

**SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE**

**2005-2006 ADDITIONAL SENATE ESTIMATES HEARING
16 FEBRUARY 2006
EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO**

QUESTIONS ON NOTICE

Outcome 2: Higher productivity, higher pay workplace

Output Group 2.1: Workplace relations policy and analysis

Output 2.1 2: Workplace Relations Legislation Development

Question Number: W709-06

Question:

Senator Wong asked in writing:

During the public hearings into the *Work Choices Act*, it was suggested that a woman who was on maternity leave would not have the right to return to work if her position no longer existed and her employer determined that she no longer qualified for any other positions that are in existence in the organisation (*Hansard*, 18/11/05). Does DEWR agree that this situation could arise under WorkChoices?

Answer:

1. Under section 280 of the *Workplace Relations Act 1996* (as amended) (the WR Act), an employee who returns from maternity leave has an entitlement to return to her former position. However, if her former position no longer exists and she is qualified for and able to work in another position, subsection 280(5) deals with her transfer to that other position. If there is more than one position, she is entitled to return to the position which is nearest in status and remuneration to her former position. Equivalent provisions apply in a similar way to other forms of parental leave.
 - Section 280 is consistent with the AIRC's model parental leave clause, which provides that where the employee's position no longer exists but there are other positions available which the employee is qualified for and is capable of performing, the employee will be entitled to a position as nearly comparable in status and pay to their former position. It is also consistent with the old clause 14 of Schedule 1A to the WR Act, and clause 12 of Schedule 14 to the WR Act.
2. Section 659, and the civil remedy provisions in Division 7 of Part 7, of the WR Act facilitate the effective operation of the return to work guarantee provided by section 280.

3. Paragraph 659(2)(h) of the WR Act prohibits the termination of an employee's employment for the reason, or reasons including the reason, that the employee was absent from work during maternity leave or other parental leave.
4. The civil remedy provisions in Division 7 of the Standard enable a court to prevent further breaches, or to rectify the consequences of a breach of the relevant parts of the Standard. For example, the court may make an order for reinstatement or compensation if an employee's employment was terminated in breach of section 280.
5. An employee who considers that they have been dismissed on discriminatory grounds could also seek a remedy under the *Sex Discrimination Act 1984* (SD Act).
 - Division 1 of Part II of the SD Act prohibits discrimination on the basis of sex, marital status, pregnancy or potential pregnancy in employment and, amongst other things, provides that it is unlawful for an employer to discriminate against an employee on the ground of the employee's family responsibilities by dismissing the employee (subsection 15(3A) of the SD Act).