

31 January 2014

Australian Human Rights Commission
Pregnancy and Return to Work National Review
GPO Box 5218
SYDNEY NSW 2001

Dear Sir/Madam

I write to you in relation to the Australian Human Rights Commission's "Supporting *Working Parents: Pregnancy and Return to Work National Review*".

Executive Summary:

Business SA supports legislation designed to prohibit pregnancy and return to work discrimination. However, there are already adequate legal measures to protect employees against unlawful pregnancy discrimination. Our overall experience is that businesses are very supportive of employees who are due to commence parental leave or are looking at returning to work. Key challenges with the current laws include difficulties finding suitably qualified and experienced replacement employees, managing the return to work where there have been significant technological or environmental developments and accommodating requests for reduced working hours. Feedback indicates that the obligations under section 79A and 81 of the *Fair Work Act 2009* may be challenging to comply with.

Background:

Business SA supports legislation designed to prohibit discrimination in relation to pregnancy and return to work after parental leave. We provide advice, support and training to our members in relation to obligations under State and Federal anti-discrimination laws and unpaid parental leave and return to work under *Fair Work Act 2009*.

Our members are offered a range of products and services to assist them in managing employees who are pregnant, on parental leave or returning to work following parental leave. This includes:

- a dedicated handbook on parental leave which includes practical examples and relevant proforma documents and checklists;
- member advisory service that members can call for advice regarding Modern Awards, workplace relations and other employment-related laws, including anti-discrimination laws;
- training sessions on parental leave, discrimination and adverse action;
- workplace relations consulting services to assist with tailored advice.

In the last twelve months close to 400 members sought advice on parental leave from Business SA and approximately 700 members attended a dedicated series of training

sessions that was offered in 2010-2011.

Key challenges

A common challenge with unpaid parental leave relate to difficulties finding suitably qualified and experienced employees to temporarily replace the person on leave. In industries with skill shortages this can be particularly demanding, to the point that employers may have to accept “replacement employees” with less experience and skills. In such instances employers commonly have to provide specialised training and a higher degree of coaching and supervision.

Managing situations where highly skilled and experienced employees are absent on parental leave is challenging for all businesses. However, whereas larger organisations may be able to offer a maternity leave contract internally to an existing employee or reallocate tasks and duties to other employees, smaller businesses usually are more restricted in their options. In a business with 5-10 employees, the person taking parental leave commonly is the only person with the required skills and qualifications for a particular role, making it difficult for tasks and duties to be reallocated to others during the period of parental leave.

In industries subject to rapid change and ongoing technical development such as the IT industry, engineering, high-end manufacturing and research, a twelve month absence from the workplace can pose a challenge both to the employee and the employer. Being unfamiliar with the latest developments in the industry, employees returning from parental leave initially may lack in confidence and may find that they need time to adjust to new technology, new working methods and a new legal context. To assist returning employees, a greater degree of coaching and mentoring may initially be required.

In our experience businesses have a key interest in keeping in touch with employees on unpaid parental leave and commonly invite them to work conferences, planning days, staff meetings and social events. However, it is not uncommon that a portion of those employees on parental leave wish to keep any contact with their employer to a minimum.

Existing information materials on parental leave provided by for example, the Fair Work Ombudsman, tend to focus on employer obligations in relation to keeping in touch. It is recommended that more information targeted at employees is provided regarding the benefits to the employee of actively engaging with their employer during a period of parental leave.

Employees who are due to return from parental leave commonly request a reduction in working hours. Employers as far as possible try to accommodate these requests through various measures, including job-sharing. However, it may not always be practical or indeed possible for a job to be performed in a part-time capacity particularly in small business.

Managing this situation can be challenging as some employees may expect such requests to be automatically granted.

Law and policies

Under section 79A of the *Fair Work Act 2009*, an employee while on unpaid parental leave may perform up to ten days of work as “keeping in touch days” without breaking the period of unpaid parental leave. The purpose of keeping in touch days is to enable the employee to keep in touch with his or her employment in order to facilitate a return to that employment after the end of the period of leave.

However, there appears to be no reason why the number of keeping in touch days should be limited to ten and why the employee and the employer should not be able to mutually agree to a greater number if that would suit both parties. Given that an employee on parental leave could perform more than ten day’s paid work for another employer during that period without directly breaching any provision of the *Fair Work Act 2009*, the current limitation does not seem logical.

Anecdotal evidence indicates that some employees would like to work on more than ten keeping in touch days. However, due to section 79A, employers have been unable to grant such requests. The case study set out below illustrates this problem:

Lisa has taken 12 months unpaid parental leave at the time of the birth of her son. After six months of leave, Lisa feels ready to perform some work. Her mum has offered to look after her son one day a week. Lisa contacts her employer and offers to come into to work for one full-day per week, in total 24 working days for the remainder of six months parental leave period.

Lisa’s employer is happy to hear that she is interested in performing some work and that she has the necessary family support to enable this. Recently work has been very busy and her employer could need some more help in the office.

However, after looking into their requirements under the *Fair Work Act 2009*, Lisa’s employer informs her that although there is enough work for her to come one day a week, the number of keeping in touch days is limited to 10. Mutually agreeing on a greater number of days would be a breach of the *Fair Work Act 2009* and would also affect her unpaid parental leave entitlements.

Accordingly, Lisa’s employer is unable to provide more than 10 days of work to her. A casual employee instead is engaged to assist her employer with the additional days needed.

It is recommended that section 79A be amended to allow an employee and an employer to agree to a greater number of keeping in touch days.

Under section 81, an employee who is pregnant is entitled to transfer to a “safe job” if it inadvisable for her to continue in her present position due to an illness or risk arising out of the pregnancy or hazards associated with the position. Feedback from our members indicates that they as far as possible would aim to find “an appropriate safe job” for the

employee.

However, whereas larger organisations are more likely to find suitable alternative duties, smaller businesses, may be unable to provide alternative duties that would satisfy the definition of “an appropriate safe job” in section 81(3). In practice this means that small business are more likely to be required to provide “paid no safe job leave” in accordance with section 81A than larger organisations that more easily can accommodate requests for alternative duties.

In relation to the laws on pregnancy discrimination, Business SA submits that there are already adequate measures to protect employees against unlawful pregnancy discrimination and for alleged contraventions to be properly investigated and dealt with if substantiated.

This includes provisions under the *Sex Discrimination Act 1984*, the South Australian *Equal Opportunity Act 1984* and the discrimination and general protections provisions in the *Fair Work Act 2009*. We do not believe that there is a need for additional regulation in relation to pregnancy discrimination.

Our overall experience is that businesses are very supportive of employees who are due to commence parental leave or are looking at returning to work. This includes providing flexible working conditions both during the pregnancy and when returning to work, allowing time off in working time for medical visits relating to the pregnancy, keeping in touch with the employee and genuinely considering requests for additional unpaid parental leave.

Who We Are

As South Australia’s peak Chamber of Commerce and Industry, Business SA is South Australia’s leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

Should you require any further information or have any questions, please contact Rick Cairney, Director of Policy, Business SA on (08) 8300 0060 or rickc@business-sa.com.

Yours sincerely



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