



Australian
Human Rights
Commission

2013

Supporting Working Parents:
Pregnancy and Return to Work
National Review

ISSUES PAPER: OCTOBER 2013

Table of Contents		1
1	About this Issues Paper	2
2	Brief background about the National Review	2
3	What work has the Commission carried out in relation to pregnancy and work?	3
4	What do we know about discrimination experienced by pregnant employees and women and men returning to work after taking parental leave today?	3
5	What concerns employers?	4
5.1	<i>Practical challenges</i>	4
5.2	<i>Possible solutions</i>	4
6	What is the current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave?	4
6.1	<i>Anti-discrimination law</i>	4
6.2	<i>Employment laws and policies</i>	5
6.3	<i>Work health and safety laws</i>	6
7	What are some of the key issues of interest to this National Review?	7
7.1	<i>Women’s participation in the workforce</i>	7
7.2	<i>Impact of discrimination against pregnant employees and women and men returning to work after taking parental leave</i>	7
(a)	<i>On women</i>	7
(b)	<i>On parents and families</i>	7
(c)	<i>On business</i>	8
(d)	<i>On the wider Australian community</i>	8
7.3	<i>Challenges faced by employers as well as leading practices and strategies implemented by employers</i>	8
8	How can you participate in the National Review?	8
Attachment A		9

1 About this Issues Paper

The Issues Paper provides some background information for those individuals, organisations and businesses interested in contributing to the *National Review on the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave*.

Details on how individuals, organisations and businesses can participate in the National Review are provided in Section 8.

The material in this Issues Paper does not represent any finalised research, nor is it intended to limit the scope of submissions. Rather, the paper is intended to provide guidance on the types of issues that the Commission is interested in exploring through the course of the National Review.

2 Brief background about the National Review

On 22 June 2013, the Attorney-General's Department asked the Australian Human Rights Commission to conduct a national review on the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave.

The number of complaints received by the Australian Human Rights Commission and Fair Work Australia indicate that discrimination against pregnant employees and against men and women returning to work after taking parental leave continues to be a problem in Australian workplaces.

The National Review will involve collection of quantitative and qualitative data to assess the prevalence, nature and consequences of discrimination at work related to pregnancy and during, or on return to work after parental leave. It will also seek to identify, with employers, leading practices and strategies for addressing the challenges of accommodating the needs of pregnant employees and women and men returning to work after parental leave. This will be done through:

- a national telephone survey aimed at gathering quantitative data on the prevalence of discrimination;
- consultations through online written submissions, group discussions and interviews aimed at gathering qualitative data on the nature and consequences of discrimination faced by men and women affected by discrimination and the challenges and leading strategies developed by employers;
- a national roundtable discussion with relevant stakeholders to discuss the findings and recommendations from the survey and consultations; and
- desktop research including analysis of the adequacy of existing laws and policies.

See Attachment A for the Terms of Reference of the National Review. Further details on the methodology and timeframe can be found in the [National Review Factsheet](http://www.humanrights.gov.au/pregnancy-discrimination) (see <http://www.humanrights.gov.au/pregnancy-discrimination>).

The Commission will prepare a report on the national review, including recommendations, by June 2014.

3 What work has the Commission carried out in relation to pregnancy and work?

In August 1998, the federal Attorney-General asked the Australian Human Rights Commission to conduct a national inquiry into pregnancy and work. This was Australia's first national inquiry into pregnancy-related discrimination at work.

The Commission published its findings and recommendations the following year in [*Pregnant and Productive: It's a Right not a Privilege to Work while Pregnant*](#). In addition, in 2001, the Commission launched the [*Workplace Pregnancy Guidelines*](#).

4 What do we know about discrimination experienced by pregnant employees and women and men returning to work after taking parental leave today?

More than a decade after the release of the *Pregnant and Productive* report, the Commission continues to receive complaints concerning discrimination based on pregnancy as well as related grounds such as family responsibilities and breastfeeding.

In 2011 to 2012, 21% of complaints under the Sex Discrimination Act received by the Commission related to pregnancy discrimination and family responsibilities¹. The Commission received 160 complaints related to pregnancy discrimination, 63 complaints related to family responsibilities discrimination and 2 complaints related to breastfeeding discrimination. The overwhelming majority of these complaints were submitted by women.

Similarly, 21% of the complaints investigated by the Fair Work Commission in 2011-2012 related to an allegation of pregnancy discrimination².

The ABS 'Pregnancy and employment transitions 2012' data reveals that approximately 67,300 women (19%) employees perceived experiencing some level of discrimination in the workplace while pregnant. The most common kinds of treatment women reported in the survey included: 'Missed out on opportunity for promotion' (34%); 'Missed out on training or development opportunities' (32%); and 'Received inappropriate or negative comments from their manager/supervisor' (28%)³.

Q4.1 What discrimination do employees face in the workplace related to pregnancy, parental leave or on returning to work after parental leave?

Q4.2 What other data is available on the prevalence and nature of discrimination in relation to pregnancy at work and returning after parental leave?

5 What concerns employers?

5.1 Practical challenges

Just as pregnant employees and women and men returning to work after parental leave face practical and financial challenges, so do some employers. Challenges may include:

- Planning for when employees become pregnant, take parental leave and/or return to work (arranging alternative duties, finding a replacement employee, return to work date etc.)
- Costs associated with accommodating needs of pregnant employees, and temporarily replacing employees on parental leave
- Awareness of rights and responsibilities towards pregnant employees and employees on parental leave.

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

Q5.1.2 What support do employers need to accommodate pregnant employees and women and men returning to work after parental leave?

5.2 Possible solutions

There are many employers and other organisations with leading strategies and practices to accommodate the needs of pregnant employees in the workplace and women and men returning to work after taking parental leave. This National Review is interested in identifying creative and flexible solutions and we would like to hear from individuals and organisations with experience and knowledge of practical measures that will prevent discrimination and assist employers.

Q5.2.1 What strategies assist with retaining and supporting employees who are pregnant or have taken parental leave?

6 What is the current national legal and policy framework relevant to the rights of pregnant employees and women and men returning to work after taking parental leave?

6.1 Anti-discrimination law

The *Sex Discrimination Act (Cth)* (SDA) makes it unlawful to treat a person unfairly because they are pregnant, potentially pregnant, breastfeeding or have family responsibilities. It includes both direct and indirect discrimination.⁴

In the workplace, this covers situations where a person has been: refused employment; dismissed; denied a promotion, transfer or other employment-related

benefits; given less favourable terms or conditions of employment; or denied equal access to training opportunities.

Women who are pregnant should be able to continue to work in the same way and under the same conditions as other employees, unless there are valid medical, safety, or pregnancy-related reasons.

Direct discrimination happens when a woman is treated less favourably because she is pregnant, or because she may become pregnant or because she is breastfeeding or needs to breastfeed over a period of time. It also happens when a woman or a man is treated less favourably because they have family responsibilities. For example, refusal to train a pregnant employee where training is available to other comparable staff or reducing the number of shifts a pregnant employee is allocated because it is assumed she will be too tired to work her regular shifts.

Indirect discrimination happens when there is a rule or policy that is the same for everyone but has an unfair effect on women who are or may become pregnant or are breastfeeding or need to breastfeed over a period of time. For example, 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.

6.2 *Employment laws and policies*

In 2010, the Australian Government enacted the *Paid Parental Leave Act 2010* (Cth), which established Australia's first paid parental leave scheme. Key objectives of parental leave pay are to 'promote equality between men and women and balance between work and family' and to 'encourage women to continue to participate in the workforce'.

The *Fair Work Act 2009* (FWA) sets out minimum terms and conditions of employment in Australia through the National Employment Standards (NES). Under the NES, most employees who have completed 12 months service have a right to unpaid parental leave and to return to work after taking parental leave. Many employees⁵ may request flexible working arrangements, such as a change in hours, patterns or locations of work from their employer. In addition, employees returning to work after taking parental leave are entitled to return to the same position they held before they commenced their period of parental leave, provided that position still exists. However, if that position no longer exists, an employee is entitled to return to an available position for which they are qualified and suited nearest in status and pay to the pre-parental leave position.

A pregnant employee who can show that she is fit for work, but that it is inadvisable for her to continue in her present position because of illness, or risks arising out of her pregnancy, or hazards connected with that position, is entitled to be transferred to an appropriate 'safe job'⁶. If there is no appropriate 'safe job' available, the employee may be entitled to paid or unpaid 'no safe job leave' for the period of risk.

Employers must seriously consider a request for flexible working arrangements but may refuse on reasonable business grounds. Factors that may be relevant include: the effect on the workplace such as financial, efficiency, productivity and customer service impact; inability to organise work among existing staff; inability to recruit a replacement employee or organise practical arrangements to accommodate the employee's request⁷.

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

Q6.2.2 Are the laws adequately implemented?

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

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

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

6.3 Work health and safety laws

The *Work Health and Safety Act 2011* (Cth) (WHS Act) and the *Work Health and Safety Regulations 2011* (the Regulations) provide a nationally consistent framework to secure the health and safety of workers and workplaces. The WHS Act is a code that has been implemented in all states and territories except for Victoria and Western Australia.

There are no references to pregnancy, potential pregnancy or reproduction in the WHS Act. The Regulations outline the circumstances in which a pregnant worker should be removed from lead risk. The WHS Act provides that workers may cease, or refuse to carry out work if the worker has a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard. Ceasing or refusing to work should not affect the employee's continuity of employment as long as she does not unreasonably refuse to carry out safe and appropriate alternative work provided by her employer.

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

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

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

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

to make workplaces safe for pregnant employees?

7 What are some of the key issues of interest to this National Review?

7.1 Women's participation in the workforce

Women's equal participation in the workforce is a critical part of achieving gender equality. It provides women an equal opportunity to work and ensure lifetime economic security.

Research has shown that women are an 'untapped productivity potential'⁸. Increasing women's participation in the workforce would lead to an estimated growth in Australia's GDP of \$25 billion per year⁹.

Further, contrary to the 'ideal worker' stereotype, research has found that female employees in flexible roles tend to be more productive than their full-time colleagues simply by using their time more wisely¹⁰.

Q7.1.1 What policies or programs assist with the retention of employees while pregnant and on return to work after taking parental leave?

7.2 Impact of discrimination against pregnant employees and women and men returning to work after taking parental leave

The Review is interested in the impact of discrimination on women, on parents and families, on business and on the wider Australian community.

(a) On women

- Denies women their right to work and have a family
- Preserves traditional stereotypes about gender roles such as 'women must make a choice between their careers and having a family'
- Being demoted, forced to resign or reduce hours during pregnancy limits financial resources at a time most needed to care for a family
- Lack of opportunity to return to work limits employment options and interrupts advancement in women's careers
- Lack of options to stay or re-enter the workforce negatively affects women's retirement incomes and savings

(b) On parents and families

- Lack of return to work options puts financial and caring pressures on families

- Lack of flexible arrangements on return to work denies parents a chance to bond in the crucial early stages
- Discrimination affect the general health and wellbeing of parents, and in turn families

(c) *On business*

- Loss of qualified and highly trained staff
- High cost of recruiting new employees (advertising, management time, training etc.)
- Loss of productivity in the workplace
- Discrimination and lack of job security affect levels of satisfaction and morale of staff
- Loss of pregnant employees limits diversity in the workplace

(d) *On the wider Australian community*

- Fosters negative attitudes that pregnant women and parents are undervalued in the community
- Loss of women in the workforce can affect overall economic productivity and growth in Australia's gross domestic product
- Women's lower levels of superannuation savings increases their reliance on aged pension and other welfare needs

Q.7.2.1 What are some of the other impacts of discrimination against pregnant employees and women and men returning to work after taking parental leave on;

- women?

- parents and families?

- business and the wider community?

7.3 *Challenges faced by employers as well as leading practices and strategies implemented by employers*

As mentioned above, the Review is interested in understanding the challenges faced by employers in accommodating the needs of pregnant employees and women and men returning to work after parental leave. It is also interested in identifying, with employers, leading practices and strategies for addressing these challenges and developing practical and effective recommendations.

8 How can you participate in the National Review?

Individuals and organisation interested in participating in the National Review can do so through consultations or by making a written submission or completing the online questionnaire for employers.

The information collected through the consultations and written responses will be used for the purposes of understanding the issues and may be drawn upon, quoted or referred to in the National Review's report. Only de-identified information will be used unless you indicate otherwise.

Individuals and organisations making submissions should note that any request made under the *Freedom of Information Act 1982 (Cth)* for access to a submission will be determined in accordance with that Act. While the National Review will endeavour to identify and protect confidential and exempt material there is no absolute guarantee that the National Review will not be required to reveal confidential information as a result of an FOI request. Submissions or information you provide is not legally privileged and is subject to the ordinary rules of self-incrimination and of defamation as well as the *Privacy Act 1988 (Cth)*.

Details on the submission process and further information about the National Review can be found at: <http://www.humanrights.gov.au/pregnancy-discrimination>

Submission forms for affected women and men and organisations that work with women and men, can also be downloaded from: <http://www.humanrights.gov.au/pregnancy-discrimination>. An online questionnaire for employers will be available on the website shortly also.

¹ Australian Human Rights Commission (2012) *Annual Report 2011 – 2012*

² Information provided by Fair Work Ombudsman as of 30 May 2013

³ Australian Bureau of Statistics (2012) *Pregnancy and Employment Transitions*, Cat. No. 4913

⁴ Only direct discrimination on the ground of family responsibilities is unlawful: s 7A SDA.

⁵ Employees who are: the parent or carer of a child who is school aged or younger, carers, who have a disability, over 55, experiencing violence from a family member, or who provide support to a family member experiencing violence.

⁶ An appropriate safe job should require the employee to work the same number of ordinary hours of work (unless a different number of ordinary hours is agreed to with the employee) and be at the same pay.

⁷ Fair Work Ombudsman (2013) 'Fact sheet: Requests for flexible working arrangements and the National Employment Standards'

⁸ Ernst & Young (2013) 'Untapped opportunity: The role of women in unlocking Australia's productivity potential'

⁹ Grattan Institute (2012) 'Game-changers: Economic reform priorities for Australia'

¹⁰ Ernst & Young (2013) 'Untapped opportunity: The role of women in unlocking Australia's productivity potential'.

Attachment A

Terms of Reference for the National Review

The Sex Discrimination Commissioner, on behalf of the Commission, will conduct research to identify the prevalence of discrimination in relation to pregnancy at work and return to work after parental leave as follows:

1. A national telephone survey to assess the prevalence, nature and consequences of discrimination relating to pregnancy at work and return to work after parental leave. Selected phone interviews may be conducted with target groups unable to access the online survey.
2. The Commission would provide an interim report on the survey headline data.
3. The Commission would then convene a series of roundtables and consultations nationally and in regional areas, including with government, industry and employer groups, unions, workers, women's groups, relevant community and health organisations, and affected women not otherwise represented, to consider the prevalence data and its implications.
4. Based on the above, the Commission will prepare a research report, including recommendations, which identifies the prevalence of discrimination, adequacy of existing laws, policies procedures and practices, best practice approaches for addressing this, and proposed areas of focus for future activities to address any major matters of concern arising.

The Commission will seek to obtain data on the full range of family circumstances, including single parent or separating households, to determine the extent to which the impact of any discrimination may be exacerbated by family circumstances.

In conducting the research, the Commission will consider recent developments in the area (including the introduction and any initial evaluation of the paid parental leave scheme) as well as previous reports (such as the Commission's National Inquiry into Pregnancy and Work, [*Pregnant and productive: It's a right not a privilege to work while pregnant*](#) (1998)).