



29 January 2014

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Ms Elizabeth Broderick
Sex Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

and via email: communications@humanrights.gov.au

Dear Commissioner

National Review – Discrimination in relation to pregnancy at work and return to work after parental leave

I refer to your invitation of 14 October 2013 inviting the Society to attend a community consultation in relation to the Australian Human Rights Commission's National Review to identify the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave.

We welcome the AHRC's work on a very important topic and we look forward to the outcome of the AHRC's Review. Regrettably a representative of the Society was unable to attend the consultation held in Adelaide.

The Society's Women Lawyers' Committee, Human Rights Committee and the Public Sector Lawyers' Committee reviewed an Issues Paper titled "Supporting Working Parents: Pregnancy and Return to Work National Review". We are grateful for the opportunity to consider this matter and the Society provides the following comments for your consideration.

The Society considers that discrimination against women on the basis of pregnancy in the workplace whether it is related to returning to work or otherwise is unacceptable, and

believes that employers in the legal profession should put in place genuine flexible workplace practices.

We have identified the following broad areas of concern:

- That female lawyers of child bearing age, during pregnancy, and on return to work are discriminated against by not being given work of equal value to colleagues with the same skills and expertise.
- The need for increased education amongst employers and employees regarding their rights and responsibilities in this area.
- The importance of the Review to address background issues which directly impact upon the decisions of female lawyers when returning to work, on a full or part-time basis. For example pay inequity, inflexibilities of Court processes, access to breastfeeding rooms and childcare.
- Timeframes in relation to discrimination claims.
- Having a legislative framework to combat discrimination is one thing but in essence the problem may not lie in the legislation but people's perception and opinion as well as level of awareness.
- Employees may be afraid to voice or complain for obvious reasons; fear of losing their job and most importantly fear of not being able to secure another job in the future due to the perception of them being a troublemaker.

The Society has identified the following key legislative and policy issues:

1. The current protections in the *Fair Work Act 2009* (Cth) and the *Paid Parental Leave Act 2010* (Cth) should be maintained and expanded upon rather than reduced.
2. An increase in education for employers and employees regarding each party's legislative rights and obligations. In particular, an increased awareness that parental leave is an entitlement that either parent or a combination of parents may take to allow families to discuss shared parenting and potentially encourage more fathers to access these entitlements so that their partners may return to work.

3. Improved timeframes for making and dealing with complaints in relation to pregnancy discrimination protections. In particular consideration of the following:

- i. The likely fact that the person being discriminated against may often have other major health concerns and may be less able to deal with the stress of contesting a decision by an employer. Due to these health reasons they may not file their discrimination or general protections application (with the Equal Opportunity Commission (EOC), the AHRC or Fair Work Commission) within the correct timeframe. This is particularly the case for the limited 21 day time period for general protection applications relating to dismissal under the *Fair Work Act 2009* (Cth).
- ii. Matters relating to pregnancy discrimination be given priority over other discrimination matters when listing a conciliation conference. The timeframes for dealing with pregnancy discrimination mean that once a complaint is made to the EOC or AHRC it can take months before a conciliation is listed, by which time the woman is likely to have already had their child. If the matter cannot be conciliated, it proceeds to the Federal Court, again a lengthy and expensive process, and many women 'drop out' of the process if the conciliation fails, leaving them with no remedy and often no job.

4. The gap in the current protections relating to return to work should be addressed. Although there is a notional right to be returned to the same position with the same pay [s 84 *Fair Work Act 2009* (Cth)], it is the experience of many female lawyers that the quality of work assigned to them upon returning from maternity leave is substantially diminished from that which was allocated to them prior to going on leave. The return to work guarantee [s 84 of the *Fair Work Act 2009* (Cth)] provides:

'On ending unpaid parental leave, an employee is entitled to return to (a) the employee's pre parental leave position; or (b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre parental leave position.'

In particular we note the following:

- i. Upon returning from leave female Lawyers may be returned to their position of Associate, Senior Associate, etc., however, many experience discrimination in relation to the types of files they are allocated. For example, the files

allocated upon returning from leave may be less complex or less valuable than the files they previously had.

- ii. Each woman is an individual and some female lawyers may prefer having a lighter workload whereas others want back their previous workload. It is important for the employer to clearly communicate with the female lawyer before they go on leave to ascertain what her wishes are. While some female lawyers commented that their quality and quantity of work had diminished, others experienced an overload of work in spite of the employer offering part-time work. It is concerning to hear that “part-time” female lawyers can be expected to fit 5 days of work into 4 days (or perhaps even 3 days).
 - iii. Women also often feel excluded from their team and from making decisions due to their returning part time or as a result of the leave they have taken. For example, requiring a female lawyer to attend meetings very early in the morning or late in the afternoon can clash with child drop-off and pick-up times. Making employers more aware of these practical issues and simply re-scheduling the meeting can improve the productivity of the workplace. These types of practical changes are not difficult to accommodate and are more about changes to workplace culture rather than more legislation.
 - iv. This type of discrimination can also occur prior to women taking leave in the form of being allocated less valuable work or experiencing a reduction in responsibilities as the leave becomes imminent. It can also be that women who are not even pregnant, but recently married, or simply of child bearing age experience this type discrimination in allocation of work in anticipation that they will take time out to have children.
5. There is potential for expansion of the keeping in touch days [s 79A *Fair Work Act*, and ss 49-50 under the *Paid Parental Leave Act 2010* (Cth)]. At the moment, only 10 days are allowed while an employee is on unpaid parental leave. Any more days taken ends the entitlement to unpaid leave.
 6. We acknowledge that many people may not wish to work during this period (and should not be required to), however 10 days may be ineffective in some instances. For example where a woman is working on a very lengthy dispute spanning a few years, it may be that in order to be able to re-join the team when she returns she will need to be kept up to date and provide assistance more often. This is particularly the case for female lawyers.

The Society also provides comments on a selection of questions from the Issues Paper.

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

No doubt, pregnancy and returning to work from parental leave pose real life challenges to parents. But if the parent is able to juggle both work and family in a balanced manner, this is likely to result in a more productive employee and a happier parent and a satisfied employer. If this balance is taken away, all you may get is a disgruntled employee, a miserable parent and unhappy family.

There are mutual benefits to employers and employees if flexible working arrangements are acknowledged. Acknowledgement is possible if there are public awareness campaigns.

Challenges faced by parents returning from leave can include:

- lack of confidence – challenges of parenthood and change in lifestyle;
- managing taking time off for sick children and not having flexible arrangements to accommodate this;
- sleep deprivation;
- company restructure on return from leave; and
- emotional stress.

The above is not intended to deny that employers also face challenges in this area.

Q5.1.1 What challenges do employers face in accommodating pregnant employees and women and men returning to work after parental leave?

Employers may need support to accommodate pregnant employees and working parents returning from work after parental leave. This includes educating the employers on best method of retaining an employee. Having an excellent parental policy should result in lower staff turnover which may have a number of benefits (e.g. lower costs for advertising vacancies and training new employees). An employer who is able to accommodate a flexible workplace is likely to find more satisfied employees and employees who are keen to perform better.

One mother who recently returned to work said that although the company she has been working with for the last 6 years allowed her to work part time after she returned from

maternity leave, she was still required to enter into a 3 month probation period as a new staff member. Whilst this treatment of the employee appears to be unlawful (see above), it is an example of the need for more than a legislative framework to combat discrimination in this area.

The Fair Work Ombudsman 'Best Practice Guide on Parental leave' has excellent points on best practice for both employees and employers. This best practice should (and is probably intended to) be used as a tool to educate employers, to enable them to operate and to tailor specific circumstances of the business and its employees. It may also be designed to educate employees who are unaware of their options or rights after returning to work from paid parental leave.

Employers could be more accommodating of female lawyers that are breastfeeding. If available, female lawyers should be able to use a spare room in a workplace to breastfeed. In many workplaces this is not encouraged, not for want of space but because it is frowned upon and not culturally acceptable. The benefits of breastfeeding to both mother and baby are well known and female lawyers should be able to breastfeed without fear of consequences or "disapproval" from an employer.

General Comments

As well as having a strong legislative framework that prohibits pregnancy discrimination, the successful implementation of the laws that afford these protections is key to reducing and ultimately eliminating this type of discrimination.

The issue is not resolved by just having strict laws that prohibit discrimination against pregnant women. It is crucial to understand the main drivers of pregnancy discrimination. It is only by unearthing and understanding the root cause of pregnancy discrimination that we can begin to create solutions to tackle this growing issue. It has been indicated by the Fair Work Ombudsman that according to its figures pregnancy has overtaken disability as the top source of workplace discrimination complaints in 2013. In light of this, it has to be questioned whether or not much has changed since the enactment of the laws prohibiting pregnancy discrimination and also since the first national inquiry into pregnancy discrimination in 1998. A culture change in the workplace is imperative.

Examining what factors in a workplace environment are contributing to pregnancy discrimination will assist in figuring out how to go about this cultural shift. Education must be provided to employers in order to change their mindsets. Instead of seeing pregnancy as a financial cost or detriment to their businesses, it has to be explained that there are

economic benefits to engaging women in the workforce where their skills and expertise can benefit the community as a whole. Public awareness programmes regarding the current protections in place should be conducted extensively.

It should also be examined whether there are cases of women being discriminated against because they suffer from a medical condition related to pregnancy or childbirth. The possibility of expanding the existing legal framework to include prohibiting discrimination against women who suffer from a medical condition related to pregnancy or childbirth could then be explored. Comparative studies of other jurisdictions which specifically provide this type of protection (i.e. the United States) should be undertaken.

Research could be undertaken to ascertain the best practice that has been adopted by other countries.

I trust these comments are of assistance.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'C' shape followed by a wavy line.

Morry Bailes

PRESIDENT

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