

Human Rights and Equal Opportunity Commission

PREGNANCY GUIDELINES

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ISBN 0 642 26976 9

Human Rights and Equal Opportunity Commission, Sydney, March 2001

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Foreword

The Report of the National Pregnancy and Work Inquiry, entitled *Pregnant and Productive: It's a right not a privilege to work while pregnant* was published in 1999. Consultations and discussions throughout the Inquiry evidenced that pregnancy discrimination remains a matter of concern in workplaces throughout Australia. In fact over the last financial year, complaints of pregnancy discrimination amounted to 18% of all complaints accepted under the federal *Sex Discrimination Act 1984*.

These Pregnancy Guidelines clarify many of the issues surrounding pregnancy and work. While pregnancy is a normal, healthy physical condition that many women experience, at work there are a number of anti-discrimination, industrial relations and occupational health and safety laws that cover pregnancy. The intersection of these laws can at times be complex and confusing, consequently the Pregnancy Guidelines aim to address the overlap to help people better understand and adhere to the existing frameworks.

The Pregnancy Guidelines continue the work of the Pregnancy Report by providing practical assistance. They provide case study material, information on legal precedents and current laws that cover employees who are pregnant or potentially pregnant, to assist all parties to understand and fulfil their obligations under the federal *Sex Discrimination Act 1984*.

As evidenced in the Pregnancy Guidelines, employers are finding constructive creative ways of managing pregnancy issues that not only avoid discrimination, but also contribute to a positive working environment and successful business practice. I encourage all employers to develop policies and strategies to make their workplaces pregnancy friendly.

It is a human right, not a privilege for a woman to work while she is pregnant. I hope that employers and workplace participants will find these Pregnancy Guidelines useful in clarifying their rights and responsibilities in relation to the management of pregnancy at work.

Susan Halliday
Sex Discrimination Commissioner
Human Rights and Equal Opportunity Commission
6 March 2001
Sydney

Preface

Status

On 26 August 1998, the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP, referred to the Human Rights and Equal Opportunity Commission a national inquiry into discrimination on the ground of pregnancy and potential pregnancy and the management of pregnancy in the workplace. The terms of reference for the Inquiry are set out at page 73-74.

The Report of the National Pregnancy and Work Inquiry, entitled *Pregnant and Productive: It's a right not a privilege to work while pregnant* ("the Pregnancy Report"), was tabled in Parliament in August 1999. The Pregnancy Report made findings identifying the specific issues covered in these Guidelines.

The Guidelines are a companion to the Pregnancy Report, and where greater detail on a subject covered by the Guidelines is needed, the relevant section of the Pregnancy Report should be referred to.

These Guidelines are not legally binding. They provide practical guidance and advice on the rights and responsibilities relating to pregnancy and potential pregnancy discrimination that arise under the *Sex Discrimination Act 1984 (Cth)* ("the federal Sex Discrimination Act"), and related case law. The case examples are provided by way of illustrative example only. Some of the suggestions are inferred from or based on an interpretation of the law, rather than on settled cases.

Whether or not particular conduct amounts to discrimination can only be determined by taking into account the circumstances of each particular case. These Guidelines should not be used as a substitute for legal advice in complex or difficult situations. Employers are strongly encouraged to comply with these Guidelines to minimise the risk of unlawful discrimination.

Purpose

The purpose of these Guidelines is to:

- provide ***employers, employees, managers and agents*** (or other workplace participants) with the necessary practical guidance to comply with the federal Sex Discrimination Act, and prevent pregnancy and potential pregnancy discrimination; and
- assist ***trade unions*** and ***employer organisations*** to advise their members on issues concerning pregnancy and potential pregnancy in the workplace.

Scope

The Guidelines deal with discrimination on the grounds of pregnancy and potential pregnancy in employment. An act of pregnancy or potential pregnancy discrimination may also amount to discrimination on the ground of sex or family responsibilities, depending on the circumstances.

The Guidelines apply to employees and employers in the following areas:

- Commonwealth Government departments, agencies and business enterprises;
- all private sector organisations;
- unions;
- educational institutions not under the control of State Government, for example universities; and
- non-government, community and voluntary organisations in their capacity as employers.

Except where expressly stated, these Guidelines do not apply to State Government instrumentalities or State Government employees.

Although these Guidelines are a guide to the federal Sex Discrimination Act, discrimination on the ground of pregnancy and potential pregnancy is also prohibited by State and Territory anti-discrimination laws. Unless an exception applies, employers must comply with both the federal legislation and the relevant State or Territory law. These are:

- *Anti-Discrimination Act 1977* (NSW);
- *Equal Opportunity Act 1995* (VIC);
- *Equal Opportunity Act 1984* (SA);
- *Equal Opportunity Act 1984* (WA);
- *Discrimination Act 1991* (ACT);
- *Anti-Discrimination Act 1991* (QLD);
- *Anti-Discrimination Act 1992* (NT);
- *Anti-Discrimination Act 1998* (TAS).

Federal, State and Territory anti-discrimination laws are similar, however, there are some specific differences in definitions and coverage discussed throughout the Guidelines.

General principles: Pregnancy discrimination at work

Pregnancy is a normal, healthy physical condition that many women experience. Various laws have been put in place to ensure that pregnant women are not disadvantaged in their employment because of their pregnancy.

The *Sex Discrimination Act 1984 (Cth)* (“the federal Sex Discrimination Act”) makes pregnancy and potential pregnancy discrimination in employment unlawful. The principles arising from the federal Sex Discrimination Act are set out below. For more information, see the full text of the Pregnancy Guidelines.

Anti-discrimination laws are only one part of the legal framework covering pregnancy and work. Industrial relations laws, occupational health and safety (“OH&S”) laws, awards and agreements also deal with pregnancy issues. Employers, supervisors and employees need to understand these laws in addition to anti-discrimination laws.

This summary is intended to provide an overview of the principles involved in avoiding pregnancy discrimination at work, and may be copied and distributed to inform workplace participants of their rights and responsibilities.

The federal Sex Discrimination Act

Who is covered?

The federal Sex Discrimination Act covers all private sector and Commonwealth employers and employees. All types of employees are covered, including temporary, casual, full-time and part-time workers, apprentices and trainees. Commission agents, contract workers and partners in partnerships of six partners or more are also covered.

Employers must not discriminate. Employers can also be held liable for the actions of their managers, employees and agents such as recruitment agents, unless they take reasonable steps to prevent the discrimination. Recruitment agents and individual employees may also be held liable if they assist, aid, instruct, induce or permit an employer to discriminate.

What is pregnancy or potential pregnancy discrimination?

Direct pregnancy and potential pregnancy discrimination takes place when a woman is treated less favourably because she is pregnant or has the potential to become pregnant.

Indirect pregnancy and potential pregnancy discrimination takes place when there is a requirement, condition or practice that disadvantages pregnant or potentially pregnant women. It will not be discriminatory if the requirement, condition or practice is reasonable in the circumstances. In assessing whether an action was reasonable, a court will consider, among other things, the disadvantage to the employee, how the

Case Example:

A policy requiring temporary employees to work full time before being made permanent was found to indirectly discriminate. The complainant had resigned from permanent employment after taking leave to have a baby and returning to work on a part-time basis.

The requirement to work full-time was not reasonable in view of evidence that the temporary employees were largely very experienced and had already completed a two year period of probation.

Speering v Ministry for Education (1993)
EOC 92-513

disadvantage could be overcome and whether it is proportionate to what an employer sought to achieve.

Under the federal Sex Discrimination Act, the term “pregnancy” refers to the time when a woman is carrying a foetus, as well as physical characteristics of pregnancy such as having a large abdomen and tiredness. The term “potential pregnancy” refers to being capable of having children, a situation where a woman has expressed a desire to have children or when a woman is likely or is perceived to be likely to become pregnant.

An act of pregnancy discrimination may also be sex discrimination or discrimination on the ground of family responsibilities, depending on the circumstances.

When is discrimination unlawful?

The following principles help identify how to avoid discrimination at each stage of the employment relationship.

Recruitment

- Pregnant or potentially pregnant women must be treated the same as any other potential employee during the recruitment process.
- To avoid discrimination, employers and employment agencies should seek the best applicant for the job based on merit, regardless of pregnancy or potential pregnancy.
- Assumptions about the capacities of pregnant women and mothers of young children should not intrude upon the recruitment process.
- Always ask questions that are job specific. Avoid asking applicants about whether they have or want to have children. Rather, ask questions about ability to travel or complete a project within the given timeframe.
- If a pregnant applicant is genuinely unable to perform the requirements of the job, it is not discriminatory to refuse her the job.

Case example:

An organisation refused to employ a woman as a trainee pilot because of the possibility of absences due to possible future pregnancy. Although the woman was rated highly at the interview, the organisation argued that it could not justify the investment in training if it was likely the woman would have children later.

The organisation was found to have discriminated against the woman.

Wardley v Ansett Industries (Operations) Pty Ltd (1984) EOC 92-002

Using recruitment agents?

To prevent discrimination in recruitment, employers should tell recruitment agents that they expect the best job candidates to be interviewed, irrespective of pregnancy or potential pregnancy.

Employment

- Pregnant or potentially pregnant employees should be treated in a fair and equitable manner. Employers should not reduce an employee's terms and conditions or deny other benefits on the basis of pregnancy or potential pregnancy.
- Where necessary, employers should make all reasonable adjustments to the workplace to accommodate the normal effects of pregnancy. Employers need to discuss the issues with the pregnant employee to find solutions.
- Where medical issues are associated with a pregnancy or legitimate OH&S issues arise, employers should make reasonable adjustments in the workplace to allow pregnant employees to continue to work.
- It is not discriminatory to accommodate an employee who is pregnant.
- In limited cases where medical or OH&S issues cannot be resolved, an employer may need to temporarily transfer a pregnant employee.
- Constant references to an employee's pregnancy, touching her stomach and badgering her about whether she is "really" planning to come back to work are likely to amount to discrimination.
- When an employee has had her position adjusted in some way because of her pregnancy, her benefits should remain the same, although her salary may alter if her hours decrease.

Case example:

A convention supervisor was transferred to a telephonist position (at the same salary) because she was pregnant. Her employer said that it did not look good for a pregnant woman to be carrying film projectors and raised other OH&S issues.

Although the employee's salary remained the same, the employer was found to have discriminated, as it had demoted the employee because of her pregnancy. The Tribunal was also satisfied that the employee was able to carry out her duties safely.

Duggan v Shore Inn Pty Ltd (1992) EOC 92-457

Simple measures can prevent discrimination.

Depending on the workplace, simple measures to accommodate pregnancy can include:

- adequate toilet breaks;
- providing larger uniforms or not requiring pregnant women to wear uniforms;
- providing seating.

In some cases an assessment of exposure to hazardous materials will be required and managed in a non-discriminatory way.

Leave

- Minimum maternity leave provisions are set in industrial relations laws, awards and agreements. Employee entitlements and notice requirements should be checked as they differ from workplace to workplace.
- Minimum leave entitlements for non-casual employees include:
 - up to 12 months unpaid maternity leave after 12 months service; and
 - access to sick leave when ill during pregnancy.
- Some casuals qualify for unpaid maternity leave.
- Pregnant employees who do not qualify for maternity leave are still protected by the federal Sex Discrimination Act. Employers and employees can negotiate a fair and reasonable period of leave for those who do not qualify for maternity leave.
- Employers and co-workers should not assume that pregnant employees will automatically take 12 months maternity leave, as women take varying amounts. Some women take no maternity leave at all, preferring to utilise paid annual leave or long service leave.
- Generally, employees are entitled to return to their former position after maternity leave.

Employers can help prevent discrimination by:

- Advising pregnant employees of their rights and responsibilities in relation to maternity and sick leave.
- Having policies and procedures for managing maternity leave, including how the employee and employer can keep in touch during the leave.
- Developing an information kit on maternity leave for employees and managers.

Dismissal and retrenchment

- An employer cannot dismiss or retrench an employee because she is pregnant or has the potential to become pregnant, even if this reason is only one of the reasons for her dismissal.
- An employer may dismiss or retrench an employee if the decision is based on reasons **other than pregnancy** such as:
 - genuine financial or operational reasons;
 - poor or inadequate work performance; or
 - serious or wilful misconduct.

Restructuring?

Remember to advise and consult your employees on maternity leave if the organisation is undergoing a restructure.

Redundancy arrangements should be offered to an employee on maternity leave in the same way it is offered to other employees.

Just because an employee is pregnant or on maternity leave, does not mean she will want to be made redundant.

Case example:

Following a restructure, an employee was transferred to new duties on return from maternity leave without consultation. The Hearing Commissioner found that the complainant's pregnancy was a factor in the change of duties. This was because the pregnancy led to her being on maternity leave and the restructuring occurred without consultation during this time. The conduct of the employer was found to be unlawful sex discrimination.

Gibbs v Australian Wool Corporation (1990) EOC 92-327

How can pregnancy friendly policies help?

Effective anti-discrimination policies can limit employer liability in the event of a complaint, as they demonstrate the employer taking steps to prevent acts of discrimination.

Policies aimed at achieving a balance between work and family life can also benefit organisations through, for example, increased productivity and staff retention.

Writing a policy need not be difficult. Start with a document explaining what constitutes pregnancy and potential pregnancy discrimination, stating that it will not be tolerated and inform all workplace participants of the action that will be taken if discrimination occurs. A good policy will also include information about maternity leave and how the organisation manages pregnancy related issues such as OH&S.

Once a policy is developed, it should not be left to languish on a file or intranet. For effective implementation and employer protection, the policy must be well communicated. Education of all parties is required if anti-discrimination laws and the organisation's policy are to be adhered to.

Remember that the facts of each situation will determine whether unlawful discrimination has occurred. If in doubt, refer to the full text of the Pregnancy Guidelines and talk to your Human Resources or Industrial Relations adviser. You could also contact the Human Rights and Equal Opportunity Commission's Complaints Infoline on 1300 656 419.

PREGNANCY DISCRIMINATION AT WORK

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- 4.1. Retrenchment
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1. Introduction

These Guidelines offer advice on preventing pregnancy discrimination in the workplace. They outline the law and provide practical suggestions and examples.

The Guidelines cover issues of pregnancy discrimination through all aspects of the employment relationship, including recruitment, employment and dismissal.

The Guidelines are followed by additional information for reference purposes:

Appendix A: Definitions and case law

Appendix B: Pregnancy policies and procedures

Appendix C: Which law; which forum?

1.1 The federal Sex Discrimination Act

Pregnancy is a normal, healthy physical condition that many women experience. Various laws have been put in place to ensure that pregnant and potentially pregnant women are not disadvantaged in their employment because of pregnancy or potential pregnancy.

The *Sex Discrimination Act 1984* (Cth) (“the federal Sex Discrimination Act”) makes pregnancy and potential pregnancy discrimination in employment unlawful.

Who is covered by the federal Sex Discrimination Act?

The federal Sex Discrimination Act covers employers and employees in all States and Territories.¹

All types of employees are covered, including temporary, casual, full-time and part-time workers, apprentices and trainees. Commission agents, contract workers and partners in partnerships of at least six partners are also covered. References to employees throughout the Guidelines include all these workplace participants, except where otherwise stated.

Employers must not discriminate. Employers can also be liable for the discriminatory actions of their managers, employees and agents, such as recruitment agents, unless they take reasonable steps to prevent the discrimination.

When does discrimination take place?

Direct pregnancy discrimination and potential pregnancy discrimination take place when a woman is treated less favourably because she is pregnant or is potentially pregnant.²

Indirect pregnancy and potential pregnancy discrimination take place when there is a requirement, condition or practice that disadvantages pregnant or potentially pregnant women, and when the requirement, condition or practice is not reasonable in the circumstances. In assessing whether an action is reasonable, a court will consider, among

¹ With the exception of State Government employment: section 13 *Sex Discrimination Act 1984* (Cth).

² See discussion in Appendix A at pages 32-34.

other things, the disadvantage to the employee, how the disadvantage could be overcome and whether it is proportionate to what an employer sought to achieve.³

What is meant by pregnancy and potential pregnancy?

Pregnancy includes the time when a woman carries a foetus, as well as physical characteristics of pregnancy such as having a large abdomen and tiredness. Potential pregnancy includes being capable of having children, a woman expressing a desire to have children or a woman being likely or being perceived as likely to become pregnant.⁴

Prohibitions on pregnancy and potential pregnancy discrimination apply irrespective of the marital status or age of an employee.

Does the federal Sex Discrimination Act require employers to accommodate pregnancy?

To avoid indirect discrimination employers may need to make some changes to the workplace or to the conditions under which a pregnant employee is employed. The Guidelines refer to this as accommodation or adjustment. For example, employers may need to accommodate pregnant employees by providing seating where this will assist employees to continue working.

Pregnancy discrimination often occurs because people make automatic assumptions about pregnant employees requiring different treatment. However, most pregnant employees carry out their work in the same way they did before they were pregnant.

The federal Sex Discrimination Act protects employers who provide benefits to women who are pregnant. It is not discriminatory to provide rights and privileges in connection with pregnancy and childbirth.⁵

Other relevant grounds of discrimination

An act of pregnancy discrimination may also be sex discrimination or discrimination on the ground of family responsibilities. While this publication focuses on pregnancy and potential pregnancy discrimination, employers and employees are advised to seek information on other areas and grounds of discrimination under the federal Sex Discrimination Act that may apply.

More information on this can be found in Appendix A.

1.2 Policies and procedures

A good way for employers to demonstrate compliance with the obligations of the federal Sex Discrimination Act and to avoid discrimination against pregnant or potentially pregnant employees is through the development of policies and procedures dealing with pregnancy issues.

All employers regardless of size or industry type can benefit from developing policies. Effective anti-discrimination policies can minimise employer liability in the event of a

³ See discussion in Appendix A at pages 34-36.

⁴ See discussion in Appendix A at pages 31-32

⁵ Section 31 *Sex Discrimination Act 1984* (Cth).

complaint, as they are evidence of the employer taking reasonable steps to prevent acts of discrimination.

Specific policies may be developed to deal with pregnancy or potential pregnancy, or existing policies can incorporate a position in relation to pregnancy or potential pregnancy.

Appendix B provides guidance on developing policies and procedures to prevent and, if necessary, respond to pregnancy discrimination.

1.3 The legal framework

These Guidelines detail principles which have been developed, based on case law and the terms of the federal Sex Discrimination Act, for each stage of the employment relationship.

Where relevant the Guidelines indicate overlaps with State and Territory anti-discrimination, industrial relations and occupational health and safety (“OH&S”) legislation. Common provisions in awards and agreements relevant to pregnancy and potential pregnancy discrimination are also mentioned. These Guidelines, however, should not be taken as a comprehensive discussion of these provisions. Independent legal advice should be sought where necessary.

Appendix C summarises the interaction between these laws.

2. Recruitment

Principles

- Pregnant or potentially pregnant women must be treated the same as any other potential employee during the recruitment process.
- To avoid discrimination, employers and employment agencies should seek the best applicant for the job based on merit, regardless of pregnancy or potential pregnancy.
- Assumptions about the capacities of pregnant women and mothers of young children should not intrude upon the recruitment process.
- Always ask questions that are job specific. Avoid asking applicants about whether they have or want to have children. Rather, ask questions about ability to travel or complete a project within the given timeframe.
- If a pregnant applicant is genuinely unable to perform the requirements of the job, it is not discriminatory to refuse her the job.

2.1 Non-discrimination in recruitment

The federal Sex Discrimination Act makes it unlawful for an employer to discriminate against a person on the ground of pregnancy or potential pregnancy during the recruitment process.⁶ Pregnancy discrimination in recruitment can occur when an applicant is not given an opportunity to apply for a position, or is not offered a position because she is pregnant. Potential pregnancy discrimination in recruitment can occur when a woman is not given an opportunity to apply for a position, or is not offered a position because she may become pregnant in the future.

Recruitment processes include:

- seeking applications;
- standard application forms;
- any system used for selection, including psychological testing, interviews, group assessments, bonding exercises etc;
- the conduct of selection processes;
- short listing applicants; and
- the final selection and hiring of successful applicants.

Recruitment processes should ensure all potential applicants understand the specific requirements of the job.

Applicants should be selected on merit-based attributes such as skills, experience, qualifications and aptitude. If an applicant is less qualified or is unable to perform the pre-determined requirements of the position, it is not discriminatory to refuse her the position. In only very limited cases will pregnancy have any effect on an applicant's capacity to carry out the requirements of the position. Pregnancy is a normal, healthy physical condition.

Employers must not discriminate against existing employees when filling internal positions. Pregnant and potentially pregnant employees must not be discriminated against when decisions about promotions, transfers and existing or new positions with the same employer are being made.

2.2 When it is not discriminatory to refuse employment

In very limited situations it may not be discriminatory to refuse to employ, promote or transfer an applicant who is pregnant. For example:

- if an applicant is not able to adequately perform the duties required for the position due to a medical condition;⁷
- where there are OH&S issues in the workplace that cannot be resolved due to the pregnancy; or

⁶ Section 14(1) *Sex Discrimination Act 1984* (Cth). See also sections 15(1), 16(1), 17(1) *Sex Discrimination Act 1984* (Cth), covering other workplace relationships.

⁷ If the medical condition is a disability, an employer would be required to consider the *Disability Discrimination Act 1992* (Cth), which requires employers to consider the inherent requirements of the job or whether reasonably accommodating the person would cause unjustifiable hardship. These provisions do not apply to promotion or transfer.

- if the position requires completion of a specific project and the applicant would be unable to meet the absolute timeframes of the project.

Before an employer refuses an applicant employment on the basis of OH&S or medical issues the employer should proceed with caution. Obtaining a medical report and contacting the relevant State or Territory OH&S organisation,⁸ could assist in avoiding discrimination. All reasonable options for accommodating the applicant should first be considered. See discussion below at pages 16-19.

In NSW, anti-discrimination legislation allows an employer to discriminate against a pregnant woman during recruitment, in limited circumstances.⁹ The federal Sex Discrimination Act does not provide an exemption of this type and an employer in NSW may be the subject of a complaint under the federal law,¹⁰ even if they are complying with the NSW law.

2.3 Who is liable for discrimination in recruitment?

Employers and employment agencies may both be liable for discrimination in recruitment.

Employment and recruitment agencies

Employment and recruitment agencies are liable for discriminatory hiring practices even if they are acting on behalf of, or following the directions of, a client.¹¹

Employers

When contracting an agency to advertise, search for and select prospective employees, an employer would be well advised to require the agency to adhere to and adopt non-discriminatory processes. This will help employers avoid being held jointly liable with the agency for any acts of discrimination during the recruitment process.

An employer may also be liable for the discriminatory actions of its employees or agents who recruit others on behalf of the employer, unless the employer took all *reasonable steps* to prevent the employee or agent from doing the discriminatory acts.¹²

Reasonable steps might include the employer making it clear that the best applicants for the position are to be short listed irrespective of pregnancy or potential pregnancy. It could also include a review of recruitment and selection procedures, particularly with respect to interview questions asked.

More information is contained in Appendix A at pages 36-37.

⁸ See contact list at page 67.

⁹ Section 25(1A) *Anti-Discrimination Act 1977* (NSW).

¹⁰ Except for NSW State Government employment: section 13 *Sex Discrimination Act 1984* (Cth).

¹¹ Section 105 *Sex Discrimination Act 1984* (Cth) would make a recruitment or employment agent liable if they caused, instructed, induced, aided or permitted an employer to do an act that was unlawfully discriminatory. This may also be the case for recruitment and employment where the contracting organisation is offshore and providing instructions from an office offshore, as long as the part of the recruitment process that was discriminatory was conducted in Australia.

¹² Section 106 *Sex Discrimination Act 1984* (Cth).

2.4 Advertising employment vacancies

Under the federal Sex Discrimination Act, it is an offence to publish or display an advertisement or notice for a position of employment that indicates an intention to discriminate. It is also an offence to cause or permit such an advertisement or notice to be published or displayed.¹³

An advertisement or notice includes publicly or privately distributed notices in a wide variety of forms and by a wide variety of mediums, including advertisements placed on the Internet or notice boards.¹⁴

At every stage of recruitment advertising, all parties involved may be held liable for discriminatory advertisements, including:

- the *employer* who authorises the terms of the advertisement;
- the *recruitment agency* that writes and places the advertisement; and
- the *newspaper* or other medium that publishes or displays the advertisement.

There are also State and Territory anti-discrimination laws that cover discrimination in advertising.¹⁵

2.5 Job applications

Generally, job applicants are not required by law to include information regarding their sex, age, marital status, pregnancy or potential pregnancy, in job applications. If such information is provided, employers should not use it to evaluate applicants.¹⁶ Sound recruitment practices generally do not include the need to ask for this type of information and not doing so removes any suspicion of discriminatory use.

2.6 Questions at interview

Employers need to ensure that interviews and selection processes are not based on, or influenced by, stereotypical assumptions about pregnant employees or women who may potentially become pregnant. For example, employers should not make assumptions about the length of maternity leave that individual women want, or that women with young children would not be able to travel extensively to undertake job commitments.

To avoid discrimination, sound management may include:

¹³ Section 86 *Sex Discrimination Act 1984* (Cth). Further information on advertising is contained in the Human Rights and Equal Opportunity Commission brochure *Guidelines for writing and publishing recruitment advertisements: How the Sex Discrimination Act affects you*.

¹⁴ Section 86(2) *Sex Discrimination Act 1984* (Cth).

¹⁵ Section 103(1) *Equal Opportunity Act 1984* (SA); it is a defence to a prosecution to prove that the defendant believed on reasonable grounds that the publication did not indicate an intention to do an unlawful act: Section 103(2). Sections 195 and 197 *Equal Opportunity Act 1995* (Vic); it is a defence to a prosecution to prove that the defendant took reasonable precautions to prevent the publication or display: section 196. Section 68 *Equal Opportunity Act 1984* (WA); section 20 *Anti-Discrimination Act 1998* (Tas); section 69 *Discrimination Act 1991* (ACT); section 127(1) *Anti-Discrimination Act 1991* (Qld); and section 109(1) *Anti-Discrimination Act 1992* (NT).

¹⁶ Section 27(1) *Sex Discrimination Act 1984* (Cth).

- asking only those questions relevant to the inherent requirements of the job; and
- developing a series of questions that can be asked of each applicant, irrespective of whether the applicant is male or female.

Workplace examples:

Short and fixed term contracts

When recruiting for a fixed-term time-bound project, such as hiring an accountant to implement a new accounts system by the end of the financial year or employing an events manager for an upcoming conference, it would be appropriate to ask the applicant if they have any obligations that would prevent them from undertaking the duties in the period required.

Inappropriate question: Are you pregnant?

Appropriate question: Will you be available to complete the project within the deadlines that have been set?

Jobs with extensive travel

It should not be assumed that a pregnant employee could not be employed in a position requiring extensive travel. The information that could be properly sought by the employer is, for example, the applicant's ability to effectively communicate with people in different regions, including any possible limits on the applicant's ability to travel. The employer should consider options that can accommodate temporary inability to travel, including telephone and video-conferencing.

Inappropriate question: Are you planning to start a family?

Appropriate question: The position will require regular travel for periods ranging from overnight to one week. Are you able to undertake this travel?

2.7 Medical examinations to determine pregnancy

In practice, it is very rare for medical information about pregnancy to be relevant to recruitment. Good employment practice would only require this information where there are legitimate and documented OH&S concerns associated with a particular job. Information from medical examinations must strictly be used in a non-discriminatory manner and remain confidential.

3. Employment

Principles

- Pregnant or potentially pregnant employees should be treated in a fair and equitable manner. Employers should not reduce an employee's terms and conditions or deny other benefits on the basis of pregnancy or potential pregnancy.
- Where necessary, employers should make all reasonable adjustments to the workplace to accommodate the normal effects of pregnancy. Employers need to discuss the issues with the pregnant employee to find solutions.
- Where medical issues are associated with a pregnancy or legitimate OH&S issues arise, employers should make reasonable adjustments in the workplace to allow pregnant employees to continue to work.
- It is not discriminatory to accommodate an employee who is pregnant.
- In limited cases where medical or OH&S issues cannot be resolved, an employer may need to temporarily transfer a pregnant employee.
- Constant references to an employee's pregnancy, touching her stomach and badgering her about whether she is "really" planning to come back to work are likely to amount to discrimination.
- When an employee has had her position adjusted in some way because of her pregnancy, her benefits should remain the same, although her salary may alter if her hours decrease.

3.1 Equity for employees who are pregnant

Pregnancy discrimination often occurs because people make automatic assumptions about pregnant employees requiring different treatment. However most pregnant employees carry out their work in the same way as they did before they were pregnant.

It is the responsibility of employers to treat pregnant and potentially pregnant employees in a fair and equitable manner that does not discriminate against them. This includes providing pregnant and potentially pregnant employees with the same basic terms and conditions of employment and the same benefits as they would receive if they were not pregnant. It is also the employers' responsibility to ensure other employees treat pregnant and potentially pregnant women in a non-discriminatory way.

Generally this means that an employee cannot be:

- transferred;
- demoted;
- made part-time if she was full-time or vice versa;
- made casual if she was permanent;

- given reduced hours of work or increased hours of work;
- given less skilled or less demanding work;
- denied education or training;
- denied promotion; or
- denied other employment benefits or opportunities

because of her pregnancy or potential pregnancy without the agreement of the employee.

There are a small number of cases when medical issues associated with pregnancy may require an employer to make some adjustment to work arrangements to allow a pregnant employee to work safely and efficiently. Making these adjustments will help ensure that there is no discrimination against an employee because she is pregnant.

3.2 Adjustments for employees who are pregnant

Some women experience physical effects such as tiredness and nausea during certain stages of pregnancy. In most cases, this does not prevent women performing their work. To avoid discriminating on the basis of pregnancy, employers are encouraged to accommodate the normal effects of pregnancy in the workplace.

Employers should note that anti-discrimination legislation in Tasmania and the Northern Territory has provisions that deal specifically with the accommodation of pregnant employees.¹⁷

¹⁷See sections 24 and 58 *Anti-Discrimination Act 1992* (NT) and section 28 *Anti-Discrimination Act 1998* (Tas).

Workplace examples:

Do I have an obligation to provide seating?

Providing seating is a simple way to accommodate the needs of some pregnant employees. Failure to provide seating when the work can be reasonably performed sitting down, may be discriminatory. It may also endanger the health of the employee and her unborn child.

What if an employee requires additional toilet breaks?

The physical changes pregnant women experience may mean that some women need increased access to toilet breaks. Denying a pregnant employee adequate toilet breaks is likely to be discrimination.

Can I alter rosters or hours of work?

In most situations an employee who is pregnant will be able to work the same rosters and hours as an employee who is not pregnant. Rosters should not be altered because of pregnancy unless there is a specific reason, such as a pregnancy related illness. Nor should the pregnant employee's hours or normal shifts be altered, unless done in consultation with, and with the legitimate agreement of, the employee. A medical report supporting the changes, stating the reason why the existing rosters cannot be worked and detailing the nature, amount and times that work can be performed, given the circumstances of the pregnancy, is often helpful.

Do I need to provide uniforms for pregnant employees?

Where an employer requires an employee to wear a uniform, uniforms should be provided in sizes sufficient to accommodate pregnancy. Alternatively, an employer may consider waiving the requirement to wear a uniform for the period when suitably sized uniforms are unavailable. Where an inability to wear the uniform causes detriment to the employee, such as denial of access to particular duties, sound workplace management would ensure that this situation is properly addressed to prevent discrimination.

Is there an issue with drinking water?

The body temperature of pregnant women tends to increase more rapidly than that of women who are not pregnant. It is important that pregnant women have access to drinking water while working.

What if an employer fails to make appropriate adjustments for employees who are pregnant?

An employment condition, requirement or practice that unreasonably fails to accommodate pregnancy may disadvantage pregnant employees and therefore constitute indirect discrimination under the federal Sex Discrimination Act.¹⁸ While the requirement or practice may appear to be non-discriminatory, ultimately it could have the *effect* of disadvantaging

¹⁸ Matters taken into account in assessing reasonableness are contained in section 7B(2) *Sex Discrimination Act 1984* (Cth).

pregnant employees. The fact that an employer did not intend to discriminate is not relevant under the federal Sex Discrimination Act, it is the impact of the requirement or practice that is assessed.

Refer to Appendix A at pages 34-36 for a definition of reasonableness and case examples.

General advice for employers is to consider all reasonable options when accommodating pregnant employees and to be prepared to discuss these options with employees to find individual solutions.

There is no single answer as to what is required to reach a non-discriminatory outcome as it depends on individual circumstances. Employer decisions taken in consultation and cooperation with the pregnant employee will usually assist in a reasonable outcome. Remember, no two pregnancies are the same and people need to be managed as individuals. Do not make assumptions about what a pregnant woman wants or needs. It is always better to ask her.

What if an employee who is pregnant cannot be accommodated?

It is unlikely that an employee cannot be accommodated. However, problems may occur if there are medical issues in addition to the pregnancy, or where there are particular OH&S issues in the workplace.

Pregnancy discrimination and medical issues

If a pregnant employee has medical issues associated with her pregnancy, such as fatigue or high blood pressure, the employer should consider the medical issues and the need to accommodate them in the broader context of discrimination law. This may involve seeking medical advice, consulting with the employee and acting on the medical advice in a non-discriminatory way. See the discussion of sick leave at page 18 and the role of medical advice at page 22.

Pregnancy discrimination and OH&S

When complying with the responsibility to accommodate pregnancy at work, employers must be aware of OH&S requirements, as well as the prohibition of discrimination against pregnant employees.¹⁹

Where OH&S risks to pregnant employees cannot be controlled or eliminated, the employer may need to transfer a pregnant employee to an alternative job within the organisation. For further discussion of OH&S and pregnancy, see Appendix C, pages 61-63.

Under the federal Sex Discrimination Act, any transfer must be done in a way that does not discriminate against a pregnant employee. For example, the transfer should not result in loss

¹⁹ See for example section 16 *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) and section 15 *Occupational Health and Safety Act 1983* (NSW) that require the provision of systems of work and plants (including equipment, appliances and machinery) which are safe and without risks to health. See also section 19 *Occupational Health, Safety and Welfare Act 1986* (SA); section 19 *Occupational Health and Safety Act 1984* (WA); section 27 *Occupational Health and Safety Act 1989* (ACT).

of opportunities for promotion, training, financial loss, extra travel time or exposing the pregnant employee to harassment by fellow workers.

Maternity leave provisions under some State and federal laws, awards or agreements require an employer to consider such a transfer on the production of a medical certificate.²⁰ These laws also generally provide that a woman be returned to her original job, not the job she was transferred to while pregnant, upon her return from maternity leave.²¹ Refer to pages 20-22 for information on maternity leave.

The role of medical advice in managing pregnancy at work

Nurses, health care workers, midwives, general practitioners and obstetricians, among others, can provide advice about managing pregnancy in the workplace. In-house medical advisers and doctors can also provide general advice, however employees should also seek independent advice.

Medical certificates are usually required when an employee needs to transfer to safer or lighter duties, to reduce working hours, or where special maternity leave is required.²² The federal Sex Discrimination Act states that it is not unlawful to request or require a person who is pregnant to provide medical information concerning the pregnancy.²³

Of concern to some employers is the inadequacy or limited nature of the information provided in medical certificates. Of particular concern is the phrase 'light duties'. Employers are encouraged to request that medical certificates address the actual duties that would be appropriate for the pregnant employee.

An employee should discuss with her medical adviser the detail required in a medical certificate. To assist this process, employers may consider developing a simple information sheet to obtain the relevant information.

Information sheets could contain information about current duties, hazards particular to the workplace or the work being performed, and seek any relevant information about the particular circumstances of the pregnancy and possible alternative duties. Information sheets should be compiled in a non-discriminatory manner, concentrating on OH&S criteria.

The limits of workplace adjustment

There are, on very rare occasions, circumstances where a pregnant employee can no longer perform her job even after workplace adjustments and there are no alternative tasks or

²⁰ Schedule 1A clause 17 *Workplace Relations Act 1996* (Cth), (applying to Victorian workers); section 70 *Industrial Relations Act 1996* (NSW); section 36(2)(a) *Industrial Relations Act 1999* (Qld).

²¹ Schedule 1A clause 14 *Workplace Relations Act 1996* (Cth) (applying to Victorian workers); schedule 14 clause 12 *Workplace Relations Act 1996* (Cth); section 66 *Industrial Relations Act 1996* (NSW); section 32 *Workplace Relations Act 1999* (Qld); section 38 *Minimum Conditions of Employment Act 1993* (WA); clause 17 schedule 5 *Industrial and Employee Relations Act 1994* (SA).

²² Special maternity leave is provided for under a number of federal and State workplace and industrial relations laws. Generally, it allows pregnant employees unpaid leave because of illness associated with the pregnancy or because they have suffered a miscarriage or still birth. Often special maternity leave is taken where the pregnant employee has exhausted all available paid sick leave. The choice of leave is up to the employee.

²³ Section 27(2) *Sex Discrimination Act 1984* (Cth).

available transfers. In such circumstances, the employer can provide extended leave with or without pay or the pregnant employee could commence unpaid maternity leave early.

It may, after careful consideration, be lawful to terminate the employment contract where the pregnant employee is no longer able to meet the terms and conditions of the position.²⁴ It is very rare for these circumstances to arise. If such a situation did arise, sound management practice would ensure that there was adequate documentation to demonstrate that no other alternative options existed and that all requirements of anti-discrimination, industrial relations and OH&S legislation had been met. Employers would be well advised to discuss the situation and appropriate responses with a specialist adviser or relevant government agency. See the contact list at page 67.

Case example:

A kennel assistant alleged she was discriminated against when she fell pregnant and resigned because her employer could not provide alternative duties that did not involve working with cats. Cats' faeces carry the toxoplasmosis infection which is dangerous for a human foetus.

The Tribunal accepted that the employer imposed a requirement on the employee to work with cats. The risk to her unborn child gave the employee no choice but to resign. However, the Tribunal stated that the requirement was reasonable in all of the circumstances.

Evidence presented to the Tribunal by the employer satisfied the Tribunal that the efficiency and effectiveness of running the animal refuge meant that it was impossible to organise the work to ensure that the employee was not exposed to cats. There was no alternative method of work available, as the entire animal refuge was a high risk area for exposure to the toxoplasmosis infection. The complaint was dismissed.

Parker v North Queensland Animal Refuge Inc (1998) EOC 92-926

Sex Discrimination Commissioner Comment: *In most cases entire workplaces will not pose a risk to a pregnant woman or her unborn child. Employers should generally consider adjustments to the duties, transferring the employee or providing some form of leave. Employers should also note the high level of evidence that may be required to defend a claim of discrimination such as this.*

²⁴ See, for example, *Parker v North Queensland Animal Refuge Inc (1998) EOC 92-926*.

3.3 Leave

Principles

- Minimum maternity leave provisions are set in industrial relations laws and awards and agreements. Employee entitlements and notice requirements should be checked as they differ from workplace to workplace.
- Minimum leave entitlements for non-casual employees include:
 - up to 12 months unpaid maternity leave after 12 months service; and
 - access to sick leave when ill during pregnancy.
- Some casuals qualify for unpaid maternity leave.
- Pregnant employees who do not qualify for maternity leave are still protected by the federal Sex Discrimination Act. Employers and employees can negotiate a fair and reasonable period of leave for those who do not qualify for maternity leave.
- Employers and co-workers should not assume that pregnant employees will automatically take 12 months maternity leave, as women take varying amounts. Some women take no maternity leave at all, preferring to utilise paid annual leave or long service leave.
- Generally, employees are entitled to return to their former position after maternity leave.

Taking maternity leave

Who has a right to maternity leave?

All employees, except for some casual employees, who have completed 12 months continuous service, are entitled to 12 months unpaid maternity leave. Long-term casual employees are entitled to maternity leave in some States.²⁵

Maternity leave entitlements under other federal, State and Territory legislation, awards and agreements can be more beneficial than the minimum standards in the *Workplace Relations Act 1996* (Cth). Where this is the case, they may apply rather than the minimum standard.²⁶ Some employers also provide additional benefits that have been individually negotiated or feature in an organisation's employment policy.

What happens when an employee is not entitled to maternity leave?

Where an employee is not entitled to maternity leave, for example an employee with less than 12 months service or some casuals, an employer remains bound by the federal Sex Discrimination Act and must ensure that a pregnant employee is not discriminated against. Dismissal in these circumstances is likely to be unlawful under the federal Sex Discrimination Act.

²⁵ Section 53 *Industrial Relations Act 1996* (NSW); section 16(1)(a) *Industrial Relations Act 1999* (Qld).

²⁶ Section 170KA(4) *Workplace Relations Act 1996* (Cth).

Therefore while some pregnant employees may not qualify for maternity leave, employers at a minimum must not discriminate unlawfully and may consider:

- providing access to other forms of leave (such as annual leave or leave without pay);
- discussing a reasonable period of absence having regard to the needs of both the employer and the employee; and
- if leave is refused, providing the employee with reasons why the employer is unable to grant leave without pay or why other options are impracticable.

How much notice does the employee need to provide before taking maternity leave?

Federal, State and Territory industrial relations laws, awards and agreements determine the minimum notice for maternity leave.

The federal *Workplace Relations Act 1996* requires:

- notice of the employee's intention to take maternity leave ten weeks prior to the estimated date of birth;
- a medical certificate stating the expected date of birth and an application for maternity leave at least four weeks prior to the first day of maternity leave; and
- a statutory declaration saying the employee will be the child's primary caregiver and will not do anything inconsistent with her contract of employment.²⁷

The federal *Workplace Relations Act 1996* also states that the required notice of intention to take maternity leave, the provision of documents and application for leave will not be strictly applied if it is not reasonably practicable for an employee to give this notice, for example, if a child is born prematurely.²⁸

Similar provisions exist in other industrial relations laws, awards and agreements, although they vary slightly.²⁹ The applicable provisions most beneficial to employees should always be applied.

Generally, there is no obligation for a pregnant employee to take maternity leave if she chooses not to.³⁰ Accumulated annual leave or other forms of leave may be used instead of, or in conjunction with, maternity leave, subject to the usual requirements for taking such leave.

²⁷ Schedule 14 clause 3(2) *Workplace Relations Act 1996* (Cth).

²⁸ Schedule 14 clause 3(3) and 3(4) *Workplace Relations Act 1996* (Cth).

²⁹ For example, section 58(1)(b) *Industrial Relations Act 1996* (NSW) requires a pregnant employee to give four weeks written notice of her intention to take maternity leave and the proposed dates of the leave; schedule 5 clause 2 *Industrial and Employee Relations Act 1994* (SA) and section 33(2) *Minimum Conditions of Employment Act 1993* (WA) require the employee to give ten weeks written notice of their intention to take maternity leave.

³⁰ Under some laws, awards or agreements an employer may require an employee to take some form of leave before and/or after the expected birth date. See page 22 below.

Does a medical certificate have to be provided?

Under industrial relations laws, awards and agreements, an employee planning to take any maternity leave must provide a doctor's certificate confirming the pregnancy and the expected date of birth, prior to taking the maternity leave.³¹

Medical certificates may also be required when an employee requests to transfer to safer or light duties, or to reduce work hours due to a medical condition related to pregnancy, or where sick leave or special maternity leave is taken.

Can an employer require a pregnant employee to commence maternity leave prior to the birth?

Some laws, awards and agreements allow employers to request employees who have applied for maternity leave to commence leave before the birth of the child.³² Usually this arises if it can be demonstrated that continuing to work poses a genuine OH&S risk.

If commencing maternity leave disadvantages an employee, the employer must be able to demonstrate that a thorough examination of alternative duties, options for job modification and availability of positions for transfer have been undertaken in consultation with the employee. It would be most unwise, even if State legislation allows it, to require an employee to commence maternity leave early if she had a medical certificate that stated that she was able to continue working.

See the discussion on accommodating pregnant employees at pages 16-19.

Can an employer require an employee to take maternity leave after the birth?

Some laws, awards and agreements require employees who are taking maternity leave to take a mandatory period of leave after the birth of the child.³³ If an employee is disadvantaged by this requirement a complaint under the federal Sex Discrimination Act could still be made. The award or agreement prescribing the mandatory period of maternity leave would then be referred to the Australian Industrial Relations Commission ("the AIRC") for review.³⁴

See Appendix C at page 64.

Sick leave

Using sick leave during pregnancy

Pregnant employees who become ill during pregnancy have the same sick leave rights and entitlements as well as the same responsibilities as other employees.

³¹ See for example schedule 14 clause 13(2) *Workplace Relations Act 1996* (Cth); section 58(1)(c) *Industrial Relations Act 1996* (NSW); schedule 5 clause 4 *Industrial and Employee Relations Act 1994* (SA); section 35 *Minimum Conditions of Employment Act 1993* (WA).

³² For example, section 34 *Minimum Conditions of Employment Act 1993* (WA).

³³ For example, schedule 1A clause 4(4) *Workplace Relations Act 1996* (Cth).

³⁴ Section 46PW *Human Rights and Equal Opportunity Commission Act 1996* (Cth).

Pregnant employees are entitled to use sick leave to attend regular prenatal medical appointments or special appointments associated with pregnancy complications, subject to the same conditions that apply to sick leave generally. Any restriction on the use of sick leave to attend these appointments, or unreasonable restrictions on actually attending such appointments could amount to discriminatory treatment under the federal Sex Discrimination Act, or a possible breach of an award or a certified agreement.³⁵

Some laws, awards and agreements make provision for unpaid special maternity leave prior to the birth where a medical practitioner certifies it to be necessary.³⁶ Special maternity leave is taken instead of, or in conjunction with, paid sick leave and in most cases employees can choose which form of leave to use.

Where sick leave is limited, it is a good idea for pregnant employees, in consultation with their employers, to take the necessary leave in hourly increments rather than whole days. If sick leave runs out and a pregnant employee is still unwell, employers may consider exploring other leave arrangements, such as annual leave, time off in lieu, long service leave or leave without pay in place of sick leave.

Using sick leave during maternity leave

The birth of a child does not, by itself, constitute an illness and does not provide an entitlement to sick leave. However, in some circumstances a pregnant employee or an employee who has just given birth may also be sick. The availability of sick leave in this situation will depend largely on the relevant law, award or agreement covering the given workplace and the pregnant employee's medical certificate. It also depends on how closely the illness and the pregnancy are connected.

Case example:

In 1999, the South Australian Industrial Relations Commission decided that if a pregnant employee becomes ill and, as a result, the child is born prematurely, the employee might be able to claim sick leave until the child is able to leave hospital, and then commence maternity leave.

SA Commission for Catholic Schools v Association of Non-Government Education Employees SA (1999) 88 IR 130

3.4 Return to work after maternity leave

Under industrial relations laws, awards and agreements as well as the federal Sex Discrimination Act, an employee is generally entitled to return to the position she held prior to commencing leave or to a comparable available position if her original job has ceased to exist. However, where the pregnancy has required some temporary adjustment or accommodation to the normal role prior to commencing maternity leave (such as part-time employment or change in shifts), the employee is entitled to return to the position or job she held immediately prior to the temporary accommodation.

³⁵ See also section 170CK(2)(a) *Workplace Relations Act 1996* (Cth) which prohibits dismissal due to a temporary absence from work because of illness.

³⁶ See for example schedule 1A clause 10 *Workplace Relations Act 1996* (Cth) (applying to Victorian workers); section 71 *Industrial Relations Act 1996* (NSW).

An employee returning from maternity leave may also wish to work part-time or on a job share basis. Awards, agreements, and some State laws specifically allow for a return to part-time work after maternity leave by agreement with the employer. In some situations, an employer may be deemed to have made a discriminatory decision if a reasonable request for part-time work is refused.

Sex Discrimination Commissioner Comment: *There is a growth of precedent in this area. Employers should be aware that in both the industrial relations and anti-discrimination jurisdictions there is an increase in the number of findings that state women returning from maternity leave should have access to part-time employment.*

Case example:

An employee requested a job share arrangement, relying on an award provision that allowed for job sharing arrangements by agreement. The employer rejected the request arguing that job share arrangements were inefficient. The NSW Industrial Relations Commission found that women, as primary care givers to children, may need to seek flexible work arrangements to accommodate their carer responsibilities. The employer's decision was found to indirectly discriminate against the employee on the basis of sex and the Commissioner recommended that the employer trial a job share arrangement.

Federated Municipal and Shire Council Employee's Union of Australia (NSW) v Nambucca Shire Council (NSW IRC 6771 of 1997, 26/8/1998)

Case example:

A dental clinic charge nurse sought to return to work on a part-time job share basis following adoption leave. Her employer offered her either her old job back on a full-time basis or a part-time job with lesser status and responsibility.

The employer indicated that the position of charge nurse could not be shared, noting that the position had always been performed on a full-time basis.

The Tribunal found that there was a requirement to work full-time imposed on employees undertaking supervisory positions and that this disproportionately affected women and employees with family responsibilities. The requirement was found to be unreasonable, as the employer had failed to conduct any proper analysis or evaluation of the employee's job share proposal.

Bogle v Metropolitan Health Service Board (2000) EOC 93-069

3.5 Preventing unlawful harassment

Pregnant employees are sometimes subjected to behaviour at work that is inappropriate and may be discriminatory. Examples of inappropriate behaviour include constant references to the pregnancy, touching the employee's stomach, badgering the employee about her ability to cope with the workload, or continually questioning the employee about whether she 'really' intends to come back to work. Where such conduct constitutes less favourable treatment of the pregnant employee, it will amount to unlawful discrimination under the federal Sex

Discrimination Act. See Appendix A at pages 32-33. Employers could be liable for their employees' inappropriate conduct unless they took reasonable steps to prevent it.³⁷

Harassment of pregnant women may also amount to sexual harassment for the purposes of the federal Sex Discrimination Act, where the conduct is of a sexual nature, for example, touching a pregnant woman's abdomen or breasts.³⁸ In cases of sexual harassment the person who harasses may be found to be directly liable.³⁹ An employer may also be vicariously liable for sexual harassment unless they have taken all reasonable steps to prevent the harassment.⁴⁰

Appendix B provides advice to employers on how to take adequate steps to prevent discrimination and harassment of pregnant employees.

3.6 Other issues

Miscarriage, still birth or the death of a newborn child

Discrimination against employees who suffer a miscarriage, a still birth or the death of a newborn child is likely to be unlawful under the pregnancy discrimination provisions of the federal Sex Discrimination Act.⁴¹

Where a pregnancy has ended due to a miscarriage, or an employee has suffered a still birth or the death of a newborn child, employers can generally cancel maternity leave if it has not commenced, or limit the leave if it has already commenced.⁴² However, employees are usually entitled to special maternity leave or sick leave in such circumstances, subject to the provision of a medical certificate.⁴³

Extended leave after a miscarriage, a still birth or the death of a newborn child is in some cases left to the discretion of the employer.⁴⁴ However, any discrimination, including the denial of entitlements, may be found to be unlawful under the federal Sex Discrimination Act.

³⁷ Section 106 *Sex Discrimination Act 1984* (Cth).

³⁸ Section 28B *Sex Discrimination Act 1984* (Cth). See also section 22 *Anti-Discrimination Act 1977* (NSW); section 85 *Equal Opportunity Act 1995* (Vic); sections 118-120 *Anti-Discrimination Act 1991* (Qld); section 17 *Anti-Discrimination Act 1998* (Tas); section 87 *Equal Opportunity Act 1984* (SA); section 24 *Equal Opportunity Act 1984* (WA); sections 58-60 *Discrimination Act 1991* (ACT); section 22 *Anti-Discrimination Act 1992* (NT). For a detailed discussion of sexual harassment issues, see Human Rights and Equal Opportunity Commission *Sexual Harassment: A code of practice* HREOC Sydney 1996.

³⁹ Section 28B(2) *Sex Discrimination Act 1984* (Cth).

⁴⁰ Section 106 *Sex Discrimination Act 1984* (Cth).

⁴¹ Sections 7 and 14 *Sex Discrimination Act 1984* (Cth). Although there is no case law on this point, a reasonable interpretation of the Act would cover miscarriage and still birth.

⁴² Schedule 14 clause 10 *Workplace Relations Act 1996* (Cth). In NSW the discretion to return to work after a miscarriage or still birth resides with the employee. An employee may choose when she wishes to return to work by notifying the employer: section 61(2) *Industrial Relations Act 1996* (NSW).

⁴³ For example, schedule 1A clause 10 *Workplace Relations Act 1996* (Cth) (applying to Victorian workers); section 71 *Industrial Relations Act 1996* (NSW).

⁴⁴ However, in NSW, section 61(2) *Industrial Relations Act 1996* (NSW) allows an employee who has commenced maternity leave to continue on maternity leave for the period of leave requested. If maternity leave has not commenced the employee may take as much sick or special maternity leave as her medical practitioner certifies is necessary: section 71 *Industrial Relations Act 1996* (NSW).

Pregnancy termination

Discrimination against employees who terminate a pregnancy may be unlawful under the pregnancy discrimination provisions of the federal Sex Discrimination Act.⁴⁵

Employees who terminate a pregnancy are entitled to access their sick leave, subject to meeting eligibility requirements under the relevant legislation, award or agreement. Extended leave after a termination is at the discretion of an employer.

Fertility treatment

Discrimination against employees on the basis that they are undertaking fertility treatment, such as in-vitro fertilisation (IVF), may be found to be unlawful under the potential pregnancy discrimination provisions of the federal Sex Discrimination Act. This may include, for example, denial of training or promotional opportunities on the basis that the employee may become pregnant.⁴⁶

In considering whether the conduct would be discriminatory for the purposes of the federal Sex Discrimination Act, the marital status of the employee in question is irrelevant to the situation.

Adoption

The provisions of the federal Sex Discrimination Act relating to pregnancy discrimination do not cover adoption. However, some types of discrimination against employees who have adopted or plan to adopt children could be unlawful discrimination on other grounds.⁴⁷ It would be wise for employers to adopt non-discriminatory practices relating to recruitment, selection, terms and conditions of employment and termination of employment when managing employees who are adopting children.

⁴⁵ Sections 7 and 14 *Sex Discrimination Act 1984* (Cth). Although there is no case law on this point, a reasonable interpretation of the Act would cover termination of a pregnancy.

⁴⁶ Sections 7 and 14 *Sex Discrimination Act 1984* (Cth). Although there is no case law, a reasonable interpretation of the definition of potential pregnancy would cover situations where an employee was undergoing fertility treatment.

⁴⁷ For example, it is unlawful to discriminate against an employee on the grounds of family responsibilities by dismissing the employee: section 14(3A) *Sex Discrimination Act 1984* (Cth). See also section 7(1)(e) *Discrimination Act 1991* (ACT); section 7(1)(d) *Anti-Discrimination Act 1991* (Qld); Part IIA *Equal Opportunity Act 1984* (WA); section 19(1)(g) *Anti-Discrimination Act 1992* (NT); section 16(e) and (d) of the *Anti-Discrimination Act 1998* (Tas), section 6(1) *Equal Opportunity Act 1995* (Vic), section 49T *Anti-Discrimination Act 1977* (NSW).

4. Dismissal and retrenchment

Principles

- An employer cannot dismiss or retrench an employee because she is pregnant or has the potential to become pregnant, even if this reason is only one of the reasons for her dismissal.
- An employer may dismiss or retrench an employee if the decision is based on reasons *other than pregnancy* such as:
 - genuine financial or operational reasons;
 - poor or inadequate work performance; or
 - serious or wilful misconduct.

It is discrimination to take into account pregnancy or potential pregnancy when considering dismissal or retrenchment. If an employee's pregnancy is one of the reasons for a dismissal or retrenchment, even though it may not be the dominant reason, the employer has acted unlawfully.⁴⁸ Similarly, an employer cannot retrench an employee on the basis that the employee may become pregnant in the future, or because an employee has indicated an interest in having a child.

4.1 Retrenchment

It would not be discriminatory for an employer, due to genuine financial or operational reasons, to retrench a pregnant employee. However, the employer should be able to demonstrate that financial difficulty or economic downturn was the legitimate reason for the retrenchment, and that pregnancy or potential pregnancy of the employee did not play a part.

In addition, the employer should demonstrate that the process adopted to identify employees for retrenchment was not discriminatory. Employers should not forget to consult with employees who are on maternity leave. Nor should employers assume that women on maternity leave will automatically opt for retrenchment or that they will resign and therefore not be entitled to redundancy payments or redeployment opportunities.

4.2 Dismissal

An employer is entitled to dismiss an employee because of poor or inadequate performance. An employer is not entitled to dismiss an employee if a reason for the dismissal (even if it is not the only or main reason) is the employee's pregnancy or potential pregnancy.

⁴⁸ Section 8 *Sex Discrimination Act 1984* (Cth).

Case example:

An employee was terminated by her employer on the same day that she informed her employer of her pregnancy. The employer said the dismissal had nothing to do with her pregnancy, rather it was due to poor work performance. During her employment the employee had been counselled about her poor performance and encouraged to try harder.

The employee argued that the relationship in time between advising the employer of her pregnancy and her dismissal led to the inference that she was dismissed because of her pregnancy. The employer argued that the decision to dismiss the employee had been made the previous week and brought evidence to show that a new employee had been engaged because the existing employee was to be dismissed.

The Hearing Commissioner found that the employer had decided to terminate the employee for poor work performance before being notified of the employee's pregnancy. The Hearing Commissioner found in favour of the employer stating that pregnancy was not a factor in the decision to dismiss the employee.

Manely v East West Holdings Pty Limited (1994) EOC 92-645(4)

Confusion about the motives for dismissal of a pregnant or potentially pregnant employee can often lead to an allegation of discrimination. This can be the result of poor communication and inadequate management practices, for example, where an employee with unsatisfactory work performance is not made properly aware of the performance issues prior to the pregnancy and/or dismissal. Where an employee is under performing it is important to inform the employee directly and conduct regular performance reviews and counselling sessions. Thorough documentation should be kept. Conducting the first such review or dismissing an employee after the employee announces a pregnancy may lead to considerable misunderstanding.

It should also be noted that an employee, including a long-term casual employee, may have access to protection under unfair dismissal and unlawful termination laws if her employment is terminated due to pregnancy.

Renewal of Contract

Failure to renew an employee's fixed-term contract because of her pregnancy is unlawful, even if the pregnancy forms only part of the decision not to renew. However, a failure to renew may not be discriminatory if the contract is for a fixed period of time or a one-off specified task with a pre-determined deadline and the pregnant employee will be absent for a significant part of the set time. See Appendix A at pages 41-42.

APPENDIX A: DEFINITIONS AND CASE LAW

1. Definitions of terms in the federal Sex Discrimination Act
 - 3.1 What is pregnancy?
 - 3.1 What is potential pregnancy?
 - 3.1 What is direct pregnancy or potential pregnancy discrimination?
 - 3.1 What is indirect pregnancy or potential pregnancy discrimination?
 - 3.1 Employers' liability for others' conduct.
 - 3.1 Which actions in the workplace can be discriminatory?

2. Does the federal Sex Discrimination Act cover your employment relationship?
 - 3.1 Casual employees
 - 3.1 Employees on fixed short-term contracts
 - 3.1 Unpaid workers
 - 3.1 Commonwealth laws and programs
 - 3.1 Licence agreements and franchise agreements

3. Exemptions and special measures
 - 3.1 Permanent exemptions
 - 3.1 Temporary exemptions
 - 3.1 Special measures

This appendix provides explanations of legal terms referred to in the earlier sections, illustrated with examples from case law and conciliations. It also provides information on different types of employment relationships and how the federal Sex Discrimination Act applies to each.

This appendix is a reference section for the Guidelines. It provides more detailed information if a thorough knowledge of a particular area is required.

1. Definitions of terms in the federal Sex Discrimination Act

1.1 What is pregnancy?

The federal Sex Discrimination Act does not specifically provide a definition of pregnancy. However the term pregnancy should be understood to include the actual period of pregnancy and any circumstances related to, or connected with, pregnancy. The following points provide guidance in determining whether an employee is considered 'pregnant' under the federal Sex Discrimination Act.

- Pregnancy includes the everyday definition of pregnancy – a time during which a woman carries a developing foetus.
- The pregnancy need not currently exist for unlawful pregnancy discrimination to occur. For example, pregnancy discrimination may include discrimination based on a past pregnancy. Thus, discrimination because an employee has taken maternity leave or terminated a pregnancy may be pregnancy discrimination.¹
- The courts have also included the physical elements of pregnancy such as having a large abdomen and tiredness, in the definition of pregnancy.² Thus, 'pregnancy' under the federal Sex Discrimination Act may include a woman who is presumed to be pregnant even though she is not.
- Taking maternity leave has been held to amount to a characteristic appertaining to pregnant women.³

Examples of unlawful pregnancy discrimination

- Dismissal of an employee because of her pregnancy.
- Failure to promote an employee because she is large and looks pregnant.⁴
- Failure to promote an employee because she suffered a miscarriage and the employer assumes she will become pregnant again.
- Transferring an employee to a position of lesser duties on her return from maternity leave, without prior consultation.⁵
- Selecting an employee for redundancy while she is on maternity leave either partly or primarily because the employee is on maternity leave.⁶

¹ See discussion in the Pregnancy Report, HREOC, 1999, paras 4.11-4.17.

² *Bear v Norwood Private Hospital* (1984) EOC 92-019 at 75,467 found these physical conditions to be characteristics appertaining to pregnant women. Section 7 *Sex Discrimination Act 1984* (Cth) includes in the definition of pregnancy discrimination characteristics appertaining to pregnant women or a characteristic generally imputed to pregnant women.

³ *Milevski v Boral Building Services* (1994) unreported, HREOC, 1 September 1994.

⁴ *Bear v Norwood Private Hospital* (1984) EOC 92-019.

⁵ *Gibbs v Australian Wool Corporation* (1990) EOC 92-327 at 78,220.

⁶ *Milevski v Boral Building Services Pty Ltd* (1994) unreported, HREOC, 1 September 1994.

Case example: Pregnancy discrimination based on maternity leave

An employee was transferred to new duties on her return from maternity leave without consultation. The Hearing Commissioner found that the complainant's pregnancy was a factor in the change in duties. This was because the pregnancy led to her being on maternity leave and restructuring occurred without consultation during this time. Thus, the conduct of the respondent was found to have been unlawful pregnancy discrimination under section 14 of the federal Sex Discrimination Act. *Gibbs v Australian Wool Corporation* (1990) EOC 92-327

1.2 What is potential pregnancy?

Potential pregnancy is defined as including:

- the fact that the woman is, or may be, capable of bearing children;
- the fact that the woman has expressed a desire to become pregnant; or
- the fact that the woman is likely, or is perceived as being likely, to become pregnant.⁷

Examples of unlawful potential pregnancy discrimination

- Employers or co-workers making assumptions or asking questions about an employee's plans to have children, particularly when the assumptions or answers influence decisions about the employee.
- Questions about a woman's interest in having children, or future plans to have children, during a recruitment process when, in the circumstances, it appears that this information played a part in determining the applicant's suitability for the job.
- Failure to promote an employee because she is undergoing IVF or other form of fertility treatment.

Case example: Potential pregnancy discrimination

A major organisation refused to hire a woman as a trainee pilot because of the possibility of absences due to pregnancy. The organisation also argued it could not justify the large investment in the training. At the interview stage the female applicant was rated highly by all interviewers on the panel except one interviewer whose comments indicated reservations arising from "lack of decision re future childbirth and/or number of children". The female applicant's average score was higher than that of seven of the 14 successful applicants.

The Tribunal held that the organisation discriminated against the female applicant, on the ground of her sex, by refusing to offer her a position as a trainee pilot because of her child bearing potential.

Vardley v Ansett Industries (Operations) Pty Ltd (1984) EOC 92-002

⁷ Section 4B *Sex Discrimination Act 1984* (Cth).

1.3 What is direct pregnancy or potential pregnancy discrimination?

Direct discrimination on the ground of pregnancy or potential pregnancy occurs when the discriminator:

- treats a woman who is pregnant or potentially pregnant less favourably than someone in similar circumstances who is not pregnant or potentially pregnant;
- because of the pregnancy or potential pregnancy, or a characteristic of pregnancy or potential pregnancy.⁸

Direct discrimination will occur when a detrimental decision is made about a person simply because of an attribute or personal characteristic. Such discrimination is often based on a stereotype or fixed idea, for example, discrimination based on the assumption that women who are pregnant will not return to their jobs after giving birth or will not be committed to their jobs if they do return.

Less favourable treatment need not involve financial detriment, or an intention by the employer to discriminate.⁹ Some employers, while intending to be supportive, actually facilitate less favourable treatment.

Examples of direct discrimination

- Reducing the number of shifts a pregnant employee is allocated because it is assumed she will be too tired to work her regular shifts.
- Refusing to train a pregnant employee where training is available to other comparable staff.
- Asking female applicants about their plans to have children, then eliminating those who intend to start a family.
- Dismissing or making a pregnant employee redundant because she will soon be absent from the workplace on maternity leave.
- Transferring a pregnant employee to a work location further from her home.
- Subjecting a pregnant employee to harassment and inappropriate personal comments.
- Transferring a pregnant employee to a position of lower status, even if the wage remains the same.

Case example: Direct discrimination and constructive dismissal

A woman employed as a sales representative became pregnant. She suffered a miscarriage then became pregnant again. After advising her employer the woman continued in her normal work. The employee had some difficulty with her pregnancy and was advised by her doctor to take a week of leave. During this week the employer phoned the employee and suggested that she not return to work as a sales representative but commence, as an alternative, working from home. The employee said this was unacceptable as she would suffer financially and assumed that her employment was terminated due to the telephone call.

⁸ Section 7(1) *Sex Discrimination Act 1984* (Cth).

⁹ *Waters & Ors v Public Transport Corporation* (1991) EOC 92-390; *R v Birmingham City Council; Ex parte Equal Opportunities Commission* (1989) 2 WLR 520 at 525-526.

The Tribunal found that the offer made by the employer that the complainant should work at home was in real terms a 'constructive dismissal'. The employer knew the employee could not accept the position, as it did not pay enough money, leaving her no option but to leave her employment. The Board also said that even though the employer removed the woman from her position partially out of concern for her health, the fact remained that he was not entitled to end the employee's employment and make the decision for her if she was prepared to continue working on the same terms and conditions as she had always done.

Smith v Frankl & Anor (1991) EOC 92-362

Case example: Discriminatory reason is one of a number of reasons for the treatment

A pregnant woman made a complaint under the federal Sex Discrimination Act after she was dismissed during her pregnancy. The Hearing Commissioner concluded that the dominant reason for the dismissal was not the employee's pregnancy, but rather the employer's dissatisfaction with the standard of the employee's work. However, the fact that the employee's pregnancy did influence the dismissal decision meant that the Hearing Commissioner found the complaint to be substantiated on the basis that "[a]lthough the complainant's pregnancy only played a lesser part in the committee's decision to dismiss her, Section 8 of the Act indicates that pregnancy need not be the dominant or substantial factor in a dismissal for that dismissal to be unlawful." The employer was required to financially compensate the complainant.

Larsen v RSPCA Northern Division (Tas) (1991) EOC 92-356

Case example: Direct discrimination and transfer in employment

A convention supervisor was transferred to a telephonist position (at the same salary) because she was pregnant. When explaining the decision, her manager said: "It doesn't look good for a pregnant woman to be carrying film projectors." The Tribunal found the complainant had been discriminated against, and said that to require her to work in a job that usually had a considerably lower salary (even though she was being paid at a higher level), was a demotion in employment status and a detriment to her. The Tribunal rejected the argument that the company was obliged to transfer the employee in order to comply with OH&S obligations. The Tribunal was satisfied that the complainant could carry out her duties safely during pregnancy and the employer was ordered to pay compensation and legal costs.

Duggan v Shore Inn Pty Ltd (1992) EOC 92-457

1.4 What is indirect pregnancy or potential pregnancy discrimination?

Indirect discrimination occurs when a condition, requirement or practice in the workplace appears to apply equally but is actually discriminatory in its effect.

Indirect pregnancy or potential pregnancy discrimination under the federal Sex Discrimination Act arises where:

- a person imposes, or proposes to impose a condition, requirement or practice;

- that has or is likely to have the effect of disadvantaging women who are pregnant or potentially pregnant;¹⁰ and
- which is not reasonable in the circumstances.¹¹

A ‘condition, requirement or practice’ may include policies, practices, rules, routines, standards or stipulations, whether they are formal or informal. This phrase has been broadly interpreted by Courts and Tribunals.¹²

Reasonable behaviour is not discriminatory

Indirect discrimination will not be unlawful if the ‘condition, requirement or practice’ is reasonable in the circumstances.¹³ It is the employer’s responsibility to prove that the requirement is reasonable, based on factors including:

- the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
- the feasibility of overcoming or mitigating the disadvantage, including the costs to an organisation; and
- whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.¹⁴

These factors should be considered in all the circumstances.

Examples of indirect discrimination

- A policy that employees may apply for a promotion only after two years of uninterrupted service may be indirectly discriminatory to female employees who break their term of service for maternity leave.
- A policy requiring all employees to stand while working at a cash register or counter may be indirectly discriminatory to employees who are pregnant and unable to stand for several hours without a break.

Case example: Indirect discrimination and the requirement to work full-time

A solicitor was nominated for advancement to contract partner. She then advised the firm that she was pregnant. In the following month her arrangements for maternity leave were agreed; she would take three months off work after the birth and then work three days per week on her return. Shortly before her scheduled return several of the firm’s partners met with the solicitor and suggested that she reduce her practice and give up a number of her case files. She did not agree to this proposal and the firm then refused her request for a temporary replacement. She returned to work, working three days from the office and two days from home. She subsequently received an unfavourable performance assessment that noted “I do not believe you can run a practice and service clients three days per week.” Her partnership contract was not

¹⁰ Section 7(2) *Sex Discrimination Act 1984* (Cth).

¹¹ Section 7B *Sex Discrimination Act 1984* (Cth).

¹² For a more detailed discussion, see the Pregnancy Report, HREOC, 1999, paras 4.31–4.36.

¹³ Section 7B(1) *Sex Discrimination Act 1984* (Cth).

¹⁴ Section 7B(2) *Sex Discrimination Act 1984* (Cth).

renewed.

The solicitor's complaint was that the statement concerning part-time work was in effect a requirement that she must work full-time to maintain her position and that such a requirement was indirect discrimination on the ground of sex. The firm responded that full-time work was inherent to the position. The Hearing Commissioner found that the requirement to work full-time would inevitably disadvantage women practitioners, especially those aspiring to be partners and that the requirement to work full-time imposed on the solicitor in order to maintain her position was not reasonable in the circumstances. The Hearing Commissioner also noted the importance of the firm having clearly defined maternity leave and part-time work policies to ensure minimum standards of fair and equal treatment, including matters such as changes to personnel or to the practice and decisions about recruitment.

Hickie v Hunt & Hunt (1998) EOC 92-910

Case example: Indirect discrimination and the requirement for permanent employment

The complainant, a teacher, claimed that the requirement for long standing temporary teachers to work one year full-time "probation" in order to obtain permanency was discriminatory. The complainant had taken leave to have a baby and then resigned and worked as a part-time teacher and a relief teacher. In this capacity, she was not entitled to maternity leave when she became pregnant a second time and she left work. She later began teaching part-time, as she was not able to work full-time. The complainant gave evidence about the disadvantages of temporary status including lack of continuity and security of employment, no annual 'performance appraisal' and the preference for permanent staff when professional development opportunities were available. She said permanent employment had the advantages of continuity of employment, entitlement to apply for leave without pay, study leave, plus employment within the central office and promotion, as well as higher status within the school's staff.

The Tribunal found the "probation" requirement not reasonable in view of evidence that temporary teachers were largely very experienced and highly skilled and had already completed two years probation after graduation. The Tribunal found that the requirement was unreasonable in the circumstances and referred to the less favourable position of temporary teachers and the stress the complainant experienced as a result of the discriminatory policy and the comparative advancement of her contemporaries. The Tribunal awarded financial compensation to the complainant.

Speering v Ministry of Education (1993) EOC 92-513

1.5 Employers' liability for others' conduct

Employers can be held liable for discrimination committed by their employees in the course of employment.

The federal Sex Discrimination Act makes employers and principals liable for the conduct of their employees or agents.¹⁵ This is referred to as vicarious liability. Vicarious liability means that if an employee harasses or discriminates against a co-worker, client or customer, the employer can be held legally responsible and may be liable for damages.

The vicarious liability provisions in the federal Sex Discrimination Act also provide employers with a defence. Vicarious liability can be minimised if an employer can show that ‘all reasonable steps’ were taken to prevent the harassment or discrimination. To reduce or avoid liability, employers could implement policies and practices to minimise the risk of unlawful workplace behaviour occurring and informing staff about established procedures to address complaints of discrimination.

Avoiding vicarious liability

Employers can limit their vicarious liability and should note three important principles that have emerged from vicarious liability cases:

- ‘reasonable steps’ must be active, preventative measures;
- the obligation to prove that ‘all reasonable steps’ were taken rests with the employer; and
- lack of awareness that the discrimination or harassment was occurring is not a defence for employers.

The Federal Court has indicated reasonable steps for employers to take to minimise vicarious liability under the federal Sex Discrimination Act. While this information was provided in the context of a sexual harassment matter, the principles apply equally to pregnancy and potential pregnancy discrimination.

Case example: Reasonable steps

An employee alleged sexual harassment by a co-worker. The employer argued that reasonable steps to prevent the harassment had been taken.

The Court said “it may be more difficult for a small employer, with few employees, to put in place a satisfactory sexual harassment regime than for a large employer with skilled human resources personnel and formal training procedures. But the [federal Sex Discrimination] Act does not distinguish between large and small employers”. The Court noted that a “simple procedure” involving the preparation of a brief document setting out the nature of discrimination and harassment, the sanctions that attach to it and the course to be followed by an employee who suffers discrimination or harassment should be provided to each employee on recruitment as a matter of routine.

Such a document “would go some distance towards reducing the chance of sexual harassment [or discrimination] at the employer’s workplace and a long way toward enabling the employer (in the absence of knowledge of an actual problem) to make out a defence.”

Gilroy v Angelov and Botting and Botting trading as C&T Botting Cleaning,

¹⁵ Section 106 *Sex Discrimination Act 1984* (Cth).

Principals and their agents

The federal Sex Discrimination Act also makes a principal vicariously liable for the unlawful conduct of agents.¹⁶ An agent is a person authorised to act on behalf of another (referred to as the principal). If the agent is acting in accordance with the express, implied or ostensible authority conferred on them, the principal is bound by its actions and can be held vicariously liable for its wrongs. Depending on the particular situation, agents in the area of employment could include:

- volunteer workers;
- recruitment agents;
- holders of unpaid honorary positions;
- boards of directors; or
- contractors and consultants.

1.6 Which actions in the workplace can be discriminatory?

It is unlawful to discriminate on the ground of pregnancy or potential pregnancy:

- in the arrangements made for and in determining who should be offered employment, engaged as a commission agent or partner or the terms or conditions on which employment, engagement as a commission agent or partnership is offered;¹⁷
- in the **terms and conditions** provided to the employee, commission agent, contract worker or partner;¹⁸
- by **denying or limiting access** to opportunities for promotion, transfer, training or to any other benefits associated with the employment to the employee, commission agent, contract worker or partner;¹⁹
- by dismissing the employee, terminating the engagement of the commission agent or contract worker, or expelling a partner;²⁰ or
- by subjecting the employee, commission agent, contract worker or partner to **any other detriment**.²¹

What are 'terms and conditions' of employment?

'Terms and conditions' of employment may be found in agreements, policies and practices that govern the employment relationship. These may be implied by law or arise from:

- a contract of employment or appointment (which can be written, verbal or a combination of both);
- the terms set out in awards and agreements;

¹⁶ Section 106 *Sex Discrimination Act 1984* (Cth).

¹⁷ Sections 14(1), 15(1), 17(1) *Sex Discrimination Act 1984* (Cth).

¹⁸ Sections 14(2)(a), 15(2)(a), 16(a) *Sex Discrimination Act 1984* (Cth).

¹⁹ Sections 14(2)(b), 15(2)(b), 16(c), 17(3)(a) *Sex Discrimination Act 1984* (Cth).

²⁰ Sections 14(2)(c), 15(2)(c), 16(b), 17(3)(b) *Sex Discrimination Act 1984* (Cth).

²¹ Sections 14 (2)(d), 15(2)(d), 16(d), 17(3)(c) *Sex Discrimination Act 1984* (Cth).

- employment policies,²² whether in staffing manuals or accepted custom and practice, such as a policy on uniforms;²³ or
- day to day decisions made by an employer²⁴ about the workplace and individual employees.²⁵

What is limiting or denying access to benefits?

The term ‘benefits’ has been defined broadly, and may include:

- loss of income, including “in kind” income such as access to housing, cars, telephones, salary packages;
- opportunities for promotion, transfer or training;
- intangible benefits such as freedom from physical intrusion or harassment;
- voluntary benefits that may not be enforceable at law, such as voluntary severance payments;
- performance and bonus payments; or
- superannuation.

It is not necessary to prove that the pregnant or potentially pregnant employee would have received a particular benefit, such as a promotion, if the discrimination had not occurred. It is enough to show that the opportunity to apply for the benefit was denied, to show that discrimination occurred.²⁶

Workplace examples: Denial or limitation of access to benefits

Performance reviews: Where a performance review is linked to salary increases or promotional opportunities, failing to provide a pregnant employee with a performance review at the same time as other staff on the basis that the pregnant employee will be commencing maternity leave soon, may be unlawful discrimination. If the employee is on maternity leave when performance reviews are conducted, failing to make arrangements to assess the portion of the annual review period that the employee worked, on either their return or during maternity leave, may also be unlawful discrimination.

Voluntary severance payments: An employer who voluntarily provides severance payments to retrenched employees would generally need to provide the benefit on the same basis to all employees in the same situation, for example, all retrenched employees irrespective of whether they are pregnant or on maternity leave.

Conciliated complaint example: Failing to provide a pregnant employee with a performance review

In March an existing employee was offered a new position as an ‘after-hours’

²² *Appeal by the Commissioner of Police* (1984) EOC 92-017.

²³ See discussion in the Pregnancy Report, HREOC, 1999, para 12.62.

²⁴ In this context, an employer would include an individual granted the right to represent the mind and will of the employer, such as a supervisor or manager.

²⁵ *O’Callaghan v Loder & Anor* (1984) EOC 92-023.

²⁶ *Glynn v Gillette Australia Pty Ltd*, unreported, NSW Equal Opportunity Tribunal, No 13/1996, 10 September 1996.

consultant, with the idea that she could work from home. The employee claimed that, although the employer knew she was pregnant at the time of offering her the job, the offer was withdrawn in May on the grounds that she was unsuitable for the position as she was pregnant and that working from home would be a worker's compensation risk to the company. She continued to work in her old position, attending the workplace. The complainant also claimed she was denied a pay increase and bonus from an annual performance review in September as a result of her impending maternity leave break in October. A conciliation agreement was reached between the parties and the woman received financial compensation and a written work reference.
HREOC conciliation, 1996.

What does ‘any other detriment’ mean?

‘Any other detriment’ has been interpreted broadly by Courts and Tribunals to include a disadvantage of any kind so long as it is not a trivial disadvantage.²⁷ Employers are advised to carefully consider the disadvantages that pregnant employees may suffer, due to existing or new policies, practices and procedures. Some framework considerations include:

- detriment can comprise economic loss such as lost salary or promotional opportunities;
- detriment can also include non-economic loss such as loss of reputation, the impact of a hostile work environment, injury to feelings, humiliation, distress and other consequences to health and well being;²⁸ or
- in some instances, the personal preference of an employee may be relevant,²⁹ for example, an employee’s objection to being transferred to a new position during her pregnancy may be relevant in determining if she has suffered detriment.

Examples of detriment

- employer actions that have adverse consequences for the health and well being of the employee or her child;
- financial loss through denial of promised promotion or pay increase;
- financial loss through denial of casual shifts or denial of overtime;
- financial loss and loss of status through demotion upon return to work;
- termination of employment;
- personal inconvenience or additional costs through transfer to a work location further from the complainant’s home;
- unreasonable refusal to consider a pregnant employee’s request to work part-time;
- loss of status or negative impact on career advancement through relegation to less interesting and fulfilling ‘back room’ duties;
- withdrawal of an offer of employment;
- exclusion from consideration for promotion or permanent employment or individual or team development opportunities;
- scheduling a regular group meeting at a time when a pregnant employee must attend a regular medical appointment;
- bullying, harassment and humiliating behaviour, acts and gestures that create a hostile work environment;
- alteration of the terms or conditions of the job without the agreement of the employee;
- failure to accommodate the physical requirements of a pregnant employee, for example, through not providing seating or a maternity uniform;
- a standard policy that all pregnant workers move to ‘light duties’ irrespective of individual circumstances;

²⁷ *Leonard v Youth Hostels Association of Australia* (1995) EOC 92-763 at 78,651. See also *O’Callaghan v Loder & Anor* (1984) EOC 92-023; *Langley v University of New South Wales* (1984) EOC 92-018 at 75,467.

²⁸ *Hill v Water Resources Commission* (1985) EOC 92-127.

²⁹ *Dopking v Department of Defence* (1995) EOC 92-669; *Sullivan & Ors v Department of Defence* (1992) EOC 92-421 at 79,005.

- not providing information on maternity leave; and
- excluding pregnant women from office activities.

Case example: Non-economic detriment

The complainant was transferred to another position on her return from maternity leave. While she was on maternity leave the department in which she had been working was restructured. She was not told of the transfer until the day she returned to work. The complainant alleged that she was arbitrarily returned to a lesser position and that this constituted detriment because the duties did not relate to her area of specialisation, her number of clients dropped drastically and there was not the same scope for interstate travel.

The Hearing Commissioner decided that the complainant should have been consulted about the changes affecting her role in the department. The fact that the changes did not involve salary or conditions did not prevent a finding of discrimination on the basis that the 'lesser position' was detrimental to the complainant. The Hearing Commissioner found that the complainant's pregnancy must have been a factor leading to the arbitrary change in the complainant's duties. It was her pregnancy that led to her absence on leave. If she had not been on leave, she would have been consulted about the restructure, irrespective of whether or not her transfer to other duties would have taken place. The complainant was awarded financial compensation.

Gibbs v Australian Wool Corporation (1990) EOC 92-32

2. Does the federal Sex Discrimination Act cover your employment relationship?

Federal Sex Discrimination Act coverage of pregnancy and potential pregnancy discrimination includes:

- full-time employees;
- part-time employees;
- casual employees;
- shift workers;
- seasonal employees;
- contractors;
- employees on fixed-term contracts;
- apprentices and trainees;
- commission agents;
- temporary employees;
- employment of partners in partnerships of six or more persons; and
- the services of employment agencies

2.1 Casual employees

Some casual employees do not have a legislative right to unpaid maternity leave³⁰ or other leave entitlements and have restricted access to the unfair dismissal and unlawful termination provisions of the *Workplace Relations Act 1996* (Cth).³¹

Courts and Tribunals have adopted various tests for determining entitlements of casual employees. The Full Bench of the AIRC has held that the nature of the actual employment arrangements under which an employee is employed determines whether they are casual employees.³² More recently, the Full Federal Court decided that the status (or legal character) of employment is determined by the original contract and changes indicating that work has become more regular are irrelevant.³³ This means that the Court can look at the terms of the original contract without necessarily considering any other factors of the employment.

Despite this, all casual and other temporary employees are fully covered by the federal Sex Discrimination Act.³⁴ This means that if a casual employee is dismissed or treated less favourably or suffers other forms of detriment as a result of her pregnancy or potential pregnancy, she is entitled to pursue a claim for unlawful discrimination under the federal Sex Discrimination Act.

While a casual employee may not have a legislative entitlement to maternity leave, employers should be aware of discrimination issues for casual employees. Employers could avoid discrimination by:

- discussing a reasonable period of absence, having regard to the needs of both the employer and the employee; and
- if leave is refused, providing the casual employee with reasons why the employer is unable to grant leave without pay or why other options are impracticable.

If a regular casual employee is not granted a reasonable period of leave after the birth of her child enabling her to return to her regular casual role, the employer may be subject to a claim of pregnancy discrimination. Well documented and well grounded reasons for not granting a period of leave will assist the employer if a complaint is made.

³⁰ NSW and Queensland have introduced a right to unpaid maternity leave for employees engaged as regular casuals for at least two years with their employer: section 16(1)(a) *Industrial Relations Act 1999* (Qld); section 53(1) *Industrial Relations Act 1996* (NSW).

³¹ Casual employees are excluded from making a complaint of unfair dismissal or unlawful termination under the *Workplace Relations Act 1996* (Cth) if they have been employed for less than 12 months: regulations 30B(1)(d) and 30B(3) *Workplace Relations Regulations 1996* (Cth).

³² *Australian Municipal, Administrative, Clerical and Services Union v Auscript* (1998) 43 AILR 3-756.

³³ *Community and Public Sector Union v State of Victoria* [2000] FCA 759.

³⁴ Section 4 *Sex Discrimination Act 1984* (Cth) defines 'employment' to include temporary employment. This classification includes casual employees. For a full discussion of the definition of casual employment and the issues surrounding casuals, see the Pregnancy Report, HREOC, 1999, paras 10.5-10.39.

Sex Discrimination Commissioner Comment: *NSW, Queensland and Tasmania have moved to allow casual employees access to parental leave. The AIRC is considering whether to extend federal award entitlements to parental leave to regular casual employees. Employers should check whether the outcome affects awards applying at their workplace. See contact list at page 67.*

2.2 Employees on fixed short-term contracts

Fixed short-term contracts are often for a duration of less than 12 months, however they may cover longer periods. It is not uncommon for a person to be employed on a series of short-term contracts, with each term intended to be a new term, independent of the previous term.

Failing to renew or terminating an employee's fixed-term contract because of her pregnancy or potential pregnancy is unlawful.³⁵ However, a failure to renew may not be discriminatory if the contract is for a set period of time or a one-off specified task with a deadline and the pregnant employee will be absent for a significant part of the time. Employers wishing to avoid discrimination or acts that appear to discriminate should ensure that all other avenues are considered before a contract is terminated, and that written documents supporting the relevant decision are kept.

A short-term contract worker who has 12 months service with the employer is eligible for maternity leave, although a period of maternity leave will not extend beyond the expiry date of the short-term contract.

Where an employer is using short-term contracts to avoid the rights of pregnant or potentially pregnant employees, such as reappointment or maternity leave, the employer is likely to be in breach of the federal Sex Discrimination Act.

2.3 Unpaid workers

The federal Sex Discrimination Act does not expressly cover unpaid workers. However, unpaid workers may be covered if they fall within the definition of an 'employee'. Employers and employees should consider the individual circumstances of each case.

An 'employee' is someone who has an employment contract with an employer. An employment contract need not be in writing. An employment contract consists of a mutual exchange of benefit and an intention to create a legally binding relationship. Although a mutual exchange of benefit generally consists of work in exchange for remuneration, a mutual benefit may also be found when the worker is not being paid. For example, where a person is required to perform a certain amount of work experience to obtain qualifications, the benefit exchanged can be a period of unpaid work in exchange for supervision and experience.³⁶

³⁵ Section 14 *Sex Discrimination Act 1984* (Cth). An employee on a short-term contract may also have access to protection under unfair dismissal and unlawful termination laws under s170CK *Workplace Relations Act 1996* (Cth) if the contract is terminated due to pregnancy.

³⁶ *Morian v South West Area Health Service* (1996) EOC 92-799.

It is also possible that if unpaid workers do not fall within the ambit of an employment relationship, they may fall within the provision of the federal Sex Discrimination Act that prohibits discrimination on the basis of pregnancy or potential pregnancy in the provision of goods, services or facilities, whether for payment or not.³⁷ Refusing to provide pregnant or potentially pregnant unpaid workers with access to facilities that are accessed by non-pregnant unpaid workers may be unlawful discrimination.

The provisions of the federal Sex Discrimination Act dealing with Commonwealth laws and programs cover workers participating in unpaid work schemes initiated, funded or administered by the Commonwealth Government.³⁸ This includes the 'Work for the Dole' Scheme and the Community Development Employment Projects Scheme.

2.4 Commonwealth laws and programs

The federal Sex Discrimination Act makes it unlawful for an individual or an organisation exercising power under a Commonwealth law or program to discriminate on the ground of pregnancy or potential pregnancy.³⁹ The federal Sex Discrimination Act would apply to the way in which a Commonwealth Government program is conducted, such as in the allocation of places for a training program and whether a pregnant or potentially pregnant person is offered a place.

2.5 Licence agreements and franchise agreements

While currently it is unlikely that a licensor or franchisor (the individuals or organisations controlling the whole chain of franchises) could be deemed an employer under the federal Sex Discrimination Act, there may be some circumstances where they may be held vicariously liable.

Generally, when a franchise is purchased the franchisee not the franchisor is the employer and therefore legally responsible for the employees. The franchisor may however be held responsible when:

- the franchisor is seen to be contractually retaining employment rights or responsibilities over employees within the franchise⁴⁰ (this may be evident from the content of the franchise agreement or the role of the franchisor in establishing employment directions and policies towards franchise employees); or
- the franchisor is seen to cause, instruct, induce, aid or permit the franchise, the franchisee or a franchise employee to do a discriminatory act.⁴¹

For example, if a franchisor directs franchise employees to continue to wear a uniform while pregnant, but does not provide uniforms to accommodate the changing shape of a pregnant woman, the franchisor and the franchisee could be held jointly liable for this act, which is likely to be unlawful pregnancy discrimination.

³⁷ Section 22 *Sex Discrimination Act 1984* (Cth).

³⁸ Section 26 *Sex Discrimination Act 1984* (Cth).

³⁹ Section 26 *Sex Discrimination Act 1984* (Cth).

⁴⁰ Section 106 *Sex Discrimination Act 1984* (Cth).

⁴¹ Section 105 *Sex Discrimination Act 1984* (Cth).

3. Exemptions and special measures

Not all unfair treatment is unlawful. Unlawful discrimination occurs when the discriminatory act, and the individuals or organisations involved in the discriminatory act, are covered by the federal Sex Discrimination Act and an exemption or an exception does not apply.

3.1 Permanent exemptions⁴²

There are a number of exemptions under the federal Sex Discrimination Act that exclude certain acts and practices from coverage. These include:

- rights or privileges granted to a woman connected with pregnancy or childbirth, for example, maternity leave and transfer to safe work during pregnancy;⁴³
- the employment of staff performing residential domestic duties;⁴⁴
- the employment of staff at educational institutions founded on doctrines, tenets, beliefs or teachings of a particular religion or creed, where the discrimination occurs in good faith to avoid injury to the religious susceptibilities of adherents to that religion;⁴⁵
- discrimination on the ground of sex where it is a genuine occupational qualification of the position to be a person of a particular sex;⁴⁶ and
- acts which comply with orders, awards or certified agreements.⁴⁷

3.2 Temporary exemptions

The federal Sex Discrimination Act gives the Human Rights and Equal Opportunity Commission power to grant temporary exemptions from the operation of the federal Sex Discrimination Act. The effect of an exemption is that the actions or circumstances covered are not unlawful under the federal Sex Discrimination Act while the exemption remains in force. Exemptions are limited in time and scope.

For guidance on how to apply for a temporary exemption see the Human Rights and Equal Opportunity Commission's *Guidelines on Applications for Temporary Exemption under the federal Sex Discrimination Act* on the Commission's website at www.humanrights.gov.au.

3.3 Special measures

The federal Sex Discrimination Act provides that it is not discriminatory to take special measures to achieve substantive equality between women who are pregnant or potentially pregnant, and people who are not pregnant or potentially pregnant.⁴⁸ One

⁴² For further information about permanent exemptions to the *Sex Discrimination Act 1984* (Cth), see the Pregnancy Report, HREOC, 1999, paras 5.37-5.58.

⁴³ Section 31 *Sex Discrimination Act 1984* (Cth).

⁴⁴ Section 14(3) *Sex Discrimination Act 1984* (Cth).

⁴⁵ Section 38(1) *Sex Discrimination Act 1984* (Cth); see also section 38(2) *Sex Discrimination Act 1984* (Cth).

⁴⁶ Section 30 *Sex Discrimination Act 1984* (Cth).

⁴⁷ Section 40(1) *Sex Discrimination Act 1984* (Cth).

⁴⁸ Section 7D(1)(c) and (d) *Sex Discrimination Act 1984* (Cth).

example of a special measure to achieve equality between pregnant women and non-pregnant people would be providing a mentoring program specifically for pregnant women. For further information, see the Human Rights and Equal Opportunity Commission's *1996 Guidelines for Special Measures under the Sex Discrimination Act 1984*.

Appendix B: Pregnancy policies and procedures

1. Pregnancy friendly policies
 - 1.1. The benefits of pregnancy friendly policies
 - 1.2. Writing a pregnancy friendly policy
 - 1.3. Workplace policies that may assist in preventing pregnancy discrimination
2. Implementing pregnancy friendly policies
 - 2.1. Informing employees of their rights and responsibilities
 - 2.2. What should happen once a policy is developed?
3. Dealing with grievances and complaints
 - 3.1. Dealing with complaints internally
 - 3.2. Employees with special needs in accessing grievance procedures
 - 3.3. External complaints
4. Employees with special needs
 - 4.1 Employees in rural and remote areas
 - 4.2 Apprentices and trainees
 - 4.3 Family diversity
 - 4.4 Culturally and linguistically diverse backgrounds
 - 4.5 Indigenous employees
 - 4.6 Women with disabilities
5. Employers' checklist: A checklist to good practices in dealing with pregnancy in the workplace

Preventing pregnancy and potential pregnancy discrimination in the workplace is not only about responding to the immediate circumstances of individual employees. It is also about proactive education and putting structures into place that prevent discrimination occurring. In addition, there is a need to establish procedures to follow if there is an issue, or potential issue, of concern.

In practice, this means developing appropriate pregnancy policies, and establishing procedures to deal with discrimination. While this process is not complex, the following sections have been designed to provide guidance for those developing effective pregnancy policies and procedures.

In general, policies and procedures covering discrimination benefit both employers and employees. Policies that cover pregnancy specifically will help ensure that treatment of pregnant employees is fair and that managers and employees are made aware of their rights and responsibilities. Having clear policies and procedures in place on issues such as pregnancy may also serve as evidence of an employer seeking to prevent workplace discrimination. However, the existence of a policy is not in itself a sufficient defence to a complaint of discrimination.

This appendix provides information on developing appropriate pregnancy policies and complaints procedures.

1. Pregnancy friendly policies

1.1 The benefits of pregnancy friendly policies

Effective anti-discrimination policies may minimise potential employer liability in the event of a complaint, as they evidence the employer has taken steps to prevent acts of discrimination. For further information see Appendix A at pages 36-37.

Policies aimed at achieving a balance between work and family life can also benefit organisations, through:

- increased productivity;
- access to a variety of working options that meet both organisation and employee needs;
- reduced stress;
- improved health and well being of individual employees;
- improved morale and commitment;
- reduced OH&S risks;
- reduced absenteeism;
- a more diverse workforce;
- increased staff retention;
- increased ability to attract and recruit new staff; and
- an enhanced corporate image.

Rotating existing staff or accessing temporary, fixed-term or casual staff to cover maternity leave can benefit organisations by developing the general skill base of staff.

Workplace example: Benefits of providing family friendly work practices

Westpac introduced 6 weeks paid maternity leave. As a result, the percentage of staff returning from maternity leave increased from 52% in 1995 to 94.5% for the year ending 1998. Westpac estimates that the replacement of an employee costs approximately 50% of their annual wage for roles up to and including junior management. Replacement costs for staff in middle and senior management roles were greater and were costed conservatively as being equivalent to one year's salary. In commercial terms Westpac estimated that their initiatives resulted in savings in excess of \$6 million per year based on average salary costs.¹

1.2 Writing a pregnancy friendly policy

Employers specifically indicating their commitment to the prevention and elimination of pregnancy and potential pregnancy discrimination is an important step in promoting a discrimination-free workplace. This commitment can be demonstrated through a clear and accessible policy and prompt, fair action when the policy is breached.

¹ Submission to the National Pregnancy Inquiry, HREOC.

Writing an anti-discrimination policy to cover pregnancy need not be difficult. A simple document explaining what constitutes sex and pregnancy and potential pregnancy discrimination, a statement that discrimination will not be tolerated and informing all workplace participants of the action that will be taken if discrimination occurs, is sufficient.

What information should be provided?

As part of sound management practice, employers should consider providing information to all staff on:

- the employer's commitment to a non-discriminatory workplace;²
- any workplace specific OH&S considerations for pregnant women;³
- any rights and obligations applying at the workplace under an award or agreement;
- the legal right to unpaid maternity leave at the time of employment, including:
 - the qualifying period of employment for an employee to access maternity leave;
 - the need for the employee to provide notice of an intention to take maternity leave, and a medical certificate indicating the estimated date of birth;
 - the maximum duration of maternity leave;
 - whether leave is paid or unpaid;
 - that the employee is entitled to take part or all of any accrued annual leave or long service leave instead of, or in conjunction with, unpaid or paid maternity leave;
 - notification requirements and processes if the employee wants to extend maternity leave;
 - the right of the employee to return to her former position following maternity leave;
 - the necessary processes if the employee wants to vary hours on return to work; and
- information on complaint or grievance procedures if an employee feels that discrimination has occurred.

In NSW, the employer has a legal obligation under industrial relations law to inform the employee of maternity leave rights.⁴

1.3 Workplace policies that may assist in preventing pregnancy discrimination

Following are examples of workplace policies and provisions in agreements⁵ that seek to avoid pregnancy discrimination in the workplace and provide sound management practice options. They can be adapted to different workplaces and provide ideas for new provisions in workplace policies or agreements. While some of

² See discussion at pages 15-16.

³ See discussion of OH&S and pregnancy at pages 62-63.

⁴ Section 67(1) *Industrial Relations Act 1996* (NSW).

⁵ Examples provided by the federal Department of Employment, Workplace Relations and Small Business.

the examples require dedicated resources, other examples such as a “keeping in touch” policy may be better suited to small business as they are easily implemented and require few resources.

Improved parking/building access for pregnant employees

The **University of Queensland** has a policy of providing special parking arrangements on campus for use by staff during pregnancy.

Provision of uniforms/protective clothing to fit pregnant employees

In the **Queensland Police Service** the Police Service State Award provides that pregnant police officers are entitled to apply for a clothing allowance should their police uniform become uncomfortable or ill-fitting. The production of a medical certificate confirming the pregnancy is required in order to access this allowance.

Telstra provides and funds maternity wear for pregnant staff as part of its corporate wardrobe.

Management and staff education programs

Westpac has undertaken an extensive program to address pregnancy discrimination as part of a broad-based anti-discrimination policy. A key issue is helping managers understand the advantages of preventing pregnancy-based discrimination. Extensive training was undertaken and Westpac continues to educate through a variety of internal communication and management channels.

Westpac also briefs recruitment agencies that the organisation expects to see the best job candidates irrespective of pregnancy and a range of other criteria associated with discriminatory practices. All staff involved in recruitment are required to complete a Recruitment Accreditation Process, which includes education on non-discriminatory selection processes.

Westpac has participated in external research that helped identify myths about pregnancy and work which block career advancement. The results were used to educate staff about the myths and realities of combining pregnancy and work.

Westpac has also developed a parental leave information pack entitled *Great Expectations* outlining many issues encountered by pregnant staff, as well as putting policies and practices in place to assist staff during pregnancy and after their return to work.

Breastfeeding provisions

The **Australian Wheat Board** established a maternity care room in its Melbourne head office in 1997. The facility enables employees to express milk or breastfeed their babies in privacy and comfort throughout the working day, on paid lactation breaks. All women planning to take maternity leave have access to information on how they can combine breastfeeding and work and, after the birth, have free access to the Nursing Mothers' Association of Australia breastfeeding counselling and equipment.

Lend Lease Corporation has introduced a range of initiatives to help employees combine breastfeeding and work. Breastfeeding rooms are located in its Mulgrave, Victoria workplace and one of its Sydney child care centres. Nursing Mothers' Association of Australia representatives are invited to address employees on breastfeeding issues.

Employees returning from parental leave have access to regular part-time work and home based work. Lend Lease maintains a library of computer equipment to help breastfeeding employees telework if that is their preference. Lend Lease also employs a nurse to provide advice and answer any queries that mothers returning to work might have, for example concerning diet and depression. This service is available through the child care centres.

Telstra provides several multi-purpose family rooms under the guidance of Nursing Mothers' Association. These allow access to private facilities for expressing and storing milk, breastfeeding, as well as for nappy changing

Keeping in touch during leave

Santa Sabina College introduced a parental leave "keep in touch" program where staff on parental leave are invited to be involved in yearly planning processes. They are also placed on a mailing list to ensure staff communications and are invited to staff and school social functions.

Sydney Water Corporation's maternity leave policy requires individual managers to keep in touch with employees on extended leave.

Paid maternity leave

The **National Australia Bank** provides employees with a lump sum equal to three weeks pay at the commencement of maternity leave and 3 weeks upon return to work and also maintains any concessional financial benefits the employees may have established.

The communication regarding employee entitlements within the policy for the National includes a brochure on childcare consideration and pamphlets on childcare referral services and entitlements provided by the government.

CSL Ltd provides employees with 12 weeks of paid maternity leave and three days of paid paternity leave.

Combining work and leave

Mobil Oil Australia ensures employees taking parental leave are able to retain their job status for the duration of the parental leave and may work ad hoc days throughout the period of leave if they wish. In addition there are "keeping in touch" guidelines and a parental leave resource kit

Job Security

McDonalds Australia has extended unpaid parental leave entitlements to male and female casual employees. Continuous casual employees with more than 12 months service with the company, can take up to 12 months parental leave. At the end of the parental leave, casual employees can return to the position they held before going on leave

2. Implementing pregnancy friendly policies

2.1 Informing employees of their rights and responsibilities

Written policies on how management will address pregnancy issues provides certainty for all staff irrespective of level and, if effectively implemented, may reduce employer liability if a complaint of pregnancy discrimination is made. In addition:

- specific guidelines and good management encourages employees to notify their employers of their pregnancy;
- early notification of pregnancy by employees who do not fear a negative response but rather feel confident about discussing work duties during different stages of pregnancy ensures everyone is well informed about work and leave arrangements, and is the best way to manage duty of care and OH&S issues; and
- sound management of workplace pregnancy results in better integration and commitment to work and family issues.

Sex Discrimination Commissioner comment

Pregnancy is a normal, healthy, physical condition. It does not alter a woman's ability or right to make her own decisions. "Parental" attitudes and potentially patronising behaviour need to be kept in check. A good starting point for developing policies is to avoid making assumptions about pregnancy and the "likely" choices of a pregnant woman. One organisation submitting to the National Pregnancy Inquiry commented:

"We recently had a manager wanting to send a pregnant officer home as one of his other staff may have been exposed to chicken pox. It had not occurred to him that he could have advised her what had happened and allowed her to decide if she should remain at work, seek medical advice or stay at home for a few days. He believed that he had to make the decision for her. Common sense should have prevailed. Prior to being pregnant she could make these decisions – why not now?"⁶

Informing people about their rights and responsibilities, and taking prompt, fair remedial action, in consultation with staff where required, reduces the risk of an employer being held liable for pregnancy discrimination under the federal Sex Discrimination Act and other anti-discrimination laws.

⁶ Submission to the National Pregnancy Inquiry, HREOC.

2.2 What should happen once a policy is developed?

Implementing an anti-discrimination policy is as important as developing the policy. Writing a policy and allowing it to languish on a file or on a corporate intranet, is ineffective and is unlikely to protect an employer from liability.

The following steps can be taken to implement anti-discrimination policies:

- all current and new staff could be given a copy of the policy;
- where employees do not understand written English or have a disability that prevents them accessing the policy, consideration should be given to providing it in an appropriate language or form;
- education on pregnancy and potential pregnancy discrimination is usually necessary to ensure that employees understand anti-discrimination laws and company policies (this can include the dissemination of literature and the provision of seminars on discrimination issues); and
- monitoring the workplace to ensure compliance with sex and pregnancy anti-discrimination laws and policies could be considered and include:
 - S requiring managers to report on changes to their work practices as a result of policies and education;
 - S asking employees affected by the policies to provide feedback or suggestions for improvements; and
 - S monitoring the complaints received in order to determine whether or not they were successfully resolved.

Case example:

A woman was employed as an apprentice in an open-cut mine. During her first six months, she was subjected to on-going lewd comments and sexually explicit magazines and posters. The employee suffered significant stress and subsequently resigned.

The Tribunal found that the employee had been unlawfully discriminated against on the basis of her sex and had been sexually harassed. In finding that the employer was vicariously liable for the conduct of its employees, the Tribunal considered the steps necessary to effectively implement an anti-discrimination policy.

The employer had an anti-discrimination policy in place, and had spent significant time educating senior managers as to the requirements of the policy. However, the employer had no effective education program to ensure employees were aware of the policy nor had the employer endeavoured to eliminate prejudicial attitudes or behaviour towards women. The employer was held vicariously liable for the discriminatory conduct.

Hopper v Mount Isa Mines Ltd and Ors (1997) EOC 92-879

Sex Discrimination Commissioner comment: *This example reflects the need for employers to implement a training program across the entire workplace. This is*

essential whether the issue be sexual harassment or sex and pregnancy discrimination.

3. Dealing with grievances and complaints

Grievances and complaints about pregnancy and potential pregnancy discrimination in the workplace may be resolved internally, through informal or formal resolution, or externally via a complaint to the Human Rights and Equal Opportunity Commission or a State or Territory anti-discrimination body.

The federal Sex Discrimination Act makes employers legally responsible for providing a workplace that is free from unlawful discrimination and harassment. One further step employers can take to make the workplace free of discrimination and harassment is to provide staff with access to an internal procedure for resolving discrimination and harassment grievances and complaints.

As an alternative, or at any stage if a complainant is not satisfied with the way a grievance is dealt with internally by her employer, a complaint can be lodged under the federal Sex Discrimination Act with the Human Rights and Equal Opportunity Commission. See contact details at page 67.

In some cases, industrial relations legislation may also provide an avenue of redress for concerns relating to discrimination on the ground of pregnancy or potential pregnancy. See Appendix C for further explanation on the appropriate law and forum under which to bring a complaint.

3.1 Dealing with complaints internally

The establishment of internal procedures for dealing with grievances and complaints can maximise the possibility of resolution of issues within an organisation.

The costs to organisations of failing to attempt internal resolution of grievances and complaints, plus consequent external resolution, may include:

- administration costs (legal costs, expenses involved in travel and out-of-office attendances);
- hidden costs (the diversion of management focus, decrease in productivity, damaged corporate image, bad publicity, stress, decreased staff morale and turnover costs); and
- costs associated with a Court or Tribunal finding of discrimination against the employer (payment of damages and/or compensation).

Case example: Employer liability for failing to investigate a complaint of discrimination

An employee made a complaint of racial and sexual harassment against her immediate supervisor and she was subsequently dismissed without warning. The Tribunal found that the failure by her employer “to adequately and promptly” investigate the complaint caused her to believe that it was not taken seriously by the employer. This was unlawful discrimination under the NSW *Anti-Discrimination Act 1977*. In addition, the employer was held liable for the discriminatory actions of the complainant’s supervisor, as the employer could not demonstrate that it had taken steps to address the discrimination.

Kolavo v Ainsworth Nominees and Anor (1994) EOC 92-576

The federal Sex Discrimination Act does not prescribe any particular type of grievance or complaint procedure so employers have the flexibility to design a system that suits the organisation’s size, structure and resources.

Employers can establish a specific procedure for discrimination complaints or use a procedure that is already in place for other types of work-related grievances. However, discrimination complaints are often complex, sensitive and potentially volatile. It is good practice for anyone dealing with grievances to have some specialist expertise and appropriate training. Access to an external adviser working in the area is also most useful. Failure to handle grievance procedures in an impartial manner is likely to amount to, or exacerbate, a complaint of discrimination against the employer. Employers would be advised to ensure that complaint procedures:

- are clearly documented and accessible to all employees;
- offer both informal and formal options;
- guarantee timeliness, confidentiality and objectivity;
- are based on the principles of natural justice;
- are administered by trained personnel;
- provide clear guidance on investigation procedures and record keeping;
- give an undertaking that no employee will be victimised or disadvantaged for making a complaint; and
- are regularly reviewed for effectiveness.

3.2 Employees with special needs in accessing grievance procedures

One important consideration when establishing policies and grievance procedures is the composition of the workforce. Contractors, commission agents, casuals, outworkers and shift workers may face difficulties in obtaining information, or being able to attend training or a particular venue for interviews concerning grievances.

See Appendix A at pages 40-43 on categories of employment/employees.

Other considerations include the need to accommodate employees for whom English is a second language, both in the distribution of information about procedures and in dealing with grievances.

See pages 55-58 on employees with special needs.

3.3 External complaints

All employees should be made aware that they have a legal right to make an external complaint, be it to the Human Rights and Equal Opportunity Commission, State or Territory anti-discrimination body or federal or State industrial relations commission, at any time. Employees also need to understand that they have a right to discuss their situation with a union or advocate. It is inappropriate to have a policy that requires internal management of a discrimination issue as mandatory in the first instance.

Making a complaint to the Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission provides a free complaint handling service. Employees and employers can contact the Human Rights and Equal Opportunity Commission for information and assistance with a problem that they feel has been caused by discrimination.

Employees considering making a complaint should phone the Human Rights and Equal Opportunity Commission's Complaints Infoline on 1300 656 419 to discuss their circumstances and obtain information. A complaint must be made in writing, and can be written in any language. If a complainant is unable to formulate a complaint or reduce it to writing, the Human Rights and Equal Opportunity Commission may provide appropriate assistance. The Human Rights and Equal Opportunity Commission has a standard form that sets out what information is required as an aid to complainants.

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) requires the President of the Commission to inquire into and attempt, where appropriate, to resolve complaints of unlawful discrimination through a process of conciliation. If a complaint is made, the Human Rights and Equal Opportunity Commission will generally write to the organisation giving formal advice about the nature of the complaint. A respondent does not require legal advice to respond to a complaint but legal advice may be obtained if desired.

If the complaint proceeds to conciliation, the role of the conciliator is to conduct the conciliation conference in a fair and impartial manner, giving each party an opportunity to present their point of view and assist them in resolving the complaint. The conciliator may make suggestions for terms of settlement, give expert advice on settlement terms and actively encourage the parties to reach an agreement. The conciliator is not an advocate for either party and will help both parties understand the complaint and explain the areas where conciliated results work most effectively. The conciliator also has a role to ensure that settlement terms are in accordance with the principles of the legislation.

If a complaint cannot be conciliated or is terminated for any other reason by the President, the complainant can apply to the Federal Court of Australia or the Federal Magistrate's Service to have the case heard.

Further information on complaints is available from the Human Rights and Equal Opportunity Commission in the free publication entitled *The Complaint Guide: An introduction for people considering making a complaint, or responding to a complaint, before the Human Rights and Equal Opportunity Commission*. See also the Commission's website at http://www.humanrights.gov.au/complaint_help.

See Appendix C for a discussion of alternative complaints forums.

4. Employees with special needs

Good management requires regular assessment of the workplace to ensure that practices, procedures and policies in relation to pregnancy and potential pregnancy are appropriately focused and take account of the particular characteristics of the workforce. Regular distribution of information and training that is tailored to the needs of the workforce are essential. Not only will this assist with reducing an employer's vicarious liability, it will also ensure a safe, well managed working environment.

The following section examines the special needs and circumstances of particular groups of employees that should be considered in the development of management strategy. It should act as a starting point only. Special accommodation for pregnancy or potential pregnancy needs to be developed in consultation with the employee, taking into consideration the individual circumstances of the case.

4.1 Employees in rural and remote areas

When managing pregnancy in rural and remote workplaces, employers should be aware of the additional challenges pregnant and potentially pregnant employees face due to location.

Rural and remote pregnant employees often travel considerable distances to access antenatal services, which can create regular and significant absences from the workplace. Sound management practices would allow employees access to adequate leave to meet these needs and regular consultation between employers and employees allows employees to schedule leave at mutually convenient times. Travelling long distances to antenatal services can be particularly difficult in the later stages of pregnancy and in some cases, employees may wish to commence maternity leave early.

In order to avoid discrimination, or acts that appear discriminatory, consideration should be given to how a variety of leave options may best be used to accommodate such circumstances including annual leave, sick leave, leave without pay or maternity leave.

4.2 Apprentices and trainees⁷

Lack of workplace experience sometimes results in limited understanding of anti-discrimination laws. For adolescent and school aged women who are pregnant, this can be exacerbated by the difficulties associated with completing school or training, obtaining employment, working part-time or casually and combating community prejudices.

Generally, apprentices will need to suspend their indentures during maternity leave and should discuss this with the authority regulating apprenticeships in the relevant State or Territory.

Female apprentices and trainees sometimes find themselves in competitive male dominated industries where management is unfamiliar with the practical management of pregnancy and potential pregnancy issues and anti-discrimination law.

Employers of young women should ensure that they are well informed about their rights and responsibilities and provide pregnant employees with specific information.

Employers should also:

- take steps to ensure that co-workers are aware that discrimination and harassment of pregnant employees is unlawful;
- ensure that recruitment processes for apprentices, trainees or junior employees are in compliance with the federal Sex Discrimination Act; and
- ensure that discrimination policies and training clearly cover the issues that pregnant apprentices and trainees face.

Failing to take on a female apprentice because she may become pregnant, encouraging a pregnant apprentice to discontinue her apprenticeship or dismissing an apprentice because she is pregnant, or has indicated an intention to become pregnant, is unlawful.

4.3 Family diversity

Employees come from, and make up, a diverse range of family types, both with and without children, including married couples, single parent families, extended families, and heterosexual, gay and lesbian defacto couples.

Single parents and unmarried or lesbian women who are pregnant are at times subjected to discriminatory attitudes and behaviours. The federal Sex Discrimination Act protects pregnant and potentially pregnant employees irrespective of their marital status. Protection from discrimination on the basis of sexual preference is available under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and most State and Territory anti-discrimination laws.

⁷ The *Sex Discrimination Act 1984* (Cth) covers apprentices and paid trainees. It may also cover unpaid trainees in some circumstances, such as when they are working under a Commonwealth law or program. See Appendix A at page 42 on unpaid workers.

Employers should be aware that the support person for a pregnant woman will not always be a husband. But like a husband, support people may be required to attend medical appointments with a pregnant family member.

4.4 Culturally and linguistically diverse backgrounds

Pregnant or potentially pregnant employees from diverse cultural or linguistic backgrounds may have particular needs that raise management issues for employers.

The term “culturally and linguistically diverse backgrounds” refers to a wide range of people from different backgrounds, including immigrants from non-English speaking countries, people born in Australia who have a minority ethnic background and Indigenous people. Employers should be aware that the following issues might require special attention in managing pregnancy in the workplace:

- employees may have difficulties with English and may not understand company policies, their rights and responsibilities or have difficulty communicating their own needs;
- cultural differences may mean that an employee has special requests relating to her own customary practices and traditions around pregnancy; and
- employees may have a lack of awareness of procedures and services in Australia, sometimes even a fear or distrust of government bodies that provide information.

Consultation with the individual employee is the most effective way to manage these issues. However, managers should be aware that some female employees may not feel comfortable discussing pregnancy related issues with a male manager. Sensitivity and common sense should be used in such circumstances.

It is important that employers of women from culturally and linguistically diverse backgrounds ensure that all employees are aware of their rights and responsibilities in relation to pregnancy and potential pregnancy at work. Information and training should be provided in a manner that is culturally appropriate and acknowledges English as a second language. Company policy information may need to be translated into different languages.⁸

4.5 Indigenous employees

Indigenous communities are diverse and cultural practices vary from community to community. Particular traditions may give rise to unique needs in relation to pregnancy and maternity leave, while others may not. Issues also vary according to the geographical location of the employee and that of their community. Managers should be aware of the following factors and raise them for discussion with a pregnant employee in order to develop sound management strategies:

- some Indigenous women may wish to return home for the birth of their child and this may require extensive travel to remote areas, hence early commencement of maternity leave;

⁸ For more information on the obligations of employers to provide information on discrimination in the workplace, see page 51 and Appendix A at pages 36-37.

- the high incidence of diabetes and other health concerns amongst Indigenous women means that some Indigenous employees require additional sick leave during their pregnancy;
- Indigenous women in remote or isolated locations may suffer serious illness that requires both time and travel, which again may require additional sick leave; and
- Indigenous women may be reticent to assert their legal rights or to approach management to discuss matters of concern.

Employers should note that when managing the employment relationship with a pregnant Indigenous woman, they must comply with both the federal Sex Discrimination Act and the federal *Racial Discrimination Act 1975* (Cth).

4.6 Women with disabilities

Some women with disabilities will have particular needs when managing their pregnancy at work. These needs should be determined on a case by case basis and will depend upon the nature and extent of the disability. Employers may wish to seek external advice on appropriate modifications to accommodate particular situations. The following points should be noted:

- employers should not assume that a pregnant employee does not have a disability just because it is not visibly evident, for example, pre-existing back injuries may be exacerbated by pregnancy and in need of accommodation;
- some women with disabilities may require information on their rights and responsibilities to be provided in suitable formats, for example, on an audio cassette for employees who are vision impaired;
- some physical disabilities may require additional modification of work duties during pregnancy;
- women with intellectual disabilities who are pregnant may need additional leave from work; and
- employers have a responsibility to provide a safe and harassment-free environment for women with disabilities who, due to the personal attitudes of some co-workers and supervisors, may be subjected to harassment during their pregnancy.

Employers should note that when managing the employment relationship with a pregnant employee with a disability, they must comply with both the federal Sex Discrimination Act and the federal *Disability Discrimination Act 1992* (Cth).

5. Employers' checklist: A checklist to good practices in dealing with pregnancy in the workplace

This checklist is to provide a summary of the material contained in Appendix.

1. Do you have a written policy informing employees of their rights and responsibilities in relation to workplace discrimination, leave and OH&S?
2. Do you have a written anti-discrimination policy that includes pregnancy discrimination?
3. Have you implemented this policy?
 - a. Have all staff been directly informed of the policy?
 - b. Are you satisfied that, through training and education, all staff understand the policy and how it applies to the workplace?
 - c. Do you have in place a strategy for monitoring compliance with and effectiveness of the policy?
4. Do you have clear processes for complaints resolution?
 - a. Does your anti-discrimination policy outline your commitment to resolving complaints, the internal procedures for doing so and provide contacts for external complaints bodies such as the HumanRights and Equal Opportunity Commission?
 - b. Does your organisation have a designated contact person who is knowledgeable about pregnancy discrimination matters?
 - c. Is your designated contact person able to respond adequately to internal complaint situations by being, for example, sufficiently trained and readily available?
 - d. Do you have clear steps in place for formal or informal resolution of complaints?

Appendix C: Which law; which forum?

1. The relationship between anti-discrimination and OH&S laws
 - 1.1 Duty of care in OH&S law
 - 1.2 OH&S and pregnancy
2. The relationship between anti-discrimination and industrial relations laws
3. Alternative complaint forums
 - 3.1 The Australian Industrial Relations Commission or the Human Rights and Equal Opportunity Commission?
 - 3.2 State and Territory anti-discrimination bodies or the Human Rights and Equal Opportunity Commission?
 - 3.3 Making complaints in alternative forums

This appendix provides an overview of the relationship between anti-discrimination, OH&S and industrial relations laws. It gives guidance on the options for redress for pregnancy discrimination. As this section is only an overview of rights and responsibilities, employers and employees should contact specialised bodies for detailed advice. See the contact list at page 67.

1. The relationship between anti-discrimination and OH&S laws

Employers have an obligation to ensure the health, safety and welfare of employees at work. Legally, this obligation arises from OH&S laws that apply throughout Australia. OH&S laws have been enacted in each State and Territory.¹

In managing pregnancy and potential pregnancy in the workplace, OH&S and anti-discrimination law must be dealt with simultaneously. The challenge for employers is to balance the requirements of each. The obligation under OH&S law is to ensure a safe place of work for all employees. This requirement must be implemented in a non-discriminatory manner. At workplaces where both the federal Sex Discrimination Act and State or Territory OH&S laws apply, the federal Sex Discrimination Act should be followed to the extent of any inconsistency.²

Risks to pregnant and potentially pregnant employees should be assessed objectively, free from discriminatory assumptions and stereotypes. While each situation must be individually considered, the following guidelines provide general assistance for the evaluation of workplace risks.

1.1 Duty of care in OH&S law

Both federal and State or Territory OH&S laws require employers to ensure the health, safety and welfare of their employees at work.³ While in some cases, this is expressed as a general duty of care, most laws provide a list of specific duties. Failure to discharge any of these duties is a breach of the employer's overall duty of care. These duties of care include:

- the duty to ensure safe systems of work;
- the duty to ensure safety and absence of risks in use, handling, storage or transport of plant and substances;
- the duty to provide training and supervision to ensure employees are safe from injuries and risks to health;
- the duty to provide adequate facilities; and
- the duty to ensure that visitors to the workplace are aware of safety requirements and abide by them.

¹ *Occupational Health and Safety Act 1983* (NSW); *Occupational Safety and Health Act 1984* (WA); *Occupational Health and Safety Act 1985* (Vic); *Occupational Health, Safety and Welfare Act 1986* (SA); *Workplace Health and Safety Act 1995* (Qld); *Workplace Health and Safety Act 1995* (Tas); *Work Health Act 1986* (NT); *Occupational Health and Safety Act 1989* (ACT).

² *HREOC v Mount Isa Mines & Ors* (1993) 118 ALR 80.

³ Section 15 *Occupational Health and Safety Act 1983* (NSW); section 19 *Occupational Safety and Health Act 1984* (WA); section 21 *Occupational Health and Safety Act 1985* (Vic); section 19 *Occupational Health, Safety and Welfare Act 1986* (SA); section 28 *Workplace Health and Safety Act 1995* (Qld); section 9 *Workplace Health and Safety Act 1995* (Tas); section 29 *Work Health Act 1986* (NT); section 27 *Occupational Health and Safety Act 1989* (ACT) and regulations under these Acts. Section 16 *Occupational Health and Safety (Commonwealth Employment) Act 1991* provides for employer and employee responsibilities in relation to OH&S in Commonwealth workplaces. In some instances, more specific requirements exist through adoption by the States and Territories of national Codes of Practice dealing with a variety of areas such as manual handling and hazardous substances.

Employers' duty of care obligation, common to all jurisdictions, requires providing a safe work environment for all employees. Establishing a safe work environment will generally ensure a safe work environment for pregnant and potentially pregnant employees.

Case example: Duty of care in OH&S law

The complainant, a pregnant woman, was dismissed from her position as a bar attendant because the employer thought that there was a danger she might fall on the slippery floors behind the bar. The employer said there was concern for the complainant's safety and welfare due to her pregnancy. The employer also claimed to be concerned about possible exposure to common law liability for other possible injuries suffered by the complainant.

The Tribunal said that the employer had not acted reasonably and was not justified in dismissing a pregnant employee for whom the workplace was unsafe. Instead the workplace needed to be made safe for all employees. It was not reasonable to dismiss the complainant because it was convenient to do so. Damages were awarded in favour of the complainant.

Allegetta v Prime Holdings (1991) EOC 92-364

1.2 OH&S and pregnancy

The general rule for satisfying OH&S issues for pregnant employees is to ***provide a safe workplace for all workers***. In some work environments, however, pregnant and potentially pregnant employees are exposed to particular risks not faced by other workers. While OH&S laws rarely deal with specific conditions such as pregnancy, the general 'duty of care' obligations automatically extend to cover the management of pregnant and potentially pregnant employees. Relevant issues may include:

- containment or removal of hazardous substances, such as chemicals, metals, gases or biological hazards to which a pregnant or breastfeeding woman, or her child, are particularly susceptible;
- identification and management of high risk physical tasks, such as heavy lifting, tasks requiring constant use of stairs or long periods of work on ladders;
- making provision for pregnant employees to work seated rather than standing;
- providing regular access to toilet breaks;
- avoiding the allocation of duties to pregnant employees that require long periods of working outside on hot days;
- avoiding exposure to infectious diseases; and
- providing alternative duties where tasks involve high lead exposure.

It is important for employers to be aware of any potential risks and actively address any OH&S issues raised. Workplaces with obvious risks or frequent issues should develop specific policies that provide guidelines for staff and managers.

External medical advice may be of assistance. Employers can request that a pregnant employee provide a medical certificate, having previously discussed with the employee what information the certificate should include. However, employers

should note that requesting medical certificates too frequently or repeatedly for the same purpose may constitute pregnancy discrimination.⁴

Where medical advice is available and the employer is made aware of it, but does not follow it, the employer may be liable for any injury or harm that occurs as a result of failing to follow the advice.

Specific advice on individual workplaces may be obtained by contacting federal and State or Territory OH&S bodies. These bodies work together to establish standards and codes of practice.⁵ A standard sets the required level of preventative action, and usually relates to a specific workplace hazard. A code of practice generally sets out the best way to achieve the standard.⁶ For example, the *National Code of Practice for Manual Handling* requires employers to take account of special needs such as pregnancy in the risk assessment process.⁷ *The National Standard for the Control of Inorganic Lead at Work* lists the circumstances in which pregnancy is a criterion for exclusion from a lead-risk job.⁸

Employers should be aware that in some cases codes may contravene the federal Sex Discrimination Act. Sometimes the code will identify this and indicate that employers should seek an exemption under the federal Sex Discrimination Act. This is most important if employers are unable to resolve the differences between their OH&S obligations, the relevant code and anti-discrimination law requirements.⁹ See Appendix A at pages 43-44.

Further information on managing OH&S and anti-discrimination obligations, particularly in relation to the lead industry, is contained in Chapter 9 of the Pregnancy Report.

2. The relationship between anti-discrimination and industrial relations laws

Industrial relations and anti-discrimination laws both impact upon the employment relationship. Industrial relations laws at the federal and State or Territory level regulates the workplace and the employment relationship. Anti-discrimination laws at the federal and State or Territory level prohibits discriminatory conduct, particularly in the workplace.

⁴ Section 27(2) *Sex Discrimination Act 1984* (Cth).

⁵ For example, the National Occupational Health and Safety Commission (which comprises federal, State and Territory Governments and employer and employee representatives) has declared *National Model Regulations for the Control of Workplace Hazardous Substances* and a *National Code of Practice for the Control of Workplace Hazardous Substances*.

⁶ As defined in *A Short Guide to The Employer's Duty of Care under the Occupational Health and Safety (Commonwealth Employment) Act 1991* (available through the Comcare website at www.comcare.gov.au).

⁷ National Occupational Health and Safety Commission: 2005 (1990) February 1990 section 4.44: "In some instances, employees may have special needs that require consideration in the risk assessment process. These needs may be permanent or temporary, for example, returning to work from an illness or extended leave of absence, pregnancy, or specific disability."

⁸ National Occupational Health and Safety Commission: 1012 (1994) October 1994 section 14(1).

⁹ See *HREOC v Mount Isa Mines & Ors* (1993) 118 ALR 80 and preface to *National Standard for the Control of Inorganic Lead at Work* National Occupational Health and Safety Commission 1012 (1994) October 1994.

A number of provisions in the federal *Workplace Relations Act 1996* are concerned with discrimination against pregnant and potentially pregnant employees.¹⁰

The AIRC must take into account anti-discrimination principles when undertaking several of its functions, including:

- dispute handling and settlement, in particular by the making of new awards;¹¹
- certification of agreements;¹² and
- the handling of discrimination complaints arising because of the discriminatory nature of awards or agreements.¹³

Some discriminatory acts by an employer may contravene both industrial relations and anti-discrimination laws. Awards and agreements should not be discriminatory in their operation. In addition, awards and agreements can supplement laws by providing entitlements to non-discriminatory treatment or particular benefits in connection with pregnancy.

An employee, whose employment has been terminated due to sex, pregnancy or absence from work during maternity leave, may apply to the AIRC for relief.¹⁴

A complaint of pregnancy or potential pregnancy discrimination in employment may also be made to the Human Rights and Equal Opportunity Commission. See Appendix B at page 54 and contact list at page 67.

3. Alternative complaint forums

3.1 The Australian Industrial Relations Commission or the Human Rights and Equal Opportunity Commission?

Discrimination resulting from a federal award or agreement

Discriminatory actions arising from direct compliance with an award or agreement are exempted from a finding of unlawful discrimination under the federal Sex Discrimination Act.¹⁵ However, a formal complaint may still be made.¹⁶ If the complaint appears substantiated (but for the exemption for awards and agreements), the President of the Human Rights and Equal Opportunity Commission will refer the matter to the AIRC for examination. If the AIRC finds that the award or agreement is discriminatory it must remove the discrimination.¹⁷

¹⁰ Discrimination on the ground of sex under the *Workplace Relations Act 1996* (Cth) may cover discrimination on the ground of potential pregnancy. Section 93 *Workplace Relations Act 1996* (Cth) states that the AIRC shall take into account the principles of the *Sex Discrimination Act 1984* (Cth).

¹¹ Section 88B(3)(e) *Workplace Relations Act 1996* (Cth).

¹² Section 170LU(5) *Workplace Relations Act 1996* (Cth).

¹³ Section 111A *Workplace Relations Act 1996* (Cth).

¹⁴ Sections 170CE and 170CK(2)(f) *Workplace Relations Act 1996* (Cth). Regulation 30BD *Workplace Relations Regulations 1996* (Cth) provides that a fee of \$50 (subject to an exemption for serious hardship) is payable on lodging an application.

¹⁵ Section 40(1)(e) and (f) *Sex Discrimination Act 1984* (Cth).

¹⁶ Section 46PW *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

¹⁷ Section 113(2A) *Workplace Relations Act 1996* (Cth).

This referral power does not apply to federal Australian Workplace Agreements (AWAs). Allegations of discrimination arising from compliance with AWAs may be dealt with directly by the Human Rights and Equal Opportunity Commission.

Employers should note that under some State anti-discrimination laws, compliance with an award or agreement provides no defence for discriminatory conduct. Employers covered by State awards and agreements should therefore consider whether the provisions in their awards and agreements unlawfully discriminate on the ground of pregnancy or potential pregnancy. If there is the possibility of unlawful discrimination, employers should take steps to remove the discriminatory provision or ensure that they provide terms and conditions that do not unlawfully discriminate.

Discrimination resulting from termination of employment

An employee who is dismissed because of her pregnancy can make a complaint under the federal Sex Discrimination Act or to the AIRC under the federal *Workplace Relations Act 1996*.

The federal *Workplace Relations Act 1996* provides that termination of employment on the ground of sex, pregnancy¹⁸ or absence due to maternity leave¹⁹ is prohibited and relief may be sought from the AIRC.²⁰ It should be noted, however, that a number of categories of employment are excluded from the termination of employment provisions of the federal *Workplace Relations Act 1996*. These include trainees where the traineeship is for a specified period, and casual employees engaged for less than 12 months.²¹ The exclusions do not apply under the federal Sex Discrimination Act and all trainees, casuals and other short term employees are covered.

3.2 State and Territory anti-discrimination bodies or the Human Rights and Equal Opportunity Commission?

In addition to the federal Sex Discrimination Act, anti-discrimination laws in all States and Territories prohibit discrimination on the ground of pregnancy.²² The federal Sex Discrimination Act is not intended to exclude or limit the operation of a

¹⁸ This is subject to the exemption for the inherent requirements of particular employment and the exemption in respect of employment in religious institutions: section 170CK(2)(f), (3) and (4) *Workplace Relations Act 1996* (Cth).

¹⁹ Section 170CK(2)(h) *Workplace Relations Act 1996* (Cth).

²⁰ Section 170CE *Workplace Relations Act 1996* (Cth). Regulation 30BD Workplace Relations Regulations 1996 (Cth) provides that a fee of \$50 (subject to an exemption for serious hardship) is payable on lodging an application.

²¹ Other categories of employees excluded are those under a contract of employment for a specified period or a specified task, employees serving a period of probation or qualifying period of less than 3 months (unless a longer period is reasonable having regard to the nature and circumstances of the employment) and employees who are not employed under award conditions and who are employed on piece rates or commission at above a specified rate. Section 170CC *Workplace Relations Act 1996* (Cth) and regulation 30B Workplace Relations Regulations 1996 (Cth) provide more detail on the excluded categories.

²² *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic).

State or Territory anti-discrimination law²³ that is capable of operating concurrently with the federal Sex Discrimination Act. This means that where provisions of the federal Sex Discrimination Act and State and Territory anti-discrimination Acts are similar, and can operate together, both will apply. In the event of inconsistency, the federal Sex Discrimination Act should be followed.

The majority of employers are required to comply with both the federal and the relevant State or Territory anti-discrimination Act. While generally there is consistency between these laws, sound employment practices and compliance with the higher standard will ensure employers avoid potential legislative breaches.

3.3 Making complaints in alternative forums

If an employee believes that they have been treated less favourably or dismissed because of their pregnancy or potential pregnancy they may have a choice about which forum to make a complaint.

Federal and State or Territory anti-discrimination laws generally cover the same grounds and areas of discrimination. There are, however, some circumstances where only the federal law applies or only the State or Territory law applies. For example, if an employee is employed by a federal Government department she can only make a complaint about pregnancy discrimination in employment under federal law. State Government employees are only entitled²³ to lodge complaints under State or Territory law. If both federal and State laws seem to apply, the employee needs to choose the forum in which she will make a complaint.

However, there is a general principle that a person cannot make a complaint to two different forums about the same subject matter. This principle is in place to avoid “double dipping”. The federal Sex Discrimination Act specifically provides that a person cannot lodge a complaint under both federal and State or Territory law. If a person starts a complaint under State or Territory law, they cannot later decide to make the complaint under a federal law.²⁴ However, a person can start under the federal law and decide to move the complaint to State or Territory law.

When choosing between anti-discrimination and industrial relations laws the general principle against “double dipping” also applies. A person cannot make a complaint about the same subject matter with a view to obtaining exactly the same remedy in two jurisdictions. Some industrial relations laws specifically prevent people making multiple complaints at the same time. For example, the federal *Workplace Relations Act 1996* prevents a person from bringing proceedings under more than one Act in relation to the same subject matter.²⁵ Therefore, proceedings relating to allegations concerning a woman being unfairly dismissed because of her pregnancy cannot be brought under the federal *Workplace Relations Act 1996* if a complaint has already been made under the federal Sex Discrimination Act or a State or Territory anti-discrimination Act.

²³ Section 10(2) *Sex Discrimination Act 1984* (Cth).

²⁴ Section 10(4) *Sex Discrimination Act 1984* (Cth).

²⁵ Sections 170HB and 170HC *Workplace Relations Act 1996* (Cth).

Often complaints about alleged discrimination in the workplace are quite complex and do not fit easily under one law. In these circumstances an employee could pursue certain parts of their complaint under industrial relations law and other parts under anti-discrimination law. However, one jurisdiction may have broader coverage and an employee may prefer to make a complaint to the body that can deal with the entire subject matter, rather than obtain partial remedies in separate jurisdictions.

Where the law allows it, it is up to an employee to elect under which law they want to lodge a complaint. The Human Rights and Equal Opportunity Commission, State and Territory anti-discrimination bodies and industrial relations bodies can provide information about what their law covers and how complaints will be handled. See contact list at page 67.

Employees may seek advice from trade unions or legal advisers when making this decision. Issues that an employee may consider when choosing a forum to make a complaint are:

- the process for handling the complaint;
- the timeframe for making the complaint;
- the remedies available;
- the costs associated with making the complaint;
- the necessity for legal representation;
- the waiting times for taking action on the complaint;
- the accessibility of the service; and
- whether the forum can deal with the entire complaint.

CONTACT LIST

The following government agencies can provide information and assistance with anti-discrimination laws, maternity leave and other industrial issues, including OH&S requirements.

ANTI-DISCRIMINATION AND AFFIRMATIVE ACTION AGENCIES

FEDERAL AGENCIES

Human Rights & Equal Opportunity Commission

Sex Discrimination Unit
Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 1042

Complaints Info line: 1300 656 419 (local call)

TTY: 1800 620 241 (free call)

Website: <http://www.humanrights.gov.au>

Equal Opportunity for Women in the Workplace Agency

Level 17
1 Market Street
Sydney NSW 2000

Telephone: (02) 8255 6300

Website: <http://www.eowa.gov.au>

STATE AND TERRITORY ANTI-DISCRIMINATION AGENCIES

ACT Human Rights Office

Level 4
Mort Street
Canberra City
Canberra ACT 2601

Telephone: (02) 6207 0576

TTY: (02) 6207 0525

Website: <http://www.act.gov.au>

Anti-Discrimination Board of New South Wales

Level 17
201 Elizabeth Street
Sydney NSW 2000

Telephone: (02) 9268 5544

TTY: (02) 9268 5522

Toll free: 1800 670 812 (only within NSW)

Website: <http://www.lawlink.nsw.gov.au/adb>

Northern Territory Anti-Discrimination Commission

Level 7
9-11 Cavenagh Street
Darwin NT 0800

Telephone: (08) 8999 1444
Free call: 1800 813 846 (Australia wide)
TTY: (08) 8999 1444

**Anti-Discrimination Commission
Queensland**

Level 1, Rams House
189 Coronation Drive
Milton, Brisbane QLD 4064

Free call: 1300 130 670 (Australia wide)
TTY: 1300 130 680
Website: <http://www.adcq.qld.gov.au>

**The Office of the Commissioner for Equal Opportunity
South Australia**

45 Pirie Street
Adelaide SA 5000

Telephone: (08) 8207 1977
Toll free: 1800 188 163 (only within SA)
TTY: (08) 8207 1911
Website: <http://www.eoc.sa.gov.au>

**Anti-Discrimination Commission
Tasmania**

Level 5
15 Murray Street
Hobart TAS 7000

Telephone: (03) 6224 4905
Free call: 1800 632 716 (only within Tasmania)
Website: <http://www.justice.tas.gov.au>

**Equal Opportunity Commission
Victoria**

Level 3
380 Lonsdale Street
Melbourne VIC 3000

Telephone: (03) 9281 7100
Toll free: 1800 134 142 (only within country Victoria)
TTY: (03) 9281 7110
Website: <http://www.eoc.vic.gov.au>

**Equal Opportunity Commission
Western Australia**

Level 2, Hartley Poynton Building
141 St Georges Terrace
Perth WA 6000

Telephone: (08) 9216 3900
Toll Free: 1800 198 149 (only within WA)
TTY: (08) 9216 3936
Website: <http://www.equalopportunity.wa.gov.au>

WORKPLACE AND INDUSTRIAL RELATIONS AGENCIES

Federal Department of Employment, Workplace Relations and Small Business

GPO Box 9879
Canberra ACT 2601

Telephone: (02) 6121 6000
Website: <http://www.dewrsb.gov.au>

Wageline - for Federal Awards

ACT, NT, NSW, VIC	1300 363 264
Tasmania	1300 636 264
SA	1300 365 255
WA	1300 655 266
Queensland	1300 369 945

Website: <http://www.wagenet.gov.au>

Office of the Employment Advocate

Level 7, 477 Pitt Street
Sydney NSW 2001

Toll Free: 1300 366 632 (Australia wide)
Website: <http://www.oea.gov.au>

New South Wales Department of Industrial Relations

1 Oxford Street
Darlinghurst NSW 2010

Telephone: (02) 9243 8888
State award inquiries: 131628 (local call)
Website: <http://www.dir.nsw.gov.au>

**Department of Employment, Training and Industrial Relations
Queensland**

Neville Bonner Building
Block B
75 William St
Brisbane QLD 4000

Telephone: (07) 3225 2000
Website: <http://www.detir.qld.gov.au>

Workplace Services

**Department for Administrative and Information Services
South Australia**

Level 3
1 Richmond Road
Keswick Adelaide SA 5035

Telephone: (08) 8303 0400
1300 365 255 (local call - only within SA)
Website: <http://www.eric.sa.gov.au>

**Department of Premier and Cabinet
Tasmania**

Level 9
144 Macquarie Street
Hobart TAS 7000

Telephone: (03) 6233 6459
Website: <http://www.dpac.tas.gov.au>

Industrial Relations Victoria

Level 8
1 Macarthur Street
Melbourne VIC 3002

Telephone: (03) 9651 5560
Website: <http://www.vic.gov.au/ir>

**Department of Productivity and Labour Relations
Western Australia**

Dumas House
2 Havelock Street
West Perth WA 6005

Telephone: (08) 9222 7700
Website: <http://www.doplar.wa.gov.au>

OCCUPATIONAL HEALTH AND SAFETY AGENCIES

National Occupational Health & Safety Commission (NOHSC)

92 Parramatta Road
Camperdown
Sydney NSW 2050

Telephone: (02) 9577 9555
Toll Free: 1800 252 226 (from anywhere but Sydney)
Website: <http://www.nohsc.gov.au>

Comcare

Level 5
12 Moore Street
Canberra ACT 2601

Telephone: 1300 366 979 (local call – Australia wide)

Website: <http://www.comcare.gov.au>

ACT WorkCover

Level 4
197 London Circuit
Canberra ACT 2601

Telephone: (02) 6205 0200

Website: <http://www.workcover.act.gov.au>

WorkCover NSW

400 Kent Street
Sydney NSW 2000

Telephone: (02) 9370 5000

Information Centre (Toll Free): 131050

Website: <http://www.workcover.nsw.gov.au>

Northern Territory Work Health Authority

Department of Industries and Business
Minerals House
66 The Esplanade
Darwin NT 0800

Telephone: (08) 8999 5010

Toll Free: 1800 193 111 (Australia wide)

Website: <http://www.nt.gov.au/wha>

**Queensland Division of Workplace Health and Safety
Department of Employment, Training and Industrial Relations**

Neville Bonner Building
Block B
75 William St
Brisbane QLD 4000

Telephone: (07) 3225 2000

1300 369 915 (local call cost - only within Queensland)

Website: <http://www.dtir.qld.gov.au/>

WorkCover Corporation**South Australia**

100 Waymouth Street
Adelaide SA 5000

Telephone: (08) 8233 2222
Free call: 131855 (only within SA)
1800 888 508 (Australia wide)
1800 188 000 (only within country SA)
TTY: (08) 8233 2574
Website: <http://www.workcover.com>

Workplace Standards Tasmania

30 Gordon's Hill Road
Rosny Park TAS 7018

Telephone: (03) 6233 7657
1300 366 322 (local call cost - only within Tasmania)
Website: <http://www.wsa.tas.gov.au>

Victorian WorkCover Authority

Level 24
222 Exhibition Street
Melbourne VIC 3000

Telephone: (03) 9641 1555
Website: <http://www.workcover.vic.gov.au>

WorkSafe Western Australia

1260 Hay Street
West Perth WA 6005

Telephone: (08) 9327 8777
TTY: (08) 9327 8838
Website: <http://www.safetyline.wa.gov.au>

Terms of reference

I, Daryl Williams, Attorney-General of Australia, IN PURSUANCE OF section 48(1)(g) of the *Sex Discrimination Act 1984*, HEREBY REQUEST the Human Rights and Equal Opportunity Commission to inquire into and report matters relating to pregnancy and work.

The Commission is to:

- a) examine the policies and practices of employers in relation to the recruitment of women who are pregnant or have the potential to become pregnant;
- b) examine the rights and responsibilities of employers and their employees in relation to employees who are pregnant;
- c) examine the rights and responsibilities of employers and their employees in relation to potentially pregnant employees;
- d) examine the rights and responsibilities of employees who are pregnant in relation to that pregnancy;
- e) examine rights and responsibilities arising under sections 15,16,17 and 20 of the *Sex Discrimination Act 1984*;
- f) examine the adequacy of, and any need for changes to, relevant Federal anti-discrimination laws, or to policies and practices relating to pregnant or potentially pregnant workers;
- g) produce and publish guidelines to:
 - provide employers, principals of commission agents and contract workers, partnerships and employment agencies with practical guidance to those provisions of the *Sex Discrimination Act 1984* which apply to discrimination on the grounds of pregnancy or potential pregnancy;
 - assist those parties to implement policies and to eliminate and prevent discrimination on the grounds of pregnancy and potential pregnancy;
 - provide employees and potential employees with practical guidance on those provisions of the *Sex Discrimination Act 1984* which apply to discrimination on the grounds of pregnancy or potential pregnancy; and
 - assist all parties to understand and fulfil their obligations under *the Sex Discrimination Act 1984* in relation to pregnancy and potential pregnancy.

These guidelines may include:

- an overview of minimum standards;
- workplace examples that provide individual solutions to the circumstances of particular pregnant employees above and beyond minimum standards;
- sound management practices that meet the needs of individuals and their employers.

The term “employees” is to be interpreted broadly and should include, for example, part time, temporary, casual and shift workers.

IN PERFORMING its functions in relation to the reference, the Commission is to

- a) consult with individuals and organisations, particularly with employers and employer organisations, individual women, unions, relevant non-government

organisations, relevant government authorities, medical practitioners' associations and other inserted parties;

- b) have regard to relevant law, practice, research and experience; and
- c) have regard to Australia's international human rights obligations.

THE COMMISSION IS REQUIRED to report no later than 31 May 1999.*

Dated 26 August 1998
DARYL WILLIAMS

* extended to 24 June 1999.

Acknowledgments

The Human Rights and Equal Opportunity Commission would like to thank the following people:

COMMISSIONER AND EDITOR

Susan Halliday

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Sabina Lauber (to January 2001)

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Jocelyn Murphy	YWCA of Sydney
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Martina Nightingale	Women's Equity Bureau
Geraldine Parsons	Telstra
Jodi Perkins	Office of Women's Policy, Victoria
Debbie Simms	Active Australia, Australian Sports Commission
Alison Spencer	IBM Global Services
Rohan Squirchuk	Council for Equal Opportunity in Employment Ltd

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