THE LAW SOCIETY
OF NEW SOUTH WALES

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23 December 2013

Mr Martyn Hagan
Secretary General
Law Council of Australia
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Canberra ACT 2601

By email: sarah.moulds@lawcouncil.asn.au

Dear Mr Hagan,

Supporting Working Parents: Pregnancy and Return to Work National Review

The Law Society and the Society's Employment Law Committee ("Committee") thank you for the Memorandum dated 10 October 2013 and the opportunity to comment in relation to the Issues Paper released by the Australian Human Rights Commission *Supporting Working Parents: Pregnancy and Return to Work National Review* ("Paper").

Comments from the Committee

The Committee has limited its comments to those matters raised in section 6.2 of the Paper, in particular the following questions raised in the context of current employment laws framework:

> Q6.2.3 How could the laws and their implementation be strengthened?
> Q6.2.4 What challenges do employers face in implementing employment laws and policies?
> Q6.2.5 What challenges do employees face while pregnant, on or returning to work after taking parental leave?

Section 6.2 of the Paper refers to a number of measures contained in the *Fair Work Act 2009* (Cth) ("FW Act") which assist pregnant employees and parents returning to work. A number of these measures were altered or extended by the *Fair Work Amendment Act 2013* ("Amendment Act") which was assented to on 28 June 2013. In the Committee's view it is appropriate to note the recent extension or alteration of these measures by the Amendment Act:

(1) Special maternity leave taken no longer reduces the period of parental leave, allowing women who suffer illness during their pregnancy to access unlimited unpaid leave during pregnancy without there being any impact on their parental leave period;

(2) Concurrent parental leave for employee couples is now able to be taken for up to 8 weeks and in "separate periods", rather than in a single 3 week period;

(3) Extension of the right to request flexible working arrangements to parents of school age children, rather than only to parents of children under school age; and

(4) Transfer to a safe job is an entitlement for all pregnant employees, regardless of their access to parental leave. Where there is no entitlement to parental leave, then "unpaid no safe job leave" will be provided to those employees.

1. Special maternity leave

The Amendment Act removed the mechanism which reduced the amount of parental leave available by the same amount of special maternity leave taken by the employee. As a practical matter for employers, this has the effect of providing unlimited unpaid leave for pregnant employees for the duration of their pregnancy.

For employers this means there is a reduced ability to budget for the total cost impact of the pregnancy on their business as there is no longer a single maximum period of leave, but rather a combination of special maternity leave and parental leave.

During pregnancy a sick employee appears to have the option to take special maternity leave or personal/carer's leave. It is unclear whether this is the case for any illness that a women suffers while she is also pregnant, or only for pregnancy-related illnesses. This issue should be clarified to strengthen the operation of these provisions.

The Committee notes that before taking special maternity leave there is no requirement for an employee to first exhaust all accrued paid personal/carer's leave (as is the case with access to unpaid carer's leave under s 103(3) of the FW Act). It is not clear why special maternity leave should be different from unpaid carer's leave in that accrued personal/carer's leave should not first be exhausted to access it.

The Committee also notes that during a period of special maternity leave the employee will not accrue leave requiring adjustments to be made to the accruals register for that period.

From an employee's perspective this measure should provide greater access to special maternity leave, without impacting on the period of time allowed to be taken as parental leave. This is an enhanced flexibility measure that will assist in the management of an employee's pregnancy where there is an illness and transfer to a safe job is not an option.

Providing increased access to special maternity leave allows paid personal/carer's leave to be rationed out by the employee at their own election to alleviate the financial implications for that employee where there are a number of anticipated absences during a more complicated pregnancy.

2. Concurrent parental leave

The Bill increased the access to concurrent parental leave (both adoption and birth) for employee couples. The consequences for employers of employee couples are significant:

(a) an increase in the concurrent leave that is allowed to employee couples of more than double the existing amount – from three weeks to eight; and

(b) the periods (other than the initial period) may be taken at any time during the primary carer's parental leave period at the election of the employee who must only provide notice to, rather than seek the agreement and approval of, the employer.

The notice required to be given to an employer that periods of concurrent leave will be taken (other than the initial period), if not provided in advance, can be provided as soon as practicable (similarly to personal/carers leave). In the case of concurrent leave there is no guidance as to what sorts of circumstances might make the immediate taking of such leave acceptable. There may not be any appropriate relevant evidence, like a medical certificate,

which would assist in establishing the need for immediate leave. This increases the lack of clarity for all parties and reduces the employer's ability to adequately plan for the leave.

There may be between one and four periods of concurrent leave that the employer must make alternative arrangements for, of at least two and at most eight weeks. For employee couples the increase in allowable periods of concurrent leave is a significant improvement and has the practical effect of promoting equity in responsibility for the care of children. The changes promote the important role played by both parents in raising a child and also support the health of the primary carers during a high risk period.

The clarity now provided for employee couples highlights the absence of clarity regarding the operation of concurrent leave for non-employee couples. Under the FW Act as currently drafted, it is unclear what the position is where the employee is, for instance, the partner of a woman who has given birth. What are the obligations of that employer to provide unpaid leave to such an employee on a concurrent basis? Is the employer able to refuse a two week period of parental leave (after the initial period) where the employee provides their employer with the relevant notice and it is within the eight week total? If not, what sorts of reasons will be acceptable for the employee in the same circumstance giving no notice (ie, simply informing the employer on the first morning of their two week parental leave period that they have commenced that leave, and it was not practicable to provide notice prior to that point?)

3. Right to request flexible working arrangements

Amendments to s 65 of the FW Act made by the Amendment Act have expanded the access to the right to request flexible working arrangements to more groups of employees. Prior to the recent amendment, the right to request flexible working arrangements was limited to a parent of a child under school age. The Amendment Act extended this right to request flexible working arrangements to a parent of a school age child, or younger.

Section 65(1B) of the FW Act also expressly provides that an employee who is a parent or has responsibility for the care of a child and is returning to work after taking leave in relation to the birth or adoption of the child may request to work part-time to assist the employee to care for the child.

Employers may refuse a request for flexible working arrangements only on "reasonable business grounds". Section 65(5A) of the FW Act sets out a list of what may constitute "reasonable business grounds":

> (5A) Without limiting what are reasonable business grounds for the purpose of subsection (5), reasonable business grounds include the following:
>
> (a) that the new working arrangements requested by the employee would be too costly for the employer;
>
> (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
>
> (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
>
> (d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
>
> (e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service."

It is apparent that the list at s 65(5A) of the FW Act is not exhaustive but it specifies the kind of grounds by inclusion. There is a qualitative judgment to be made as to whether the circumstances of the kind listed are met; for instance, whether the new working arrangements are "too costly" or would result in "a significant loss in efficiency or productivity" or have "a significant negative impact on customer service". In the Committee's view, consideration could be given to adding a temporal element to the grounds. For example, a proposal might be affordable in the very short term but too costly if in place for a longer period.

For employees, it is likely their requirement for flexible work arrangements will change considerably over the pre-school and the early school life of their child or children. It is possible that any single employee could make a number of requests in the course of his or her employment and each such request would be the exercise of a workplace right and be within the general protection afforded by s 340 of the FW Act.

4. Transfer to a safe job

The FW Act now incorporates the concept of "unpaid no safe job leave" for those employees who do not otherwise have access to parental leave.

The implications for employers are essentially that now all pregnant employees must be considered for transfer to a safe job, not just those who have an entitlement to parental leave. The only difference is whether or not the employee will be paid while on no safe job leave. For employers who traditionally do not have employees who would ordinarily gain access to parental leave, especially those with a reliance on casual, seasonal or fixed-term arrangements, this will increase the compliance burden where employees exercise their rights under these amendments. Without appropriate education this change could result in an increase in termination or adverse action type claims where proper process is not followed.

Pregnant employees in more flexible, casual or short term employment situations will have greater access to opportunities for employment and income during their pregnancy, and increased protection from being removed from a roster or otherwise affected in their employment when their pregnancy makes it inadvisable to perform certain tasks.

There is however significant uncertainty in relation to this measure and consideration should be given to clarification of:

(a) Whether there needs to be a written notice provided to the employer by the employee in order to enliven the access to transfer to a safe job or no safe job leave. Currently, it is only necessary that the employee provide "evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her current position." This could give rise to a great many circumstances where it may be clear to one party but not the other, either at the time or in hindsight, that such access should have been given. For instance, a pregnant woman could complain about swollen feet to her employer. If she is in a standing centric role, then this may be sufficient for the provision to apply, however if she is in a desk job then it is unlikely that any further accommodations can be made. In both situations the comment and evidence (pointing to the swollen feet) would have been provided. A requirement for a written request, similar to the request for flexible working arrangements, may assist in resolving this issue.

(b) The definition of an appropriate safe job. Further details as to the nature of what an alternative "safe job" might be would assist parties to understand what sorts of measures should be put in place to enable the transfer to take place. For example, whether there are any other suitable ways for performing the employee's work which

might reduce or remove the hazard. Alternatively, whether there is a different position in the employer's business that does not require the employee to be exposed to the hazard.

(c) Whether there should be a requirement for the employee to define what specifically they have been advised would be safe, and not safe, to assist the employer in determining whether there are any appropriate safe jobs within the workplace.

(d) What would happen to the employee's entitlements if the appropriate safe job was a "higher duty" rather than the assumed lesser role. While there is protection for the employee's wages when placed on lower duties for the risk period, there is no corresponding entitlement to any higher duties pay if the appropriate safe job was a "higher duty" position.

Each of these measures should support pregnant employees and parents returning to work. However some consideration should be given to the possible impact on female workers of a reproductive age competing in the job market. Two candidates who differ only on gender will present a different potential cost to the prospective employer. In order to encourage the objects of the measures, education and support will be needed so that the consequence of the measures is not to ultimately make the hiring of female employees of a reproductive age financially or administratively undesirable for some employers.

Law Society's Advancement of Women in the Legal Profession Project

The Law Society has a strong history of supporting the advancement and retention of women in the legal profession. This has been at the forefront of activities over the past three years through the flagship thought leadership project on the advancement of women in the profession. Following the publication of the first report in December 2011, the Society has worked to implement a series of recommendations intended to have a positive impact on the experiences of women solicitors in NSW, including the initiatives in relation to flexible working arrangements and returning to work after parental leave, which are relevant to the following question in the Paper.

> Q.7.1.1 What policies or programs assist with the retention of employees while pregnant and on return to work after taking parental leave?

1. Flexible working

Feedback fom Society members during the Project indicates that the availability of flexible working arrangements is a key area in which impediments to the advancement of women continue to exist. While most employers have policies for flexible working, difficulties were experienced translating those policies into appropriate workplace arrangements. Practitioners who reported positive experiences suggested that discussion between individuals, supervisors and colleagues, including clients where necessary, can be effective in devising an arrangement which meets the needs of the individual, the work team, the practice and the client.

The Society has published a "Flexible working resource" to help solicitors and their employers capitalise on the benefits of flexible working. The resource draws on the experiences of practitioners and brings together practical tools which may assit them and the practices in which they work. Information is provided on a number of aspects of flexible working including:

(a) types of flexible working arrangements, such as job-share, compressed work week and remote working;

(b) the value of flexible working in attracting and retaining talent and improving productivity; and

(c) ways to develop effective flexible working arrangements, with supervisor tips for success and tips for employees.

The resource also includes a sample flexible work proposal or business case and individual flexible work plan, reproduced with the permission of Victorian Women Lawyers.

2. Returning to work after parental leave

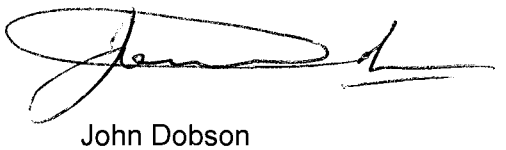
Returning to work after an absence, particularly maternity leave, was identified as a second area where the existance of a policy may not translate to a successful transition back to practice. One strategy identified for improving the experience of women was to maintain a connection with the profession during the absence. It was also suggested that women may benefit from continuing professional development (CPD) activities which are targetted at those who have been absent from practice.

The Society has developed targeted return to work seminars which are designed to provide practical strategies and guidance about the steps practitioners can take to ensure that their return to work after parental leave is successful. The seminars are delivered throughout the year as part of the Society's CPD program. The Society has also established an online "Returning to work" resource which brings together information to assist practitioners during an absence from the profession and when preparing to return to work.

More information about the Law Society's work on the advancement of women in the profession, including the flexible working and return to work resources, is available online at www.lawsociety.com.au/advancementofwomen.

If you have any questions in respect of this letter, please contact Gabrielle Lea, Policy Lawyer, Employment Law Committee (02) 9926 0375 or gabrielle.lea@lawsociety.com.au.

Yours sincerely



John Dobson
President