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Sex Discrimination Amendment (Pregnancy and
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Sex Discrimination Amendment (Pregnancy and Work) Bill
2002

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Sex Discrimination Amendment (Pregnancy and Work) Bill 2002

Date Introduced: 14 February 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The introductory provisions commence on Royal Assent, and the functional parts of the legislation commence 28 days after Royal Assent.

Purpose

To make amendments to the *Sex Discrimination Act (1984)* ('the SDA' or 'the Sex Discrimination Act') which clarify the intention of the Act.

Background

In 1998 the Attorney-General gave a reference to the Human Rights and Equal Opportunity Commission ('HREOC') to enquire into 'matters relating to pregnancy and work'. The enquiry was overseen by Susan Halliday, the Sex Discrimination Commissioner from April 1998 to April 2001. The Report, delivered in June 1999, was called *Pregnant and Productive: It's a right not a privilege to work while pregnant*.¹

The Government responded to the Report in November 2000, some 17 months later. The response accepted roughly half of the recommendations made. There were twelve recommendations calling for amendments to the SDA, and of these recommendations the Government accepted three. The *Sex Discrimination Amendment (Pregnancy and Work) Bill 2002* represents the Government's implementation of these three recommendations.

The SDA already contains prohibitions on discrimination on the basis of pregnancy or potential pregnancy (s. 7), and none of the amendments to be made change the substance of the legislation, they just clarify a few issues.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

During its enquiry HREOC had many submissions which emphasised that post-pregnancy issues are central to issues of sex discrimination. One from the Women's Electoral Lobby said:

Pregnancy is a workplace issue that starts well before conception and ends long after birth. It is impossible to separate pregnancy and family responsibilities.²

It was a result of submissions on these issues that HREOC recommended that the Attorney-General amend the SDA to specifically cover breastfeeding as a ground of unlawful discrimination.³ The current Bill chooses a method of implementing this recommendation that does not create a new ground of unlawful discrimination. Instead the Bill clarifies the fact, should it need clarification, that breastfeeding (and expressing milk) is a characteristic of women, thereby bringing it under the umbrella of the prohibition on sex discrimination in the Act. In contrast to this approach taken by the Government, the private member's Bill dealing with similar issues, introduced to the Parliament by Ms Jenny Macklin in 2000, sought to implement HREOC's recommendation by creating an entirely new ground of discrimination.⁴

The *Pregnant and Productive* Report also identified problems with s. 27 of the SDA in dealing with discrimination in advertising and recruitment. The Report suggested that a broader range of people should be able to take action against discriminatory advertising without having to prove that they had themselves been affected by the discriminatory advertisement. This would clarify that bodies such as a community legal centre of an employee representative with a concern about a particular job advertisement that may exclude or discourage pregnant or potentially pregnant women from applying could lodge a complaint about such an advertisement. The current legislation does not take up this recommendation, which was not approved in the Government response to the Report.

The Report went on to say that:

Non-discriminatory employment selection processes are crucial for ensuring that discrimination is eliminated. Processes need to be transparent and fair; they should operate so as to eliminate as far as possible any doubt about whether discrimination actually occurred. Irrelevant questions about pregnancy or potential pregnancy need to be removed from the process. A clear legislative provision, and information about its application will assist with this.⁵

The proposed legislation seeks to implement this approach by inserting clarificatory provisions in s. 27.

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Main Provisions

There are three provisions in the Bill which amend the SDA.

Item 1 inserts into the definition of sex discrimination, a clarification that breastfeeding (including expressing milk) is a characteristic that 'appertains generally to women'. This amendment does not change the law, it is simply a clarification (should one be needed) that discrimination against a breastfeeding women is a form of sex discrimination.

Item 2 inserts a **new subsection 27(1)** which is designed to be more transparent in its rules regarding questions that can be put to possible employees regarding pregnancy or potential pregnancy. Essentially the subsection clarifies that a question regarding pregnancy or potential pregnancy should not be put unless it falls within the category of a general question that is asked of everyone involved – i.e. people of both sexes and of different marital status. So, for instance, a standard question at a job interview about 'future plans' may elicit information about a planned pregnancy from a candidate. However, as long as this information is not taken into account when determining who to give the job to, the posing of the question is not necessarily wrong because it is not inherently discriminatory.

Similarly to **Item 2**, **Item 3** inserts a clarificatory note to subsection 27(2) which explains that as long as a person asking a question about someone's medical condition or pregnancy uses that information in a legitimate way (the example given is occupational health and safety) then the question is not discriminatory. The subsection allows employers to ask questions about someone's medical or pregnancy status in a manner which distinguishes between the sexes because it may assist in the enforcement of appropriate precautionary measures.

Endnotes

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1. Human Rights and Equal Opportunity Commission, Sydney, 1999.
 2. *ibid*, p. 225.
 3. *ibid*, p. 226.
 4. Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 [No. 2], item 10.
 5. *Pregnant and Productive: It's a right not a privilege to work while pregnant*, Human Rights and Equal Opportunity Commission, Sydney, 1999, p. 171.

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