



WERP



WOMEN'S EMPLOYMENT RIGHTS PROJECT

Funded by the Office for Women, NSW Department of Premier and Cabinet



IMPORTANT NOTE: THIS FACT SHEET ONLY APPLIES TO WOMEN WHO WORK IN NEW SOUTH WALES

DISCRIMINATION IN THE WORKPLACE

Women now make up 45 per cent of the Australian workforce so discrimination in the workplace is an important issue for women as it is in other areas of society.

Because freedom from discrimination is a basic human right, anti-discrimination law has been enacted at state and federal levels. In New South Wales the *Anti-Discrimination Act 1977 (NSW)* is administered by the [Anti-Discrimination Board \(ADB\)](#), whereas the federal anti-discrimination laws are administered by the [Human Rights and Equal Opportunity Commission \(HREOC\)](#).

WHAT DOES DISCRIMINATION MEAN?

Discrimination occurs when someone is treated unfairly because they happen to belong to a particular group of people or have a particular characteristic.

WHAT ABOUT DISCRIMINATION AND EMPLOYMENT?

In NSW many types of discrimination are against the law. You have the right to make a complaint to either the ADB or HREOC if you think you have been –

- ✂ refused employment
- ✂ dismissed
- ✂ denied promotion, transfer or other benefits associated with employment
- ✂ given less favourable terms or conditions of employment
- ✂ denied equal access to training opportunities
- ✂ harassed or bullied

because of your

- ✂ race - including colour, descent, national or ethnic origin
- ✂ sex - including pregnancy, family responsibilities and sexual harassment

- ✂ disability or medical condition - including past, present or future disability; whether it is permanent or temporary, physical, intellectual, psychiatric, neurological, sensory, whether it is work-related or not and includes association with a person with a disability (such as a child, partner or parent)
- ✂ age - young and old.

Other grounds of unlawful discrimination are homosexuality, transgender status, marital status and carer's responsibilities.

It is also unlawful to discriminate against an employee because of these characteristics of their family members or associates as well as being victimised because of a complaint about discrimination.

DO I HAVE TO BE A PERMANENT EMPLOYEE?

No. These laws apply to you if are –

- ✂ on probation
- ✂ casual, part-time, full-time or permanent
- ✂ an apprentice or a trainee
- ✂ a contract worker or a commission agent.

DO THE LAWS APPLY TO PUBLIC AND PRIVATE SECTOR EMPLOYERS?

The laws cover all types of employers and employment relationships including small business, Commonwealth and state government employees (except under the *Sex Discrimination Act*), private sector, and recruitment and application processes arranged through recruitment and employment agencies.

ARE THERE ANY EXCEPTIONS?

Discrimination laws have lots of exceptions and are usually called 'exemptions'.



WHAT ARE THESE EXEMPTIONS?

There are some exceptions for employers with fewer than five employees, some private schools, some charities and religious organisations and some jobs in the defence forces.

On the other side, discrimination laws also recognise that some types of unequal treatment are good for the community eg services that meet the special needs of a certain group, such as women's health centres etc. There is also an exception if the provision of special services or facilities for an employee with a disability would impose an 'unjustifiable hardship' on an employer.

Because this is a complex area of law, you should get legal advice about whether discrimination laws will cover your problem at work.

KEY POINT!

Making a complaint under discrimination laws is just one avenue. There are other legal options available eg lodging a workers compensation claim if the discrimination has caused you a physical or psychological injury etc. Get immediate legal advice on the best option (or combination of options) because there are time limits.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC) STATISTICS 2005/6

- ❖ Employment was the main area of complaint under all federal anti-discrimination legislation. Complaints regarding employment constituted –
 - ✎ 85 per cent of complaints under the Sex Discrimination Act (20 per cent alleged pregnancy and 19 per cent alleged sexual harassment)
 - ✎ 74 per cent of complaints under the Age Discrimination Act
 - ✎ 58 per cent of complaints under the Disability Discrimination Act
 - ✎ 48 per cent of complaints were under the Racial Discrimination Act
- ❖ There was an increase in the number of employment-related complaints lodged under all of these Acts.

ANTI-DISCRIMINATION BOARD OF NSW (ADB) STATISTICS 2005/6

- ❖ Employment was also the main area of complaint in NSW - 59 per cent

- ❖ 54.4 per cent of complaints were about work environment and harassment
- ❖ 15 per cent of complaints were about dismissal.

WHAT IS THE DIFFERENCE BETWEEN DIRECT DISCRIMINATION AND INDIRECT DISCRIMINATION?

Unlawful discrimination in the workplace can occur in a direct way or in a way that is not so obvious and known as indirect discrimination. An example of **direct** discrimination is where an employer terminates your employment because you are pregnant. This would be 'direct' sex discrimination. A more common example of direct discrimination in a workplace is where only the female employees are expected to get the coffee and collect the boss's dry cleaning.

Indirect discrimination is where a rule or policy that appears to apply equally to everyone is actually unfair because it disadvantages one group of people. For example, an employer's policy that provides wage increases to all workers who had worked continuously for 20 years may appear fair and generous on the face of it. But it is likely that many more women than men would miss out on the increase. Many women interrupt their working lives to have children and would not have worked continuously in one company for 20 years. This kind of unfair treatment is called indirect sex discrimination.

So the rule or policy must be 'unreasonable' for this discrimination to be unlawful.

Most discrimination against women in the workplace falls under the banner of **sex discrimination**.

WHAT IS SEX DISCRIMINATION?

Sex discrimination happens in a workplace when you are treated less favourably or differently because of your sex or pregnancy or potential pregnancy. It also includes being dismissed from employment because you have carer's responsibilities. See 'What about carers?' (see page 4)

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is against the law. In terms of anti-discrimination law it is any **unwanted** or **unwelcome** sexual behaviour that makes a person feel offended or humiliated and the reaction is reasonable. Sexual harassment has nothing to do with people attracted to each other, and it's not about mutual flirting.



It's about sexual behaviour you don't want and didn't invite. Everyone has the right to be safe and free from harassment at work.

Examples of sexual harassment are –

- ✍️ staring, leering or unwelcome touching
- ✍️ suggestive comments or jokes
- ✍️ having to look at sexually explicit material including offensive emails or SMS messages
- ✍️ insults or taunts based on sex
- ✍️ unwanted invitations or requests for sex
- ✍️ intrusive questions about a person's private life
- ✍️ displaying pornographic posters, magazines or screensavers

EXAMPLE OF SEXUAL HARASSMENT AND VICTIMISATION IN EMPLOYMENT

A woman was employed in a civilian administrative position at a naval base. The sexual harassment initially included physical contact, requests for sex and pornographic messages by a male employee who worked for the Australian Defence Force in the same office. The woman told him to stop the conduct. A few weeks later she attended an after-work dinner at the home of two co-workers that he also attended. The woman passed out after drinking wine, but awoke to find the man raping her at his own home.

The Federal Magistrates Court found that sexual harassment had occurred and that the ADF was vicariously liable for it. The Court also found that the rape at the dinner party was work-related because it involved work colleagues, and that the woman had been victimised at the workplace by managerial staff and other employees after making a complaint of sexual harassment. The woman was awarded damages of \$100,000 for hurt, suffering and humiliation. It was also possible that the woman could get compensation for economic loss and medical expenses, plus payment of legal costs.

Source: CCH Equal Opportunity Alert, May 07

KEY POINT!

Sexual harassment can include sexual behaviours that are criminal offences eg sexual assault, indecent exposure, stalking and obscene communications and should be reported to the police. You should get immediate legal advice.

WHAT ARE THE RIGHTS OF PREGNANT WORKERS?

It is against the law for someone to treat you less favorably than another worker simply because you are pregnant or because you may become pregnant.

Pregnancy discrimination can occur if an employer –

- ✍️ refuses to employ or promote a pregnant woman
- ✍️ dismisses or retrenches a pregnant woman
- ✍️ excludes a pregnant woman from a training course
- ✍️ transfers a pregnant woman except for a valid medical or safety reason (there are very few situations where this applies)
- ✍️ demotes a pregnant woman.

EXAMPLE OF ALLEGED PREGNANCY DISCRIMINATION

The complainant advised that she commenced full-time employment as an office administrator with a small training consultancy company in September. She claimed that three months later she advised the company director that she was pregnant and was suffering from pregnancy-related illness. She alleged that when advised of this the Director said words to the effect: "Look, this will jeopardise your position". The complainant claimed that a few weeks later when she advised the Director that she was again ill, the Director said, "That's it. I have had enough. Pack your stuff and go" and terminated her employment. The complainant claimed that the company signed a separation certificate that indicated that her employment was terminated due to her pregnancy and frequent illness.

The company denied that the complainant was discriminated against on the basis of her pregnancy and associated illness. The company stated that it had accommodated the complainant's medical appointments and had allowed her to take sick leave. The company denied that the complainant's employment was terminated but rather claimed that the complainant resigned. The company stated that the details on the separation certificate had been completed by the complainant prior to signature by the company.

The complaint was resolved by conciliation with the company agreeing to provide the complainant with written and verbal references and an ex gratia payment (ie a payment based on special circumstances rather than legal obligation) of \$6,000.

Source: www.hreoc.gov.au



MATERNITY/PARENTAL LEAVE RIGHTS

The *Workplace Relations Act 1996* and the *NSW Industrial Relations Act* clearly state that women have a lawful right to unpaid maternity leave of one year as a result of the birth or an adoption of a child.

If a woman has worked for an employer for 52 weeks in a full time or part time capacity or as a casual who worked continuously on a regular or systematic basis during the preceding 12 month period, she is entitled to unpaid maternity leave of up to one year. This includes six weeks compulsory leave after the birth.

Some workers, especially in the public sector, are covered by enterprise agreements or awards providing paid maternity leave. However, paid maternity leave is not an entitlement paid to the majority of workers.

Do I have to come back on full-time duties?

NSW awards and some federal awards (provisions are not protected under WorkChoices) now provide a right to request unpaid leave to work part-time up to the child's second birthday. This would mean a maximum of two years' maternity leave.

In NSW women have the right to request part-time work until her child reaches school age.

Can my partner take unpaid parental leave at the same time?

Both parents have a right to request a simultaneous period of unpaid parental leave up to eight weeks.

Can the employer refuse?

An employer does have a right to refuse a request by an employee to extend her maternity leave for two years; or allow her to work part-time until the child reaches school age; or allow both parents to take simultaneous unpaid parental leave up to eight weeks. **But** if the employee challenges this refusal to a tribunal or court, the employer must demonstrate that the proposal had been carefully considered and the refusal was reasonable.

Can I go back to the same job?

Upon returning to work, a woman is entitled to return to the same job she held before going on leave. If she had been transferred to another safer job before taking maternity leave, she has the right to return to the job she held before the transfer. If the job she held before taking maternity leave no longer exists, the worker is entitled to a job similar in pay and status, or in some cases a redundancy payment.

KEY POINT!

If you are having problems extending your maternity leave beyond one year or trying to return to work part-time, you should complain to the ADB or HREOC regardless of whether you are employed in the NSW system or covered by WorkChoices. Get advice immediately.

WHAT ABOUT CARERS?

Carers are responsible for the care or support of a dependent child or another immediate family member. Immediate family members include a spouse or former spouse of the employee, grandchildren, parents and step-parents of the employee or their spouse or former spouse and brothers and sisters of the employee or of their spouse or former spouse. 'Spouse' in this case has the same meaning as in the amended *Property Relationships Act 1984 (NSW)* and includes same-sex partners.

If you are treated unfairly or harassed at work because you are a carer you may have been unlawfully discriminated against. For example, an employer can only refuse an application from an employee for a change in hours or rosters because of her carer's responsibilities, if such a change in hours will cause unjustifiable hardship.

Depending on the nature of the employment it may be reasonable for the employer to –

- ✍ Allow you to work from home for some or all of your workdays. This may mean that the employer may have to provide equipment to do this, such as a phone, a computer and/or modem.
- ✍ Allow you to work your hours over fewer days or allow you to work part time instead of full time, or job share.

EXAMPLE OF ALLEGED DISCRIMINATION ON THE GROUND OF FAMILY (CARER) RESPONSIBILITIES

The complainant advised that she had been employed as a full-time sales assistant with the respondent retail store for approximately six years. She claimed that when a new store manager commenced, her hours were changed from 8.30am-4.30pm to 10.30am- 6.30pm. The complainant said that she advised the manager that she could not work the new hours as the day care centre her daughter attends closes at 6pm. The complainant claimed she spoke with the Area Manager about a possible transfer to another store but was told that even if she transferred, she would be required to do the later shift two days

