

Submission to the Productivity Commission

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My background

I qualified as a barrister and solicitor in the ACT in 1995. After 5 years of practice as a litigation lawyer with the Commonwealth Government, I had my first baby and joined the Australian Breastfeeding Association ('ABA') in 2000. I qualified as a Breastfeeding Counsellor with the ABA in 2003 and began leading group meetings that provide information and support for mothers and babies. I led two groups for a total of 10 years as Group Leader of the Aspley Group and the Springwood Group. Both groups cover over 15 suburbs in geographic scope. During this time I also work voluntarily on the Breastfeeding Helpline, counselling mothers in Queensland and then nationally after the helpline went national. I am still active at the group level and am also the QLD State Grants Co-ordinator for the ABA.

In 2014, I became a PhD student of the TC Beirne School of Law at the University of Queensland. My thesis is on the legal entitlement of women to breastfeed at work in Australia. The thesis focusses on anti-discrimination legislation, the *Fair Work Act 2009* and health and safety laws. I intend to conduct survey research of women who have returned to work as to their awareness of the laws, the clarity of the laws and of what use such laws are to such breastfeeding employees.

Some of the Benefits of Breastfeeding

The short and long term health benefits for the mother and her baby of breastfeeding are well documented.¹ The National Health and Research Medical Council's Australian Dietary Guidelines (2013) summarise the international and Australian position on breastfeeding as follows:

The World Health Organization (WHO) states that 'breastfeeding is an unequalled way of providing ideal food for the healthy growth and development of infants'.⁸⁷¹ Breastfeeding has short-term and long-term health and other benefits for infants and mothers. Maximising the benefits of breastfeeding to the infant and mother requires the support of the other family members and a supportive community environment.

¹ For a summary of benefits see, for example, the National Health and Medical Research Council *Australian Dietary Guidelines, Eat for Health, Providing the scientific evidence for healthier Australian diets*, Australian Government, Department of Health and Ageing, Commonwealth of Australia, Canberra 2013, particularly Guideline 4, from pages 87 to 96.

Australia has a long history of promoting and supporting breastfeeding in its public health policy. In 1981 Australia became a signatory to the WHO *International code of marketing of breast-milk substitutes* (WHO Code),⁸⁷² the main aim of which was to protect and promote breastfeeding. The importance of breastfeeding led to its inclusion in the first edition of the dietary guidelines endorsed by the NHMRC in 1982.⁷⁵⁰

Guideline 4 (of 5 Guidelines) of the NHRMC Guidelines includes that:

Increased duration of breastfeeding

- Encourage exclusive breastfeeding until around 6 months of age when solid foods are introduced
- Encourage the continuation of breastfeeding while solid foods are introduced until 12 months of age and beyond, for as long as the mother and child desire.

It is important to note that the breastfeeding is recommended to continue 'for as long as the mother and child desire'. However, when women return to work, often it is not the mother and child who decide the issue of whether they will continue to breastfeed. It is important to note that the guideline does not state 'for so long as the employer desires'. And yet in Australia today, without clearly legislated guaranteed breastfeeding breaks and facilities in the workplace for women to breastfeed their baby or to express if they so desire, many women are forced to make a choice as to whether to continue to breastfeed when they return to work or whether they will delay return to work.² This 'choice' is no choice at all and this situation was voiced by Senior Constable Tammy O'Connell in her application to the Queensland Civil and Administrative Tribunal in 2011, that alleged unlawful discrimination against the Queensland Police Service and the Crimes Misconduct Commission (where she was seconded) in circumstances that she alleged forced her to wean her baby on return to work. "In reality I was left with no choice," O'Connell said in her unlawful discrimination application.³

As one researcher has summarised the issue:

To breastfeed or not to breastfeed when a lactating mother returns to work is a dilemma many mothers face after just having had their baby. The dilemma every mother faces at this time is not so much about what to feed her baby, but the whole issue surrounding the concept of leaving her baby and returning to work in an

² See, for example, House of Representatives Standing Committee on Health and Ageing, *The Best Start Report: Inquiry into the Health Benefits of Breastfeeding*, Commonwealth of Australia, Canberra 2007, chapter on work, pp75-82.

³ Sandy, A, 'Qld Police service unable to confirm outcome of breastfeeding policy review', *The Courier-Mail*, September 21, 2011, at <http://www.couriermail.com.au/news/queensland/senior-constable-tammy-oconnell-compensated-by-queensland-police-service-after-she-was-forced-to-stop-breastfeeding-to-return-to-work/story-e6freoof-1226149850699>.

organization where there are no workplace facilities to support them continue the practice of exclusive breastfeeding with full-time work.⁴

Many countries recognise the adverse effect of women returning to work and the barriers to workplace participation and to workplace productivity, where breastfeeding breaks are not provided. In Ghana, for example, the *Ghana Labour Act (2003)* stipulates that a working mother is entitled to disrupt her work for an hour during her working hours to breastfeed (nurse) her baby.⁵

According to Heymann's global comparative study of breastfeeding policies that included data from 182 countries, 130 countries provided guaranteed paid breastfeeding breaks and 7 countries provided guaranteed unpaid breastfeeding breaks.⁶ In this study, Australia was found not to have a breastfeeding policy that guaranteed breastfeeding breaks.

The International Labor Organisation recognised in its first year that lactating women needed to be provided with breastfeeding breaks and facilities. In 1919, the third convention, the Maternity Protection Convention provided for a one hour break for lactating women. In the almost 100 years since this Convention, Australia has not legislated to protect women in the way outlined as globally necessary in 1919. Because of this, women are unclear as to their legal entitlements to breastfeed or express breastmilk during their working hours, have at times been discriminated against without knowing but understanding the dire consequences of being treated less favourably in the workplace, or have not even bothered to seek out entitlements at work due to the 'frowned upon' nature of the workplace culture where lactation breaks and facilities may be provided but the woman worker is not supposed to actually exercise the right or use the breaks or facilities,⁷ or the workers perceives that her workplace will not allow it or will deny her attempts to negotiate for breastfeeding to be accommodated and she may have already been discriminated against while pregnant or while on parental leave or on return to work. *The Australian Human Rights Commission's Supporting Working Parents, Pregnancy and Return to Work, National Review, Report of 2014*, provided evidence that women had often been discriminated more than once from pregnancy to return to work and were often not aware that situations they had experienced at work could amount to discrimination.⁸ Further, few women made either an internal or external complaint⁹ and many mothers found that where they made a complaint that the matter was not resolved.¹⁰

⁴ Mensah, AO, 'The Influence of Workplace Facilities on Lactating Mothers' Job Satisfaction and Organisational Commitment: A Case Study of Lactating Working Mothers in Accra, Ghana, (2011) 6 *International Journal of Business Management* 7,234-241, p234.

⁵ Ibid.

⁶ Heymann, J, Raub, A, and Earle, A, 'Breastfeeding Policy: a Globally Comparative Analysis', *Bull World Health Organ* 2013; 91: 398-406, at p400, doi: <http://dx.doi.org/10.2471/BLT.12.109363>.

⁷ See, eg, Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work, National Review – Report, 2014*, Sydney; see also Grenfell, L & Hewitt, A, 'Supporting breastfeeding mothers in the workplace' [online]. *Bulletin (Law Society of South Australia)*, Vol. 36, No. 7, Aug 2014: 24-25.

⁸ AHRC National Review, Ibid, p27.

⁹ Ibid, p33. It was found that 91% of women surveyed did not complain.

¹⁰ Ibid, p35.

In my research, to date, although breastfeeding women may be treated adversely in the workplace by denial of their lactation, in treatment such as negative comments from managers and co-workers to demotion or not being allowed to perform their usual duties until they wean their baby, and to the extent of job loss, that there is little in the way of recorded enquiries or complaints about breastfeeding laws and entitlements with agencies such as the Australian Human Rights Commission and the state and territory equivalent Commissions. The complaints, though infrequent are usually recorded as having been in the area of the provision of goods and services. However, as anti-discrimination commissions in Australia typically receive more complaints of discrimination in the area of work, it is important to note that women who may be affected detrimentally at work are either not aware of the separate ground of breastfeeding discrimination protection in the workplace provided by section 7AA of the *Sex Discrimination Act 1984* and every *Anti-Discrimination Act* or *Equal Opportunity Act* in the states and territories (except South Australia in the work context). Both direct and indirect discrimination protections appear in this context federally and in the state and territory jurisdictions in relation to breastfeeding.

The National Review found that:

...it is noteworthy that those who reported experiencing discrimination on return to work were less likely to make a complaint to a government agency than those who reported experiencing discrimination.¹¹

However, the prevalence of breastfeeding employees appears to be more prevalent in workplaces than is revealed in the federal and state anti-discrimination commissions' records, such as contained in Annual Reports.¹² The National Review found that of the 36% of mothers who reported in a survey that they experienced discrimination in the workplace when returning to work, one in five women (22%) reported discrimination related to breastfeeding or expressing milk.¹³

One of the few written works on discrimination against breastfeeding mothers in the work sphere in Australia, is 'Discrimination Against Breastfeeding Mothers in Childcare', by Julie Smith, Sara Javanparast, Ellen McIntyre and others, in 2013.¹⁴ Where women are experiencing discrimination from their childcare services, this potentially impacts both on their ability to enter or re-enter the workforce (such as where the childcare centre demands that the mother wean the baby before they will accept enrolment), their ability to continue to breastfeed on their return to work, their confidence in the carers of their baby when they leave their baby in care, their productivity at work. Smith and others found that only 21% of mothers using childcare were aware of Australian legislation covering discrimination against

¹¹ AHRC National Review, 2014, supra, p33.

¹² For a summary of complaints and enquiries to such commissions and to the Fair Work Commission (though the statistics for breastfeeding are not broken down by the FWC tables of information), see the National Review, Appendix E at p238 onward.

¹³ Ibid, p29. It is not clear whether all of these women, who were surveyed, breastfed or intended to on their return to work.

¹⁴ Smith, J, Javanparast,S, McIntyre,E, Craig,L, Mortensen,K, Koh,C, 'Discrimination Against Breastfeeding Mothers in Childcare', (2013) 16 *Australian Journal of Labour Economics* 1,65-90,pp74-75.

breastfeeding by childcare services (in the area of provision of goods and services). Around half were not aware and 25% were unsure. It was found that almost two thirds of childcare service leaders were not aware or unsure of the legal responsibilities of childcare services under current legislation. One in four childcare services were well-informed of discrimination laws.

The prevalence of discrimination against women who are pregnant was revealed in the 2011 Australian Bureau of Statistics, *Pregnancy Transitions Study*, wherein 67,000 women reported, in a survey, that they had experienced discrimination while pregnant.¹⁵ These are no insignificant numbers of women who are experiencing detriment in the workplace and the Fair Work Ombudsman distributed 100,000 kits on pregnancy rights in the workplace in 2010. In 2011, there were 205,000 women with babies under the age of 2 years and of these, 190,000 returned to work having worked while pregnant, and 15,000 entered the workforce not having worked while pregnant. A large number of women took no leave, 22,000 women, after their baby was born. Such numbers lead to the question of what rigorous policy and legislation making efforts are being examined in Australia in order to protect breastfeeding workers and their babies and the happiness of the family unit in the treatment of mothers?

Women who are told by employers or managers to 'just put the baby on the bottle', to 'go and express in the toilet and stop being a drama queen' or are being otherwise denied access to breaks and facilities, are being denied their motherhood, their reproductive rights, and the workplace is denying that they are employing women, not non-lactating males in the ideal male worker norm workplace. Such women are not equal in their workplaces and the denial of their childbearing rights and the biological fact that lactation follows pregnancy must have an impact on their self-worth and confidence and trust in their employer and workplace. Studies have borne out that women who are provided with lactation breaks and facilities are more productive, more loyal to their employer, and have better longer term health benefits from longer duration of breastfeeding.¹⁶ Lactation does not work like a tap that is turned on and off, women need to breastfeed or express regularly to avoid engorgement and pain, mastitis and loss of milk supply which impacts adversely on their babies also. Breaks for mothers need to factor in the unpredictability of when a mother may need to breastfeed or express, which cannot always be done to a set schedule or a schedule designed by others in the workplace and can depend on the age of the baby, the frequency that the baby feeds and or the mother expresses, the rate at which a mother starts to fill with breastmilk such that she needs to be relieved by breastfeeding or expressing. Women have to accommodated to suit their needs and cannot necessarily go

¹⁵ Australian Bureau of Statistics, *Pregnancy and Employment Transitions Australia*, Nov 2011, 916/11/2012), Canberra, downloaded on 11 December 2014 at [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/\\$File/49130_nov%202011.pdf,p5](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/$File/49130_nov%202011.pdf,p5).

¹⁶

for long periods between the last breastfeed of their child before they are separated, travel to work time and then commencement at work. They may need to breastfeed or express shortly after starting a shift. The time taken per break also may vary for a mother as the release of milk depends on the let-down reflex which ejects the milk. This is not always an automatic response whether during breastfeeding or expressing and may be more difficult in a work setting while the mother gets used to her surrounds while she attempts to breastfeed or express. Many women need a private, clean, quiet room where no one will intrude. The New Zealand Department of Business has excellent resources including an educational video for employees and employers about return to work, breastfeeding and breastfeeding laws in New Zealand that do stipulate guaranteed paid, additional breaks and penalties for employers that fail to provide breaks and or facilities.

Why Returning to work and breastfeeding is an important workplace, health and safety and social issue

As more and more women with babies and small children return to work, governments world-wide are legislating to remove barriers to their participation at work and in childcare, for paid parental leave and subsidised and regulated childcare.

The National Breastfeeding Strategy first commenced in 1996 with \$2 million dollars of funding to encourage employers to help accommodate women returning to work and breastfeeding. The current National Breastfeeding Strategy of 2010-2015, was signed by all state and territory Health Ministers and by the federal government in 2009. The aim to encourage breastfeeding in workplaces is still a key arm of this strategy.

In 2007, *The Best Start: Report of the Inquiry into the Health Benefits of Breastfeeding*, the Department of Health and Ageing documented evidence, submissions and made recommendations on matters including women returning to work and breastfeeding.¹⁷ In 2014, the Australian Human Rights Commission made recommendations that the reform of Australian laws including the *Fair Work Act 2009* (Cth) with respect to breastfeeding employees is necessary.¹⁸ The Commission's *National Review* report states that 'the National Review recommends that the *Fair Work Act* be clarified to allow employee breaks from work for the purposes of breastfeeding or expressing'.¹⁹ The National Review also identifies breastfeeding and expressing breastmilk at work as a health and safety issue.²⁰

¹⁷ House of Representatives Standing Committee on Health and Ageing, *The Best Start Report: Inquiry into the Health Benefits of Breastfeeding*, Commonwealth of Australia, Canberra 2007, chapter on work, pp75-82.

¹⁸ AHRC, *National Review*, 2014, eg, p124.

¹⁹ Ibid.

²⁰ See, for example, p125.

Maternity leave typically expires before the end of the breastfeeding period (6 months exclusive breastfeeding and up to one year and beyond)^{21,22} and in 2010 the Paid Parental Leave scheme was introduced, providing for 18 weeks paid leave.²³ The 2010 Australian National Infant Feeding Survey found that the breastfeeding initiation rate after birth was 96% but that only 39% of babies were exclusively breastfed (essentially, breastmilk only) at less than 4 months and only 15% at less than 6 months.²⁴ Studies have found that mothers returning to work before their babies are six months old are less likely to be breastfeeding at six months than mothers who are not employed.²⁵ Julie Smith and others, for the Australian Institute of Family Studies, have conducted an excellent study about return to work and breastfeeding and workplace support in their 2013 study, 'Workplace support, breastfeeding and health'.²⁶

The Breastfeeding Friendly Workplace Program, an initiative of the Australian Breastfeeding Association, provides guidance on creating a breastfeeding-friendly workplace including that the provision of a private space or area, preferably with a lockable door, that is not a shower or a toilet, with access to: power, clean running water, refrigeration to store expressed breastmilk, and lactation breaks for the woman to breastfeed her baby or to express her breastmilk.²⁷

The government has previously recognised the importance of providing clear information and guidance to employers and employees on breastfeeding and work and pregnancy and work.²⁸ Pregnancy Guidelines were issued in 2001 by the federal government following the

²¹ World Health Organisation, UNICEF, (2014), *Global Nutrition Targets 2025: Breastfeeding Policy Brief*, [online] http://www.who.int/nutrition/publications/globaltargets2025_policybrief_breastfeeding/en/ [cited 21 June 2015].

²² National Health & Research Medical Council, *Infant Feeding Guidelines*, 2003, 2012.

²³ *Paid Parental Leave Act 2010* (Cth). A proposal of a Bill to amend the *Fair Work Act 2009* to enable 26 weeks of paid parental leave in recognition of the WHO recommendation of 6 months exclusive breastfeeding and of *ILO Maternity Protection Convention No.183*, and Article 11.2(b) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979, but was not passed: *Fair Work Amendment (Paid Parental Leave) Bill 2009 No. [sic]2009 1*: downloaded on 10 February 2015, at <http://www.austlii.edu.au/au/legis/cth/bill/fwapl2009349/>.

²⁴ Baxter, Cooklin et al, 2008.

²⁵ Ibid. See Baxter, J's review of the *Growing Up in Australia: The Longitudinal Study of Australian Children*, and her statement that policy makers need to be aware of the lack of universal maternity leave entitlement coupled with the lack of breastfeeding friendly work environments and of how the two are related and impact on breastfeeding duration and outcomes: Baxter, J, 'Breastfeeding, employment and leave: an analysis of mothers in Growing Up in Australia, (2008) *Family Matters*, No.80, p17.

²⁶ Smith, J, McIntyre, E, Craid, L, Javanparast, S, Strazdins, L and Mortensen, K, 'Workplace support, breastfeeding and health', *Family Matters*, No.93, 58-73.

²⁷ See <https://www.breastfeeding.asn.au/workplace?q=workplace>; see also Baxter (2008), p24.

²⁸ In the year 2000, the 'Balancing Breastfeeding at Work' initiative provided information to employers and female employees about options for work arrangements that may be conducive to women continuing to breastfeed after maternity leave ended including: work from home, delay returning to work, work flexible hours, work less hours, bring baby to work, express breastmilk at work, use child care onsite or near work.

Pregnant and Productive inquiry and report of 1999 and workplace kits were provided to employers and pamphlets to employees about breastfeeding at work in the year 2000.

Some state and federal governments and public service commissions have provided paid breaks for employees to breastfeed or express and facilities, and some private enterprise agreements and work contracts also provide similar conditions. However, there is clearly a need for legislated guaranteed breaks for breastfeeding and expressing of breastmilk for all Australian working women of childbearing age to access if this is needed and to know that it is a guarantee so that initiation and duration of breastfeeding goals can be approached by women and their supporters and by employers with more certainty. The anti-discrimination legislation in Australia, both federally and at the state level, does not provide clear guarantees for women and employers to have certainty and legal academics Laura Grenfell and Anne Hewitt has questioned the lack of clarity in section 7AA of the Sex Discrimination Act 1984.²⁹ How can working women really know what exactly is provided by that provision and similar state and territory provisions? There is no specific reference to breastfeeding breaks and facilities, there is a large scope for employer discretion as to what an employer will decide about breastfeeding and it is unclear as to whether the breastfeeding employer is in a position to question that or to seek redress, there is a test of 'reasonableness' for the indirect discrimination that is not clearly set out what this means in the breastfeeding at work context, there are no cases on the provision and I am not aware of any other cases, apart from O'Connell in Queensland in 2011 and that case settled prior to a judgment being made, so there is no reported case to give guidance. There are no minimum standards in the SDA and there is the criticism by some legal academics that the anti-discrimination law sphere is not the appropriate sphere for workplace issues and regulation, in terms of remedies, respect, strength of provisions and penalties, union protections and action, and being assisted by others such as the Fair Work Commission and the Fair Work Ombudsman.³⁰

The ability of the father to access parental leave and flexible work arrangements is also important to the success of continued breastfeeding and the sharing of care-work in raising

²⁹ Grenfell and Hewitt are critical of the opacity in section 7AA of the Sex Discrimination Act, and the minimal incentives and legislative protections for breastfeeding in Australia, in Grenfell, L & Hewitt, A, 'Supporting breastfeeding mothers in the workplace' [online]. *Bulletin (Law Society of South Australia)*, Vol. 36, No. 7, Aug 2014: 24-25.

³⁰ See, eg, Smith, B, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Laws', (2010) 23 *AJLL* 199, eg p199; Harpur, P, French, B, and Bales, R, 'Australia's Fair Work Act and the Transformation of Workplace Disability Discrimination Law', (2012-13) 30 *Wisconsin International Law Journal* 190-226; Gaze, B & Chapman, A, (2013) The Human Right to Non-discrimination as a Legitimate Part of the Workplace Law: Towards substantive Equality at Work in Australia?, *The International Journal of Comparative Labour Law and Industrial Relations* 29, no.4:355-374.

children in Australia.³¹ Studies have shown also that the support shown by the father of the baby toward the mother's breastfeeding results in better breastfeeding rates for women.

According to the Australian Breastfeeding Association:

Breastfeeding happens more easily when the people closest to the breastfeeding mother support her. She needs information, rest, time to learn and her own needs cared for. Most of all, she needs the emotional support and commitment from the people closest to her, especially her partner. The more her partner knows about breastfeeding and is willing to help and encourage her, the more likely she will breastfeed successfully.³²

It is important to recognise that when a breastfeeding employee is treated poorly, that this is likely to impact negatively on the baby, the father of the baby and other family members. In fact, Zachary Kramer in 'After Work' explores the extent of negative behaviour impacts on family members of victims and questions whether this is compensable through the civil tort (negligence) law.³³ Babies particularly sense when their mothers are tense and or unhappy, particularly breastfed babies are held throughout breastfeeding and can feel physical tension of their mothers.

Some women are vulnerable after having a baby and post-natal depression and or anxiety are not uncommon for mothers and fathers also to experience. The PANDA website encourages employers to be aware of signs in employees where they may be more vulnerable and need more support. Where breastfeeding women are denied access to breastfeeding breaks and facilities, and or where they are made by others in the workplace to feel ashamed or embarrassed that they are breastfeeding, the impact on employees may be even more detrimental if they may be vulnerable to conditions of anxiety and or depression. Separation from a baby also may not be a natural inclination for a mother to experience and to cope with. Legislation to protect women from negative behaviours of others, due to the sexualisation of the breast in western society and any embarrassment or harassment that follows this, and pressure to act as if one has not had a baby but is a non-

³¹ Heron, A, and Charlesworth, S, Working Time and Managing Care under Labor: Whose Flexibility? (2012) ABL 38 (3), 214-233, p215-16 – in terms of sharing the care-work load; Baxter (2008), supra, – re breastfeeding duration, p19.

³² See <https://www.breastfeeding.asn.au/bfinfo/we%E2%80%99re-together-%E2%80%A6-breastfeeding-partnership>; cited there are: Rempel LA, Rempel JK 2011, The breastfeeding team: the role of involved fathers in the breastfeeding family. *Journal of Human Lactation* 27(2):115–121, 187–189; and Tohotoa J, Maycock B, Hauck YL, Howat P, Burns S, Binns CW 2009, Dads make a difference: an exploratory study of paternal support for breastfeeding Perth, Western Australia. *International Breastfeeding Journal* 4:15.

³³ Kramer, Z, 'After Work', (2007) 95 *California Law Review* 627-667, eg 'Employment discrimination scholarship tends to assume that the harms of employment discrimination are not borne beyond the walls of the workplace. This is a mistake....As employees take the effects of discrimination home with them, their private lives are also affected.(p627)....'Due to the stress of discrimination, employees are less able to participate productively in family life, which in turn creates problems for their partners and children (p628).

lactating member of staff, also needs to clearly apply to breastfeeding women workers and positive duties on employers and managers to deter negativity, to foster a positive workplace culture where breastfeeding and expressing are perceived as normal, may be necessary.

1. Summary of Recommendations

Recommendation 1: That there be legislative reform to provide for working mothers with adequate paid breastfeeding or lactation breaks and access to appropriate facilities for breastfeeding or expressing, including, where viable, a lockable, private room (not a toilet), with access to power, clean running water and refrigeration.

Recommendations 2 -6: I have had the benefit of reading the Australian Breastfeeding Submission to the Productivity Commission, dated 18 September 2015, and I support and endorse those recommendations, as if they were my own and do not repeat those for the sake of expediency. I also agree with and endorse and approve of the rationale provided for those recommendations in terms of reviewing the legislation of the *Fair Work Act 2009* (Cth) and other ancillary or related legislation or laws with a view to ascertaining in what ways the legislation can specifically refer to breastfeeding employees and breastfeeding and expressing in Australian workplaces and that these entitlements be available to all women who breastfeed or express breastmilk or who may intend to, regardless of any continuous service period, notice requirement, or other qualification. The obligations should also apply to all employers regardless of the number of employees working for the employer, as this is a health and safety issue as well as a reproductive rights issue and the baby's short and long term health outcomes are impacted where the mother is denied access to breastfeeding breaks and facilities. All babies and mothers should have equal access to such entitlements and this is why paid breaks are recommended, in my view, as unpaid breaks may act as a deterrent and also impact on the gender equity pay gap which is already problematic in the Australian workforce and society.

Further Recommendations: I have had the benefit of reading the recommendations of the National Working Women's Centre in their March 2015 submission and I approve and endorse all of those recommendations and the reasoning that supports those recommendations, as if they were my own.

2. Response to questions posed by the Productivity Commission

I have concentrated this submission on particular aspects of the workplace relations system in the discrete areas relating to the enhanced equity and provision for women workers who breastfeed or express breastmilk, or who potentially will do so in future, at work.

In general, with the exceptions of these discrete areas, any protections in place that protect women workers who breastfeed or express breastmilk, including protection against dismissal and general protections as provided in the *Fair Work Act 2009* (Cth), remain unchanged. Also, any protections that protect or enable men and women to access flexible work arrangements should not be eroded where those men or women have family or carer responsibilities and or a partner of a breastfeeding worker or mother.

Entitlements to paid breastfeeding or lactation breaks and access to facilities

As outlined in the introduction, the ILO Maternity Protection Convention provided for lactation breaks from 1919, almost one hundred years ago. The current convention Recommendation No. 183 (2000), Article 10, provides:

1. A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.
2. The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.

Heymann and others' global analysis (described in the submission introduction) shows Australia as trailing far behind many other developed and developing countries on the provision of breastfeeding breaks and facilities in national legislation.

The study recognised that:

A woman's ability to breastfeed is markedly reduced when she returns to work if breastfeeding breaks are not available, if quality infant care near her workplace is inaccessible or unaffordable, and if no facilities are available for pumping or storing milk.³⁴

Boswell-Penc and Boyer, in their study of the United States law in 2007 stated that:

Over three-quarters of the counties in the world have adopted the International Labor Organization's current standards which include, in addition to maternity leave policies, breastfeeding breaks totalling at least one hour per day. In Mozambique, mothers can have two paid half-hour breaks per day (in addition to normal breaks)...; in Egypt women are granted two half-hour breaks which are paid for 18 months; and in Japan women are granted two half-hour breaks which are paid....In France, mothers are allowed two one-hour breaks and nursing/pumping rooms must be provided by employers; and in Norway...women are allowed two hours daily. In Sweden, which had breastfeeding breaks comparable to the US until the government launched a pro-breastfeeding campaign, a woman can take breaks for pumping or nursing when she wishes. It is noteworthy that Scandinavian success rates have been related to work policies and that, there, few women express milk, as extended maternity leave and on-site childcare are much more available than in the US (Greiner, noted in Hausman,2003,p183). The lack of a supportive legislative framework constitutes a formidable structural barrier to women in the US seeking to combine breastfeeding and wage labor.³⁵

The World Health Organisation and UNICEF have encouraged global support and approaches to legislation to promote and support breastfeeding at work. The *Innocenti Declaration* of 1990

³⁴ Heymann et al, supra, p398.

³⁵ Penc-Boswell, M, and Boyer, K, 'Expressing Anxiety? Breast pump usage in American wage workplaces', (2007) 14 *Gender, Place and Culture: A Journal of Feminist Geography* 5, 551-567, pp555-556. Downloaded on 17 July 2015, DOI: 10, 1080/09663690701562248.

encourages governments to enact ‘imaginative legislation protecting the breastfeeding rights of working women and established means for its enforcement’.³⁶

In Australia, the legislation that specifically provides for breastfeeding is mostly contained in the anti-discrimination legislation and it is unclear. In terms of ‘imaginative legislation’, Australian women need simple and straightforward legislation to clearly set out breastfeeding breaks entitlements and access to facilities. It is very simple and many other countries have accomplished this. There are many good laws in place that provide precedents for Australian legislatures and relevant departments to consider such as the New York State law and the guidelines set out by the New York Department of Labor Division of Labor Standards, which sets out in detail when women are entitled to breaks during their shift (at least 3 hourly), when it will and when it will not be acceptable to deny provision of facilities, under what circumstances, what is ‘reasonable’ and etc.³⁷ In Hawaii, there is a package of breastfeeding rights laws, defining breastfeeding as a civil right. Employers are not required to provide break time but instead employers are prohibited from forbidding its employees from expressing breastmilk. This ‘subtle difference in language implies that breastfeeding is something to be presumed, not given permission for one to do.’³⁸ Louisiana prohibits discrimination against breastfed children in childcare settings. This law ‘couches a child’s “best interest” in constitutional terms, rather than in public health or psychological terms’.³⁹ It is one of the few laws that recognises the child as a rights-bearing individual.

Since 2007, the United States federal government⁴⁰ and New Zealand⁴¹ have both legislated for guaranteed lactation or breastfeeding breaks at work.⁴²

In Australian law the requirement for ‘reasonableness’, for example, in the indirect discrimination test of the *Sex Discrimination Act*, creates uncertainty as to when and how it may be exercised, though a concept of what can reasonably be provided by a workplace is also necessary where, for example, there is a small workplace. However, Ehrenreich, in reviewing the US breastfeeding law provisions, contends that while a reasonableness standard provides flexibility for the myriad contingencies that will arise, the ‘broad standard has a significant downside as well’,

... leaving many details to the discretion of individual employers. Especially given that the government has issued no formal regulations under the statute, common attitudes about breastfeeding will likely have a significant impact on employer-created policies (whether official or unofficial) and, later, perhaps on judicial decisions about the validity of those policies as well.⁴³

³⁶ <http://www.unicef.org/programme/breastfeeding/innocenti.htm>.

³⁷ See Guidelines at <http://www.labor.ny.gov/formsdocs/wp/LS702.pdf>.

³⁸ Kedrowski, KM, and Lipscomb, ME, *Breastfeeding Rights in the United States*, 2008, p113.

³⁹ Ibid.

⁴⁰ In 2010, the United States Congress passed a comprehensive health care reform law: the Patient Protection and Affordable Care Act, (Pub.L.No.111-148, 124 Stat. 119(2010)) of which section 4207 amended the Fair Labor Standards Act. For more critical review of this legislative amendment see, Karin, M, and Runge, R, ‘Breastfeeding and a New Type of Employment Law’, [2014] 63 *Catholic University Law Review*, 329-370.

⁴¹ In New Zealand the *Employment Act 2000* (NZ) was amended in 2008 by the *Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008*.

⁴² See the ABA Submission to the Productivity Commission for information on the NZ Act.

⁴³ Ehrenreich, (2014), ‘Breastfeeding on a Nickel and a Dime’, 20 *Michigan Journal of Race and Law* 65-116, p87

The scope of the employer discretion is a feature in the Australian anti-discrimination provisions relating to breastfeeding discrimination. Further to this, the Australian government has not issued any specific formal regulations in or under legislation such as the *Gender Workplace and Equality Act 2012* (Cth) or under the *Fair Work Act 2009*, the latter of which does not mention breastfeeding at all.⁴⁴

Where there is conflict between employer and employee in terms of breastfeeding employees being accommodated with breaks and facilities, and where the employer is informed that this is not going to be made available or where she is receiving other unfavourable treatment, there is a necessity to achieve a fast resolution because time is of the essence with breastfeeding and lactation. This is due to the physical health detriments to women when they are prevented from breastfeeding or expressing including a threat to their ongoing milk supply that feeds their babies who are dependent upon what their mother produces, as well as mastitis which may necessitate medical treatment and bed rest for a matter of days.

It is vital that enforcement or implementation mechanism be encouraged or facilitated quickly. In many cases, if disputes are not resolved within a matter of hours or days for the breastfeeding employee,⁴⁵ she may rapidly experience health problems (such as engorgement and pain⁴⁶), and or may be expressing in an unhygienic toilet stall either with the knowledge of the workplace or in hiding⁴⁷ and may be prematurely weaning her baby which was not her intention. Some women quit work at this point or could struggle with performance of work if, eg, they are in pain or the pressure from the build up of milk is distracting their attention (apparently it is harder to ignore than hunger).

Breastfeeding women may be too embarrassed or fearful to complain about this issue where the law is not clear as to exactly they can ask or demand. Employers need to be aware that in some situations the mother will need immediate accommodation and where there are no 'reasonable' grounds for withholding her use of breaks and facilities, this may be discrimination.⁴⁸

⁴⁴ The AHRC National Review recommended that the FWA be amended and in March 2015 the National Working Women's Centres have submitted to the Productivity Commission inquiry into Australian workplace law that the FWA be amended: National Working Women's Centre, (Mar 2015), *Submission to the Productivity Commission – Workplace Relations Framework Inquiry*, Recommendation 2,p4.

⁴⁵ As opposed to a dispute where the worker is on leave and will not return for some time, though a dispute may affect a worker to consider weaning when but for this negative situation the consideration of premature weaning would not have been contemplated.

⁴⁶ See, eg Karin and Runge, *supra*, p336. See also Australian Breastfeeding Association website on 'engorgement' and 'mastitis': www.breastfeeding.asn.au.

⁴⁷ Gatrell documents the exclusion of breastfeeding workers by employers, managers, co-workers and unsupportive workplace cultures in her research including how women go into hiding to continue to breastfeed their babies or express their breastmilk: Gatrell, CJ, 'Secrets and Lies: Breastfeeding and professional paid work', (2007) 65 *Social Science & Medicine*, 393-404. See Karin and Runge for legal cases in the United States where breastfeeding workers have been harassed in the workplace for breastfeeding or expressing, *supra*, p337-338 and corresponding footnoted case citations.

⁴⁸ according to the federal Department of Employment, that has launched a 'Supporting Working Parents' website in July 2015: 'Breastfeeding is a protected ground of discrimination. Failure to provide adequate facilities may constitute discrimination and a breach of work health and safety laws. Also, failure to allow an employee to have breaks to facilitate breastfeeding or expressing milk may constitute discrimination.'

Also, there are no decided cases on anti-discrimination law in Australia in the context of breastfeeding and work that may provide guidance on the application of the laws and guaranteed breastfeeding breaks are a necessity for mothers and women of childbearing years to have confidence to plan for breastfeeding.

One of the advantages of coverage by the *Fair Work Act 2009* will be that the system will not necessarily rely on individual complainants who are not well resourced, may be tired from parenting babies and small children, may have no money to take legal action where they have been out of the workforce, may not feel confident as the break from work may have lowered their confidence in their place in the workplace and job security. Such women will benefit from assistance by the Fair Work Ombudsman, the Fair Work Commission and inspectors, and by unions. Individual women should not be required to try to deal with systemic discrimination and try to change workplace practices on their own. Pursuing their own interests by way of legal action is not something that an employee wishes to pursue when they have newly returned to work and have a baby to care for.⁴⁹

Recommendation 1: That there be legislative reform to provide for working mothers with adequate paid breastfeeding or lactation breaks and access to appropriate facilities for breastfeeding or expressing, including, where viable, a lockable, private room (not a toilet), with access to power and refrigeration.

⁴⁹ I note that the Productivity Commission has held an inquiry already into access to justice issues and so anticipate that the Commission is aware of the access to justice barriers for women in the workplace where discrimination and work structures are based on male ideal workers to the detriment of women who have childbearing logistics in their lives. I refer to the Senate Inquiry into the effectiveness of the Sex Discrimination Act 1984, 2008, see 'Complaints' and 'Enforcement' chapters 5 and 6, and also to the body of work by legal academics such as Margaret Thornton, Beth Gaze, Rosemary Hunter, Belinda Smith, Anna Chapman, Paula McDonald and Rosemary Owens. Note that I can provide specific references to their articles if the Productivity Commission requires.