Human Rights and Equal Opportunity Commission

PREGNANCY GUIDELINES

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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

Employment

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 [redacted] for her dismissal2e26 leave.

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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 DISCRIMINAT

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.

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 ensc 0rd0.023lm160.0223c2.s ie fTw (st in speciv7.04 0 ,wc 0in speciv7.c mer

- 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).

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

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- 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

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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,

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

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.

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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

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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.

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[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.[35]

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

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 ployee nnchment

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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.

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]

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[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*

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

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]

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

- 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 positi

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).

(unreported) No. 465 of 2000, Federal Court, 8 December 2000, per Wilcox J

Principals and their agents

The federal Sex Discrimination Act also makes a principal vicariously liable for the

- 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 employer[24] about the workplace and individual employees.[25]

What is limiting or denying access to benefits?

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

2.1 Casual employees

Some casual employees do not have a legislative right to unpaid maternity leave [30] or other leave entitlements and have restricted access to the unfair dismissal and

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]

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[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.

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 exemptions[42]

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

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[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-

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.

This appendix provides information on developing appropriate pregnancy policies and

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.

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

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-

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-

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

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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.

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

  - the duty to provide training and supervision to ensure employees are safe from

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.

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.

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[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.

State or Territory anti-discrimination law[23] 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 entitled 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. A0.0413 Tc 0.1613 Tw (and indulies or only thew3.92

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:

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.

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 Tas

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)

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

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