Effective protection of pregnant women at work: Still waiting for delivery?

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This article examines how the problem of unfavourable treatment of pregnant workers has been dealt with in court decisions under the anti-discrimination provisions in the Sex Discrimination Act 1984 (Cth) and the Fair Work Act 2009 (Cth), and under rights provided under the National Employment Standards (NES). We focus in particular on the loss of employment due to redundancy to highlight particular weaknesses in the anti-discrimination protections available under both statutes and in the interpretation by the courts of pregnancy-related discrimination. While these rights can be contrasted less favourably with rights provided under the NES, the return to work ‘guarantee’ after parental leave in the NES also appears to offer only limited protection where the pre-parental leave job is no longer available. We briefly canvass several options for reform that may make pregnancy-related discrimination protections more practically effective.

Introduction

Despite the increasing participation of women in the Australian labour market, many continue to experience significant disadvantage because of pregnancy and maternity. In 2014, 55.1% of women aged 15 years and over were in paid employment with female employment participation rising from 49.5% in 1999.1 In 1999, the then Human Rights and Equal Opportunity Commission reported on its national Pregnancy and Work Inquiry, pointing to the ‘erroneous tactics and exploitative practices’ being used to remove pregnant women from the workforce or deny them equal employment opportunity.2 Almost 15 years later the prevalence survey undertaken by the Australian Human Rights Commission (AHRC) as part of its Pregnancy and Return to Work National Review, found that pregnancy discrimination remains endemic in Australian workplaces.3 Nearly half of the women surveyed experienced at

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1 Australian Bureau of Statistics, Labour Force, Australia, Detailed — Electronic Delivery, September 2014, Cat No 6291.0.55.001, Table 2, ABS, Canberra, September 2014.
least one instance of unfair or disadvantageous treatment at work because of pregnancy, asking or taking leave or on their return to work including negative changes to their job, with 27% of respondents reporting at least one of these instances occurred during pregnancy. Nearly a fifth (18%) of respondents reported job loss during pregnancy, when they requested or took parental leave or when they returned to work through a redundancy or a restructure, or dismissal or non-renewal of their contract. This suggests, as in other countries, job loss during pregnancy and early maternity is relatively commonplace in today’s workplaces.

Anti-discrimination provisions protecting pregnant women have been in place in Australia in both state and federal jurisdictions since 1984. Today pregnancy is a separate ground of discrimination in all states and territories with the exception of New South Wales (NSW), where pregnancy is dealt with as a characteristic of women. Laws prohibiting sex discrimination have been the subject of a sustained critique by feminist scholars both in Australia and internationally. In the Australian context attention has been drawn to the narrowness and complexity of direct and indirect sex discrimination provisions reflected in case law. There has been much critical analysis of the complaints-based model whereby the burden of seeking redress has historically fallen on individual complainants and ineffectual enforcement processes are reinforced by limited legislative awareness of both employers and employees, including in relation to pregnancy discrimination.

At the heart of much of the critique of anti-discrimination law is the tension between formal equality or ‘equality as consistency’, and substantive...
equality in the application of anti-discrimination law. Despite the formal equality model reflected in direct discrimination provisions, feminist commentators have long argued that substantive not formal equality is (or should be) the aim of discrimination law. Some jurisdictions now accept that this is the case, such as the Court of Justice of the European Union (CJEU). In Australia, however, pregnancy discrimination has historically been treated more narrowly in much of the extant case law, with an insistence on comparative assessment in establishing less favourable treatment arguably leading to ‘incoherence’. While Australian case law has avoided much of the North American legal debate over pregnancy and non-pregnant persons and the alternatives of denying difference or insisting upon it, anti-discrimination law like the Sex Discrimination Act 1984 (Cth) (SDA) works by measuring people against both real and abstract categories of similarity or dissimilarity.

This approach provides a real challenge when applied to pregnancy. Fredman puts this dilemma in a nutshell: ‘clearly a woman is different from a man when she is pregnant, but how significant is this difference and what legal consequences should follow from it’?

In this article we assess how the legal protections in the Australian federal jurisdiction address this dilemma, by examining how the courts have dealt with unfavourable treatment towards pregnant workers. Our article unfolds as follows. In the next section we outline protections available to pregnant workers and workers on parental leave in the federal jurisdiction. We highlight key differences between the discrimination provisions in the SDA and the Fair Work Act 2009 (Cth) (FW Act) providing protections for pregnant women and new parents. We also compare these anti-discrimination rights and the explicit protections relating to pregnancy and maternity set out in the National Employment Standards (NES) in the FW Act. In the following section, this analysis provides a basis for our examination of 14 cases pursued under the FW Act and the SDA between 2010 and 2014 and that reached final judgment. We focus in particular on the redundancy cases as highlighting weaknesses in an employee’s right to return to their job after parental leave, which is critical.

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13 See Thornton, above n 9; and Fredman, Discrimination Law, above n 9, pp 11–15. This approach is arguably required of member states by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We note that the Sex Discrimination Act (Cth) 1984 gives effect to Australia’s obligations under CEDAW.
14 See Masselot et al, above n 7, at 6–7. However, the CJEU’s inconsistency in the application of this principle has been much criticised especially in relation to issues of sick pay while pregnant and on maternity leave. Ibid and J Mulder, ‘Pregnancy Discrimination in the National Courts: Is There a Common EU Framework?’ (2015) 31 Int’l J Comp Lab L & Indus 1 at 67–90.
16 Graycar and Morgan, above n 12, pp 44–5.
to women maintaining their labour market position.\textsuperscript{19} Drawing on deficiencies in the protections revealed by this analysis, we suggest options for law reform that recognise the distinctive position of pregnant women.

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\textsuperscript{19} Australian Human Rights Commission, above n 3.