



Supporting Working Parents: Pregnancy and Return to Work National Review

Submission to the
Australian Human Rights Commission

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The Queensland Nurses' Union (QNU) thanks the Sex Discrimination Commissioner for providing this opportunity to contribute to the review of discrimination during pregnancy and on return to work.

The QNU - the union for nurses¹ and midwives - is the principal health union in Queensland. Nurses and midwives are the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNU covers all categories of workers that make up the nursing workforce in Queensland including registered nurses, registered midwives, enrolled nurses and assistants in nursing who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 50,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU.

Our submission addresses some of the questions put forward in the issues paper and provides individual case studies and data from our records. We have made recommendations that seek changes to federal and state legislation to reinforce current protections for female employees.

Nursing During Pregnancy

Nursing is a highly feminised profession. Over 90% of our members are female and around 51 % of these are of reproductive age (QNU, 2013).

Nurses work in a unique occupational environment that can require rotating and night shifts, long hours, prolonged standing, lifting, and exposure to chemicals, infectious diseases and x-ray radiation (Lawson, Whelan, Hibert, Grajewski, Spiegelman & Rich-Edwards, 2009). This makes them vulnerable not only to occupational risks but also to a range of workplace practices where they may experience direct and indirect discrimination during pregnancy and on return to work.

Reproductive health issues continue to be of interest to our members. The primary workplace concerns that pregnant nurses themselves cite include environmental exposure, dangers of lifting and moving patients, lack of time to obtain adequate fluid and nutrition during their shift and patient assignments that could put their foetus at risk (Croteau, Marcoux & Brisson, 2006)

There is international evidence around occupational exposures and pregnancy outcome among nurses. A systematic review and meta-analysis of 29 studies found that nurses are at

¹¹ Throughout this submission the terms 'nurse' and 'nursing' are taken to include 'midwife' and 'midwifery' and refer to all levels of nursing and midwifery including Registered Nurses and Midwives, Enrolled Nurses and Assistants in Nursing.

increased risk of adverse pregnancy outcomes when they are have exposure to anaesthetic gases, chemotherapy agents and other drugs (Quansha & Jaakkloa, 2010). A Finnish population-based study (Simcox & Jaakkloa, 2008) concluded that working as a nurse during pregnancy may reduce fetal growth. In the United States, researchers (Lawson, Whelan et. al., 2009) investigated the association between occupational exposures and the risk of preterm delivery among nurses. Their study found that shift work and physical factors were not strong predictors of preterm birth, however nurses who worked nights had a three fold higher risk of delivering before 32 weeks' gestation). Lawson et. al. (2009) recommended that the effect of sterilising agents on nurses working in operating rooms or surgeries should be explored in further studies.

Data from a further US study (Luke, Mamelle, Keith, Munoz, Minogue, Papernik, & Johnson, 1995) showed that within a population of American nurses working in the fields of obstetrics, gynaecology and neonatology, the risk of pre-term birth was higher among women exposed to strenuous working conditions and long weekly working hours than it was among women working under less arduous conditions. Luke et. al. (1995) suggested that at least three preventive measures might help reduce the incidence of preterm birth:

- Reducing working hours per shift;
- Changing work areas;
- Granting leave during pregnancy, especially for women with pregnancy complications.

We would expect that employers accommodate the needs of pregnant nurses through the implementation of measures such as these.

Historically, pregnant women were among the most susceptible to virulent infectious respiratory diseases (Smith, Bresee, Shay, Uyeki, Cox, & Strikas, 2006). Nurses in general have an increased risk of contact with infectious disease and are therefore even more exposed when pregnant.

Beyond the medical risks, pregnant nurses may also experience psychological stress including fear, anxiety and dread if they perceive their working conditions places their unborn child at risk. While inadvertent exposure from diagnostic procedures in pregnancy does not usually increase the natural risk of congenital anomalies, it creates a considerable state of maternal anxiety (De Santis, Di Gianantonio, Straface et. al., 2005). This occurs both pre- and post-conception.

While some employers are sensitive to the risks pregnant nurses face and accommodate requests to move to another work site, others will direct them to take short term measures such as wearing protective clothing.

What discrimination do employees face in the workplace related to pregnancy, parental leave or on returning to work after parental leave?

The requirement to work according to a 24/7 continuous shift working regimes presents particular problems for pregnant nurses and those returning to work following the birth. Our members with childcare responsibility will often experience indirect discrimination when wholesale changes are made to shift rosters. A large metropolitan Hospital and Health Service (HHS) recently sought to withdraw longstanding 10 hour shift arrangements in particular work areas with no consultation with staff or unions. These types of changes have profound effects, not just on work and family life, but also on nurses' working lives.

Using research syntheses, Kangas (1999) examined variables affecting nurses' job satisfaction from 38 previous studies. The results indicated that job satisfaction for nurses correlated with prestige or status, independence in decision-making, control over practice, and perceived social support. Also important to nurses' job satisfaction were work schedule, job security, salary, and fringe benefits (Mills & Blaesing, 2000).

Importantly, Kangas' (1999) study found that nurses' high levels of job dissatisfaction were linked to poor work-life balance, which in turn was linked with fatigue and reduced recovery periods between shifts. Hwang and Chang (2009) suggest that hospitals can influence and prevent job dissatisfaction by creating a positive work climate and improving important work context characteristics.

The withdrawal of 10 hour shift arrangements at the HHS was ostensibly due to budget constraints, however in the long term the disruption to nurses' professional and family lives may ultimately find its way into reduced levels of job satisfaction. Several studies have shown that job satisfaction improves with the longer shift and if correctly designed can be beneficial to employees and employers (Aiken et al., 2011; Freshe, 2012; Hayes et al., 2006; Ma et al., 2003). Therefore these types of changes are not only discriminatory, but in the long term self-defeating.

Case studies

We have selected a number of recent cases that the QNU has dealt with in order to give an indication of the type of discrimination our members experience when pregnant or on return to the workplace.

Although nurses encounter a range of difficulties when they are pregnant, workplace health and safety and industrial relations laws offer protections around working in a safe environment. Our data indicates that one of the most difficult times for nurses is on return to work following a pregnancy. Here, they face the tension between the demands of a 24/7 continuous shift roster and the ability to find childcare. Many nurses prefer to return to work on a part-time basis with a regular pattern of shifts so they can make permanent

childcare arrangements. This may at times be difficult for an employer to accommodate, but for a highly feminised, well-educated workforce it is not unreasonable to expect flexibility in programming work schedules.

These cases² indicate how strong industrial advocacy provides women workers with greater protections. We suggest that there are many other women who have not pursued a case of discrimination as they do not belong to a union and/or cannot afford legal representation.

Public Sector
<p>The member took a period of maternity leave to have her first child, then became pregnant with her second child and had another period of maternity leave. The member's husband works on a 24/7 shift roster and is on-call. They live in outer Brisbane and were only able to find childcare at a centre 25 minutes in the opposite direction to where they live and work for three days per week. The member requested to return to work on a part-time basis for three 10 hour shifts per week as the facility was operating on 10 hour shifts prior to her maternity leave. Initially, the line manager agreed to the request, however a higher position overturned the line manager's approval and the member was advised that she could not return on this basis as the facility was moving to standard eight hour shifts for all employees.</p>
<p>The QNU lodged a dispute with the Queensland Industrial Relations Commission (QIRC) on the basis that the employer had not complied with its obligations in accordance with the <i>Industrial Relations Act 1999 (Qld)</i> to consider her individual circumstances.</p>
<p>At conciliation, the QNU argued that the changes to shift length subjected the member to indirect discrimination. The employer continued to refuse the member to return to work on the basis she requested, but the QNU persisted with the claim. Eventually, the employer agreed to allow the member to return to work as requested and that these arrangements would remain in place until her youngest child begins school.</p>
<p>The employer denied the member's request to return to work following maternity leave because of 'job cuts' and organisational freezes on new appointments. The QNU wrote to the employer advising that the member is appointed to a permanent position, and is entitled, in accordance with the legislation, to return to her position. The member returned to work in her substantive position.</p>

² We have de-identified these cases to protect our members.

A member, who was very unwell sought leave for the remainder of her pregnancy. The employer aggressively declined the request. The member offered to take unpaid leave.

Following representations made by the QNU, the employer agreed to assist the member accessing other paid leave alternatives.

The member sought assurance from her employer that she could continue part-time job sharing arrangements for the coming 12 months until her child started school as her current work area is transitioning to new governance arrangements. The member was anxious that the new management would not allow continuance of part-time arrangements. With the assistance of the QNU the member accepted a part-time role within the new structure.

The member was returning to work following maternity leave and requested a set pattern of shifts due to her husband's work commitments. The QNU and the member met with the employer to negotiate an agreement that she could work on set shifts until her child is of kindergarten age.

A member who returned from maternity leave to have twins was denied a request to work according to set shifts so she could arrange care. The employer refused the request and the member left that work area.

Private Sector

A member was employed as a casual nurse manager. Approximately 3 months into her employment, she discovered that she was pregnant. Following her disclosure of the pregnancy, the employer ceased to communicate with her.

A few weeks later, the employer called the member to an impromptu meeting, told her that "it's not working out" and gave her two weeks notice. There had been no issues with her performance. The member and employer were aware of proper procedures around termination of employment, yet no credible reason was given for her dismissal. The member registered with an agency, however the agency told her that it is very unlikely that she would obtain any work due to her pregnancy. The member was not able to access the government's paid parental leave scheme as she had not worked enough time in the preceding 12 months to be eligible.

The QNU lodged a 'General Protections' application under the *Fair Work Act 2009* and the matter is still progressing.

The member made a complaint that a number of unresolved workplace issues were having a detrimental impact on her pregnancy. The employer stood the member down (on pay) and directed her to attend an independent medical examination. As the employer alleged that the employment relationship had irretrievably broken down, the parties agreed to a mutual separation via a deed of settlement.

A member was denied paid parental leave as she went into preterm labour and had to start maternity leave 3 weeks short of one year of employment. In her original leave application, she was due to start maternity leave the week after she would have been at the facility for one year.

The QNU lodged a dispute with the Fair Work Commission. The employer argued that it would be in breach of the *Fair Work Act 2009* if they were to allow the member to begin her maternity leave earlier. The QNU and the employer negotiated that the member should receive her entitlement to maternity leave.

An employer asked a member who was in the late stages of her pregnancy to resign because she was pregnant, suffering a pregnancy related illness and working on a subclass 457 Visa. The QNU negotiated a period of unpaid leave for this member.

A member regularly working several casual shifts per fortnight was told by her employer that they would be reducing her shifts because she is three months pregnant. An employer can reduce the number of casual shifts if the workload declines, but in this case the employer actively discriminated against her because of her pregnancy. The QNU is pursuing the case with the member.

What other data is available on the prevalence and nature of discrimination in relation to pregnancy at work and returning after parental leave?

QNUConnect deals with all members' initial phone and email enquiries. During the period 1 Jan – 26 November, 2013, QNUConnect received 175 enquiries regarding rights to maternity leave and fair treatment during pregnancy and on return to work. Of these, around 50 calls were from members who were experiencing difficulty negotiating suitable hours of work, accessing entitlements, extending maternity leave and working in a suitable area.

What support do employers need to accommodate pregnant employees and women and men returning to work after parental leave?

Based on the experiences of some of our members, it appears that many employers, even those employing large numbers of staff, still engage in discriminatory practices or misinform staff about their rights and entitlements. Accommodating a range of individual requirements within a 24/7 continuous shift regime poses a number of problems for employers. They need to be able to retain qualified nurses and provide safe, quality care to patients on a 24 hour cycle. This requires effective planning and workload management.

In consultation with the QNU, Queensland Health has developed the *Principles of Best Practice Shift Rostering*. These guidelines support flexible work options for employees to balance the needs of the individual within the demands providing 24 hour care in most settings. In conjunction with the *Business Planning Framework (BPF)* and the *Work Life Balance* policy, these guidelines provide a practical reference tool for employees and managers to address work, life and family balance.

However, recent changes to industrial relations legislation by the LNP government in Queensland have weakened the authority and status of public sector directives and policies such that they are no longer enforceable. The QNU has strongly opposed these changes because they leave the public sector nursing workforce vulnerable to unilateral changes by the employer. This is damaging to our members and the nursing profession.

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

Nurses rely on workplace health and safety, industrial relations, and anti-discrimination legislation as well as Human Resource policies to protect their rights during pregnancy and on return to work. In this section we comment on specific sections of the federal and state industrial relations legislation and the Queensland Health *Parental Leave* policy.

Industrial Relations Act 1999 – Part 2 – Family Leave

Section 29 D Employer to give proper consideration to application for extension or part-time work

- 1) *In deciding whether to agree to an application for an extension of the period of parental leave under section 29 A or an application to return to work on a part-time basis under section 29B, the employer must consider the following –*
 - a. *the particular circumstances of the employee that give rise to the application, particularly the circumstances relating to the employee's role as the child's caregiver;*
 - b. *the impact refusal of the application might have on the employee and the employee's dependants;*
 - c. *the effect that agreeing to the application would have on the conduct of the employer's business, including for example –*

- i. any additional cost the employer would incur; and*
 - ii. the employer's capacity to reorganise work arrangements; and*
 - iii. the availability of competent replacement staff; and*
 - iv. any loss of efficiency in the conduct of the employer's business; and*
 - v. the impact of the employee's absence or temporary absence on the delivery of customer service.*
- 2) *The employer must not unreasonably refuse an application under section 29A or 29B.*
- 3) *The employer must advise the employee, in writing, of the employer's decision –*
 - a. If the application is for an extension of short parental leave, short adoption leave or short surrogacy leave – as soon as possible after receiving the application but before the short parental leave, short adoption leave or short surrogacy leave ends; or*
 - b. For any other application – within 14 days after receiving the application.*
- 4. *If the employer refuses the application, the employer must provide the employee with written reasons for refusing the application.*

Comments

The QNU has assisted several members who have made application in accordance with this section³ following their employer's refusal to grant an extension of part-time arrangements on the basis of subsection 1(c) outlined above, which are generally characterised as operational reasons. The following examples are some of the reasons employers have given for declining an application:

- That for members at Nurse Unit Manager level and above – part-time work is not appropriate. The organisation requires full-time staff in those higher level positions;
- That organisational change has occurred in the staff member's absence and therefore their preferred shift lengths cannot be accommodated as shift lengths have changed for all employees (even where no such change has yet occurred);
- That the request cannot be accommodated due to recent budgetary cuts;
- That the request cannot be accommodated because the organisation is already experiencing difficulties filling vacant positions.

Our general impressions are that some employers:

- do not adequately understand the grounds for 'reasonable' refusal of such an application;
- do not understand their obligation [as per subsections (1)(a)-(b)] to consider the employee's individual circumstances on a case by case basis.

³ The Queensland Health (QH) policy mirrors this section and we address this further on in the submission.

Section 37 – Special maternity leave and sick leave

1. *This section applies if, before an employee starts maternity leave –*
 - a. *the employee’s pregnancy terminates before the expected date of birth, other than by the birth of a living child; or*
 - b. *the employee suffers an illness related to her pregnancy.*
2. *For as long as a doctor certifies it to be necessary, the employee is entitled to the following types of leave –*
 - a. *Unpaid leave (special maternity leave);*
 - b. *Paid sick leave, either instead of, or as well as, special maternity leave.*

Comments

The QNU has recently assisted a member who became very unwell with a pregnancy related illness in her first trimester⁴. Her immediate line manager advised her that there is no way she would be given approval to take maternity leave this early in her pregnancy.

Section 38A – Employer’s obligation to advise about significant change at the workplace

1. *This section applies –*
 - a. *If an employer decided to implement significant change at a workplace; and*
 - b. *Whether or not the decision was made before the commencement of this section if the decision had not been implemented at the commencement.*
2. *The employer must take reasonable action to advise each employee who is absent from the workplace on parental leave about the proposed change before it is implemented.*
3. *The advice must inform the employee of the change and any effect it will have on the position the employee held before starting parental leave, including, for example, its status or the level of the responsibility attached to the position.*
4. *The employer must give the employee a reasonable opportunity to discuss any significant effect the change will have on the employee’s position.*

Comments

The QNU regularly encounters members who have not been consulted about significant organisational change during their parental leave. Such changes include restructures, changes to shift lengths and job cuts. It is our view that nurses on parental leave should be advised of *any* workplace change, not just because of the effect it may have on the nurse’s position, but on their ability to perform the duties on return to the workplace. This means advising them of changes to equipment or clinical procedures that may necessitate professional training and offering them the opportunity to take part. Nurses should return to the workplace in a no less disadvantaged position than before they went on leave.

⁴ See case studies.

Fair Work Act 2009 (Commonwealth) – Division 4 – Requests for flexible working arrangements

From 1 July, 2013 the *Fair Work Act Amendment Bill 2013* amended section 65 of the *Fair Work Act 2009* to provide (amongst other matters) expanded access to request flexible working arrangements in certain circumstances. Previously, this section was limited to employees with children under school age, or under 18 if the child has a disability. Employees can now access flexible working arrangements for a broader range of reasons, however those additional reasons do not relate to care responsibilities following the birth or adoption of a child.

This section has also been amended to make it clear that a parent who has responsibility for the care of a child or who is returning to work after taking leave in relation to the birth or adoption of the child may make a request to return to work on a part-time basis in order to assist the employee in caring for the child.

The employee must make the request in writing outlining the reasons for the request. The employer is required to provide a written response to the request within 21 days, and may only refuse a request on 'reasonable business grounds'. If the employer refuses the request, they must outline their reasons. The most recent amendments to the Fair Work Act 2009 include the following examples of 'reasonable business grounds':

- That the new working arrangements requested by the employee would be too costly for the employer;
- That there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee
- That it would be impractical to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee
- That the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity
- That the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

Disappointingly, it appears that the recent amendments to this section have not included provisions allowing for an employee to take further action (for example, in the form of the lodgement of a dispute with the Fair Work Commission) should the employer refuse their request on not 'reasonable business' grounds.

Workplace Health and Safety legislation

Whilst the federal and state industrial relations legislation (*Fair Work Act 2009*, *Industrial Relations Act Qld 1999*) contain provisions specifically related to pregnancy (see above), the *Work Health and Safety Act 2011* does not mention pregnancy. In Queensland there are

codes of practice that draw attention to potential risks for pregnant women. We note that the code of practice for *Managing Risks of Hazardous Chemicals Code of Practice* (Department of Justice and Attorney-General, 2013) came into effect from 1 Dec, 2013 and refers to safety data sheets that may include summaries of toxicological data, or advice or warnings for people that might be at risk, such as pregnant women.

The *Hazardous Manual Tasks Code of Practice* (Department of Justice and Attorney-General, 2011) also prescribes the work systems necessary to accommodate the health/fitness status of a worker. In designing work systems, considerations include pregnancy as it affects the risk of back pain because of the changing shape of the body.

It is the QNU's experience that pregnant nurses are not willing to work in areas that may pose a risk to their unborn child despite assurances that the workplace is safe. As we mentioned previously, pregnant nurses may experience psychological stress through a heightened state of maternal anxiety if they and/or their child are exposed to a dangerous situation or substance. Workplace health and safety legislation should recognise and provide for psychological stress during pregnancy.

Employers must adhere to these workplace health and safety provisions and not discriminate against or endanger a nurse who seeks to protect her own and her unborn child's safety.

Recommendations

Following our participation at a community consultation held by the Commission in Brisbane in November and the experiences of our members, the QNU makes the following recommendations.

That the federal government amends section 65 - Requests for flexible working arrangements - of the *Fair Work Act 2009* so that

1. A worker who is denied a request to work part-time following the birth of a child and who is the main care-giver is provided with the opportunity to lodge a dispute in a jurisdiction with expertise in dealing with discrimination in the workplace.

That the Queensland government amends section 38A - Employer's obligation to advise about 'significant' change at the workplace - of the *Industrial Relations Act 1999* to read

Section 38A – Employer's obligation to advise about ~~significant~~ change at the workplace

1. This section applies –
 - a. If an employer decided to implement ~~significant~~ change at a workplace; and
 - b. Whether or not the decision was made before the commencement of this section if the decision had not been implemented at the commencement.
2. The employer must take reasonable action to advise each employee who is absent from the workplace on parental leave about the proposed change before it is implemented.
3. The advice must inform the employee of the change and any effect it will have on the position the employee held before starting parental leave, including, for example, its status or the level of the responsibility attached to the position.
4. The employer must give the employee a reasonable opportunity to discuss any significant effect the change will have on the employee's position.

That the federal government amends section 49 – when consultation is required - of the *Work Health and Safety Act 2011* to read

Consultation under this division is required in relation to the following health and safety matters –

- (d) when proposing changes that may affect the health or safety of workers **including the psychological welfare of a pregnant worker in respect to risks to her unborn child.**

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