

Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia, APESMA)

Australian Human Rights Commission

Supporting Working Parents: Pregnancy and Return to Work

National Review

To: Australian Human Rights Commission

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Introduction

Professionals Australia formerly the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is an organisation registered under the *Fair Work Act 2009* (Cth) representing over 25,000 professionals including professional engineers, scientists and information technology professionals throughout Australia.

The Association represents professional employees in a variety of industries and sectors, including the public sector, statutory authorities, utilities, local government, manufacturing, construction, mining and the private sector throughout Australia.

Many of our members occupy very senior positions within their companies, including for example the positions of Chief Executive Officers, General Managers, Senior Managers, Chief Engineers, Principal Scientists and Senior Executives. We are the only industrial association exclusively representing the industrial and professional interests of these groups.

The Association's Workplace Advice and Support team has been receiving a steady growth of complaints and inquiries from members both male and female, although predominantly female member base, with respect to experiencing workplace discrimination related to pregnancy and parental leave discrimination. These experiences have been brought to our attention by many of our professionally employed members including senior level female employees.

From these complaints it appears workplace discrimination in this area is evident at three key stages: during pregnancy, when a woman is on maternity leave and when she returns to work.

The Association has responded to select questions in the Issues Paper where we felt our members could make insightful contributions. Our submission is not overly statistical; instead it will divulge personal experiences as shared by those members affected by this form of discrimination coupled with the experiences of industrial staff employed by the organisation.

Finally we propose some areas of possible law reform to eliminate workplace discrimination in this area.

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

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

From the survey conducted by the Association members report workplace discrimination in the following areas as a result of their pregnancy or the taking of parental leave:

- demoted;
- made redundant;

“People are still being fired under the guise of “organisational restructure” While some of this may be legitimate and in no way relating to pregnancy (just an unhappy coincidence) I don't believe all cases are so.” **Professionals Australia member recounts her experience of seeing fellow colleagues losing their positions under the guise of “redundancy” after taking maternity leave - 22 November 2013 Professionals Australia member survey.**

- asked discriminatory questions at interview stage;
- denied flexible work arrangements after returning to work;

“... some senior level female employees are the worst against new mothers returning to work. After asking for flexible work arrangement to assist me to look after my sick child I was told: “I have three kids and you do what it takes to get back to work even when they are sick.” **Professionals Australia member recounts her experience after asking for flexible work - 22 November 2013 Professionals Australia member survey.**

- during pregnancy – low tolerance from management as a result of the female worker taking pregnancy related sick leave;

“... I fell pregnant in August last year (2013) (currently 25 weeks). And I told my employer, as I knew I would need some time off to attend appointments etc. At the beginning of December, I became a registered pharmacist (after previously working for the same employer as an intern, and student). My employer made me casual stating that she was unable to pay me penalty rates as a pharmacist, however she stated that she would continue to provide me with full time hours of 38-40 hours per week, which I agreed on. However today my employer has told me that she doesn't require me to work as much as she will work more, and further to

this, has offered many of the available hours to another (casual) pharmacist, stating that the other pharmacist will be there longer than me (eg. due to maternity leave) and also the fact that I have appointments to attend for my pregnancy (which I have always tried to work around my hours at work). I feel as though I am being offered far less hours than agreed on because I am currently pregnant and need to attend antenatal appointments as well as taking maternity leave.” **Professionals Australia member shares her experience in an email to us on 30 January 2014.**

- excluded from team meetings;
- no communication regarding significant changes with the employee whilst on parental leave;
- loss of promotion opportunities;

“I personally have lost a promotion opportunity to a senior role. Whilst on maternity leave (baby very young) I applied for a job for a senior role in my section and was told I couldn't have the position because I intended to return to work part-time. The job subsequently went to a female work mate with less experience who 2 years later became pregnant and returned part-time! Seven years later I still work at the same level I was per-pregnancy and continue to work part-time.” **Professionals Australia member shares her experience of being denied promotion due to taking parental leave - 22 November 2013 Professionals Australia member survey.**

- unlawfully terminated;
- workplace bullied;

“Intimidation, Bullying and Harassment from Employers and trying to sack females when they are pregnant in the workforce, making females feel less adequate in the workforce and employers true to bully you out of the organisation before starting maternity leave.” **Professionals Australia member shares her experience of being subjected to workplace bullying as a result of taking maternity leave- 22 November 2013 Professionals Australia member survey.**

“I have female friends who have been discriminated by their employers when they are notified that they're pregnant they try to bully you out of the work force and do not engage you as part of the organisation.” **Professionals Australia member shares her experience witnessing others subjected to workplace bullying as a result of taking maternity leave- 22 November 2013 Professionals Australia member survey.**

- transferred to a lesser position;
- removed from mid-level and senior positions;
- denied roles that have travel components;
- directly discriminating against employees with school age children through scheduling meetings out of hours;
- ‘minimising’ employees statutory entitlements as a result of taken parental leave or severance pay;

“Clearer intent particularly with IR parental leave section and continuity of service (when my full time role was made redundant again 2013, I was told because I worked part time temporarily to accommodate extended parental leave that my entire payout would be part time - what a load of rubbish that is, I held two positions to accommodate return to work maternity provisions till school age - substantive role with replacement employee and temp part time for me until school age when I would go back to my substantive role.”
Professionals Australia member shares her experience of losing out on statutory entitlements due to having taken maternity leave - 19 November 2013 Professionals Australia member survey.

- unfairly performance managed;
- denied lactation facilities to facilitate breastfeeding and work;
- whilst pregnant seen as an “inconvenience” to business;

“The new laws appear to be offensive to older women and men who had children previous to the rules – they say “well we didn't get these entitlements when we had kids so why should you and that is a challenge when trying to communicate your needs to them.”
Professionals Australia member shares her experience dealing with senior management regards taking maternity leave- 19 November 2013 Professionals Australia member survey.

- perceived not to be “committed” to the job/employer;
- denied part-time work;
- the application process for requesting flexible work is complicated and not communicated well to employees;

“Our work place has a 'flexible work arrangement' policy, but under it any arrangement must be approved by the GM and then can only be made for a 3 month period - and then a application has to be

made again and approved again. It is very arduous.” **Professionals Australia member shares her experience after requesting flexible work- 19 November 2013 Professionals Australia member survey.**

- denied work from home arrangement; and

“The Right to Request flexible work needs to be strengthened. If an employer knocks it back you have no comeback, and instead have to move jobs. Encourage employers to offer lactation breaks and facilities so women can combine breastfeeding and work. This would make for better health outcomes for society”. **Professionals Australia member shares her suggestions on improving the current laws - 19 November 2013 Professionals Australia member survey.**

- denied further training and professional development.

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?

The Association has not personally collected statistical data on the prevalence and nature of discrimination in relation to pregnancy at work and returning and returning after parental leave. However, the Association is cognisant that the inquiry was prompted by the fact that in 2011 to 2012, 21% of complaints under the Sex Discrimination Act received by the Commission related to pregnancy discrimination and family responsibilities.

Likewise, 21% of complaints investigated by the Fair Work Ombudsman in the same period related to an allegation of pregnancy discrimination – which incidentally was the most common complaint made to the Ombudsman.

Further, 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%).

We further note the Commission conducted a similar inquiry back in 1999 called “*Pregnant and Productive: It’s a right not a privilege to work while pregnant*”, however very little has been done in real terms to eliminate damnatory practices some 15 years later.

Topic 5 - What concerns employers?

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

The Association recognises that laws surrounding parental leave and discrimination generally are complicated; however, this should not be seen as an excuse for breaches of such laws and should not allow for an attitude of complacency. It is our recommendation that a further education and training of Human Resource personnel is required in order for employers to fully understand their legal obligations to accommodate pregnant employees and employees returning to work after parental leave. In addition we would like to see employers consult the relevant employee associations and unions in their efforts to accommodate pregnant employees or employees with family responsibilities.

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

See Q5.1.1 above.

Topic 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?

6.2 Employment laws and policies

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

Anti-Discrimination provisions in the Fair Work Act (2009) (Cth)

We understand there are at least 14 different Federal, State and Territory anti-discrimination and equal opportunity laws that are in operation throughout the country. However, the Acts which are most substantive at the Federal level are the *Racial Discrimination Act*, *Disability Discrimination Act*, *Sex Discrimination Act*,

Age Discrimination Act and the *Equal Opportunity for Women in the Workplace Act* and since 2009 the Fair Work Act.

In so far as workplace discrimination is concerned when applied to the restraining of discriminatory behaviours in the workplace, we can look towards s 351 of the *Fair Work Act* (FW Act), which states that an employer must not take adverse action against an employee, or a prospective employee on the grounds of the person's:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- family or carer's responsibility
- pregnancy
- religion
- political opinion
- national extraction
- social origin.

In addition to the FWA, the Fair Work Ombudsman also has the investigative and prosecutorial powers to initiate civil penalties against an employer who is found to be in breach of the anti-discrimination provisions in the Act.

Flexible Work Arrangements

Further to the above under Section 65 of the FW Act affords employees who have completed 12 months of service with the right to request flexible work arrangements where that employee is a parent or has carer responsibility for a child that is under school age or is under 18 years of age and has a disability. However, an employer may deny a request for flexible working arrangements on the basis of 'reasonable business grounds'. The term 'reasonable business grounds' is not defined in the FW Act, however the explanatory memorandum to the Act suggests that grounds may

include the overall effect on the workplace and the employer's business including the financial impact, as well as the impact on efficiency, productivity and customer service.

The Association would like to see employers be subject to more transparency when claiming 'reasonable business grounds' for the refusal. As the law currently stands all that employers have to do is provide written reasons for the refusal to grant flexible work arrangement without necessarily qualify the reasons for such refusal. The Association would also like to see a mechanism where employees and their representatives would be able to challenge an employer's refusal of the request when purportedly based on 'reasonable business grounds' currently such challenge is not possible short of commencing general protections proceedings.

Redundancy Considerations

As mentioned above under the federal FW Act it is prohibited to take "adverse action" against a female employee on account of a protected attribute in this context her pregnancy and family and carers' responsibilities. It is also unlawful to terminate an employee for exercising a workplace right in taking maternity leave.

Most importantly the Act requires employers to discuss any changes to her role with the employee whilst she is on maternity leave and includes a "return to work guarantee" meaning the employee has the right to return to the same position she held before taking leave and if that position no longer exists she has a right to a position nearest in status and pay to the position she held prior to taking leave. But the enforceability of these provisions tells another story.

All too often employers are refusing to make contact with mothers communicating any changes to their roles whilst they are on leave. When they do return from leave negotiating flexible work agreements or part-time arrangements are seen as a cost to business and an inconvenience.

Invariably this leads to their positions couched as having been made "redundant" – when in reality it is essentially an unlawful termination of her employment. For those

who are aware of their rights what follows is usually some form of confidential legal action resulting in meagre payout to keep quiet and the signing of a mutual non-disparagement agreement which is conditional to receive few months' pay and cease a desist and further action.

A small financial settlement can never compensate for a loss of a job, for broken careers, for dignity and personal identity that comes with being gainfully employed, for financial insecurity that ensues and for the loss of superannuation benefits.

The Association supports the view as postulated by the distinguished labour law Professor Sir Ron McCallum who recently conducted a review into the effectiveness of the FW Act had expressed a desire to see a special division dealing with human rights when it comes to discrimination at work as he sees labour law and human rights as intertwined. This would make terminating a woman's employment on account of her pregnancy or parental leave a breach of a fundamental human right as opposed to a breach of a general protection against an elliptical "adverse action".¹

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

It is our experience and the experience of our members that the following areas of law should be amended to facilitated an end to pregnancy and parental leave discrimination:

1. The *Paid Parental Leave Act 2010* (Cth) ('PPL Act') provides for a period of paid leave for parents with children born or adopted after 1 January 2011. The Act contains 'keeping in touch provisions' in Division 7 which are designed to enable employees on paid parental leave to remain connected with their workplace and assist in the transition back to work after the period of leave has ceased. However, such consultation seldom occurs. Therefore we would like to see a provision necessitating a higher level of consultation with

¹ *The Industrial Relations Society of Victoria Newsletter*, Spring 2013.

employees on maternity leave if there are to be any significant changes to their role.

2. Employers to provide easy to read and understand education material on Workplace Rights with respect to pregnancy discrimination and parental leave considerations as well as general NES rights.
3. Employers to provide training and workshop seminars on laws regarding taking of parental leave and return to work procedures.
4. Employees should have access to easy to read handbooks on work policies regarding parental leave, workplace discrimination and how to make flexible work arrangements.
5. Employers should provide employees with external resources where they may obtain further advice and support such as their relevant employee association or unions.
6. The Fair Work Ombudsman has published a good set of guidelines on pregnancy and parental discrimination. Employers without internal policies should refer their employees to these Guidelines or provide them a copy of these Guidelines prior to their taking of parental leave.
7. Employees still remain unaware as to where they can seek help if they feel they are experiencing workplace discrimination therefore employers should refer such employees to bodies such as the HREOC, VCAT or their employee association for further assistance.
8. There are two other major challenges facing women when returning from parental leave. These include: access to any childcare place, particularly in the age group 6 weeks to 2 years, where there is simply not enough places for requests made for care. The cost of the childcare and the disincentive for lower paid professions (Translating, Pharmacy) and contractors to maintain

their employment and training needs, with the high cost of childcare. The restrictive hours of childcare provision do not cater for non-standard work practices of shift workers, exporters and seasonal workers.

9. The second challenge for working women is combining breastfeeding and work. It is only recently that breastfeeding was included in the Clth Anti Discrimination Act. However there is indirect discrimination by some employers by not providing lactation breaks for women and proper facilities to privately and safely express milk or breastfeed their child. In Norway, women are given 2 hours paid lactation breaks per day. The Queensland Public Service offer lactation breaks to their public servants, but this is not a national entitlement for other workers. Further to the workplace, it would assist parents with young children if public places such as libraries, parliaments, railway stations, universities, airports, and local councils offered carers' rooms and baby change tables.

Conclusion

Professionals Australia is grateful for the opportunity to provide comment on this Issues Paper and looks forward to providing further input as the National Review progresses.