

16 December 2013

Our ref 336/22

Ms Elizabeth Broderick
Sex Discrimination Commissioner
Australian Human Rights Commission
Level 3, 175 Pitt Street
SYDNEY NSW 2000

By Post and Email to: pregnancyandwork@humanrights.gov.au

Dear Commissioner

Supporting Working Parents: Pregnancy and Return to Work National Review

Thank you for the opportunity to provide comments to the National Review on Supporting Working Parents: Pregnancy and Return to Work. This submission has been compiled with the assistance of our Industrial Law Committee.

We provide some responses to question 6 of the Issues Paper relating to the current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave.

By way of general comment, the Committee agrees with the AHRC's assessment that discrimination against pregnant employees and against men and women returning to work after taking parental leave continues to be a problem in Australian workplaces. Some committee members are frequently called upon to provide advice to both employers and employees in relation to managing pregnancy and parental leave and their experience is that the level of awareness regarding rights and obligations in relation to pregnancy, parental leave and return to work is generally low. Overall the Committee is of the view that existing legislative provisions offer adequate protection to pregnant employees and women and men returning to work after taking parental leave, but that more work needs to be done to promote awareness and understanding of the effect of these laws.

Q6.2.1 Does the law adequately protect pregnant employees and parents returning to work after taking parental leave against discrimination?

Generally speaking the Committee considers that the content of existing laws in this area is sufficient.

Possible areas for improvement relate to the right to request a change to an employee's working arrangements and the use of personal leave for attendance at routine pregnancy related appointments.

Flexible working arrangements

At present there are limited avenues for an employee to challenge a decision by their employer to refuse a request made under section 65 of the *Fair Work Act 2009* (Cth) (**FW Act**).

The only apparent avenue would be to raise a dispute under an applicable modern award or enterprise agreement. There is currently no mechanism to challenge or seek review of a refusal under section 65 of the FW Act if the employee is not covered by an award or enterprise agreement.

The committee considers that this gap should be addressed perhaps by conferring direct jurisdiction on the Fair Work Commission to deal with disputes arising under section 65.

Personal leave

Many employers are unsure of whether or not they must, can or should allow employees to take personal leave for the purpose of attending routine pregnancy related appointments. The Committee is aware that some employers make it a policy to permit the use of personal leave for such appointments, whilst others will not grant leave for these purposes.

Technically pregnancy itself is not an illness or an injury and as such there is a legitimate basis for an employer to refuse to grant personal leave for the purpose of attending routine pregnancy related appointments.

The Committee considers that it would be helpful for the FW Act to either permit the use of personal leave for routine pregnancy related appointments, or otherwise for the FW Act to provide a right to unpaid leave for the purpose of attendance at such appointments.

Either way, the Committee considers that it would be beneficial for the FW Act to be amended to clarify whether or not personal leave can be used for pregnancy related appointments (or for the Fair Work Ombudsman to issue a statement in relation to this issue).

Q6.2.2 Are the laws adequately implemented?

The experience of our Committee members is that, on the whole, these laws are not implemented well as there is a lack of understanding and awareness (particularly among small and medium sized enterprises) regarding rights and responsibilities towards pregnant women, employees taking parental leave and employees returning to work following parental leave.

In particular there appears to be a lack of understanding regarding:

- the obligation to consult with employees during parental leave;
- the operation of the return to work protections contained within the FW Act;
- the grounds on which a request for a flexible work arrangement can be legitimately refused; and
- the application of anti-discrimination laws in the work context to contract workers.

Employers also continue to struggle to identify situations involving indirect discrimination.

Q6.2.3 How could the laws and their implementation be strengthened?

The primary issue relates to the lack of proper implementation. In this regard we suggest that a public education program would be valuable to increase understanding of rights and responsibilities under existing laws and promote awareness of existing resources available to assist both employers and employees.

Q6.2.4 What challenges do employers face in implementing employment laws and policies?

A lack of understanding of the laws and policies and a lack of resources to obtain that understanding is the primary challenge.

Other challenges facing employers include:

- the unpredictable nature of pregnancy and related absenteeism makes it difficult for employers to plan effectively for employee skill replacement and management;
- absence from work is an interruption to normal business practices and as such there are financial, skill and time costs involved with replacing a worker or indeed being able to source a suitably skilled replacement in the labour market on a temporary basis;
- uncertainty as to how best to communicate with employees on parental leave; and
- a mindset that pregnancy and related absences are an inconvenience to be tolerated with no advantage to the business.

In addition, some members of the Committee reported that they have come across situations where employers appear to have used a period of parental leave as an excuse to restructure operations so that the absent employee is made redundant rather than properly addressing performance or behavioural concerns.

On the flip side however, the Committee notes that some employers are reluctant to take legitimate disciplinary action against pregnant employees or carry out genuine redundancies for fear of acting in breach of the FW Act or anti-discrimination legislation.

Poor communication between employers and employees on parental leave regarding restructure decisions also leads to an increased perception of discrimination in circumstances where the employer may have a legitimate basis for their actions but have failed to properly explain their actions to the relevant employee.

All of these issues could be addressed through better education programs.

Q6.2.5 What challenges do employees face while pregnant, on or returning to work after taking parental leave?

A pregnant employee can encounter several difficulties relating to both leave and their subsequent return to the workplace. These include:

- the need for increased flexibility prior to commencement of parental leave;
- sometimes a reluctance to enquire about flexible working conditions due to:
 - job security concerns;
 - a concern that they are asking for favours; or
 - a concern that they may be perceived as a complainer or a perceived as a drain on business resources;

- whilst absent from work an employee may be 'forgotten' by management and left out of major strategic decisions;
- general disconnection from the workplace with a lack of communication and interaction with work peers and the business; and
- an employer may engage in job redesign which may effectively render their position redundant.

Q6.3.1 What difficulties are there for employers and employees in understanding relevant work health and safety standards in relation to pregnant employees in the workplace?

Both employers and employees sometimes make incorrect and uninformed assumptions regarding safety matters while pregnant. There is also a general lack of awareness and understanding of the operation of the "transfer to a safe role" provisions in the FW Act.

Q6.3.2 Are there any gaps in work health and safety laws and policies in relation to pregnant employees?

No significant gaps have been identified by our Committee at this stage.

Q6.3.3 Are there any practical challenges or issues with the interaction of anti-discrimination, employment and work health and safety laws and policies?

There may be some areas of conflict relating to various laws and policies involving parental leave and the workplace management of pregnancy such as incidents where an employee may be currently fit for work but nonetheless is at an unacceptable risk of injury.

Q6.3.4 What difficulties are there in complying with work health and safety standards?

An employer may face several difficulties in complying with health & safety standards including:

- the cost of compliance with laws and regulations;
- the knowledge barrier of understanding the application of relevant legislation; and
- the financial, skill and knowledge cost of managing risks issues in pregnancy.

Other comments

Some members of the Committee are of the view that Division 7 of Part 2-3 of the *Paid Parental Leave Act 2010* (Cth) (**PPLA**) has the potential to operate unfairly towards self-employed persons (particularly sole traders). Division 7 of the PPLA sets out when a person is taken to have returned to work and therefore is no longer eligible for payments under the PPLA.

Essentially the effect of the relevant provisions is that whilst an employee is entitled to perform paid work on up to 10 "keeping in touch" days before they are considered to have returned to work, a self-employed person is only permitted to oversee the business or perform an occasional administrative task. If they engage in paid work outside/in excess of this they are regarded as having returned to work.

The PPLA provides no guidance on what would be considered to be "overseeing the business" or an "occasional administrative task" but guidance documents prepared by the

Department of Human Services give paying an invoice as an example of an administrative task.

On the face of these provisions it would appear as though employees are potentially able to engage in a larger amount of work than self-employed persons without losing their entitlement to payment under the PPLA. The difference in the level of work permitted operates particularly unfairly in relation to sole traders as it makes it almost impossible for them to sustain their business and access payments under the PPLA.

Whilst the Committee acknowledges that the role of the payments under the PPLA is to provide income for people that are not working as a result of caring for a child, the Committee considers that it would be more equitable to allow self-employed persons to perform the same level of work as an employee is permitted to perform (i.e. the equivalent of 10 "keeping in touch" days or 76 hours' worth of work) before regarding them as having returned to work. By changing the focus to the amount of time spent engaging in paid work activities, this would also make it easier for self-employed persons to accurately determine their eligibility and reduce the risk of being required to repay monies paid in error.

Some members of our Committee also consider that another solution would be to change the allowable 10 "keeping in touch" days to a maximum of 8 - 10 hours per week. This may be of benefit for those in professional or management positions, who may need to keep in touch with their workplace far more than 10 days in a 6-month period and might be required to be available on a weekly basis for consultation, updates or to provide advice and assistance.

We understand that these comments may go beyond the scope of the AHRC's review and inquiry at this stage but wanted to share them with you for completeness.

Thank you for providing the Society with the opportunity to comment on these matters. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au for further inquiries.

Yours faithfully

Annette Bradfield
President