



**Submission of the
Anti-Discrimination Commissioner of
Tasmania**

to the

Australian Human Rights Commission's

**Supporting working parents: national
review on pregnancy and return to work**

January 2014

Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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1. Introduction

Thank you for the opportunity to make a submission on the Australian Human Rights Commission's national review on the prevalence, nature and consequences of discrimination relating to pregnancy at work and return to work after parental leave.

The following provides information on the situation within Tasmania and includes a summary of complaints received by me in relation to this issue.

I would be happy to elaborate on these matters should you wish me to do so.

2. Complaints

A positive response to pregnancy and parental leave experiences in the workforce remains elusive for many Tasmanian women. Whilst complaints of discrimination regarding pregnancy and parental leave in the area of employment form only a small proportion of overall complaints received by me, the issues raised by complainants reflect a much larger number of enquiries about problems encountered by women in their employment related to pregnancy and exhibit consistent themes: less favourable treatment on the basis of the pregnancy; poor adjustment responses; lack of clarity around leave and return to work arrangements; and loss of employment or career options.

Table 1 summarises the number of complaints of discrimination on the basis of pregnancy or family responsibilities received by my office since July 2010. Table 2 summarises the number of complaints of breaches of section 17(1) of the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act), which makes it unlawful to engage in conduct that offends, humiliates, intimidates, insults or ridicules on the basis of specified attributes including pregnancy and family responsibilities.

Appendix A provides summaries of a number of relevant enquiries.

Table 1: Tasmanian complaints alleging discrimination on the basis of pregnancy and/or family responsibilities 2010–13

	2010-11	% of complaints	2011-12	% of complaints	2012-13	% of complaints
Pregnancy	6	3.8%	4	3.0%	5	3.1%
Family responsibilities	19	11.9%	18	13.5%	19	11.9%

Table 2: Tasmanian complaints alleging conduct that is offensive, humiliating, intimidating, insulting or ridiculing on the basis of pregnancy and/or family responsibilities 2010–13

	2010-11	% of complaints	2011-12	% of complaints	2012-13	% of complaints
Pregnancy	4	2.5%	4	3.0%	4	2.5%
Family responsibilities	20	12.6%	16	12.5%	11	6.9%

The overwhelming majority of complaints of discrimination on the basis of pregnancy or family responsibilities relate to employment issues.

Figure 1 below shows the industry sector identified in complaints alleging breaches on the basis of pregnancy and or family responsibilities. The data is for the period from 1 July 2011 to date. This indicates the following industry sector breakdown for complaints received:

- Health and community services – 22%
- Education – 19%
- Government administration – 12%
- Cultural and recreational services – 10%
- Accommodation, cafés and restaurants – 10%
- Finance and insurance – 7%
- Retail trade – 6%
- Property and business services – 4%
- Agriculture, forestry and fishing – 4%
- Professional, scientific and technical – 3%
- Electricity, gas and water supply – 1 %
- Communication Services (Information/Media) – 1%

Figure 2 below shows the type of organisational respondent identified in complaints alleging breaches on the basis of pregnancy and or family responsibilities. The data is for the period from 1 July 2011 to date. This indicates that the largest proportion of complaints are received about private for-profit organisations.

Figure 1: Complaints alleging breaches on the basis of pregnancy and/or family responsibilities by industry sector

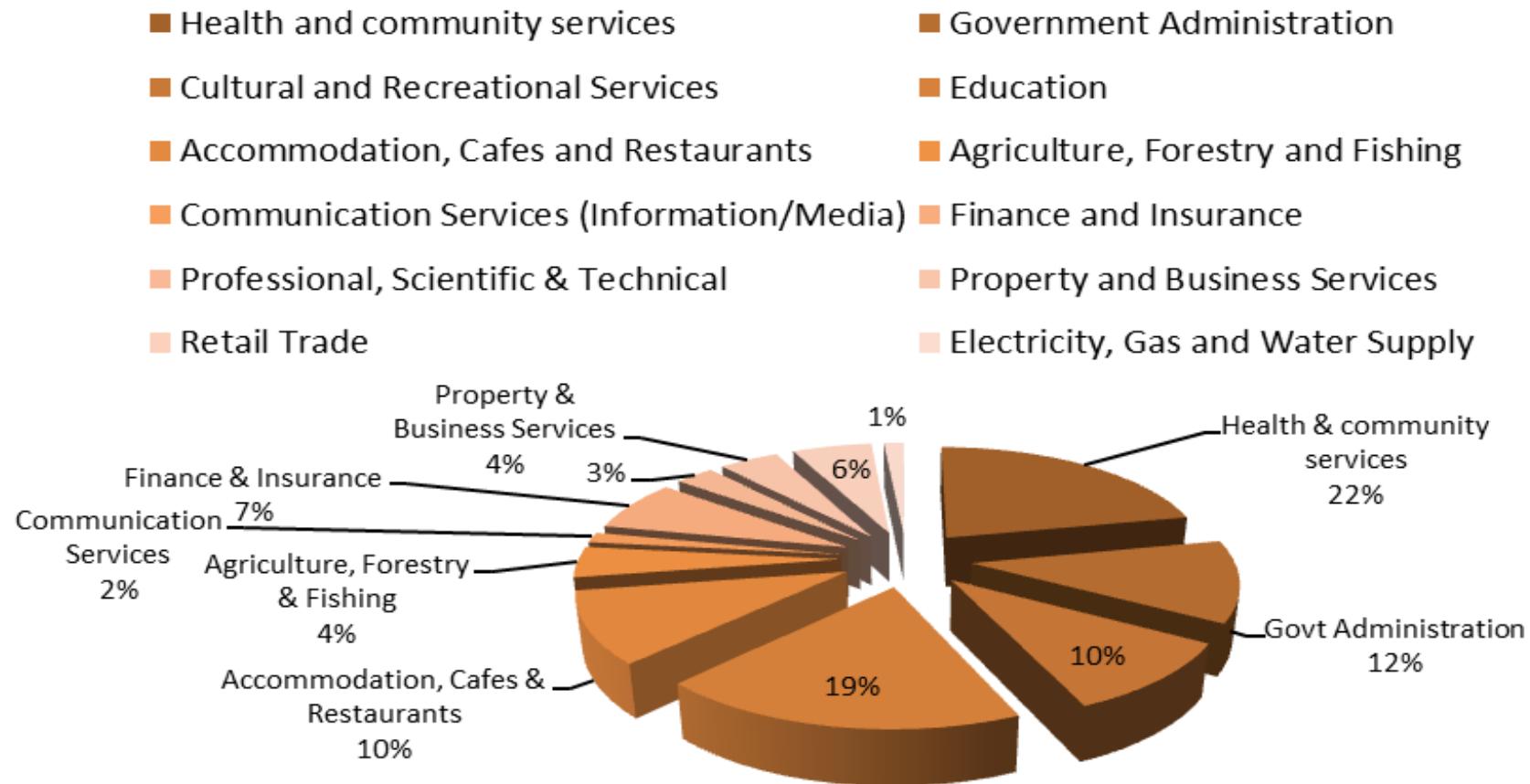
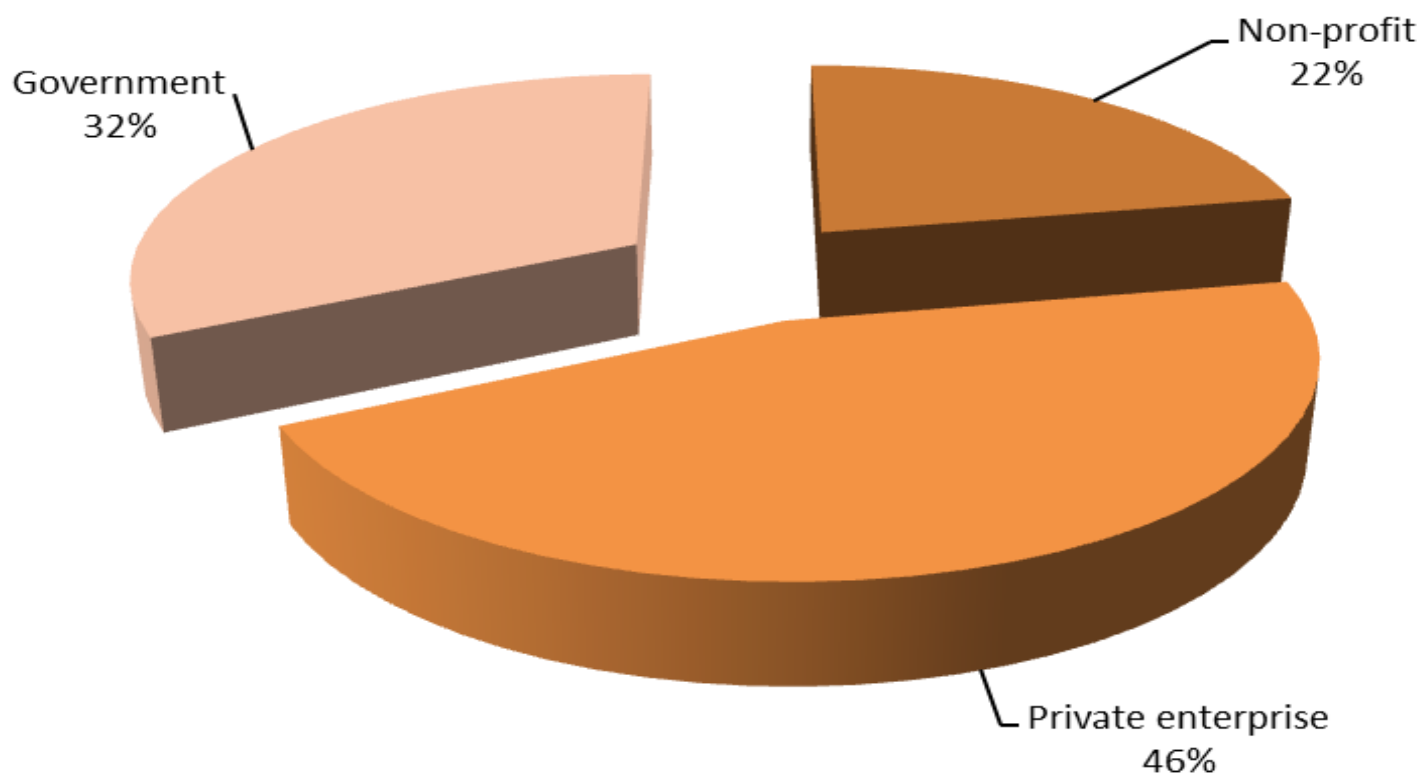


Figure 2: Complaints alleging breaches on the basis of pregnancy and/or family responsibilities by organisation type



There are a number of factors that impact on the nature of complaints received by me.

Tasmania has the lowest labour force participation rate of all states and territories and Tasmanian women are among the most poorly connected with the workforce anywhere in the country. In February 2012, there were approximately 236,000 people employed in Tasmania. Of these 84,500 people were employed on a part-time basis. This amount to almost 36% of the total number of Tasmanian employed, and is the highest proportion of part-time employed in Australia. Of those who are employed in Tasmania, 54.2% of women work on a part-time basis compared with 19% of men.¹

This in turn is reflected in the proportion of those in the workforce who have access to paid leave entitlements. As a November 2009, only 62% of employed Tasmanians had access to paid leave entitlements.²

The high proportion of women in families entering into a work arrangement in order to care for children also heightens the vulnerability to discrimination. As a June 2008, less than 40% of males in families had some kind of work arrangement which enabled them to look after children, whereas over 70 per cent of women had entered into a work arrangement to do so. These arrangements included flexible working hours, part time work or working from home.³

At the same time, Tasmania has the largest proportion of children less than 15 years of age living in lone-parent families (24.5%) of all states and territories.⁴ This compares with a national rate of around 19%. Lone-parent families are more likely to face economic and social disadvantage and lone parents face significant challenges in balancing work and family responsibilities. The overwhelming majority of lone-parent families are headed by women.

Low workforce attachment and high rates of part-time work might, because of the insecurity for workers and prospective workers, in part explain the low rate of complaints based on pregnancy or parental responsibility received by my office. I believe, however, there are other factors that also contribute to a reluctance to pursue cases of discrimination in this jurisdiction.

Some insights are available in cases where a complaint has been made and later withdrawn. In at least one recent complaint made to my office, the complainant decided not to pursue her case because she was busy with her baby and hadn't had time to think about the complaint or the processes surrounding it.

¹ Australian Bureau of Statistics, *State and Territory Statistical Indicators 2012* (Cat No. 1367.0)

² Department of Premier and Cabinet, *Women in Tasmania 2010 – Information Series*, <http://www.dpac.tas.gov.au/divisions/cdd/information_and_resources/women_in_tasmania_2010_information_series> at 30 January 2014.

³ Australian Bureau of Statistics, *Tasmanian State and Regional Indicators, December 2010* (Cat No. 1307.6) see table 7

⁴ Australian Bureau of Statistics, *State and Territory Statistical Indicators 2012* (Cat No. 1367.0)

This is a familiar theme. The time and energy required to make a complaint against discriminatory behaviour and engage in the subsequent complaint process often becomes too much of a burden for women who are already juggling significant new responsibilities. This is particularly the case when the complainant is faced with well-resourced respondent organisations with the capacity to engage legal representation and other support. This is a matter that requires further consideration by discrimination authorities and could well benefit from more creative and flexible procedures and options for supporting women to engage in complaints procedures.

The following sections of this submission provide information on the complaints received by me since 2010. I have structured these around the major stages where employment intersects with pregnancy and family commitments.

3. Discrimination in recruitment

Consistent with the provisions of the federal *Sex Discrimination Act 1984* (Cth), the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) makes it unlawful for an employer or potential employer to discriminate on the basis of pregnancy or family responsibilities unless the discrimination is based on a genuine occupational qualification or requirement in relation to a particular position or where the supply of special services or facilities would impose unjustifiable hardship.⁵

Pregnancy as defined under the Tasmanian Act includes child-bearing capacity. Family responsibilities include responsibility for the care or support of a child who is wholly or substantially dependent; or any other immediate family member who is in need of that care or support.

As the following case studies illustrate, complaints received under the Tasmanian Act include situations where the complainant has alleged that a position has not been open to them, or they have been discouraged from applying for a position, on the basis of their status as women who are, or may potentially become, pregnant.

Complaint of pregnancy discrimination (12/08/038)

Ms A received information about a part-time position advertised for 20–25 hours per week. The information regarding the position indicated that the work could be undertaken from home and that the hours were flexible.

Ms A contacted the organisational respondent seeking information in order to submit an application. The individual respondent told Ms A the position would be difficult to undertake if a new born baby was at home. Ms A had not said she was pregnant and it became apparent that the respondent had found this out by reviewing her profile on Facebook.

When Ms A advised that childcare was not an issue and had already been arranged, the respondent told her again that the role would not be suitable for her situation.

In resolving the complaint, the individual and organisational respondent both apologised to Ms A and affirmed their commitment to workplace diversity.

⁵ *Anti-Discrimination Act 1998* (Tas) ss 27(1)(d) and 28.

Complaint of discrimination on the basis of family responsibilities in recruitment (12/10/020)

Ms B answered an advertisement for a casual position. On ringing the prospective employer regarding the job, the first question she was asked was if she was married or had children. She asked if this was relevant and did not subsequently get an interview for the role. Ms B believed that she was not afforded an interview because of her family responsibilities.

In resolving the complaint, the respondent apologised, agreed to have discrimination training; and made a \$500 donation to a charity of Ms B's choice.

Complaint of discrimination on the basis of family responsibilities in recruitment (13/04/047)

Ms C was asked by one of the selection panel at a job interview for information about her age, marital status and whether she had children. She answered the questions but also commented that such questions should not be asked. Ms C subsequently wrote to the organisation to reiterate her concerns about these questions being asked. She was subsequently advised in writing that she had been unsuccessful.

Ms C believed that she was unsuccessful in her application because she disadvantaged by the questions that were asked: both by her answers and by the impact being asked these questions had on her state of mind in the interview.

In resolving the complaint, the respondent apologised, agreed to review its policies and procedures, and arranged for employees to attend discrimination training conducted by the Office of the Anti-Discrimination Commissioner.

Complaint of pregnancy discrimination (12/05/067)

Ms D was an employee of a catering company, Z Co, and the individual respondent was the manager of Z Co. Z Co had previously had a contract with larger company, Y Co, but had recently lost this contract and the company taking over the work, X Co, offered interviews to all interested staff members of Z Co.

The interview schedule for employment with X Co listed the names of all staff members except Ms D. Ms D asked her supervisor why her name wasn't on the list and was told that the manager had allegedly said words to the effect that 'she is pregnant and showing and who would want to employ a pregnant woman'.

Ms D missed out on an interview with X Co, and therefore on the opportunity for continuing work.

Z Co and the individual respondent denied discriminating against the complainant on the grounds of pregnancy. In resolving the complaint, Z Co apologised to Ms D and paid her \$1,600. Z Co confirmed that Ms D would continue as an 'employee' in the casual pool.

4. Employment and workplace adjustment

Discrimination on the basis of pregnancy or family responsibilities often arises in situations where an employing body fails to make reasonable adjustments or where the capacity or treatment of the person is different based on assumptions about their particular circumstances. The following case studies provide information about complaints to my Office in situations where hours have been altered or reduced; requested workplace adjustments have been refused; flexible working arrangements denied; or positions adjusted in some way that is perceived to be detrimental to the complainant.

In the case of Ms B, for example, the terms and conditions of her employment were allegedly altered as a result of her pregnancy. In the case of Ms J the allegations centred on the failure of the workplace to allow adjustments that would have accommodated the restrictions arising from her pregnancy.

Complaint of unlawful discrimination on the basis of pregnancy during employment (13/05/004)

Ms E alleged that following disclosure of her pregnancy her hours of casual employment were progressively reduced from around 20–25 hours per week to 8–10 hours per week. The complainant was of the view that her pregnancy had not impacted on her ability to undertake her normal duties. She had been told that the reason for her hours being cut was because she was pregnant.

Ms E decided not to pursue her complaint after her baby was born because witnesses were unwilling to assist due to fear in relation to their own employment.

Complaint of unlawful discrimination and offensive conduct on the basis of pregnancy during employment (11/10/004)

Ms F alleged that her performance was criticised when her employer raised concerns that she was not undertaking duties that would require her to lift heavy objects while pregnant. Another staff member had offered to assist with lifting tasks, in return for which the complainant undertook alternative duties for her.

Ms F's employer also accused her of forgetting things, such as not locking a secure drawer or closing the cash register after each sale, forgetting to turn lights off and not helping to rotate stock.

Ms F advised that as she was pregnant she found it hard to lift and reach stock because it is located at waist height, three rows back and at times stacked seven high. The

requirement to lift stock was only part of her duties and she did not have any difficulty doing other tasks.

Her employer suggested that she find a job that was not as physical. On the basis of the remarks made to her the complainant effectively resigned from the position.

In resolving the complaint, the respondent agreed to apologise, ensure that all staff undertook discrimination training and agreed to make a payment to Ms F in lieu of lost income arising out of the loss of employment and the circumstances of the resignation.

Complaint of unlawful discrimination and offensive conduct on the basis of pregnancy during employment (12/09/023)

When she was 18 weeks pregnant, Ms G advised her manager that she was unable to lift boxes because it was getting too difficult. She provided a doctor's certificate to this effect. Her supervisor questioned the doctor's decision and whether Ms G should work through to the date she proposed to commence maternity leave, as the supervisor did not think Ms G was capable. The supervisor proposed to reduce Ms G's shifts as a result. When the complainant made suggestions regarding alternative arrangements for undertaking the work she felt she was no longer able to do, the supervisor stated that it was not the employer's problem that Ms G was pregnant and it was not their job to pick up her tasks.

In resolving the complaint, Ms G's employer agreed to review its grievance and complaint processes and improve communication between staff and management.

Complaint of unlawful discrimination and offensive conduct on the basis of pregnancy during employment and return to work (13/02/039)

Ms H worked at a clinic. She complained that when she told management that she was pregnant the response of her supervisor was to berate her and remind her that she had told them she would not get pregnant for at least 12 months. Ms H subsequently suffered a miscarriage. Later in the year Ms H again became pregnant and the response was 'not again...you promised'. At a meeting with management, Ms H was told that if she had been employed with the practice for four years or more it would have been acceptable and that they could not have someone working with them who was not concentrating. The complainant's hours were cut and her job responsibilities altered, which resulted in reduced pay. Ms H was told if she didn't accept the proposal, a job would no longer be available to her. She was offered 18 weeks' maternity leave and not the six months she requested. Ms H's tasks were allocated to a new person whilst she was still working.

On return from maternity leave, Ms H was initially offered reduced hours. After complaining to the head of the organisation about her treatment, she was informed that there was no suitable vacant position and that her previous job had been abolished.

In resolving the complaint, the respondent organisation agreed to improve its policies and practices; provide appropriate references and documentation of work history; and pay Ms H \$5,000.

Complaint of unlawful discrimination and offensive conduct on the basis of pregnancy during employment and return to work (14/01/023)

Ms C was initially employed as a receptionist and later project administrator in an building industry company, B Co. She advised in her complaint that she had been subject to a series of insulting, offensive and humiliating comments by a Director of B Co. over a period of months prior to becoming pregnant, including being referred to as 'Miss Fat Guts' and being told that her online profile was not liked because her picture was not pretty enough.

Ms C alleges that after she advised the Director that she was pregnant she was asked to become an employee on a new contract with a company that B Co. had started with another firm. Mrs Cairns was the only B Co. employee asked to do so and she believes this was because she would not have a return to work guarantee following her maternity leave (as she would have less than 12 months continuous employment with the new employer). She felt coerced into making this move.

She alleges that she was pressured to supply dates for her maternity leave as early as 20 weeks into her pregnancy, despite being unsure about the dates of the annual closure of the company. She supplied dates as requested and proposed a part-time return to work arrangement supplemented by possible work from home.

After her maternity leave commenced (and several months after she had made the request) Ms C was advised by e-mail that her proposal to return to work part-time was rejected despite the fact that a casual officer hired to replace her was only required for 6 hours per week. No consideration was given to other flexible arrangements (such as job sharing) or her proposal that some tasks be undertaken from home.

5. Return to work

Requests for flexible work arrangements form part of national employment standards that commenced on 1 January 2010 for all employees who have been in the position for a period of 12-months or more who are covered by the national workplace relations system. The standard includes the right to request a move to part-time employment. This can only be refused on reasonable business grounds.

Several complaints have been made under the Tasmanian Act which include allegations of discrimination on the basis of family responsibilities associated with a request to transition to part-time work or to working arrangements that can better accommodate parental responsibilities.

Complaint of unlawful discrimination on the basis of parental status, family responsibilities and disability (13/03/022)

Ms I alleged she was discriminated against on the basis of her parental status and family responsibilities, and disability, after she returned to work from maternity leave. The alleged discrimination included not getting a job because she was said by a manager to be 'finding her feet' after returning to work from maternity leave; alleged difficulty she had balancing work and family responsibilities (she took some leave to care for her child) being raised in a performance review; and delay in formalising flexible work arrangements. Ms I resigned from her job.

In resolving the complaint, the respondent agreed to provide a written statement to Ms I acknowledging her distress arising out of the matters she raised in her complaint, as well as making a payment of \$6,000 for Ms I's legal costs.

Complaint of unlawful discrimination in relation to family responsibilities (11/08/003)

Mr J was a department manager with a large retailer, W Co. He was pressured to change his roster and work on weekends even though it was known that he had responsibility for caring for his children at that time. Mr J was told that if he did not agree to the new arrangements he would be demoted to a lesser role.

In resolving the complaint, W Co and the individual manager named in the complaint provided a letter of regret to Mr J and W Co arranged for Mr J's transfer to a different location on the same terms and conditions as his previous employment with a suitable roster.

**Complaint of unlawful discrimination in relation to family responsibilities
(11/0/042)**

Ms K was granted permission to work for a specified period of hours from home following her return to work after maternity leave. This allowed her to undertake certain aspects of her job in the evening. After a little more than a year under these arrangements, Ms K received a letter from her employer, U Co, terminating the working-from-home arrangement. There was no discussion regarding the decision to terminate Ms K's working-from-home arrangement and no prior warning was given.

At conciliation, agreement was reached to trial an arrangement whereby Ms K would be required to undertake working-from-home duties on a specified day, during business hours.

After a short trial it was clear to Ms K that this arrangement was not suitable. Dissatisfied with the lack of flexibility with the arrangement she terminated the trial and withdrew her complaint, returning to work only from the office.

6. Dismissal and retrenchment

Unfair dismissal and general protections provisions of the *Fair Work Act 2009* (Cth) provide an avenue for the consideration of some claims where dismissal, retrenchment or redundancy may be linked to pregnancy or parental responsibilities. However, time limits apply and not all workers are eligible, including those employed on a casual basis or fixed-term contract.

The Tasmanian Act also provides an avenue for complaint where employment has been terminated because of pregnancy or due to the employee having family responsibilities. While the statutory time limit of 12 months to complain applies⁶, there is no exclusion on the basis of the person's employment status, such as casual or fixed-term.

Deciding which jurisdiction is relevant in the circumstances can be complex. In general terms matters related to dismissal or retrenchment are referred by my office to the Fair Work Commission in the first instance. The ability to consider claims outside of the time limits set under the *Fair Work Act* mean, however, that a considerable number of related matters are dealt with under discrimination law.

The following outlines the circumstances associated with complaints received under the Tasmanian Act on these matters. In a number of instances, the circumstances surrounding the cessation of employment reflect circumstances where the complainant was of the view that they had no alternative but to resign.

Section 386(1)(b) of the *Fair Work Act* provides that a person has been dismissed if they resigned from their employment, but were forced to do so because of conduct engaged in by their employer (often referred to as 'constructive dismissal').

Complaints made under the Tasmanian Act based on actions by employers in relation to pregnancy or return-to-work arrangements often involve circumstances that meet the criteria for being considered constructive dismissal.

⁶ *Anti-Discrimination Act 1998* (Tas) s 63. Section 63(2) provides that a complaint 'made after the 12-month time limitation has expired' may be accepted by the Commissioner 'if satisfied it is reasonable to do so'.

Complaint of unlawful discrimination on the basis of pregnancy (13/07/022)

Ms L had worked with her current employer for 8 years. Shortly before finding out she was pregnant she had signed a contract to take on a management position with the employer for 12 months.

When Ms L informed her employer of her pregnancy, she was told she would need to provide a medical certificate from her doctor certifying that she was able to work beyond the end of the second trimester of her pregnancy. Ms L was also told that she had to go to Centrelink to access the recently enacted federal entitlement to paid maternity leave and that her accrued leave entitlements would be paid in a lump sum rather than fortnightly as she requested. When she questioned this, she was told it was because she would no longer be employed. Ms L was asked to sign an agreement in which she would be acknowledging that she would be returning on a 'casual' basis despite her substantive position being a permanent, part-time role.

Ms L was asked to hand over keys and information to enable her employer to access her computer files.

After approaching Fair Work Australia, Ms L wrote to her employer advising of her legal entitlement to return to her substantive position. This arrangement was confirmed, but Ms L felt that the stress she had encountered during the period of her pregnancy had not allowed her to enjoy this period of her life and created additional stress on her family.

Complaint of unlawful discrimination in relation to family responsibilities (12/01/005)

Mr M made a formal request to his employer, V Co, for flexible work arrangements for a period of 18 months to enable him to take on increased family responsibilities in respect of the care of his infant son when his wife returned to work. V Co refused to accommodate Mr M's request despite similar arrangements being made for other, female employees. Mr M was asked by V Co to submit a written resignation and did so resulting in the termination of his employment.

In resolving the complaint, V Co made a payment to Mr M of \$20,000 and provided him with a statement of service and access to paid counselling sessions. V Co also agreed to ensure that its policies and procedures promoted flexibility and assisted employees with family responsibilities and that all managers attended discrimination awareness training.

Complaint of unlawful discrimination in relation to family responsibilities (12/04/051)

Ms N alleged discrimination on the basis of family responsibilities in relation to actions of her employer, T Co, when she asked to return to work on a part-time basis after 6-months' maternity leave. T Co did not respond to the request before Ms N's return to work. Ms N commenced working on a part-time basis, subject to review. Some two months later Ms N received a letter from T Co advising that she should recommence full-time hours. Arrangements that would enable Ms N to work extended hours from home were not accepted by T Co and it terminated Ms N's employment.

Ms N's unfair dismissal claim was resolved at a Fair Work Australia conciliation conference and as a consequence her discrimination complaint was withdrawn.

**Complaint of unlawful discrimination in relation to family responsibilities
(13/07/042)**

Ms O alleged that following her return to work from maternity leave she worked part time, which she understood to be a transitional arrangement before her return to her substantive full-time position. Her employer, S Co, requested that she change her part-time work arrangements so that she - attend her workplace 4 days per week, which she could not do because of family responsibilities. As a result Ms O's employment was terminated. When Ms O asked to return to her substantive role she was given no response.

In resolving the complaint, S Co paid Ms O \$5,000 and provided a letter of apology.

7. Impacts of discrimination

While it is not possible to provide information on the long-term outcomes for those who have made a complaint to me on the basis of discrimination whilst pregnant or undertaking family responsibilities, the preceding case studies disclose a number of patterns that warrant comment.

It is clear that in many situations where discrimination is alleged, the outcome for the employee has been termination of employment, either through resignation or dismissal. Whilst a number of complaints involved situations where the employment relationship had been long-standing, in many situations it is evident that the employee had tenuous links to the workplace (because of, for example, the nature of the employment) prior to becoming pregnant and these were likely to be weakened further by the pregnancy and the demands associated with raising a family.

The risk of losing employment as a result of pregnancy impacts on everyone in the workforce, but primarily disadvantages women.

This is evident when variations in labour force participation rates for men and women in Tasmania are examined. Women in Tasmania in the 15–19 year old age bracket have higher workforce participation rates than men, but by the time they reach the 25–34 year age group, the participation rates for women are almost 18 per cent below that of men and this disparity continues throughout their working life.⁷

The resulting low levels of work attachment mean, for example, that women in Tasmania are much more likely to live in poverty or to have significant disruptions to their careers resulting in broader social and economic pressures in both the short and longer terms.

For example, Tasmanian women have significantly lower levels of superannuation account balances than men and are more likely to not have any superannuation at all. In 2007, almost 30% of Tasmanian women had never had a superannuation account compared to 19% of men.⁸

⁷ Department of Premier and Cabinet, *Women in Tasmania 2010 – Information Series*, <http://www.dpac.tas.gov.au/divisions/cdd/information_and_resources/women_in_tasmania_2010_information_series> at 30 January 2014.

⁸ Ibid.

Despite low complaint numbers, it is clear that discrimination on the basis of pregnancy continues to be a significant risk for women and for men seeking to share in parenting duties. This is symptomatic of a community where out-dated perceptions continue to be held and employers lack an understanding of their responsibilities.

It is important to go beyond minimum legal requirements, to develop best practice approaches that recognise the importance and longer-term consequences of flexibility and ongoing attachment with the workforce.

This includes developing protocols that encourage employers to establish written policies that continue to engage women whilst they are out of the workforce and set out clearly for those who are departing the workforce for maternity leave what arrangements and conditions they may expect on return.

I note in this respect the significant work that is being undertaken by the Male Champions of Change network to promote cultural change within large employing organisations. The examples that are set at this level will be invaluable as change is driven throughout the economy.

Similarly, the provisions of the *Workplace Gender Equality Act 2012* (Cth) will drive change in those organisations with 100 or more employees, particularly with regard to promoting an improved understanding of discrimination in relation to family and caring responsibilities.

More challenging, however, are the patterns of discrimination being felt by women in smaller workplaces or where, as I have described above, the attachment to their employment is often tenuous at best.

Small businesses in particular often have limited resources and perceive a greater economic rationale to discriminate against employees on the basis of pregnancy or family responsibilities. It is in these situations that the complexity of discrimination claims is most evident. Common to all employers, however, is the need to drive attitudinal change in a way that addresses inflexible attitudes and misconceptions about pregnancy and return-to-work options.

Attitudinal change must, however, also be accompanied by the removal of remaining structural or systemic discrimination.

Under the Tasmanian Act, indirect discrimination takes place if a condition, requirement or practice is imposed which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group who share, or are believed to share, a prescribed attribute or a characteristic imputed to that attribute.⁹

⁹ *Anti-Discrimination Act 1998* (Tas) s 15.

The concept of reasonableness, as an exclusion from or defence against unlawful discrimination, provides an avenue for employers to justify actions in particular cases. To do so, the employer is required to establish that the action they took, or the policy they implemented was reasonable given the circumstances at hand. In effect that it was necessary, proportionate, least discriminatory and that actions to mitigate the effect of any disadvantage were not feasible. In *Hickie v Hunt and Hunt*, for example, the imposition of a requirement that the complainant work full time in order to maintain her appointment as a contract partner was found to have imposed on her a condition or requirement that was unlawfully indirectly discriminatory.¹⁰

Whilst the general protection provisions of the *Fair Work Act* increase the protections available to those seeking to manage work and family life, there remains significant gaps in the coverage, particularly for those employment is on a part-time or casual basis.

As these are more likely to be women and are the people who have the lowest rates of job security and tenure, it is important that particular attention is paid to achieving better—less discriminatory—outcomes for this group of the workforce.

This must include action to enable more women to maintain connections with the workforce to avoid the impacts of loss of wages and seniority that often arise from significant periods of absence from the workplace. This includes the provision of more flexible and innovative child care arrangements, increased emphasis on maintaining connections with the workforce during periods of absence, and the increased use of incentives through the family allowance and related social welfare safety nets to encourage ongoing attachment to the workplace and enable women to more comfortably combine work and parenting.

Important to this is the promotion of increased acceptance and visibility of male employees engaging in actions that combine their employment with their parental responsibilities. Universal access to leave following the birth of children, together with access to parental leave arrangements for both men and women will have a role to play in normalising flexible approaches to combining work and family responsibilities for both mothers and fathers.

The precarious nature of work for many women has done little to decrease gender inequality or formalise a more equitable distribution of parental responsibilities across gender.

No single intervention on its own is likely to be sufficient. But ensuring that policies do not act as a disincentive to improved best practice approaches will assist in this regard. This approach is consistent with the objectives of *Convention on the Elimination of Discrimination Against Women* and commitments adopted in the *Beijing Declaration and platform for Action* passed

¹⁰ Susan Halliday, *Pregnancy Discrimination: Hickie v Hunt and Hunt* (AHRC 1998) at <www.humanrights.gov.au/news/speeches/pregnancy-discrimination-hickie-v-hunt>.

by the fourth World Conference on Women in 1995. Strategic Objective F.6. of the Platform for Action requires Governments to:¹¹

- a) Adopt policies to ensure the appropriate protection of labour laws and social security benefits for part-time, temporary, seasonal and home-based workers; promote career development based on work conditions that harmonize work and family responsibilities;
- b) Ensure that women and men can freely choose between full- and part-time work on an equal basis, and consider appropriate protection for atypical workers in terms of access to employment, working conditions, and social security;
- c) Ensure, through legislation, incentives and/or encouragement, opportunities for women and men to take job-protected parental leave and to have parental benefits. Promote the equal sharing of responsibilities for the family by men and women, including, through appropriate legislation, incentives and/or encouragement, the facilitation of breastfeeding for working mothers;
- d) Develop policies, inter alia, in education to change attitudes that reinforce the division of labour based on gender in order to promote the concept of shared family responsibility for work in the home, particularly in relation to children and elder care;
- e) Improve the development of, and access to, technologies that facilitate occupational as well as domestic work, encourage self-support, generate income, transform gender-prescribed roles within the productive process and enable women to move out of low-paying jobs;
- f) Examine a range of policies and programmes, including social security legislation and taxation systems, in accordance with national priorities and policies, to determine how to promote gender equality and flexibility in the way people divide their time between and derive benefits from education and training, paid employment, family responsibilities, volunteer and other activities and to promote the benefits from these activities.

The Beijing Platform also calls for the private sector, non-governmental organizations and unions to apply measures regarding temporary leave, changes in hours of work, educational and informational campaigns, and the provision of services such as child care at the workplace and flexible working hours.

It is clear that much more needs to be done in Tasmania to fulfil the commitments made in the *Beijing Declaration and platform for action*. This will be assisted through national public leadership working in concert with local initiatives to increase awareness by all employers of the rights and obligations found in discrimination laws and to identify strategies to support progressive change.

¹¹ United Nations, *Beijing Declaration and platform for action* (adopted at the 4th World Conference on Women, October 1995) available at <http://www.un.org/womenwatch/daw/beijing.pdf> (strategic objective F.6.)

One aspect of the complaint resolutions identified above that may be worthy of further investigation in the national review is the outcomes achieved by male complainants compared to female complainants.

Appendix A: Sample of enquiries

P called on behalf of his wife, who joined a company about a year ago as a permanent employee. The company is making redundancies and she was offered on, but declined. She has told her employer that she is 4 months pregnant and the employer has forced her out by saying the business is downsizing. There were only two women in the office out of ten and it was only her and the other woman that are forced to leave.

Q called on behalf of his wife who has been discriminated against because she announced her pregnancy. Q's wife is a full-time para-professional employee. Some tasks of her role put her at risk. Her position is being made redundant and she has been offered a part-time non-professional position on less pay. She was asked to come up with options to accommodate her pregnancy and these options were disregarded.

R rang about pregnancy discrimination. Ever since she disclosed her pregnancy there have been problems at work. She was reprimanded because she did not handle certain cartons. R has effectively been stood down from work and has been told if she wants more work she has to reapply for her job. She has also had problems with Centrelink because of incorrect information provided by her employer.

S contacted the office as she had been having issues at work. She had been employed full time for over 2 years and was 25 weeks pregnant. When S asked about getting a new uniform (part of her contractual entitlement) she was told 'I can't help it if your tummy is getting bigger' and was told she would have to pay for the uniform herself. She also had her sick leave entitlement recalculated to take account of her prospective absence from work on maternity leave on the basis that she was 'not working a full year'

T called about her employment. She works a few days in a swimming pool. When T was 20 weeks pregnant, she was told by her manager that she might want to think about giving the job up as some people may think 'pregnant women look gross'.

U is 35 weeks pregnant and doing a hospitality apprenticeship. The current block is 10 weeks. U is employed with a local cafe. At the training provider, the teacher said he was concerned because she was 'late into pregnancy'. The teacher told U she is an occupational health and safety risk but did not detail what the risks are. U is working in the kitchen and has not had any concerns: there is nothing heavy she has to lift and while it is true that she could fall over that is no different to anyone. The teacher has excluded U from the training component of her apprenticeship.

V is employed at a local hotel. She is four and half months pregnant. She told her boss that she could not do 'drop boxes' anymore. Drop boxes are boxed located under the poker machines and can get very heavy, for example, on one occasion V had to lift a drop box containing \$600 worth of \$1 coins. The manager of the hotel said that V was

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'pregnant, not terminally ill'. When V talked to the manager about taking maternity leave, he made comments about her not lasting that long.

W is a manager at a retail store working 9 hours a day. She has been really sick during her pregnancy and has always had a doctor's certificate for her sick leave. She recently spoke to her boss and was told she should be looking at her working times.

X called on behalf of her friend. Her friend was denied employment on the basis of pregnancy. The friend does seasonal/casual work and had an expectation she would work for the same employer but they said they didn't want her to because she is pregnant.

Y contacted the office to describe her situation at work. She said that during the course of her pregnancy her manager has threatened me with formal warnings if she continues to come in late (sometimes she is up to 15 or 20 minutes late due to morning sickness, which she has had her whole pregnancy). She has provided a letter from her doctor as requested stating that she is fit for fulltime work. She has been told by her manager that she takes too many toilet breaks and too many breaks to go outside to get fresh air (she goes outside no more than twice a day for less than 10 minutes). She has been excluded from weekend overtime and was told that this was because of her 'medical condition'. Her manager has complaint that she has her priorities wrong, that she is not putting her team first when she needs to book medical appointments or have a day off work sick.

Z is pregnant. She recently attended a workplace meeting for her section. The young man who manages her said, 'as you know we are reviewing and analysing our section for redundancies...' Z did not know this, she had not been notified. She was told that 'due to a restructure we have to make two people redundant and you are one'. Z believes she has been selected for redundancy due to her pregnancy as the manager had several months earlier said to her, 'don't you go getting pregnant'.

A works at a retail outlet. She is pregnant and is no longer getting regular shifts. Over the Christmas period the manager did not give A shifts and told her it would be too busy and that she would not be able to cope due to her pregnancy. The manager has now told A that she is not being given shifts due to her work performance and (separately) that she is getting less shifts due to her being unavailable on occasion. A has sometimes been unavailable due to care for her 2-year-old son. Around 2 weeks before the enquiry, the manager told A that she can only work at the shop counter as she 'wouldn't be able to handle the shop floor'. A believes that this is because of her pregnancy. A is the only mother working at the store and she believes that she is the first mother that they have hired.