any extended parental leave.[[9]](#footnote-9) This failure perpetuates the expectation and practical reality that women are almost exclusively responsible for early childrearing. As a result, in addition to pregnancy discrimination, women are more susceptible to parental leave and family responsibilities discrimination, as well as associated damage to their careers and finances.

A different approach to the structure of current paid parental leave entitlements is that taken in countries such as Norway, Sweden and Iceland. These countries provide better paid, non-transferable leave for fathers and partners, in addition to generous leave entitlements for biological mothers.[[10]](#footnote-10) As a result, a large proportion of men take extended leave from their jobs to be the primary carer of their young children for extended periods of time.[[11]](#footnote-11) After Norway introduced a father quota for paid parental leave, the proportion of men taking leave increased from 4% to 89%.[[12]](#footnote-12) Similarly, in 2007 in Iceland 84% of men took extended parental leave.[[13]](#footnote-13) This approach influences individual behaviour as well as community attitudes about gender roles and the value of caring work.[[14]](#footnote-14)

Incentivising men to take parental leave has been shown to reduce the gender pay gap. According to a Swedish study, a mother’s earnings increased by an average of 7% over a four year period for every month of parental leave taken by the father.[[15]](#footnote-15)

A policy shift in this direction would improve the treatment of all workers with family responsibilities. Gendered stereotypes about male and female roles with respect to work and childcare lead to discrimination against both our female and male clients. For example, when one of our male clients sought earlier shifts that would allow him to collect his children from school, his employer’s response was “Why do you have to look after your kids? Why can’t you be like a normal dad?” Male clients have reported being treated poorly and criticised for requesting parental leave or flexible work arrangements. Many feel they are forced to leave their jobs or have been dismissed as a result of their attempts to balance work and caring responsibilities and the negative view of working flexibly that is held in their workplace.[[16]](#footnote-16)

***Case study - Nathan – the harmful effects of gender stereotypes***

Nathan worked for a transport company in a role that enabled him to look after his daughter in the evenings when his ex-partner was working, and on alternate weekends when he had custody of his daughter.

However, Nathan’s boss moved him to a different role and told Nathan he would have to work during evenings and on weekends. Nathan told his boss that he couldn’t do the new role, because he had to look after his daughter. Nathan’s boss said that he couldn’t just give Nathan special treatment because he had kids. His boss said that Nathan was subject to the same rules as everyone else.

Nathan lost his job because he couldn’t work in the new role. He eventually became jobless, then homeless. He could not financially support his daughter.

## Sexual harassment

Despite being against the law for over 25 years under State and Federal laws, sexual harassment remains a serious problem in Australia. Sexual harassment disproportionately affects women with 1 in 5 experiencing sexual harassment in the workplace at some time. One in 20 men also report experiencing sexual harassment in the workplace.[[17]](#footnote-17)

The effects of sexual harassment can be debilitating. Our clients who experience sexual harassment regularly experience significant pain, suffering and humiliation as a result of the harassment, including loss of enjoyment of life, fear, anxiety and depression, post-traumatic stress disorder, suicidality, and negative impacts on their intimate relationships. These experiences are reflected in a number of sexual harassment cases and also the results of the AHRC 2012 Sexual Harassment Survey, which found that 25% of women who experienced sexual harassment felt extremely intimidated by the conduct.[[18]](#footnote-18)

Women who have been sexually harassed at work experience difficulties in proving their complaint in Court given their former co-workers are often unwilling to give evidence and due to their own emotional health issues that developed as a result of the harassment.

***Case study – Alice – the damaging impact of sexual harassment***

In her late twenties Alice worked for a motorbike retailer. A co-worker regularly made offensive sexual comments to her, including ‘I’d like to tie you up and whip you’, ‘are you the type of girl who, if I came in a shot-glass, would drink it?’, and asking male customers ‘are her boobs the same size as your girlfriend’s boobs?’ The co-worker made these numerous offensive comments and also forcefully grabbed Alice’s bottom in front of Alice’s manager and other co-workers.

The manager would not take action against the co-worker in support of Alice because he was scared of the individual employee. While her former co-workers witnessed the harassment, they were unwilling to give evidence in support of Alice’s complaints because it was likely that they would be victimised at work.

Alice was traumatised by the incident and did not have the emotional resources or social supports needed to pursue lengthy litigation. She was diagnosed with depression, for which she was receiving treatment from a psychiatrist, and had ended her relationship with her boyfriend because she developed a distrust of men.

Alice settled her claim for a relatively low amount of compensation due to the difficulties proving her complaint in Court. There were no consequences for the individual worker.

## Family violence discrimination

There is a strong link between sex discrimination and family violence. The causes of family violence are deeply embedded in community attitudes about power and the role of women in our society. To stop family violence, we also need to address the gendered attitudes that lead to sex discrimination.

However, the link between discrimination and family violence is sometimes much more direct. Our discrimination lawyers and family law practitioners have reported a number of instances of clients being discriminated against (directly and indirectly) at work because of circumstances outside of their control caused by family violence. For example, our clients have reported being dismissed by their employer because:

* their estranged partner telephoned them constantly at work;
* they had to take time off work to report property damage and stalking to the police, attend intervention order proceedings or take immediate steps to ensure their child’s safety;
* the employer refused to alter work arrangements to enable compliance with a family violence intervention order; and
* the abuse caused temporary absenteeism and impeded performance.

Our clients have reported a reluctance to report family violence to their employers for fear of embarrassment or being treated differently.

***Jane’s story – family violence discrimination at work*“**I was in an abusive relationship for many years. After a violent attack by my partner I had to take my young child to work with me one night, because I had no one to take care of her and I was worried about her safety if I left her at home with him. I worked at a care facility as a care attendant. I had worked in this role for a few years.

After this, my manager called me into a meeting and said that they were standing me down, a key reason being that I brought my child into work, even though they knew there was nothing else I could do. They told me they were worried my partner would come into the workplace and cause problems. I was forced to take all my leave and told to ‘sort out my domestic violence stuff and see a doctor’ because they said I was erratic. When I asked to return to work they told me I was not fit enough to work and demoted me, even though I was fit to work. They are still not allowing me to return to work.

I feel ostracised and alone. It feels like another form of abuse. I am now struggling financially. I am on Centrelink and I am unsure where I will be living in two months’ time. I wish my employer was more understanding and supportive. I’ll give anything to be back at work.**”**

In Australia, one in five women has been stalked, one in three women has experienced physical violence, one in five has experienced sexual violence, and one in four has experienced emotional abuse from a partner.[[19]](#footnote-19) Two thirds of women affected by family violence are in paid employment.[[20]](#footnote-20)

Victims of family violence are at extreme risk of poverty and social exclusion. Employment plays an important role in reducing the impact of family violence by affording victims a measure of financial security, independence and confidence. These elements are essential to enable victims to leave violent relationships. Workplaces therefore have the potential to play a key role in supporting and protecting the safety of people experiencing family violence.

Given that more than 1.6 million Australians now have access to family violence leave through negotiated workplace agreements,[[21]](#footnote-21) many businesses are already well-placed to provide flexible work arrangements for victims of family violence.

## Inadequate protection against discrimination

The EO Actprovides ostensible protection against discrimination on the grounds of sex in a number of ways, including:

* prohibiting employers from discriminating directly or indirectly against workers because of their pregnancy, sex or family responsibilities;
* prohibiting sexual harassment of workers by employers and others; and
* requiring employers to reasonably accommodate an employee’s family responsibilities.

The *Fair Work Act* *2009* (Cth) (**FW Act**) and federal anti-discrimination legislation also prohibit various types of workplace sex discrimination.

However, the great majority of people with legitimate complaints under Australian anti-discrimination law do not report the conduct or make a complaint. Even where clients are legally represented, due to a range of factors outlined below, the burden of enforcing their rights is often so great that they either accept a poor settlement or simply walk away rather than pursue legal proceedings.

In the context of workplace discrimination against women, it is our experience that clients are particularly deterred by:

* Fear of negative reputational consequences and of being punished at work or facing long-term unemployment;
* Difficulties proving the conduct, including due to lack of access to documents and other information held by the employer, and witness reluctance to give evidence;
* Limited understanding of rights or how to exercise them, in conjunction with the complexity of the law and legal processes and lack of access to free specialised advice;
* The poor cost-benefit of litigation due to the fact that compensation payments are usually low and legal costs generally cannot be recouped under the EO Act, even if the litigation is successful; and
* The stress, time and cost involved in instituting and pursuing a complaint of discrimination (at a period in life when the applicant is often energy and time poor, such as during and after pregnancy, or when they are experiencing poor mental health due to the harm caused by the unlawful treatment).

Discrimination is more often experienced by people who are poor, particularly people receiving government payments, and people who are experiencing other forms of disadvantage.[[22]](#footnote-22) Therefore, most victims of discrimination are particularly vulnerable to exploitation at work, as there are severe financial consequences for losing their job and they cannot afford to pay a lawyer to enforce their legal entitlements. They may also lose their entitlement to the Paid Parental Leave Scheme which requires them to have worked 10 out of the preceding 13 months.

Many of our recommendations seek to address these barriers to enforcing discrimination law, which often have a particularly harsh impact on women.

This impact is compounded by a major weakness of Australian discrimination law, being its exclusive reliance on an individual complaints-based system, where individuals must hold discriminators to account, as a means of enforcement. This is particularly problematic in situations of workplace discrimination where complainants and witnesses are often financially dependent on the discriminator.

The most significant reform we propose is to empower and properly resource the VEOHRC to investigate and enforce compliance with discrimination law (discussed further below).

Rachel's experience demonstrates the significant challenges faced by clients considering running a complex and costly legal action against a former employer and the possible negative effects of prolonged litigation on a client's health and welfare.

***Rachel’s story – the ineffectiveness of a system that relies on individual victims to enforce discrimination law***

**“**I worked at a medical centre as a permanent part-time employee for six years with hours which let me drop off and pick up my child from school. I told my boss that I was pregnant almost as soon as I found out, and I had bad morning sickness early on in the pregnancy. My manager told me that I was no longer reliable and that everyone used my name to joke about taking a sick day, “you’re not going to throw a “Rachel” are you?” A few months into my pregnancy my manager reduced my hours and told me that I was now a casual employee. My new hours no longer worked with school drop off and pick up times. When I told my manager that I wanted to go back to my old hours she said that it would be easier this way now that I’m pregnant. Soon after, just over three months before my due date, my manager fired me for no good reason. When it happened I was speechless, and I left work crying. I had put in so many years to the business and after all that they just treated me like I was worthless, I felt completely devalued.

I applied for Newstart but could not meet my mortgage repayments. I was not eligible for the Paid Parental Leave Scheme because I had been fired just one week shy of the 10 month eligibility mark. I became depressed and I thought my whole world had ended. I contacted Victoria Legal Aid and lodged an application arguing that I was discriminated against because of my pregnancy. Following this, my boss started making threatening phone calls to me and my family. Everything was already so stressful, but these threats were the worst. I was scared to pick up the phone and check the mail.

In the end I got some compensation but it did not fully compensate me or cover my lost entitlement to the Paid Parental Leave Scheme. Having said that, nothing could compensate me for what I went through. Soon after the matter settled I lost my baby at eight months pregnant. I can’t prove it but I really believe that the stress had something to do with my baby’s death. I feel like they put me through so much, and if they didn’t do what they did to me at least I would have had something to go back to after I lost my baby.

It took me over 12 months to get a new job. I just didn’t think I was good enough, I was scared and anxious and would have panic attacks where I couldn’t breathe. I was under a lot of stress due to losing the job, I couldn’t pay my bills for a year, I nearly lost the house, and I’ve got a really bad credit rating now. I’m only just starting to get back on track. I’ve just started a new job and I’m actually happy now going to work, I feel like they value me and it’s made my confidence a lot better.**”**

# How to improve gender equality

We consider that the issues of workplace sex discrimination outlined above could be substantially addressed through:

* Better enforcement of discrimination laws;
* Incentives for fathers to take paid parental leave;
* Public education about legal rights and responsibilities; and
* Law reform aimed at strengthening protection against discrimination, particularly types of discrimination that disproportionately affect women.

This section of the submission discusses these remedies in more detail and makes recommendations to improve gender equality, particularly for the most diverse and disadvantaged groups of women.

## Meaningful enforcement of discrimination laws

Sexual harassment and discrimination are public health issues that should be addressed in a similar manner to other unsafe work practices. That is, a regulatory agency should monitor and prosecute employers for unlawful conduct under the EO Act in a similar manner to the way in which the Victorian WorkCover Authority monitors and prosecutes breaches of the *Occupational Health & Safety Act 2004* (Vic)*.* Enabling a regulator to enforce compliance with the law is a standard practice in other statutory regimes regulating privacy, environmental protection, animal welfare, and consumer affairs, as well as workplace safety. There is evidence to suggest that compliance with laws such as discrimination laws improves if there is the threat of enforcement, even if this threat is rarely carried out.[[23]](#footnote-23)

The introduction of these compliance functions would remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence in litigation brought by another employee for fear of victimisation. Empowering the VEOHRC to enforce compliance with anti-discrimination law would better recognise the significance of discrimination and harassment as unlawful behaviour that can result in substantial harm to individual health and safety as well as the broader community. Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will be more socially cohesive and productive, and will have better public health outcomes.[[24]](#footnote-24)

Notably, under section 682(1)(f) of the FW Act*,* the Fair Work Ombudsman (**FWO**) has the power to bring complaints on behalf of clients and has done so on a few occasions to date in relation to discrimination matters. However the number of prosecutions is extremely limited in comparison to the prevalence of discrimination. In 2014-2015 the FWO commenced just one piece of litigation in relation to discrimination.[[25]](#footnote-25)

**Recommendation 1:** Re-enact Part 9 of the EO Act as it was at 28/04/2010 to empower the VEOHRC to more freely investigate breaches of the EO Act, issue enforceable undertakings and improvement notices and apply to VCAT to enforce compliance with those undertakings and notices.

## Educate workers and employers about their rights and responsibilities

Often employers and employees do not seek advice about their rights and obligations until the employment relationship has irrevocably broken down. While the employee may be able to obtain some compensation through discrimination law, the impact on their career is rarely remedied.

These conflicts and their impact could be avoided if employers and employees knew their rights and obligations in relation to workers who are pregnant or have family responsibilities, and discrimination law generally, particularly at an early stage. There are already existing materials available from the AHRC and VEOHRC websites.[[26]](#footnote-26) However, these materials are not widely disseminated. This could be easily addressed if employers were obliged to provide a fact sheet to employees outlining both parties’ rights and obligations relevant to pregnancy, parental leave and family responsibilities when an employee notifies their employer that they are pregnant, they intend to take parental leave or they require accommodation of their family responsibilities.

These measures would build upon existing obligations to provide fact sheets to employees under the FW Act.

***Amanda’ story – the importance of raising awareness of legal rights and responsibilities***

**“**I am pregnant with my second child and working full-time in retail. I was finding it increasingly difficult to juggle full-time work with being a pregnant working mother, so I asked my manager if I could go part-time. I’ve also got pregnancy related hypertension, which I need to monitor carefully, and standing on my feet all day causes pain and discomfort. My feet and hands swell up to the point of being barely functional past 3pm on days that I work.

My manager agreed to move me to a ‘floating’ position three days per week while they trained a person to cover my role. The owner of the business approached me and asked me to guarantee that I would be well enough to work until my proposed maternity leave. If I couldn’t, he said that he’d replace me. He also said that people were complaining that I was leaving early, even if I was unwell. I always asked my manager if I needed to leave early to attend an appointment or because I wasn’t well.

This made me feel like I was disposable and that due to being pregnant I was no longer a valued employee. I was worried about losing my job and being replaced. I’d like to return to my original full-time role after maternity leave.

I got legal advice from Victoria Legal Aid and my lawyer helped me understand my rights as an employee, which gave me the confidence to approach my bosses and help stamp out unfair treatment of myself and my colleagues. Victoria Legal Aid also helped me to prepare a letter to my employer setting out my rights and my employer’s responsibilities about transferring me to a safe job, accommodating my requests to work part-time because of my son, and my return to work.

The letter was a huge help. The owner apologised sincerely for what was said and they became accommodating towards my pregnancy and pregnancy related illness after that. It was a huge relief!**”**

**Recommendation 2:** Require employers to provide a fact sheet to employees outlining both parties’ rights and obligations relevant to pregnancy, parental leave and family responsibilities when an employee notifies their employer that they are pregnant, they intend to take parental leave or they require accommodation of their family responsibilities.

## Provide incentives for fathers to take extended parental leave

Women are more likely to take the bulk of parental leave where there is a shared entitlement to this leave and the leave is wholly transferable. This approach to parental leave increases gender inequalities both in the workplace and in the division of labour at home.[[27]](#footnote-27) In countries with well-paid, non-transferable leave for each parent there is greater take-up of extended paternity leave and increased gender equality. To improve gender equality, we should reflect on the experience in Sweden and Iceland by creating better paid, non-transferable leave for fathers and partners as well as biological mothers. This would encourage a large proportion of men to take extended leave from their jobs to be the primary caregiver and shift community stereotypes about childrearing being primarily women’s responsibility.

Iceland boasts the highest female workforce participation rate in the world (88%), and the lowest gender pay gap, while women still manage to have on average two children.[[28]](#footnote-28) Iceland’s current policy consists of three non-transferrable months of parental leave for both the father and the mother, and another three transferrable months of leave that can be used by either parent, all generally paid at 80% of previous earnings.[[29]](#footnote-29) This is soon to be replaced with five non-transferrable months for the father and another five for the mother, plus two transferable months.[[30]](#footnote-30) Sweden’s paid parental scheme provides for two non-transferable months for each parent and a further 12 transferable months (six months for each parent can be transferred), which is also well-paid, at 80% of previous earnings.[[31]](#footnote-31) A ‘Gender Equality Bonus’ offers an economic incentive for families to divide parental leave more equally between the mother and the father; both parents receive 50 SEK (€5) each per day for every day they use the leave equally.[[32]](#footnote-32)

The Victorian Government should act as a role model and set a benchmark for employers by requiring all Victorian public sector workplace agreements to provide for fathers and partners to take extended parental leave. Any requirement of this kind would require a corresponding increase in funding to public sector agencies.

**Recommendation 3:** Victorian public sector workplace agreements should provide fathers and partners, as well as biological mothers, with an entitlement to non-transferrable extended paid parental leave, which can be used to provide primary care to that person’s child at any time within the child’s first two years. The Victorian Government should specifically fund agencies to provide this entitlement.

## Law reform to provide better protection against sex discrimination

As indicated above, the prevalence of sex discrimination would likely decline if there were better enforcement of existing anti-discrimination laws. However, there are also a number of defects in these laws that largely contribute to the unjust outcomes discussed in Section 1. This section recommends law reform to achieve the following outcomes and address these defects:

* protect victims of family violence from discrimination
* protect those with irrelevant criminal records or allegations from discrimination
* provide reasonable adjustments for pregnant workers
* shift the burden of proof
* encourage the early exchange of relevant information
* protect witnesses from retribution
* increase the awards of damages
* alleviate prohibitive litigation costs
* penalise those who permit discrimination.

### Protect victims of family violence from discrimination

Discrimination against victims of family violence, discussed above in Section 1.4, could be simply addressed by amending the EO Act to prohibit such conduct. This is necessary to ensure that there is clear legal protection against family violence discrimination and because it will usually be difficult to argue that such treatment constitutes sex or disability discrimination.

Section 65 of the FW Act provides some legal precedent for the proposed protection, as it affords employees experiencing family violence the right to request flexible working arrangements. However, there is no requirement for an employer to agree to a request for flexible working arrangements made pursuant to this provision. An employer can refuse a request based on reasonable business grounds and there is no mechanism to enforce an employer to accommodate a request, even if the refusal is unreasonable.

**Recommendation 4:** Include “being a victim of family violence or stalking” as a protected attribute in section 6 of the EO Act and impose an explicit obligation on employers to make reasonable adjustments at work that an employee may require because they are a victim of family violence or stalking.

### Protect those with irrelevant criminal records or allegations from discrimination

A significant risk factor for death and life-threatening serious injury of women who experience family violence is whether the perpetrator is unemployed.[[33]](#footnote-33) In one of the largest studies of its kind in the world, VLA examined more than 15,000 clients charged with breaching family violence intervention orders from 2008 to 2015 and identified common characteristics of clients who received a grant of aid for breach of a family violence intervention order multiple times. This research demonstrated that men who are unemployed pose a high risk of reoffending, as 86 per cent of multiple grant clients were unemployed compared with 78 per cent of single grant clients.[[34]](#footnote-34)

While it is not a solution to violent behaviour, ensuring that people with a criminal record can continue to participate in the workforce is likely to result in reduced incidents of violence against women.

Individuals who are discriminated against based on an irrelevant criminal record or allegation currently have little legal recourse. We have received a number of queries from people who have experienced discrimination during recruitment processes as a result of a criminal record from their early twenties during a very different period in their life. This can have unfair and devastating consequences for them and continues to marginalise and disenfranchise people who are often already experiencing disadvantage.

Discrimination on the basis of criminal record is prohibited by the *Australian Human Rights Commission Act 1986* (Cth), although there is no mechanism for enforcing this obligation. It is unlawful in the Northern Territory and Tasmania to discriminate on the basis of criminal record. For example, in Tasmania irrelevant criminal record is defined as including a record relating to an arrest, interrogation or criminal proceeding where no further action was taken, the person was found not guilty, or where the circumstances relating to the offence are not directly relevant to the situation in which the discrimination arises.[[35]](#footnote-35) The comprehensive Victorian Equal Opportunity Review led by Julian Gardner in 2008 recommended that the Victorian Government include irrelevant criminal record as a protected attribute in Victoria.[[36]](#footnote-36)

We consider it important to protect people from discrimination on the grounds of an irrelevant criminal allegation as well as a criminal record, because we have seen instances where clients have been fired once their employer became aware that they were subject to allegations of family violence or a family violence intervention order.

**Recommendation 5:** Include “irrelevant criminal record or allegation” as a protected attribute in section 6 of the EO Act.

### Provide reasonable adjustments for pregnant workers

There is no explicit obligation for duty holders to make reasonable adjustments for pregnant women. Pregnant workers may require some adjustments to their working conditions or arrangements because of the physical symptoms of pregnancy. For example, a woman may need to take more regular bathroom breaks, to sit rather than stand, or to avoid heavy lifting incidental to her role during her pregnancy. While the EO Act requires employers to accommodate the responsibilities of parents and carers, there is currently no positive obligation on employers to make reasonable adjustments for a woman during her pregnancy.

Instead the woman has to make a complaint of indirect discrimination, or try to define her normal pregnancy as a disability so that she can access reasonable adjustment provisions for persons with a disability. Because such claims can be complex, they rarely settle quickly, as time and money is spent trying to understand legal obligations and enforce them.

While the FW Act provides for transfer to a safe job or paid ‘no safe job leave’ if the employee is fit to work but unable to perform her role for health and safety reasons, this solution is generally too extreme. More commonly, there will simply be some minor aspects of the employee’s role that require adjustment, or the employee requires flexibility to accommodate her morning sickness or other pregnancy symptoms. The impact of failing to make adjustments for a pregnant employee can be significant, as illustrated below.

***Case study - Bevilacqua v Telco Business Solutions (Watergardens) PL* (Human Rights) [2015] VCAT 269**

Ms Bevilacqua’s morning sickness caused her to vomit frequently and suffer dizziness, feel faint, experience hot flushes and back, leg and lower stomach pain. She needed to frequently run to the toilet to vomit and to sit down to rest. Her symptoms would often last all day.

She claimed that her employer refused to make reasonable adjustments for these symptoms, such as allowing her to sit down or take more frequent toilet breaks or reduce her hours, among other things.

Her claims of direct and indirect discrimination were complicated. Her claim was perhaps most easily characterised as a failure to make reasonable adjustments. She therefore argued that her morning sickness was a disability, and that her employer failed to make reasonable adjustments for her disability, even though morning sickness is a normal symptom of pregnancy.

VCAT held that while “[i]n ordinary life a pregnant woman suffering morning sickness is not considered to be a person with a disability”, for the purpose of the EO Act, morning sickness is a disability.

**Recommendation 6:** Insert provisions in the EO Act requiring all duty holders to make reasonable adjustments that are required by women because they are pregnant or by their partners who are caring for them.

### Shift the burden of proof

As outlined above at Section 1.5, our experience shows that clients who suffer even the most severe discrimination regularly decide not to make a formal complaint due to difficulty proving the conduct. Victims of discrimination and sexual harassment are often at a distinct evidentiary disadvantage due to the employer’s “monopoly on knowledge”. That is, the employer often has financial power over witnesses (generally the victim’s co-workers) and possession of documentary evidence, such as rosters, employment records, timesheets, recruitment information, and so on. Despite this, under federal and state anti-discrimination law the burden of proving discrimination rests with the applicant. In our view, shifting the burden of proof is key to addressing discrimination in our community.

There is a statutory precedent for this approach in section 361 of the FW Act, which provides that the employer has the burden of proving that a lawful reason was taken for conduct once an applicant establishes a prima facie case of discrimination (known under the FW Act as adverse action for a prohibited reason, or a General Protections claim).[[37]](#footnote-37) The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) outlines that this section “recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason”.

This approach is in line with the approach of comparative jurisdictions, such as the United Kingdom, to the employer’s monopoly on knowledge.[[38]](#footnote-38) Our experience is that shifting the burden of proof to the employer improves the prospect of the matter resolving by agreement at a mediation as well as at hearing. This is because an employee can shift the focus of a mediation to what evidence the employer has that its actions were lawful, rather than focussing solely on the limited evidence available to the employee.

**Recommendation 7:** The EO Act should be amended so that the burden of proving that the impugned conduct is not unlawful shifts to the respondent once the complainant establishes a prima facie case of discrimination.

### Early exchange of relevant information

Another consequence of the employer’s monopoly on knowledge is that it is very difficult for clients to make a decision about whether to pursue their complaint of discrimination to a Court or Tribunal without knowing the evidence available to the employer to defend their claim. It is our experience that employers will raise events or defences at a Court or Tribunal that they did not rely on at the conciliation stage of proceedings. For example, in complaints of pregnancy discrimination, it is common for employers to suddenly raise allegations of under-performance to justify a dismissal, even when such allegations have never been previously raised with the employee.

Complainants should have a right to ask the respondent questions that are relevant to their allegations prior to conciliation, as is the case in the United Kingdom and Ireland. The response should be admissible as evidence, and Courts should be able to draw an adverse inference from a failure to respond.[[39]](#footnote-39) In addition to assisting complainants, introducing a questionnaire procedure can increase efficiency by enabling parties to better assess the merits of their case, leading to early settlement or withdrawal of a complaint.

**Recommendation 8:** A ‘questionnaire procedure’ should be incorporated prior to conciliation to encourage the early exchange of relevant information.

### Protect Witnesses

As we have outlined above, one of the biggest barriers to clients taking action about discrimination is a lack of evidence. It is very rare for a client to be supported in a discrimination claim by a witness who continues to be employed by the respondent to the discrimination claim, due to concerns that they will lose their job or be subjected to other unfavourable treatment. This issue affects our clients at the early internal complaint stage of proceedings in addition to subsequent legal proceedings.

Witnesses are provided some protection under the victimisation provisions of the EO Act. Sections 104(1)(d)(i) and (ii) protect people from victimisation if they provide evidence or information in connection with a proceeding under the EO Act or an investigation of the VEOHRC. However this protection does not expressly extend to supporting a colleague’s version of events during an internal investigation, nor does it expressly extend to other witness support that falls short of attending the conciliation conference or asserting their colleague’s rights under discrimination law. Clarifying the scope of the victimisation protection to expressly cover the reasonable support of witnesses at any stage of a complaint of discrimination would assist witnesses to come forward at an early stage of proceedings.

**Recommendation 9:** The EO Act should expressly protect witnesses and individuals who assist complainants with their complaint, including prior to any formal complaint being made.

### Increase the amount of damages

We see first-hand the often devastating impact of sex discrimination on our clients. As our clients’ stories demonstrate, the harm that flows from sex discrimination is significant and can last for years after the event. It impacts on our clients’ mental health, their relationships with their family, and their financial security.[[40]](#footnote-40) It can lead to further legal issues such as eviction from housing, debt from unpaid bills and credit cards, and relationship breakdown. It takes most of our clients a significant time to re-enter the workforce as they recover and rebuild their self-esteem. Discrimination can also have a lasting impact on a client’s reputation in their industry, particularly in regional areas. Our clients often report the difficulty they have in job interviews when they are asked about the reason for leaving their previous employment, and why it took some time to find another job.

With some notable exceptions in recent cases of sexual harassment, awards of damages in discrimination matters are very low when compared to the harm suffered. For example, in *Bevilacqua v Telco Business Solutions (Watergardens) PL*[[41]](#footnote-41) the respondent was ordered to pay just $10,000 for general damages to its employee for directly discriminating against her on the basis of her pregnancy and disability (being morning sickness).

It is our experience that individuals are discouraged from pursuing complaints of discrimination because the amounts of compensation awarded do not adequately off-set the time and expense of pursuing a complaint. This is particularly the case for many of our clients who are poorly paid and work part-time or casually, which means that their claims for economic loss are severely limited.

In 2014-15 there were just two successful discrimination cases decided under the EO Act by VCAT.[[42]](#footnote-42) This means that discrimination law is largely invisible to employers, because they do not see any consequences for breaching the law. Even where employers are held to account, in our experience the low financial consequences to employers for discriminatory behaviour is a further disincentive for them to comply with the law.

The low amounts of damages awarded in discrimination cases is particularly stark when compared to damages awards in other jurisdictions for similar wrongs and types of harm, where it is not uncommon for applicants to receive hundreds of thousands of dollars in general damages, such as in cases of defamation,[[43]](#footnote-43) employer negligence,[[44]](#footnote-44) breach of employment contract,[[45]](#footnote-45) and misleading and deceptive conduct in employment.[[46]](#footnote-46) In discrimination law the focus is on compensating for the loss caused by the discrimination, whereas in defamation law damages extend beyond compensatory loss and serve three purposes: consolation for personal distress and hurt, reparation for damage to the applicant’s reputation, and vindication of the applicant’s reputation.[[47]](#footnote-47)

In the Full Court of the Federal Court’s decision in *Richardson v Oracle*,Justice Kenny observed that there is a substantial disparity between the quantum of awards in defamation and discrimination matters, despite the similar situations of applicants in both cases.[[48]](#footnote-48) Both claims relate to the dignity and standing of the applicant in the community which warrants protection, perhaps even more so for discrimination claims given the broader societal interest in the effective operation of discrimination law.[[49]](#footnote-49) There is no justification for valuing the harm caused by defamation more than that caused by discrimination. Therefore, the quantum of damages for discrimination should be brought into line with compensation for defamation.

**Recommendation 10:** The EO Act should be amended to enable a Court or Tribunal to order a respondent to pay an applicant damages by way of consolation for personal distress and hurt, reparation for damage to their reputation, and vindication of their reputation, as well as compensation for any loss or damage suffered by the applicant, in line with the principles for damages payments in defamation cases, for the purpose of increasing awards of damages in discrimination cases.

### Alleviate prohibitive litigation costs

Under the EO Act costs may be ordered at the Tribunal stage but only where one party has unreasonably caused the other to incur unnecessary costs. The VCAT has ruled that costs orders should not be made lightly in the discrimination jurisdiction so as not to deter applicants from using the method of redress provided by discrimination law.[[50]](#footnote-50) Unfortunately, however, the reality is that the failure to reward successful applicants with a favourable costs order is having the opposite effect.

Just as the presumption that costs follow the event discourages meritorious applicants from pursuing their discrimination complaint to hearing due to the significant financial risk, the presumption that the parties bear their own costs discourages meritorious applicants because an award of compensation is extremely unlikely to cover their legal costs. For example, in a recent sexual harassment case under the EO Act, the applicant was awarded $100,000 in compensation for a meritorious claim but incurred approximately $140,000 worth of legal fees. Justice Garde declined to award more than a small portion of the applicant’s costs leaving the applicant with little or no benefit from her claim despite the stress, time, and resources that went into achieving the successful outcome.[[51]](#footnote-51)

As outlined by Member Fitzpatrick in a different discrimination case heard by the Queensland Civil and Administrative Tribunal “it is not in the interests of justice that [the applicant] suffer the complete erosion of her award of compensation by legal costs necessarily incurred in successfully bringing her claim”.[[52]](#footnote-52)

We submit that the potential deterrence effect of a presumption that parties will bear their own costs can be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in discrimination cases in the United States.[[53]](#footnote-53) The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a District Court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

**Recommendation 11:** A costs provision should be inserted into the EO Act which provides that cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

### Penalise those who permit discrimination

The EO Act currently fails to impose liability on all persons with responsibility for unlawful conduct. For example, a woman who worked in disability care was being repeatedly sexually harassed by a resident with a mental disability. It was difficult to bring a claim against the employer under the EO Act, as it is unlikely that a Court would find that the employer was sexually harassing her, as is required for a breach of section 93 of the EO Act. It could not be said with certainty that the employer was requesting, instructing, inducing encouraging, authorising or assisting the resident to sexually harass her, as is required to make a breach of section 105 of the EO Act.

It is important that employers should not be allowed to simply turn a blind eye to unlawful acts against their employees. Prohibiting employers from allowing or “permitting” a breach of the EO Act is consistent with their obligations under the *Occupational Health & Safety Act 2004* (Vic)to provide a safe workplace.

**Recommendation 12:** Amend section 105 of the EO Act to extend the authorising and assisting provision to prohibit “permitting” a contravention, similar to the *Sex Discrimination Act* *1984* (Cth) and other anti-discrimination acts.

# How do we ensure we meet our objectives over the long term?

Ongoing monitoring and evaluation is critical to measure our achievement of the objectives developed in the Gender Equality Strategy in Victoria over the long-term. Obtaining baseline data to further understand community attitudes towards and experiences of gender equality, sex discrimination and sexual harassment in Victoria is an essential first step to enable future measurement and assessment of any steps taken to improve gender equality, and potentially identify further action required.

A similar approach should be adopted to that of the AHRC as part of its National Review on Pregnancy and Return to Work. The AHRC commissioned a National Survey to measure the prevalence of discrimination in the workplace related to pregnancy, parental leave and return to work following parental leave. In addition to the data collected through the consultation and submissions process, the AHRC survey revealed that significant levels of gender inequality in the workplace existed.[[54]](#footnote-54) This established a benchmark for future results to be measured against.

**Recommendations 13:** The Victorian Government should undertake a survey to obtain quantitative data on community attitudes and experiences of discrimination and gender inequality to establish a benchmark from which the Victorian Government can measure its attempts to eradicate discrimination and improve gender equality over the long-term. Thereafter, funding should be allocated to conduct prevalence surveys which should be carried out at regular intervals to map Victoria’s progress in reducing discrimination and improving gender inequality.

1. Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review: Report* (2014), page 8. [↑](#footnote-ref-1)
2. Australian Human Rights Commission, *Working* *Without Fear: Results of the Sexual Harassment National Telephone Survey* (2012), page 4. [↑](#footnote-ref-2)
3. United Nations Development Fund for Women, *Investing in Gender Equality: Ending Violence against Women and Girls* (2010), available at: <http://www.unwomen.org/~/media/headquarters/media/publications/unifem/evawkit_01_investingingenderequality_en.pdf>. [↑](#footnote-ref-3)
4. Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2014/2015*, page 21; Australian Human Rights Commission, *Annual Report 2014/2015*, page 425. [↑](#footnote-ref-4)
5. Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014), page 32, fn26. [↑](#footnote-ref-5)
6. Ibid, page 32. [↑](#footnote-ref-6)
7. Ibid, page 23. [↑](#footnote-ref-7)
8. See for example: Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014). [↑](#footnote-ref-8)
9. While the unused portion of the 18 weeks’ paid parental leave entitlement can be transferred to fathers in exceptional circumstances, fewer than one in 20 fathers take this up: Ben Moxham, ‘Parental Leave Scheme Overlooks the Fathers’, *The Age* (Melbourne), 19 March 2014. [↑](#footnote-ref-9)
10. See, for example, UN Women, *Progress of the World’s Women: Transforming Economies, Realizing Rights* (2015), available at: <http://www2.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/poww-2015-factsheet-developedregions-en.pdf?v=1&d=20151023T211255>, page 2; and International Network on Leave Policies & Research, *Country Reports*, April 2015, available at: <http://www.leavenetwork.org/lp_and_r_reports/country_reports/> [↑](#footnote-ref-10)
11. UN Women, *Progress of the World’s Women: Transforming Economies, Realizing Rights* (2015), available at: <http://www2.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/poww-2015-factsheet-developedregions-en.pdf?v=1&d=20151023T211255>, 2. [↑](#footnote-ref-11)
12. Ben Moxham, ‘Parental Leave Scheme Overlooks the Fathers’, *The Age* (Melbourne), 19 March 2014. [↑](#footnote-ref-12)
13. UN Women, *Progress of the World’s Women: Transforming Economies, Realizing Rights*, available at: <http://www2.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/poww-2015-factsheet-developedregions-en.pdf?v=1&d=20151023T211255>, 2. [↑](#footnote-ref-13)
14. The Tavistock Institute, *Shared parental leave to have minimal impact on gender equality,* May 2014, available at: <http://www.tavinstitute.org/news/shared-parental-leave-minimal-impact-gender-equality/>. [↑](#footnote-ref-14)
15. Johannson, E-A, *The effect of own and spousal parental leave on earnings*, Working Paper 2010:4. Uppsala, Sweden: Institute of Labour Market Policy Evaluation; Ben Moxham, ‘Parental Leave Scheme Overlooks the Fathers’, *The Age* (Melbourne), 19 March 2014. [↑](#footnote-ref-15)
16. See also Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report* (2014); M Sanders and J Zeng of Bain & Company and K Fagg and M Hellicar of Chief Executive Women, *The Power of Flexibility: A key enabler to boost gender parity and employee engagement* (2016). Despite taking short periods of leave, 27% of fathers experience discrimination when requesting or taking parental leave and return to work. Of that 27% who experienced discrimination, 49% reported receiving negative comments and attitudes from their colleagues or manager/employer and 47% reported discrimination related to pay conditions: AHRC *Supporting Working Parents Report,* 26, 49 and 52. [↑](#footnote-ref-16)
17. [↑](#footnote-ref-17)
18. See, for example, *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [79]; *Lee v Smith* [2007] FMCA 59 at [215]; *Poniatowska v Hickinbotham* [2009] FCA 680 at [350]-[351]; and *GLS v PLP* *(Human Rights)* [2013] VCAT 221; and Australian Human Rights Commission, *Working Without Fear: Results of the Sexual Harassment Telephone National Telephone Survey 2012,* (2012), available at <https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/survey/SHSR_2012%20Web%20Version%20Final.pdf>, page 27. [↑](#footnote-ref-18)
19. Australian Bureau of Statistics, Personal Safety Survey, Catalogue No 4906.0 (2012), 2013b. [↑](#footnote-ref-19)
20. Australian Bureau of Statistics, Personal Safety Survey, Catalogue No 4906.0 (2005), 11, 34. [↑](#footnote-ref-20)
21. Lily Partland, ‘Telstra’s introduction of domestic violence leave welcomed by ACTU’ *ABC News,* (14 January 2015), available at:<http://www.abc.net.au/news/2015-01-14/actu-welcomes-telstradomestic-violence-leave/6016212>. [↑](#footnote-ref-21)
22. Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August 2012), pages 27 and 85. [↑](#footnote-ref-22)
23. See, for example: Dominique Allen, *Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions* [2010] MonashULawRw 28 [↑](#footnote-ref-23)
24. See, for example: R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007); Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010). [↑](#footnote-ref-24)
25. Fair Work Ombudsman, *Annual Report 2014-2015*, page 37. [↑](#footnote-ref-25)
26. See for example: Australian Human Rights Commission’s Resources for Employers available at: <https://www.humanrights.gov.au/our-work/employers>; Victorian Equality Opportunity Commission’s Resources and Publications available at: <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications> [↑](#footnote-ref-26)
27. International Labour Organisation, *Maternity and paternity at work: Law and practice across the world,* May 2014, page 8. [↑](#footnote-ref-27)
28. Annadis Greta Rudolfsdottire, ‘Iceland is great for women, but it’s no feminist paradise’, *The Guardian* (Australia), 29 October 2014, available at http://www.theguardian.com/commentisfree/2014/oct/28/iceland-women-feminist-paradise-gender-gap-pay. [↑](#footnote-ref-28)
29. International Network on Leave Policies & Research, *Country Report – Iceland*, April 2015, page 2. [↑](#footnote-ref-29)
30. The Tavistock Institute, *Shared parental leave to have minimal impact on gender equality,* May 2014, available at: <http://www.tavinstitute.org/news/shared-parental-leave-minimal-impact-gender-equality/>. [↑](#footnote-ref-30)
31. International Network on Leave Policies & Research, *Country Report – Sweden*, April 2015, page 2. [↑](#footnote-ref-31)
32. Ibid. [↑](#footnote-ref-32)
33. See for example the Department of Health and Human Services, *Family Violence Risk Assessment and Risk Management Framework and Practice Guides 1-3,*(April 2012), available at: <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0010/718858/1_family_violence_risk-assessment_risk_management_framework_manual_010612.PDF>. [↑](#footnote-ref-33)
34. Victoria Legal Aid, *Research reveals risk factors for continuing family violence*, (18 February 2016), available at <http://www.legalaid.vic.gov.au/about-us/news/research-reveals-risk-factors-for-continuing-family-violence>. [↑](#footnote-ref-34)
35. *Anti-Discrimination Act* 1998 (Tas), Section 3 [↑](#footnote-ref-35)
36. State of Victoria, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008), Recommendation 48 [↑](#footnote-ref-36)
37. *Stephens v Australian Postal Corporation* [2014] FCA 732 (10 July 2014) [↑](#footnote-ref-37)
38. Sex Discrimination Act 1975 (UK) c 65, ss 63A, 66A; Race Relations Act 1976 (UK) c 74, ss 54A, 57ZA; Disability Discrimination Act 1995 (UK) c 50, s 17A(1C); Race Relations (Northern Ireland) Order 1997 NI 6, art 52A; Sex Discrimination (Northern Ireland) Order 1976 NI 15, arts 63A, 66A. [↑](#footnote-ref-38)
39. For a discussion of this procedure, see Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’, (2009) 31 *Sydney Law Review* 579. [↑](#footnote-ref-39)
40. Empirical research also shows that discrimination causes physical and stress-related illnesses, housing insecurity, relationship problems, and poverty: Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012) 172. [↑](#footnote-ref-40)
41. [2015] VCAT 269. [↑](#footnote-ref-41)
42. *Jemal v ISS Facility Services Pty Ltd* (Human Rights) [2015] VCAT 103 ($3,000 awarded as general damages for racial discrimination); and *Bevilacqua v Telco Business Solutions (Watergardens) PL* (Human Rights) [2015] VCAT 269 ($10,000 awarded as general damages for pregnancy discrimination). [↑](#footnote-ref-42)
43. See for example *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652. See also Carol Andrades, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), 12 [↑](#footnote-ref-43)
44. See for example *Swan v Monash Law Book Co-operative* [2013] VSC 326, cited in Ibid at [101]. [↑](#footnote-ref-44)
45. See for example *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [104]. [↑](#footnote-ref-45)
46. See for example *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687, cited in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [105-6]. [↑](#footnote-ref-46)
47. *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652 [↑](#footnote-ref-47)
48. *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at 109. [↑](#footnote-ref-48)
49. Carol Andrades, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998), page 12. [↑](#footnote-ref-49)
50. *Tan v Xenos* [2008] VCAT 1273 per Judge Harbison VP. [↑](#footnote-ref-50)
51. *GLS v PLP (Human Rights)* [2013] VCAT 1367. [↑](#footnote-ref-51)
52. Bell v State of Queensland & Anor [2015] QCAT 369. [↑](#footnote-ref-52)
53. *Christianberg Garment Co v EEOC* 434 US 4012 (1978). [↑](#footnote-ref-53)
54. Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report* (2014), page 13. [↑](#footnote-ref-54)