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**IS THERE A NEED FOR REASONABLE ADJUSTMENTS TO
ACCOMMODATE PREGNANT WORKERS?**

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I INTRODUCTION

The recently published report by the Australian Human Rights Commission ('AHRC'), '*Supporting Working Parents and Return to Work*'¹ ('AHRC Report') has recommended that the Australian Government address the gaps in the protection of pregnant workers' rights within the current legislative and policy framework.² The AHRC has suggested that there is a need to amend the *Sex Discrimination Act 1984* (Cth) ('SDA') to include a positive duty on employers to reasonably accommodate the needs of workers who are pregnant or have family responsibilities.³ The purpose of the AHRC Report was to provide a national review into the prevalence, nature and consequences of discrimination in relation to pregnancy at work and return to work after parental leave.⁴

The purpose of this essay is to analyse the strengths and weaknesses of the current legislative framework designed to protect the rights of pregnant workers, and to evaluate whether there is a need for legislative reform. It will demonstrate that there is a need for an explicit compulsory duty on employers to make reasonable adjustments for pregnant employees so that the employees can perform the genuine and reasonable requirements of their employment. Currently, there are no such obligations for employers to make reasonable

¹ Australian Human Rights Commission, '*Supporting Working Parents: Pregnancy and Return to Work National Review*' (Report, Australian Human Rights Commission, July 2014) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/supporting-working-parents-pregnancy-and-return-work>>.

² Ibid 12.

³ Ibid.

⁴ Ibid 2.

adjustments under the *Equal Opportunity Act 2010* (Vic) ('EOA'), the *SDA*, the *Fair Work Act 2009* (Cth) ('FWA'), or under the *Occupational Health and Safety Act 2004* (Vic). It will also suggest that the implementation of procedurally-based mechanisms would be beneficial to assist employees and employers to negotiate for reasonable adjustments. A comparison with the explicit duty to provide reasonable adjustments for individuals with disabilities and carer responsibilities under the *EOA* is beyond the scope of this essay.

*A Case Example: Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd*⁵

The recent decision in *Bevilacqua v Telco Business Solutions (Watergardens) Pty Ltd (Human Rights)* ('*Bevilacqua*') will be used as a running case study to evaluate the strengths and weaknesses of arguing that there is a failure to reasonably accommodate a pregnant worker within alternative claims under the current legislative framework.

The complainant was a full-time Sales Consultant for a small Telstra shop suffering from severe morning sickness.⁶ The complainant argued that she was subjected to direct and indirect discrimination on the basis of her pregnancy, in contravention of

s 18(b) of the *EOA*, amounting to constructive dismissal, and/or s 18(d) for subjecting her to a detriment.⁷ The complainant argued that a number of comments were made to her that amounted to direct discrimination, including

⁵ (Human Rights) [2015] VCAT 269 (11 March 2015).

⁶ *Ibid* [4].

⁷ *Ibid* [6].

comments about her pregnancy, taking sick leave, lifting heavy boxes, and sitting and taking toilet breaks.⁸ It was also argued that her employer indirectly discriminated against her by requiring her to lift heavy boxes, remain standing during her shift, take short and infrequent toilet breaks, and to work full time.⁹

The Tribunal rejected the indirect discrimination claim,¹⁰ however, the Senior Member accepted that the complainant was directly discriminated against under s 18(d), only in regards to the comments made to the complainant in relation to taking sick leave and toilet breaks.¹¹ Nevertheless, the direct discrimination did not amount to constructive dismissal under s 18(b).¹²

Additionally, the complainant argued that there was a failure to make reasonable adjustments for an employee with a disability under s 20, as an individual diagnosed with severe morning sickness.¹³ The complainant suggested that her employer should have made a number of reasonable adjustments, including making general changes to bathroom and sitting breaks, allowing her to sit whilst working and reducing her hours.¹⁴ Senior Member Proctor found that the complainant was a person with a disability, however, s 20 did not apply to the complainant, as she did not require reasonable adjustments to be made.¹⁵

⁸ Ibid [156].

⁹ Ibid [178].

¹⁰ Ibid [177]–[188].

¹¹ Ibid [160]–[162], [171].

¹² Ibid [162], [173].

¹³ Ibid [6], [190].

¹⁴ Ibid [190].

¹⁵ Ibid [206]–[217].

II AVAILABILITY OF REASONABLE ADJUSTMENTS WITHIN THE CURRENT LEGISLATIVE FRAMEWORK

Presently, there is no explicit obligation on employers to make reasonable adjustments for pregnant employees under various anti-discrimination and employment legislation. The following section will critically analyse the utility of the current anti-discrimination law, workplace health and safety legislation and the FWA in arguing that there is a requirement for employers to provide reasonable adjustments for pregnant workers. It will also explain how an explicit compulsory obligation may improve the effectiveness and strength of these protections.

A Anti-Discrimination Legislation

It is unlawful under the *EOA* for employers to directly or indirectly discriminate against pregnant employees or employees with a disability. The obligation on employers to make reasonable adjustments for employees only extends to those who have a disability under the definition of the *EOA*.¹⁶ Employers must not unreasonably refuse to accommodate parent and carer responsibilities,¹⁷ however, this does not extend to pregnant workers as they are not within the scope of the definition of parent or carer at this point in time. Therefore, there is no explicit provision that points to a specific obligation on employers to reasonably accommodate pregnant workers. In direct contrast, the *SDA* is completely silent on reasonable adjustments and only expresses that it is

¹⁶ *EOA* s 20.

¹⁷ *Ibid* ss 17, 19.

unlawful for an employer to directly or indirectly discriminate against an employee on the ground of their pregnancy.¹⁸

Submissions to the AHRC have identified that there are currently two methods that employees may be able to rely on in order to request reasonable adjustments to accommodate their pregnancy. The first method is to argue that there has been indirect discrimination under the *SDA*,¹⁹ and the alternative is to argue that the pregnancy or pregnancy-related illness is covered as a disability under the *DDA* or *EOA*, which would thereby give them access to s 20 of the *DDA* or equivalent provisions under the *EOA*,²⁰ which require reasonable adjustments to be made.²¹

As a last resort, there is also a positive duty under the *EOA* to eliminate discrimination,²² however, this section has limitations in relation to its enforceability and will not lead to a direct cause of action for the employee. These options will now be critically analysed.

1 Claiming Indirect Discrimination under the SDA and the EOA

Although there is a general consensus that an important addition to either the *SDA* or the *EOA* would be the inclusion of an explicit requirement upon

¹⁸ *SDA* ss 14, 7.

¹⁹ AHRC Report, above n 1, 119.

²⁰ *EOA* ss 19–20, 23.

²¹ Victoria Legal Aid, Submission to Australian Human Rights Commission, *National Review of Pregnancy and Return to Work*, January 2014, 4.

²² *EOA* s 15.

employers to make reasonable adjustments for pregnant workers, the AHRC Report suggests that the *SDA* already requires that policies and practices do not unreasonably disadvantage people with a particular attribute through the prohibition of unlawful indirect discrimination.²³ Indirect discrimination in the context of employment is defined as an employer imposing or proposing to impose, a condition, requirement or practice that has, or is likely to have, a disadvantaging effect and which is unreasonable.²⁴

The AHRC's argument is supported by the Discussion Paper into the consolidation of Commonwealth anti-discrimination legislation, which argues that although there is an explicit duty for reasonable adjustments under the *DDA*, there is also an implicit duty under each of the federal anti-discrimination Acts within the test for indirect discrimination.²⁵ Generally, the underlying purpose of an obligation to make reasonable adjustments is to prohibit indirect discrimination, as they are not mutually exclusive. This is exemplified in *Bevilacqua*, in which many of the reasonable adjustments that the complainant suggested could have been made were directly in response to the allegations of indirect discrimination.²⁶ The underlying purpose of adjustments is to ensure

²³ *AHRC Report*, above n 1, 119.

²⁴ *EOA* s 9; *SDA* s 7B.

²⁵ Attorney General's Department (Cth), 'Consolidation of Commonwealth Anti-Discrimination Legislation' (Discussion Paper, Attorney-General's Department, September 2011) 17 [58]

<<http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws.pdf>>.

²⁶ *Bevilacqua* [2015] VCAT 269 (11 March 2015) [178], [190].

that individuals are not disadvantaged by blanket-rule conditions, requirements or practices. Changing rules, practices and procedures is a form of making reasonable adjustments so that indirect discrimination does not occur.²⁷

2 The Limitations of Indirect Discrimination Claims

Nevertheless, submissions to the AHRC agree that the implicit duty may be contained within the definition of indirect discrimination, yet, argue that this implicit duty is insufficient. For example, Victoria Legal Aid submitted that claims of indirect discrimination can be complex and do not settle quickly.²⁸ An express positive duty may strengthen an employee's argument that their employer has unlawfully indirectly discriminated against them. It would be more difficult for the employer to justify a condition, practice, or direction that is discriminatory to some employees with a particular attribute, if an employee could point to the employer's failure to make a reasonable adjustment.²⁹ Furthermore, a compulsory requirement on employers is desirable because it is an explicit preventative measure requiring direct action, compared to indirect discrimination, which is a reactive provision.

²⁷ Australian Human Rights Commission, *Complaints Under the Disability Discrimination Act*, Australian Human Rights Commission
<<https://www.humanrights.gov.au/complaints/complaint-guides/what-you-can-complain-about/complaints-under-disability-discrimination#Heading27>>.

²⁸ Victoria Legal Aid, above n 21.

²⁹ John Wadham et al (eds), *Blackstone's Guide to the Equality Act 2010* (Oxford University Press, 2010) [3.51].

Bevilacqua exemplifies the difficulty of indirect discrimination arguments. The complainant argued that Telstra had indirectly discriminated against her on the basis of her pregnancy/disability, which the Tribunal did not accept.³⁰ It was alleged that there were a number of requirements, conditions and practices imposed on Telstra employees that amounted to a detriment and/or amounted to a constructive dismissal, some of which coincided with her argument that reasonable adjustments were required in response of these conditions.³¹ Therefore, as indirect discrimination was not found, there was no need for the Tribunal to consider reasonable adjustments in response to these allegations of indirect discrimination.

Lastly, it may be likely that occupational health and safety ('OHS') legislation covers situations where there is a need to make reasonable adjustments due to blanket-rule applied practices, conditions and procedures that are discriminatory to pregnant employees.³² Although OHS legislation may cover situations amounting to indirect discrimination, it is unlikely to apply to situations amounting to direct discrimination. Therefore, the implicit obligations within the current legislative framework do not undermine the need for an express compulsory duty under the *SDA* or the *EOA*.

³⁰ *Bevilacqua* [2015] VCAT 269 (11 March 2015) [177]–[188].

³¹ *Ibid.*

³² See below discussion at Section B.

3 Classifying Pregnancy or Pregnancy Related Illness as a Disability

Pregnant employees may be able to argue that there is an explicit requirement to make reasonable adjustments under the *EOA* and *DDA*, by arguing that they are covered under the attribute of disability. Pregnancy is not explicitly classified as a disability under either Act, and it is unlikely to ever be considered a disability. Prior to *Bevilacqua*, there was no authority as to whether pregnancy-related illnesses came within the scope of the definition of pregnancy, however, it is likely that it was considered to be a possible argument to make, as pregnancy-related illnesses may exacerbate pre-existing disabilities or create a future disability.

Senior Member Proctor decided that severe pregnancy-related illnesses are within the scope of the definition of disability under the *EOA*, and classified the complainant as having the attribute of both pregnancy and a disability under the Act.³³ It was said that in ordinary life, pregnant women suffering from morning sickness would not come within the scope of the definition of the attribute of disability.³⁴ In the context of the Act and consistent with the *Interpretation of Legislation Act 1984* (Vic), the severe morning sickness that the complainant experienced might have involved a ‘malfunction of a part of the body’ under s 3(d) of the *EOA*, as she was suffering from Hyperemesis Gravidarum, which her GP described as a ‘most serious disruption of normal function’.³⁵ Senior Member Proctor explicitly stated that he preferred this interpretation to an interpretation

³³ *Bevilacqua* [2015] VCAT 269 (11 March 2015) [153]–[154].

³⁴ *Ibid* [192].

³⁵ *Ibid* [192]–[198].

that morning sickness is part of the body functioning normally during pregnancy.³⁶ This decision indicates that severe morning sickness can be classified as a disability for the purpose of the *EOA*.

Although direct discrimination was substantiated in relation to the comments made to the complainant, the Tribunal held that there was no failure by Telstra to make reasonable adjustments as required for employees with disabilities under s 20. This was decided on the basis of the decision in *Muller v Toll Transport Pty Ltd (2) (Human Rights)* [2014] VCAT 472 (24 April 2014) (*'Muller'*), in which it was decided that reasonable adjustments should be implemented only after there has been proper consultation between both parties, with access to appropriate medical information and advice, and appropriate knowledge of the genuine requirements of the particular job.³⁷ The short period of time in which the issues arose in this case was insufficient in order to determine suitable reasonable adjustments in relation to breaks.³⁸ Furthermore, it was decided that Telstra attempted to accommodate her by switching her role within the company, despite the complainant arguing that this was an unsuitable role.³⁹

It was decided that the complainant did not require an adjustment to her working hours as she had merely requested the change, which was not upon

³⁶ *Ibid* [199].

³⁷ *Ibid* [204] citing *Muller v Toll Transport Pty Ltd (2) (Human Rights)* [2014] VCAT 472 (24 April 2014).

³⁸ *Bevilacqua* [2015] VCAT 269 (11 March 2015) [205].

³⁹ *Ibid* [203].

instructions by her GP.⁴⁰ Rather, her GP regarded a reduction in hours as a 'reasonable' request and although it was described explicitly as a 'need' in the medical certificate, it was not viewed as 'required' at the time that the certificate was provided.⁴¹ This highlights the strict interpretation and high threshold of the provision in relation to whether an adjustment is objectively required, particularly in the context of pregnancy.

4 Positive Duty under s 15 of the Equal Opportunity Act 2010 (Vic)

There is a positive duty on employers under s 15 of the *EOA* that requires them to prevent unlawful discrimination, harassment or victimisation within the workplace. Employers have an obligation to take active steps to ensure that they are in compliance with their obligations under the *EOA* by identifying and eliminating behaviour in the workplace that would be regarded as unlawful discrimination.⁴² This section has the potential to be utilised by pregnant workers, however, it is unlikely to have much impact on workers seeking reasonable adjustments to be made during their pregnancy. Generally, this section is similar to the requirement on employers to make reasonable adjustments for disabled employees under the *DDA*, except with less specificity and enforceability. This provision only creates an obligation not to engage in unlawful discrimination, harassment or victimisation, so it would depend on whether the failure to make reasonable adjustments for pregnant women is

⁴⁰ Ibid [206]–[216].

⁴¹ Ibid [212].

⁴² Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 159.

unlawful discrimination under the *EOA*. There is greater ambit for these types of arguments in light of the *Bevilacqua* case, although it must be noted that these arguments were made in the context of disability.

Unlike the *DDA* where a failure to make reasonable adjustments is a form of direct discrimination, there are limited means of enforcing s 15 as it only allows the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') to conduct an investigation into alleged contraventions that may amount to systemic discrimination.⁴³ However, there are still benefits of this section. Its enforceability is beyond a complaints-based system in which an individual is required to make a formal complaint to a court or tribunal if they believe they have been discriminated against, and no action can be taken if the individual does not lodge a formal complaint.⁴⁴ Not all pregnant women who experience discrimination due to the lack of reasonable adjustments will make a formal complaint, however, the addition of s 15 means that employers can still be held accountable by VEOHRC without a formal complaint being filed by an individual. It is argued that complaints-based systems cannot adequately address systemic discrimination,⁴⁵ which is evident in regards to reasonable adjustments for pregnant workers, which is not an

⁴³ *EOA* s 15(4).

⁴⁴ Department of Justice (Vic), 'An Equality Act for a Fairer Victoria: Equal Opportunity Review' (Report, Department of Justice, June 2008) 39 [1.96]–[1.97]
< http://www.daru.org.au/wp/wp-content/uploads/2013/03/An-Equality-Act-for-a-Fairer-Victoria_20082.pdf>.

⁴⁵ *Ibid.*

explicit obligation. It is suggested that positive duties will encourage compliance with the law, even in the absence of complaints.⁴⁶

B Occupational Health and Safety Legislation

Victorian OHS laws provide some protection for pregnant workers to the extent that they impose an obligation on employers to provide reasonable accommodation in order to ensure that the workplace is safe. However, these protections do not remove the need for positive obligations under the *EOA* or *SDA*, and the interactions between occupational health and safety legislation and anti-discrimination legislation remains complex.

The objective of the *Occupational Health and Safety Act 2004* (Vic) is to secure the health, safety and welfare of workers and to eliminate sources of risk to workers' health, safety and welfare, by giving them the highest level of protection against risk which is reasonably practicable in the circumstances.⁴⁷ The focus is on hazards and risks in the workplace that an employer is required to eliminate as far as reasonably practicable, or to reduce these hazards or risks if they cannot be eliminated.⁴⁸ It is an indictable offence if an employer does not provide or maintain a safe working environment without risks.⁴⁹ This provides clear incentives on employers to ensure that any risks to pregnant women are eliminated, or reduced. However, this is unlikely to provide any obligations on

⁴⁶ *Ibid.*

⁴⁷ *Occupational Health and Safety Act 2004* (Vic) ss 2–3.

⁴⁸ *Ibid* s 20.

⁴⁹ *Ibid* s 21.

employers to provide reasonable adjustments when they are beyond the scope of eliminating risks or hazards, as adjustments can include issues unrelated to health and safety. Nevertheless, health and safety concerns are often the focus of making reasonable adjustments. Under s 73, there is a process whereby parties can attempt to resolve any issues concerning OHS that arise, which may facilitate requests for reasonable adjustments related to OHS.

Gaps in OHS legislation in relation to the representation of pregnant workers was a main concern of many submissions made to the AHRC. There are no direct references to pregnant workers within the legislation, which contributes to ineffective implementation of the existing laws to protect these workers.⁵⁰ It also fails to provide guidance in identifying hazards, risk management, and codes of practice for pregnant workers.⁵¹ This may explain why workers lack clarity as to their rights under OHS laws.⁵² Employers are placed in an indeterminate position about their obligations, and therefore, cannot provide support to their employees. Although WorkSafe provides a number of compliance guides, including *How WorkSafe Applies the Law in Relation to Identifying and Understanding Hazards and Risks*, these guides emphasise that the onus is on employers to find hazards and understand the nature and degree of harm they pose, however, without guidance as to how they can identify hazards.⁵³ This

⁵⁰ AHRC Report, above n 1, 126.

⁵¹ Ibid.

⁵² Ibid 125.

⁵³ WorkSafe Victoria, *How Worksafe Applies the Law in Relation to Identifying and Understanding Hazards and Risks* (30 November 2007)

creates problems in relation to identifying potential hazards towards pregnant employees that may not be obvious to employers, because there is a lack of emphasis and guidance within OHS legislation. This weakens the likelihood that reasonable adjustments are already required under OHS legislation, as employers may not understand that there are unique risks to pregnant workers, or they may believe that adjustments are not required.

Additionally, the AHRC Report also identifies potential detrimental effects that OHS laws may have on pregnant employees. When employers do not understand the obligations they have under the laws, they may take unnecessary action that is to the detriment of the pregnant worker, thereby amounting to discrimination.⁵⁴ This issue has possibly arisen due to employers misunderstanding the health and safety needs of pregnant workers and how to assess the workplace in order to identify any potential risk to these workers.⁵⁵ There is an issue, however, that by expressly including obligations towards pregnant workers in OHS legislation, there could be an increase in the likelihood of overcautious employers discriminating against pregnant workers under a misunderstanding about health and safety risks to pregnant workers.⁵⁶

A compulsory requirement to accommodate pregnant workers would be more valuable than expressly including obligations to pregnant workers under OHS

< <https://www.worksafe.vic.gov.au/forms-and-publications/forms-and-publications/how-worksafe-applies-the-law-in-relation-to-identifying-and-understanding-hazards-and-risks>>.

⁵⁴ *AHRC Report*, above n 1, 126.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

legislation. Rather than having the onus on the employer to overcautiously identify risks to the detriment of workers, pregnant workers would have the ability to request that adjustments be made beyond issues of health and safety. Although this may create a tendency for employers to avoid employing pregnant women, or women who could become pregnant, there are explicit prohibitions against this type of discrimination under the *EOA* and *SDA*.⁵⁷

Therefore, OHS legislation fills in some of the gaps that anti-discrimination legislation cannot fully address, in situations where there is a health and safety issue that requires reasonable adjustments to be made. However, if the reasonable adjustments are not for the purposes of health and safety, pregnant women must rely on indirect discrimination under the *SDA* or *EOA*.

C Fair Work Act 2009 (Cth)

There are a few requirements on employers under the *FWA* that embody the underlying objectives of making reasonable adjustments for pregnant workers. This includes protection from adverse action taken by an employer, as well as transfers to a safe job when required. Although an inclusion of a compulsory duty on employers to reasonably accommodate pregnant workers would not directly impact the *FWA*, it could strengthen pregnant employees' access to general protections dispute claims. This would be an important addition in protecting pregnant workers' rights, particularly in circumstances in which an

⁵⁷ *SDA* s 14; *EOA* s 16.

unfair dismissal claim is unavailable due to eligibility requirements in relation to the minimum employment period and the high income threshold.⁵⁸

1 Transfers to a Safe Job

Under the *FWA*, employees are covered by the National Employment Standards, which provide the minimum employment entitlements that employers cannot contract out of.⁵⁹ Section 81 imposes a duty on employers to move a pregnant employee who is reasonably fit for work to a safe job in situations in which it is inadvisable for her to continue in her present position due to illnesses or risks arising out of the pregnancy, or hazards connected with that position. If there is no safe job available, then the employee will either be entitled to paid or unpaid no safe job leave.⁶⁰ There is also the right to unpaid special maternity leave, which allows a pregnant employee to be entitled to a period of unpaid leave where they are not fit for work because of pregnancy related illnesses.⁶¹ These are all forms of adjustments that an employer is required to make, however, it is a more extreme example than what may be required under a duty to make reasonable adjustments under anti-discrimination legislation.

If transfers to a safe job are the starting point for the protection of pregnant workers in terms of making adjustments for their pregnancy, there is a wide range of circumstances in which adjustments are needed which have been

⁵⁸ *FWA* s 382.

⁵⁹ *Ibid* s 55.

⁶⁰ *Ibid* s 73.

⁶¹ *Ibid* s 80.

disregarded. The legislation fails to address that there may be times when reasonable adjustments can be provided so that a worker's current job is made safe, without requiring a change of position.

Moreover, transferring employees to safe jobs has created additional burdens on pregnant employees in relation to a trend of making individuals redundant upon their request to return to their original position.⁶² This has been highlighted as an area for law reform.⁶³ A pregnant employee's original job is often made redundant once they move to a safe job or take maternity leave, on the basis that their role no longer exists. This is likely to occur in situations where a new role has been created as a result of other employees taking on the employee's duties or part of the duties of the original role.⁶⁴ This thereby bars a pregnant employee from making an unfair dismissal claim and possibly a general protections dispute termination claim on the basis that the redundancy was genuine. The AHRC Report indicates that a number of claims have been made under both the *SDA* and the *FWA* in relation to redundancy situations in the context of pregnancy,⁶⁵ and suggests that the courts will tend to make a finding that there has not been pregnancy discrimination in situations where there is sound evidence that there has been a genuine redundancy.⁶⁶ This demonstrates that there needs to be a clear provision that requires reasonable adjustments to be made, beyond the

⁶² *AHRC Report*, above n 1, 122–123.

⁶³ *Ibid.*

⁶⁴ *Ibid* 254.

⁶⁵ *Ibid* 256.

⁶⁶ *Ibid* 254.

scope of illnesses and risks that require the employee to be transferred to another job.

A main difficulty in relation to this situation is that the test applied in general protections dispute claims has a high threshold. This has a disadvantageous effect in the context of pregnancy discrimination situations in which an employee's role has been redistributed within the company. The court is required to determine whether the adverse action was taken 'because of' the prohibited reason.⁶⁷ The prohibited reason has to be the reason why, or a reason why, the adverse action was taken.⁶⁸ Where there are multiple reasons for the taking of adverse action against an employee, and at least one of the reasons is because of a prohibited reason, then the prohibited reason must be a substantial and operative reason, but does not have to be the dominant reason for taking the adverse action.⁶⁹ For example, in *Turnbull v Symantec (Australia) Pty Ltd*,⁷⁰ the Court decided that the employer's reason for deciding whether to terminate the employee did not include her being on parental leave, as the reason she was terminated was because of the reallocation of her tasks to existing employees within the company, and there was no longer a need for the employee's original position.⁷¹ This test fails to address the underlying reason as to why a job no longer exists. Generally, the job would still be in existence, but for the decision to

⁶⁷ FWA s 340.

⁶⁸ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, [41]–[45].

⁶⁹ FWA s 360; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, [102].

⁷⁰ [2013] FCCA 1771 (1 November 2013).

⁷¹ *Turnbull v Symantec (Australia) Pty Ltd* [2013] FCCA 1771 (1 November 2013) [45].

rearrange the employee's duties in response to their maternity leave or move to a safe job.

2 General Protections Disputes

An inclusion of an express duty for reasonable adjustments may strengthen the availability of general protections dispute claims on the basis of pregnancy discrimination. Under the current legislative framework, the *FWA* establishes that it is unlawful for an employer to take unlawful adverse action against an employee due to a prohibited reason, which includes an employee's pregnancy.⁷² There is no definition of pregnancy discrimination under the *FWA*, and definitions of what may constitute pregnancy discrimination under the *SDA* are not imported into s 351. Therefore, what may constitute a breach of the *SDA* may not breach the *FWA*.⁷³ However, if the definition of an attribute has been given its ordinary meaning under another Act, this may assist interpretation of the same attribute under s 351 of the *FWA*.⁷⁴ Nevertheless, since the failure to make reasonable adjustments has not been accepted within the scope of the ordinary meaning of pregnancy discrimination, it would be difficult to argue that a failure to make reasonable adjustments would constitute adverse action taken due to the employee's pregnancy. If the *SDA* were amended to include a requirement for employers to make reasonable adjustments, it may strengthen the ability of pregnant employees to file general protections dispute claims on the basis that

⁷² *FWA* s 351.

⁷³ Fair Work Commission, *Benchbook: General Protections* (1 July 2014) 65
< <http://benchbooks.fwc.gov.au/generalProtections/assets/File/GPBenchbook.pdf>>.

⁷⁴ *Ibid.*

an employer rejected a request for reasonable adjustment, and the employer took adverse action as a result of the request. It does not create a mechanism by which a failure to make reasonable adjustments alone would constitute adverse action.

However, one way in which a pregnant employee may already have access to general protections dispute claims in the context of reasonable adjustments is via the ground of workplace rights. Under the *FWA*, it is unlawful for an employer to take adverse action against an employee because the employee has a workplace right, or has or has not exercised a workplace right, or proposed or has not proposed to exercise a workplace right.⁷⁵ Workplace rights are defined broadly, and include complaints and inquiries made to their employer about their employment,⁷⁶ as well as having benefits under workplace laws,⁷⁷ including under the *EOA*.⁷⁸ Therefore, the employee may be exercising a workplace right upon requesting reasonable adjustments.

Adverse action taken by an employer in response to a request by an employee for reasonable accommodation of their pregnancy has currently been found to constitute adverse action under anti-discrimination legislation. The Fair Work Ombudsman determined that an employer's failure to make reasonable

⁷⁵ *FWA* s 340(1).

⁷⁶ *Ibid* s 341(1)(c).

⁷⁷ *Ibid* ss 341(1)(a)–(b).

⁷⁸ Fair Work Commission, above n 73, 42.

adjustments under the *DDA* amounted to adverse action against an employee.⁷⁹ The employee suffered from depression and requested accommodation of her disability, and the employer terminated her employment in response to the request.⁸⁰ This constituted termination of employment on the ground that the employee had a workplace right by being entitled to a benefit under a workplace law, which in these circumstances was the right to request reasonable adjustments under s 6(2)(c) of the *DDA*.⁸¹ Therefore, if a requirement were placed on employers to make compulsory reasonable adjustments for pregnant workers either under the *EOA* or the *SDA*, it would open the gates for pregnant workers to make general protections dispute termination and non-termination claims upon on the ground of workplace rights.

Lastly, there is a possibility of making general protections dispute claims in relation to OHS issues, as exemplified in the case *Stephens v Australian Postal Corporation*⁸². In this case, the employer was found to have contravened s 340 by taking adverse action against the employee who exercised a workplace right or could have exercised a workplace right.⁸³ The employee had a workplace right under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) due to a workplace injury,⁸⁴ and the complainant exercised some of the rights under the

⁷⁹ *Office of the Fair Work Ombudsman, Enforceable Undertaking Given By Bush and Campbell Pty Ltd to the Commonwealth of Australia*, 7 November 2012, 12-13 < <http://www.fairwork.gov.au/ArticleDocuments/721/Bush-Campbell-EU.pdf.aspx>>.

⁸⁰ *Ibid* 9–10.

⁸¹ *Ibid* 12–13.

⁸² (2011) 207 IR 405.

⁸³ *Stephens v Australian Postal Corporation* (2011) 207 IR 405, [10]–[19], [81].

⁸⁴ *Ibid* [17]–[18].

Act or could have exercised them.⁸⁵ This demonstrates that pregnant employees may have additional protection through the interaction of OHS legislation and the *FWA*, however, this would only be in circumstances in which reasonable adjustments are required for the purposes of health and safety protection.

D Constructive Dismissal under Anti-Discrimination Legislation and the Fair Work Act 2009 (Cth)

An inclusion of a duty to reasonably accommodate a pregnant worker may also strengthen their protection against constructive dismissal. Constructive dismissal occurs where an employee has no real choice but to resign from their position due to their employer's conduct.⁸⁶ The employee has the onus of proving that the employer engaged in conduct or a course of conduct which forced the employee to resign.⁸⁷ The employer's conduct has to be such that they took action with the intention of bringing the relationship to an end, or that has a probable result of bringing the relationship to an end, and that this conduct was the operative reason for the termination.⁸⁸ Constructive dismissal is used as an argument within an unfair dismissal claim, general protections dispute claim, or under the anti-discrimination legislation as it is not a cause of action in itself. A lack of an explicit obligation on employers to reasonably accommodate pregnant employees would likely make forced dismissal a common situation, yet, a

⁸⁵ *Ibid* [19].

⁸⁶ *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200, 206.

⁸⁷ *Australian Hearing v Peary* (2009) 185 IR 359, 367 [30].

⁸⁸ *Doumit v ABB Engineering Construction Pty Ltd* (Unreported, Australian Industrial Relations Commission, Munro J, Duncan DP and Commissioner Merriman, 9 December 1996).

difficult argument for these employees to make due to the lack of a specific obligation within the legislation.

An issue with constructive dismissal claims is that there is a narrow threshold in determining whether or not the resignation was at the employer's or the employee's initiative. The difficulty of successfully claiming that a pregnant employee has been constructively dismissed is demonstrated in *Bevilacqua*. The complainant had difficulty in establishing constructive dismissal for a number of reasons. Firstly, the complainant made broad submissions by arguing that she was constructively dismissed under s 18(b) on the basis of all the allegations made in relation to direct and indirect discrimination.⁸⁹ The Tribunal accepted only two of the allegations of direct discrimination. However, they were in contravention of s 18(d) as opposed to s 18(b), and therefore did not amount to constructive dismissal, as they did not cause the complainant to resign.⁹⁰ The complainant failed to establish that she was subjected to indirect discrimination.⁹¹ Perhaps, if the complainant's argument of constructive dismissal were framed more narrowly, there may have been a stronger argument for constructive dismissal. Nevertheless, it is likely that this would not have changed the outcome of the decision, given that there was a lack of consideration and proper consultations between the two parties after the request was made, as required on the basis of *Muller*.⁹²

⁸⁹ *Bevilacqua* [2015] VCAT 269 (11 March 2015) [6], [156], [178].

⁹⁰ *Ibid* [160]–[162], [173].

⁹¹ *Ibid* [177]–[188].

⁹² *Ibid* [204]–[205].

An explicit inclusion of a duty to reasonably accommodate pregnant workers would strengthen their access to constructive dismissal claims in situations where a failure to make adjustments has left the worker no choice but to resign due to the employer making their job untenable. At this point in time, the ability to successfully argue that there has been forced resignation due to lack of accommodation is weak for these individuals, beyond the context of s 20 of the *DDA*.

III DEVELOPMENT OF PROCEDURALLY-BASED MECHANISMS

Currently, there is minimal information directed towards employees and employers in relation to making reasonable adjustments for pregnant employees. The development of procedurally-based mechanisms may be a desirable addition in order to overcome the current gaps in the legislative framework.

The AHRC provides various good practice guidelines directed at employers to assist their understanding of their obligations under anti-discrimination legislation and to effectively develop adequate internal complaint mechanisms.⁹³ However, it would be beneficial for the AHRC, Fair Work Commission ('FWC') and the VEOHRC to develop specific guidelines to assist employers to develop and implement internal procedures and policies to ensure that there are effective mechanisms for negotiation in relation to making of reasonable adjustments.

⁹³ Australian Human Rights Commission, *Good Practice Good Business Factsheets* <<https://www.humanrights.gov.au/employers/good-practice-good-business-factsheets>>.

The AHRC Report notes that employers should implement internal mechanisms in order to accommodate the needs of pregnant workers.⁹⁴ This would require the establishment of comprehensive and effective practices and policies to ensure that managers and employees are sufficiently informed, and to develop procedures to ensure that there is monitoring of the effectiveness of these practices and policies.⁹⁵ Secondly, it is critical that the policies and practices are implemented efficiently and comprehensively in the first place.⁹⁶

It is important that employees and employers understand their rights and obligations in relation to the making of reasonable adjustments so that they can effectively negotiate for their making. Guidelines could be developed in order to assist employers and employees to effectively negotiate the making of reasonable adjustments. This should be based around the principles established in *Muller*.⁹⁷ For example, employers need to be provided with guidance in relation to recognising whether or not there has been sufficient consultation with the employee requesting reasonable adjustments and in relation to implementing effective procedures to ensure that there is sufficient consultation. Employers should also be provided with guidance in identifying the reasonable and genuine requirements the employee's job, as this will impact the type of adjustments that are required in order for the employee to perform the inherent requirements of the job. Providing employers with adequate information may prevent them from taking adverse action against an employee for requesting

⁹⁴ AHRC Report, above n 1, 141.

⁹⁵ *Ibid* 142.

⁹⁶ *Ibid* 157.

⁹⁷ *Muller* [2014] VCAT 472 (24 April 2014) [74].

reasonable adjustments, as there would be clear guidance as to both parties' rights and obligations.

Nevertheless, an explicit obligation under anti-discrimination legislation would be desirable along with procedurally-based mechanisms for internal negotiations in order to ensure that there are effective means to enforce a request for accommodation in situations where procedurally-based mechanisms are ineffective.

IV CONCLUSION

The analysis of the current legislative framework has highlighted that there is a need for a compulsory duty on employers to provide reasonable adjustments for pregnant employees. The implicit duty contained within the test for indirect discrimination is an insufficient mechanism to argue that employers are required to provide reasonable accommodation of pregnancy. Some pregnant employees may be able to claim that their employer is required to make adjustments under the *EOA* and *SDA*, arguing that they are covered by the attribute of 'disability'. However, this cannot be utilised by all pregnant employees requiring reasonable accommodation. Section 15 of the *EOA* can be utilised by pregnant workers, however, it has limited enforceability and does not create an explicit obligation on employers to provide reasonable adjustments. The protection afforded by OHS legislation is too narrow to provide sufficient protection, and may create additional detrimental consequences on pregnant employees. The *FWA* embodies the underlying objectives of making reasonable adjustment, but it only applies to narrow situations where adjustments are required. A compulsory

requirement to make reasonable adjustments may strengthen the ability for employees to utilise general protections dispute claims where they have been subjected to adverse action after requesting reasonable adjustments. An explicit compulsory duty on employers to reasonably accommodate pregnant workers is a necessary addition to the current legislative framework, along with internal procedural mechanisms developed through guidelines by the FWC, VEOHRC or AHRC.

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