Submission to the 'Supporting Working Parents: Pregnancy and Return to Work National Review' by the Australian Human Rights Commission

JANUARY 31, 2014

Women Lawyers Association of NSW Inc. ABN 19 092 974 880 PO Box R1120 Royal Exchange 1225
P 0466 157 087 F 1300 332 183 E executive@womenlawyersnsw.org.au W www.womenlawyersnsw.org.au

These submissions are made by the Women Lawyers Association of New South Wales Inc (WLANSW) in response to the National Review to identify discrimination in relation to pregnancy and return to work after parental leave (the National Review).

WLANSW is the peak body representing women lawyers in New South Wales for the advancement of women in the legal profession. It has members (male, female and corporate) throughout NSW. Members work in private practice, corporations, the public sector, the community legal sector, and at the Bar.

These submissions do not necessarily reflect the view of views of all WLANSW members.

The submission has been prepared by the Workplace Practices Subcommittee of WLANSW. The subcommittee is predominantly made up of legal practitioners who are currently practising or have practised in the field of employment and discrimination law.

WLANSW welcomes the National Review in view of the extent of reported discrimination on the basis of pregnancy and parenthood. The National Review Factsheet sets out the currently available data on the prevalence of discrimination during pregnancy (overall nearly one in five women experience this).

While a considerable proportion of discrimination complaints to the Australian Human Rights Commission and to the Fair Work Ombudsman comprise pregnancy and maternity discrimination complaints, the overwhelming majority of women do not complain to either body. We particularly welcome that the Review will set out to establish the incidence and nature of such discrimination in order to assist Government, employers, employees and the community in improving their efforts to eliminate it.

We comment below or on some of the issues raised in the Review Issues Paper in relation to improving the legal protection from discrimination for pregnant workers and new parents.

Duty to eliminate discrimination

We recommend first that an overall duty be imposed on employers to eliminate discrimination against pregnant women and new parents, by taking 'reasonable and

proportionate measures' and in particular complying with guidance we suggest is issued by the AHRC (see below). This would mirror the similar requirement imposed on employers by the *Equal Opportunity Act* 2010 (Vic).[1]

Guidance on what the law means

Many discrimination complaints are settled confidentially, consequently there is relatively little caselaw providing guidance on the meaning of the statutory provisions of the *Sex Discrimination Act*. We suggest that the AHRC be required (and appropriately resourced) to provide guidance on what the legislation means in practice. This guidance should be required to be taken into account in discrimination proceedings where an adjudicating body considers it relevant. Complying with the guidance should assist employers in complying with the law and avoiding successful claims against them. This sort of provision exists in the UK[2] with helpful Codes of Practice issued under it.

Detailed non-statutory guidance for employers about the range and content of the variety of laws governing pregnancy and parental leave and return to work as well as practical advice and examples of how to manage employees in these situations would be a welcome outcome from the National Review. We expand on this later on in our submission.

At present the range of remedies and actions available to raise a complaint of pregnancy are fragmented, and thought should be given to introducing some consistency across the different actions; ie general protections applications to the Fair Work Commission, complaints to the Fair Work Ombudsman, complaints under the *Sex Discrimination Act*, and complaints under State and Territory anti-discrimination legislation.

Defining discrimination

[1] S.15, wording from ss.15(2). Ideally this should apply throughout the Sex Discrimination Act.
[2] S.14 Equality Act 2006 (UK) enables the UK Equality and Human Rights Commission to issue codes in specified circumsatnces. S. 15(4) of that Act states: 'A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code–
(a)shall be admissible in evidence in criminal or civil proceedings, and
(b)shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant.'

In relation to direct discrimination on the ground of pregnancy or parental responsibilities etc, we recommend that the need to provide a comparison with someone without such a protected attribute be removed. Demonstrating unfavourable treatment on the basis of pregnancy etc should be substituted for showing less favourable treatment as the basis of a discrimination claim. Clause 19 of the *Human Rights and Anti-Discrimination Bill* 2012 Exposure Draft proposed that this occur. The case law of the Court of Justice of the European Union removed this requirement in many situations relating to pregnancy and maternity discrimination throughout the EU some 20 years ago.[3]

The requirement of a comparator leads to surreal comparisons between a pregnant woman/someone on parental leave with an employee who is sick or on leave without pay or similar incomparable situations[4]. Removing the comparator will also focus employers attention on whether they are treating an employee in a particular way because of their pregnancy etc.

We do not however support permitting direct discrimination to be justified on any grounds at all and did not support the Exposure Draft Bill's proposal to this effect.[5]

The burden of proving discrimination

Currently, a complainant alleging direct discrimination on the basis of pregnancy etc must bring evidence to prove the allegation. The Discrimination Law Experts[6] in their submission to the Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws note that the Discussion Paper states:

> allocating the burden of proving causation in direct discrimination to the complainant requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair.[7]

---

[3] See for example the judgements *Elisabeth Johanna Pacifica Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* in Case 177/88 and *Gabriele Habermann-Beltermann* v *Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V,* Case C-421/92.

[4] See Allsop Js comments to this effect in Thomson v Orica Australia Pty Limited Pty Limited [2002]FCA 939 (30 July 2002) at paragraphs 120 -122

[5] See Division 4.

[6] Discrimination Law Experts Group submission of December 2011, downloaded on 14 January 2014 at: http://www.equalitylaw.org.au/Default.aspx?PageID=5215606&A=WebApp&CCID=7478&Page=2&Items=2

[7] Ibid. at para [52].

We recommend (as did the Discrimination Law Experts Group and as set out in the Exposure Draft Bill[8]) that the claimant should be able to adduce evidence showing there is a prima facie case that the unfavourable treatment was due to pregnancy etc. If she can do this, the burden of proving that this was not the case should then move to the employer.

This is similar to, but not exactly the same, as the provisions in the *Fair Work Act*[9] in relation to establishing adverse action, which put the onus on the respondent to show that the alleged discriminatory ground was not a reason for the alleged adverse action. Either of these options is a far preferable way to deal with cases like this where the applicant employee will not necessarily know all the reasons behind an employer action, but is able to allege that they feel their pregnancy at least had something to do with it, with the onus then shifting to the respondent to show that was not a reason.

The provisions also allow an applicant to succeed where the discrimination is just one of the reasons for the adverse action, without the need to show it was predominant or main reason.

Clarifying employee rights

Several (at least) substantial omissions detract from the protection of women during pregnancy available in current Australian law. We touch on three below.

Occupational health and safety during pregnancy

The Review Issues Paper refers to

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

There are no references to pregnancy, potential pregnancy or reproduction in the WHS Act. The Regulations outline the circumstances in which a pregnant worker should be removed from lead risk. The WHS Act provides that workers may cease, or refuse to carry out work if the worker has a

[8] Clause 124.
[9] Sections 360 and 361 of the *Fair Work Act*

reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.'

This is inadequate and out of kilter with best international practice. The European Union Pregnant Workers Directive (PWD) requires employers to proactively undertake assessments of potential risks to pregnant workers' health and safety, remedy these (or suspend the worker on (in the UK) full pay as in the FWAct safe job leave provision) and keep the situation under review.[10] In the UK various practical guidance to employers exists[11]: risks can range from long periods standing, lifting heavy weights, work stress, long work hours, exposure to toxic chemicals.[12]

Planning and pregnancy at work

We would suggest that planning for health and safety during pregnancy be required of employers linked to more encouragement to employers to proactively plan for managing the period when their employees work whilst pregnant, the taking of maternity leave and their return to work, building on the existing keeping in touch provisions in the *Paid Parental Leave Act* 2010, and the consultation requirements in the *Fair Work Act*. Planning for maternity leave has been shown to assist in employees returning to work.[13]

Anecdotally, our experience has been that once on parental leave, an employee is out of sight and out of mind, and scant attention is paid to the obligations to consult and keep employees informed of significant changes at the workplace. It is only when the employee initiates discussions about their return to work that the employer begins to take steps to finalise those arrangements.

---

[10] Council Directive 92/85/EEC, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, article

[11] For example: HSE (2013) New and expectant mothers who work: A Brief Guide to Your Health and Safety, downloaded 14 Jan 2014 at:
http://www.hse.gov.uk/pubns/indg373.pdf
HSE (2011) Five Steps to Risk Assessment (general), downloaded 14 Jan 2014 at:
http://www.hse.gov.uk/pubns/indg163.pdf

[12] New and expectant mothers who work: A Brief Guide to Your Health and Safety, downloaded 14 Jan 2014 at:
http://www.hse.gov.uk/pubns/indg373.pdf

[13] Houston, D.M and Marks, G. (2004) The Role of planning and workplace support in returning to work after maternity leave, British Journal of Industrial relations, vol 41(2), pp.197-214.

This sometimes leads to an unfortunate but all too common scenario with the employee being advised just before or on their return to work that in fact there have been changes while they were away, and their position has been made redundant, and their employment will be terminated.

This could not come at a worse time, usually when the parents have arranged childcare, the primary care-giver has prepared for their return to the workforce, with the associated anxiety that can accompany leaving the young child in care, only to then find out that they have no job. This leaves them in a "Catch 22" position of needing the job to pay for the care, but knowing that if they give up the childcare place, then they will not be able to take it up again should they get another job. Where the return to work was to have involved some flexibility, such as part-time hours, that is also lost, with a lower chance of finding that kind of flexible work in a new role.

Antenatal care and work

The PWD also provides for paid time off to enable workers to attend ante-natal appointments.[14] A similar right should be incorporated in Australian law, for fathers as well as expectant mothers as essential to the good health of en expectant mothers and their child.

Assisting employers

For some employers, particularly smaller employers and those who do not often have to manage an employee's pregnancy, confusion as to their obligations and rights may exist. The time assessing a pregnant employee's health and safety, implementing any necessary changes and planning for parental leave (hiring a replacement employee and/or reallocating work duties amongst colleagues) and organising return to work represent real extra costs. In effect these are a type of 'tax' on employing women. We suggest that some financial compensation whether through a direct payment or tax arrangements acknowledge this. It could be delivered to employers in conjunction with the government's parental leave pay, where the employer is currently the pay-master (although we note there are changes mooted to this current arrangement).

[14] Article 9.

Casual employees

A thorough investigation needs to be made into whether the rights (to not be discriminated against, to parental leave & during pregnancy under the *Fair Work Act*) of casuals (both regular & irregular) are adequate and realistically enforceable. If they are not, steps need to be taken to protect casual women workers who are pregnant/new mothers.

Assisting possible claimants

Too much choice

As has been referred to above, the multiplicity of avenues available to a person who has experienced pregnancy discrimination, or difficulty in returning to work, can be overwhelming, and we believe are not well understood by employers, let alone potential complainants. Agencies such as the AHRC, FWO, FWC and state anti-discrimination bodies should collaborate to provide an easy to follow guide for employers and employees.

There are different time limits, remedies available, and limits on compensation depending on which avenue is pursued. Some actions have a fairly short decision time, such as lodging a general protections claim if dismissed. For an employee who is pregnant, the prospect of commencing litigation against their former employer while at the same time being pregnant and facing the birth of a child can be daunting. In our experience, many decide not to bother.

Some of the more subtle differences, such as costs consequences in different jurisdictions, can be off-putting and also act as a disincentive to private action. A flow-chart comparing the different types of claims available is attached as appendix 1, a paper presented by one of authors of this submissions authors at the Women and Work Conference in Darwin in July 2010.

Costs consequences, coupled with the traditionally low payouts in discrimination cases, make any form of private litigation not worthwhile from a financial perspective, for the claimant or any legal representative who may be prepared to take the case on a no-win no fee basis.

FWO needs to do more

It is not surprising that many women prefer to report complaints to the Fair Work Ombudsman and let that body do the heavy lifting of investigating and possibly prosecuting the complaint, with the woman a potential witness only, and not bearing the burden of running any litigation, with costs consequences should they be unsuccessful.

The FWO has reported that in 2012/13 pregnancy discrimination was the most commonly reported complaint[15], comprising 28% of complaints received. Despite this the FWO commenced only 3 court actions for the whole discrimination area in that same year.

While there has been one reported decision on pregnancy discrimination, *Fair Work Ombudsman v Wongtas Pty Ltd (No 2) [2012] FCA 30 (2 February 2012)* there has been little court action by the FWO in this area. This is a shame, as until the business community realises that serious penalties can be imposed, in addition to compensation ordered, little is likely to change. For the reasons outlined above, leaving litigation to force change to individuals is not a serious option.

Role for consolidating and sharing information?

There should also be scope for complaints that have made it to the AHRC conciliation phase, and the FWC general protections conference stage, but the applicant decides not to pursue, to be referred by those Agencies to the FWO for investigation and possible prosecution. It is not uncommon for employers to test the mettle of an applicant, knowing that the prospect of "hard" litigation will be off-putting, and hold out making any reasonable offer until proceedings are actually filed.

The possibility of further oversight and review by the FWO may put an end to this practice, and also allow the FWO to compile a more comprehensive picture of the extent of discrimination in the workplace. It could be for example, that one employer may be facing separate individual complaints in the AHRC, to the FWO, and at the FWC. If the complainants are not known to each other, the respondent may evade any kind of sanction, whereas if the FWO is compiling a central register of these

[15] http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2012-13.pdf, page 32

unresolved complaints, the pattern would emerge and an investigation and prosecution could be considered.

Adverse Action – a brave new world or same old same old?

Chapter 3 of the *Fair Work Act* 2009 (Cth) contains provisions dealing with the rights and responsibilities of employees that are wide ranging and intended to provide general workplace protections.

The objects of Part 3–1 are set out in section 336 as follows:

> *"336. The objects of this Part are as follows:*
>
> *(a) to protect workplace rights;*
>
> *(b) to protect freedom of association by ensuring that persons are:*
>
> *(i) free to become, or not become, members of industrial associations; and*
>
> *(ii) free to be represented, or not represented by industrial associations; and*
>
> *(iii) free to participate, or not participate, in unlawful industrial activities;*
>
> *(c) to provide protection from workplace discrimination;*
>
> *(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this part."*

For many years at both the Federal and State level, legislation has provided a patchwork of protection in respect of workplace discrimination.[16] The question that this paper addresses is whether the inclusion of expanded protections in the *Fair Work Act* represents an improvement for workers, or replicates the existing provisions in discrimination legislation, both in substance and in practical effect.

Using the *Anti-Discrimination Act* 1977 (NSW) as a comparison, the paper will compare and contrast the procedure, outcomes and other questions such as the difficulty in establishing discriminatory behaviour, in order to analyse in what circumstances an application under the *Fair Work Act* may be preferable to an action under existing anti-discrimination legislation.

Finally, it will conclude with a review of the first reported decisions on "adverse action" under the *Fair Work Act*, although at the time of writing this paper, none have specifically raised the section that makes discrimination unlawful.

[16] See the attached table for a comparison of grounds of unlawful discrimination under Australian legislation.

Discrimination under the *Fair Work Act*

Section 351(1) of the *Fair Work Act* provides that an employer must not take adverse action against a person who is an employee, or prospective employee of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

"Adverse action" is defined in section 342 of the *Fair Work Act* in a table that contains the following examples.

Adverse action is taken by …	***If…***
An employer against an employee	*The employer:* *(a) dismisses the employee; or* *(b) injures the employee in his or her employment; or* *(c) alters the position of the employee to the employee's prejudice; or* *(d) discriminates between the employee and other employees of the employer.*
A prospective employer against a prospective employee	*The prospective employer:* *(a) refuses to employ the prospective employee; or* *(b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.*

How do the new provisions compare with the previous *Workplace Relations Act*?

When the *Fair Work Bill* was introduced, the government stated in its Explanatory Memorandum[17] that clause 351 was intended to "broadly cover" the existing provisions of the *Workplace Relations Act* which made it unlawful to dismiss any employee for discriminatory reasons[18].

While noting that the protection "has been expanded to prohibit any adverse action", it is clear that the description of "adverse action" extends far beyond simply dismissing an employee and can extend to conduct during the employment that injures the employee or alters the position of the employee to the employee's prejudice, and pre-employment activities. As an analysis of the cases later will show, adverse action can amount to any number of activities prior to termination of employment.

The recognition of "workplace rights" is also new and may create additional avenues to challenge action, for example, any retaliation following a bullying and harassment claim could be brought as an adverse action claim for exercising the right to a safe workplace under occupational health and safety legislation.

[17] Page 222, paragraph 1424.

[18] Previously section s659 of the *Workplace Relations Act* 1996.

Who is covered?

We have been familiar with the concept of an unlawful termination in the previous *Workplace Relations Act*. Those provisions have been preserved in Part 6.4 of the *Fair Work Act* from sections 769 to 783. Those sections expressly rely on international conventions, meaning that any employee in Australia still retains those protections.

The general protections provisions do not cover all employees and to the extent that employees remain in State industrial relations systems following referral of state powers, those employees, such as State public sector workers and local government employees in NSW, may not be able to access the adverse action provisions.

In some circumstances conduct may be caught if it affects national system employers, and a close reading of sections 338 and 339 would be warranted to see if coverage was extended by those sections.

For employees in the Federal system however, whether they be employees of constitutional corporations, or employees of entities covered by a referral from the States, the adverse action provisions significantly expand the protection available when compared to the previous *Workplace Relations Act* provisions.

How does the Act compare with other anti-discrimination legislation?

Section 351 lists the grounds on which an employer must not take adverse action. In some instances these grounds are wider than provisions contained in existing discrimination legislation, and in some instances narrower. For example, under the *Anti-Discrimination Act* discrimination on the grounds of transgender status is unlawful. This ground is not contained in the list in section 351.

Before initiating an application under the *Fair Work Act* practitioners would be wise to check that the ground on which they rely is one that is covered by section 351 and not one that is only available under other anti-discrimination legislation.

Compare and contrast

Below is a table which sets out the pathways a discrimination complaint may take under both the *Fair Work Act*, the *Anti-Discrimination Act* or the federal *Sex Discrimination Act*.

FAIR WORK ACT		**ADB**	**AHRC**
Complain to FWO FWO may investigate FWO may mediate FWO may bring proceedings Penalties and damages/other orders No costs (to individual)	Complaint to Fair Work Australia • Breach of general protections • Discrimination Conference (compulsory if termination) or (by agreement otherwise) Hearing in FC, FMC Penalties and damages/other relief No costs (except in limited cases)	Complaint to ADB Investigation Conciliation Hearing at ADT Damages/other relief Limited costs (only if fair in all the circumstances)	Complaint to AHRC Investigation Conciliation Complaint terminated 60 days to start proceedings in FMC/FC Damages and other relief Costs follow the event usually

There are a couple of comments I wish to make about significant differences between the processes –

(a) Initiating proceedings

All processes start with a relatively straight forward application form. In the case of a complaint to the Anti-Discrimination Board, the complainant is asked to set out briefly the conduct that they say amounts to the discriminatory conduct. So too in an application to Fair Work Australia alleging a breach of the general protections, the applicant completes an application form setting out whether they are complaining

about adverse action taken in respect of their workplace rights (section 340), their industrial activities (section 346), because of one of the discriminatory grounds (section 351), or because of temporary absence due to illness or injury pursuant to section 352. A complaint to the Fair Work Ombudsman is also made on a detailed prescribed claim form.

Under the State system the Anti-Discrimination Board then attempts to distil the complaint and provide it to the named respondents for their comment. Any response is then returned to the applicant for them to review and comment upon. This process can take some time. By contrast, Fair Work Australia must, in the context of a dismissal, convene a conference and may in other cases convene a conference if the parties can agree. This occurs despite any no response being sought from the respondent prior to the conference. This represents the possibility for early intervention by a trained Fair Work Australia member to attempt to resolve the matter by agreement. While it is possible, in cases of complaints of matters other than dismissal that the employer may not agree to a conference at least that position will be known relatively quickly.

With a complaint made to the Fair Work Ombudsman, it may investigate the complaint, and then arrange a mediation, again if the parties agree. In many respects, this mirrors more closely the ADB/AHRC approach. In the writer's experience, conferences at Fair Work Australia are convened within weeks of the application being lodged, whereas conciliation conferences before the Anti-Discrimination Board or Australian Human Rights Commissions can take place many months after the initial complaint, and it is only at that stage that the employer's complete unwillingness to negotiate any resolution may become fully known.

It remains to be seen how quickly the Fair Work Ombudsman deals with matters. This will largely depend on resourcing. The Fair Work Ombudsman has been quoted as saying "*it is an "evolving area" for the FWO, with its strongest interest in the "discrimination space". He says his organisation has received a few complaints, but "none that are heading off to court immediately by any means*".[19]

If an applicant is in search of a quick resolution then an application to Fair Work Australia may be preferred.

(b) Questions of onus.

Assuming the matter is not resolved through settlement, and proceeds to a hearing, a significant advantage in an application under the *Fair Work Act* are the ancillary provisions contained particularly in sections 360 and 361. These provisions provide that a person takes an action for a particular reason if the reasons for that action include that reason. This means that it is not necessary to show that a decision was based, for example, on someone's sex and for no other reason, or that it was a substantial reason for the decision. It is sufficient if reasons for the action include that reason.

More significantly, however, section 361 reverses the onus of proof in that if it is alleged that a person took action for a particular reason, it is presumed that the action was taken for that reason unless the person proves otherwise. This then places the

[19] In an interview with Workplace Express on 10 June 2010, http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=42806

onus on the respondent to show why the action was taken and that it was not to do with the discriminatory reason.

This is a significant advantage in discrimination matters where an applicant may feel that action was taken for a particular reason but is unable to prove it. This provision means that it is now up to the respondent to demonstrate that the action was not taken for a reason that included the prohibited reason. An employer will of course be able to discharge this if the evidence is clear that the basis for their decision in fact rested on other believable and supportable grounds.

(c) Technical difficulties in proving discrimination

The *Fair Work Act* does not contain a definition of what constitutes discrimination. Although section 351 is headed "Discrimination", the section is couched in terms of adverse action against a person who is an employee because of the person's race, colour, sex, etc …" Going back to the meaning of adverse action in section 342 it simply refers to "*discriminates between the employee and other employees of the employer*".

This lack of definition of discrimination under the *Fair Work Act* will need to be addressed by the courts when they come to consider an application alleging adverse action on the basis of one of the prohibited grounds. Both in the Federal and State anti-discrimination legislation much effort has gone into defining discrimination in a manner which has lead, in the writer's opinion, to an overly complicated and complex test for both direct and indirect discrimination which discourages applications and means that some otherwise meritorious applications do not pass the legal test.

In traditional legal assessments of direct discrimination, it is necessary to show that you have been treated less favourably than a person without your characteristic (say, sex) would have been in the same or similar circumstances. This need for a "comparator" has often led to quite torturous assessments of who that appropriate person would be. No area is this more obvious than in cases of pregnancy discrimination where one has to find a comparison employee who is not pregnant yet in the same or similar circumstances of a pregnant person.[20]

In cases of indirect discrimination the test becomes even more difficult for applicants to establish, requiring them to identify with some particularity the discriminatory "condition or requirement", demonstrate that they are unable to comply with the requirement or condition because of their particular attribute, that a substantially higher proportion of people without their attribute can comply, and the requirement was not reasonable in all the circumstances. This requires an analysis of different sub-groups of employees and the ability to comply or not, a task which is beyond almost all self-represented litigants and, indeed, even some represented litigants.

A review of the cases alleging discrimination on the basis of carer's responsibilities under the NSW *Anti-Discrimination Act* shows that a number of these cases failed

[20] See Allsop J's comments in *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002) at paragraphs 120-122.

simply because they could not address the evidentiary burden imposed by the definition of indirect discrimination in the legislation.[21]

By defining adverse action very broadly to include *"injures the employee in his or her employment"* or "*alters the position of the employee to the employee's prejudice",* it has to be that this will be easier to establish than the traditional tests for direct and indirect discrimination as it requires no comparator.

There may still be a role to play for the traditional concept for comparing the employee with the attribute to other employees in the wording of *"discriminates between the employee and other employees of the employer"*. Whether this will be read as discriminating between the employee who has the characteristic and other employees of the employer without the particular characteristic remains to be seen.

(d) Role of the Fair Work Ombudsman

Section 539 sets out who can apply for orders in relation to contraventions of civil remedy provisions. An inspector is listed as a person who has standing to apply to a court in relation to a contravention or proposed contravention of the provision, including the maximum penalty.

A complainant could make a complaint to the Fair Work Ombudsman rather than lodging an application with Fair Work Australia if they felt there had been a breach of section 351, leaving it to the Ombudsman to investigate and ultimately prosecute.

It is significant is that the Fair Work Ombudsman has an active role in investigating the complaint, not merely that of seeking a response from the respondent. This is more in the nature of an inquisitorial process, than an adversarial one, and with a Fair Work inspector able to bring civil penalty proceedings, the aggrieved complainant becomes a witness in the case, but does not have the burden of running the litigation.

For unrepresented applicants this may be a more attractive way to address complaints, particularly if their employment is vulnerable. By placing the matter in the hands of an independent "umpire" as it were, it may encourage resolution quickly and efficiently, with possibly broader implications than just the individual's complaint.

(e) Remedies

Although the orders available under various anti-discrimination acts are broad, in NSW there is a cap on the monetary damages that can be awarded. That cap is currently $100,000. Depending on the contravention, if the damages sought are going to exceed this cap, the application may be better brought in pursuant to the *Fair Work Act* where damages are uncapped.

[21] See, for example, *Stokes v Serco Sedexho Defence Services Pty Ltd* [2006] NSWADT 295 (10 October 2006) at paragraph 76, although the Administrative Decisions Tribunal has been prepared to take "judicial notice" of the fact that a substantially higher proportion of persons without responsibilities of infant children can or do comply with the requirements to work full-time. *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 at paragraph 89.

If the application is brought under the *Fair Work Act*, penalties can also be imposed in addition to compensation. This may have a significant educative and deterrent effect on other employers.

Case Review

At the date of writing this paper there have been 6 reported cases involving adverse action. No doubt there will be many more as the provisions are tested, and employees, employers and their respective representative bodies get a handle of the extent to which the provisions can operate, and how best they can be used.

The decisions are:

1. *James Paul Benson & Anor v Airlite Windows Pty Ltd* [SYG 2199/2009] ***(Airlite)***

2. *Jones v Queensland Tertiary Admissions Centre Limited* [2009] FCA 1382 (25 November 2009) ***(Jones No1)***

3. *Jones v Queensland Tertiary Admissions Centre Limited (No. 2)* [2010] FCA 399 (29 April 2010) ***(Jones No2)***

4. *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284 (25 March 2010) ***(Barclay)***

5. *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Limited* [2010] FCA 590 (11 June 2010) ***(Phillips)***

6. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Limited* (2001) FCA 611 (15 June 2010) ***(Nobbs)***

Lessons learned from the cases

A common factor with the cases decided to date is that in all of them with the exception of *Jones Nos 1 and 2*, the one of the applicants has been a union. Further, the applications have related to workplace rights and industrial activities, and the facts in *Airlite* do not stray far from claims made under the freedom of association provisions contained in previous *Workplace Relations Acts*.

So far an assessment would have to be that it is "same old same old" with respect to matters that are being heard by the Courts. In general, matters being run by unions to protect their members' rights.

There are signs of a "brave new world" however.

The matters that have run to date have shown that courts are prepared to grant interlocutory relief and interfere where satisfied there is a serious question to be tried and are taking the view that, generally speaking, the status quo is in favour of the employee either by ordering reinstatement (as in *Phillips*) or preventing termination (as in *Jones No 1*).

At the very least this buys some time while possibly a compromise can be reached by agreement.

Also as it is early days, the categorisation of what is "adverse action" is still very open, but Courts have been prepared to accept that the following types of action could constitute adverse action;

- Issuing a show cause notice
- Undertaking an investigation into allegations of bullying
- Suspension of internet access
- Suspension from work

In the discrimination context, it is easy to imagine that categories of adverse action falling short of termination could include;

- Failure to allow part-time work
- Allocation of less favourable duties on return from parental leave
- Restriction of access to training or promotion
- Selection for redundancy
- Inequitable bonus allocation or limiting participation in other incentive schemes
- Performance and pay reviews
- Disciplinary investigations.

In many of these instances, if the conduct cannot be addressed quickly, there is little point in complaining about it, and it is not worth funding a contested hearing the Federal Court over the issue. Any forum that can offer a quick, and hopefully amicable resolution is welcome in order to maintain the employment relationship and address the discriminatory conduct.

Conclusion

To date we have not had any reported decisions that deal with adverse action on the basis of a proscribed ground set out in section 351. Whether this is because those matters have been successfully resolved at conciliation or whether applicants have not wished to pursue court action, we will not know.

There are certainly matters that started with Fair Work Australia. From 1 July 2009, when Fair Work Australia commenced, to 31 March 2010, there were 2,486 dispute applications lodged. Of these, about 1,100 were dispute applications in respect of dismissal in alleged contravention of the general protections provisions of the *Fair Work Act 2009* or unlawful dismissal, and around 150 were applications alleging a non-dismissal contravention of the general protections provisions.[22]

For women in particular who face discrimination in their work on the basis of sex, family or carer's responsibilities or indeed any of the grounds in section 351, the adverse action provisions may provide a relatively quick and effective way of addressing that discrimination.

There is the possibility that matters may be resolved quickly by agreement if applications are made to Fair Work Australia, and in circumstances short of dismissal, if the employer is

[22] Figures from a Presentation to Ai Group's National PIR Group Conference, The Fair Work System – Fair Work Australia's Experiences and Insights, Senior Deputy President Jennifer Acton, 19 April 2010 at http://www.fwa.gov.au/about/speeches/ActonSDP_19-April-2010.doc

prepared to attend a conference. At the very least, however, a quick resolution to the matter, even if it is unfavourable, may prevent protracted complaint handling processes that ultimately do not assist either party.

The reverse onus of proof is a significant difference to traditional anti-discrimination provisions, and when combined with potentially a simplified discrimination test and the possible abolition of a "comparator" should mean that it is easier to establish an adverse action complaint than a traditional discrimination complaint.

The ability to complain to the Fair Work Ombudsman is also a significant step forward, taking the burden off individual complainants to run matters. Whether the Fair Work Ombudsman actively pursues matters is another question, and whether it is able to do so in a timely manner is yet to be seen. If the Government is serious about the object of "*providing effective relief for people who have been discriminated against*" then there must be the ability to take the burden away from individuals to prosecute complaints, and support an active role for the Fair Work Ombudsman.

With the government announcing plans to harmonise anti-discrimination laws, it will be interesting to see whether we move towards the more streamlined model of the adverse action provisions, or retain the traditional direct and indirect discrimination tests. We need a brave new world, and not the same old same old. The adverse action provisions are a step in the right direction.

Susan Price
Bartier Perry
(02) 8281 7874
sprice@bartier.com.au

1 July 2010

GROUNDS OF UNLAWFUL DISCRIMINATION

Grounds	RDA	SDA	DDA	AGDA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)	FWA
Sex		5			24	7(1)(a)	29(1)(a), 29(2), 35(1)		16(e)	6(k)		8		7(1)(a), 8(1)	19(1)(b)	✓ (351)
Marital status		6			39	7(1)(b)	29(1)(c), 29(5), 35(1)		16(f)	6(e)		9		7(1)(d), 8(1)	19(1)(e)	✓
Pregnancy or potential pregnancy		7			24(1B)	7(1)(c)	29(1)(d), 29(6), 35(1)		16(g)	6(h)		10		7(1)(f), 8(1)	19(1)(f)	✓
Family responsibility		7A			49s, 49T	7(1)(o)			16(j)	6(ea)		35A		7(1)(e), 8(1)	19(1)(g)	✓
Parental status					49s, 49T	7(1)(d)			16(i)	6(ea)		35A		7(1)(e), 8(1)	19(1)(g)	
Sexual harassment		28A			22A-22J	118, 119	87		17(2), (3)	85-95		24-26		58-64	22(1), (2)	
Race	9				7	7(1)(g)	51-63		16(a)	6(i)		36		7(1)(h), 8(1)	19(1)(a)	✓
Racial hatred	18c											49A-49D	80A–80D			
Racial vilification					20C	124A, 131A		4	19, 22(2)		7, 24		77-80	65-67		
Disability			5-9		49A, 49B	7(1)(h)	66-78, 88		16(k)	6(b)		66A		7(1)(j), 9, 8(1)	19(1)(j), 21	✓
Disability harassment			35-40													
Sexuality					49ZG	7(1)(n)	29(1)(b), 29(3), 29(4), 33(2), 35A		16(c)	6(l)		35O		7(1)(b), 8(1)	19(1)(c)	✓
Transsexuality					38B	7(1)(m)	5(1), 29(1)(a), 29(3), 29(4), 33(2), 35A		3, 16(c)	6(ac)		35AA		7(1)(c), 8(1)	4(1), 19(1)(c)	
Age				14-15	49ZYA, 49ZV	7(1)(f)	85A-85E, 85G-85L		16(b)	6(a)		66V		7(1)(lb), 8(1)	19(1)(d)	✓
Political belief or activity						7(1)(j)			16(m), (n)	6(g)		53		7(1)(j), 8(1)	19(1)(n)	✓
Religious belief or activity						7(1)(j)			16(o), (p)	6(j)		53		7(1)(j), 8(1), 11	19(1)(m)	✓
Trade union activity						7(1)(k)			16(l)	6(c)				7(1)(k), 8(1)	19(1)(k)	✓ (346)
Breastfeeding		Pending				7(1)(e)			16(h)	6(ab)				7(1)(g), 8(1)	19(1)(h)	
Associate			15-21		See definiti	7(1)(p)			16(s)	6(m)				7(1)(n), 8(1)	19(1)(r)	

Grounds	RDA	SDA	DDA	AGDA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)	FWA
					on (eg 7 for race)											
Transgender vilification					38S	124A, 131A								65-67		
HIV/AIDS vilification					49ZXB									65-67		
Homosexuality vilification					49ZT	124, 131A			19, 22(2)					65-67		
Religious vilification						124A, 131A			19, 22(2)		8, 25					
Victimisation		94	42	51	50	129-131	86		18	96, 97	13, 14	67		68	23	
Incitement	17		43							98, 99	15, 16				27	
Aiding and permitting	17	105	43, 122	56	52	122-123	90		21	98, 99	15, 16	160		73	27	✓(362)
Vicarious liability	18A, 18E	106			53	114-116, 132-3	91			102, 103	17	161, 162			105	

RDA: *Racial Discrimination Act* 1975 (Cth)
SDA: *Sex Discrimination Act* 1984 (Cth)
DDA: *Disability Discrimination Act* 1992 (Cth)

AGDA: *Age Discrimination Act* 2004 (Cth)
ADA (NSW): *Anti-Discrimination Act* 1977 (NSW

ADA (Qld) *Anti-Discrimination Act* 1991 (Qld)
EOA (SA): *Equal Opportunity Act* 1984 (SA)
RVA (SA) *Racial Vilification Act* 1996 (SA)

ADA (Tas) *Anti-Discrimination Act* 1998 (Tas)
EOA (Vic) *Equal Opportunity Act* 1995 (Vic)