Chapter 9

Protection v. Paternalism: The Lead Issue

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The purpose of this paper is to highlight one of the most significant issues affecting equality of opportunity for women in employment in the 1990s, that is foetal protection policies.

I will use the recent developments in regard to sex discrimination issues and occupational health and safety in the lead industry in Australia and in America to illustrate the achievements, the dangers and the challenges for those of us who seek to end sex discrimination in employment and understand that occupational health and safety and equality of opportunity in employment are concepts which go hand in hand. They are not, as some have sought to argue "incompatible".

It is with a little chagrin that I recall the story of a person, who could only be described as a "seasoned and obviously hardworking man" in his 50s. He said to me at a conference last year at which issues of sex discrimination and occupational health and safety issues in the lead industry that:

I do not approve of you feminists, but it's true that it was only when that sex discrimination act was passed that we blokes saw any improvement in our general work conditions. I am not saying that I think girls should work in the lead industry, but...

Lead Industry Dangers

The lead industry in Australia has historically excluded women from employment because of the possible dangers of lead exposure to the foetus. Lead is absorbed through the respiratory system and the digestive tract. Present medical opinion supports the contention that there is no difference in the effect of lead on adult men and women. However, it is also recognised that in the case of pregnant women lead may cross the placenta creating a risk to the developing foetus, the risk most often highlighted being the possibility of aborting the foetus.

Jobs have been categorised according to risk to lead exposure. Lead risk jobs are regarded as those which expose a person to the possibility of lead in blood levels in excess of 300ug/s/100 ml. Accordingly, women who may be exposed to lead and a consequent lead level of over 300ug/s/100ml put at risk the foetus. To avoid the possible risk to the foetus, women have been excluded from the lead industry. After the introduction of the Sex Discrimination Act 1984 and the Human Rights and Equal Opportunity Commission Act 1986, as well as various State equal opportunity Acts, this historical exclusion of women from the lead industry was subjected to more intense scrutiny and debate.

In March 1990 the National Occupational Health and Safety Commission released a discussion paper which stated in the preface that "it is not possible to reconcile the two objectives of maximising occupational health and safety standards and ensuring equal employment opportunities".

The principles which govern the Human Rights and Equal Opportunity Commission's approach to sex discrimination in the lead industry are that all workers (men and women) have the right to a safe working environment. And that all workers (men and women) have the right to equal employment opportunity free from discrimination. I am convinced that not only are these principles able to be reconciled, but that they are intertwined. It is only by providing a workplace which is safe for both men and women that any true equality will be achieved.

The Sex Discrimination Act is completely consistent with occupational health and safety legislation. The Sex Discrimination Act is not requiring employers to put their workers at risk; nor is it about making the lead industry economically non-viable. The Act came into operation in August 1984. Its objects are:

(a) To give effect to certain provisions of the convention on the elimination of all forms of discrimination against women

(b) To eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status and pregnancy in the areas of work

(c) To promote recognition and acceptance within the community of the principle of the equality of men and women.

The principles embodied in the Sex Discrimination Act are derived from and inclusive of those set out in the United Nations Convention on the elimination of all forms of discrimination against women (Cedaw). As noted above the implementation of Cedaw is an object of the Act.

Cedaw has been ratified by more than 100 countries. This clearly demonstrates that the principles contained within Cedaw are important legitimate subjects of international concern. Through Cedaw the

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Community of Nations expresses its vigorous opposition to discrimination against women and its commitment to active measures to redress current inequalities between the sexes. The Sex Discrimination Act is such a measure.

Article 11 of Cedaw is the most pertinent article of the Convention to the issue of sex discrimination and occupational health and safety issues. This article requires States’ parties to take all appropriate measures to eliminate discrimination against women in the field of employment and to ensure, on a basis of equality of men and women, the same rights, including:

- The right to work as an inalienable right of all human beings
- The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment
- The right to free choice of profession and employment
- The right to equal pay and equal remuneration and treatment for work of equal value; and
- The right to protection of health and safety in working conditions including safeguarding the function of reproduction

The Sex Discrimination Act renders unlawful discrimination on the basis of sex, marital status and pregnancy in a number of areas including in employment, education and the provision of goods, services and facilities.3

Exemptions Specified in the Act

The Act recognises that some exemptions from the general prohibition of discrimination on the basis of sex, marital status and pregnancy in most fields of public life are necessary. Division 4 of part II of the Act contains the provisions which enumerate the categories of activities which are exempt from the operation of the Act. There are three different classes of exemptions. The first are activities specified in the Act and they include, for example, employment where a particular sex is a genuine occupational qualification.

The second class of exemption is provided by section 40 of the Act. When the Act came into operation in August 1984 there were a number of discriminatory State and federal acts. In recognition of the need to provide an opportunity for State and federal governments to review and amend existing discriminatory legislation and policy the Act provided for a two year exemption where a person was acting in direct compliance with any commonwealth or State act, regulation, rule, by-law or determination or direction or any law of a territory, in force at the commencement of the Sex Discrimination Act.

It was expected that at the expiration of two years the need for exemption would be minimal. The Act provided that further time limited exemptions in relation to discriminatory legislative provisions could only be obtained by way of regulation, granted by the Attorney-General. Exemption by way of regulation since 1986 has steadily decreased. The exception afforded under the current regulations expires on 31 July 1991. As I foreshadowed in my submission to the National Occupational Health and Safety Commission the Attorney-General has not extended the exemptions made pursuant to section 40 of the Sex Discrimination Act.

The third class of exemptions is that pursuant to section 44 of the Act. This section authorises the Commission to grant exemptions for periods not exceeding five years upon such terms and conditions as it considers appropriate. These exemptions are rare and are strictly limited. Section 44 exemptions recognise the need for exemption while also permitting the monitoring and assessment of that need in light of changing circumstances.

The Commission’s view on permanent exemptions generally is that they are contrary to the spirit and objects of the Act. Ideally, the need for exemption will cease to exist.3

Present Status of Lead Industry

The present exemption afforded to the lead industries in NSW, Queensland and Tasmania will cease to exist on 31 July. Only the Broken Hill Associated Smelters Pty Limited, a company in South Australia, has been granted an exemption pursuant to section 44 of the Act. The present section 44 exemption is due to expire on 31 December 1992.

Foetal Protection Policies

The experience in America of foetal protection policies is relevant when considering the social implications of foetal protection policies in Australia. The leading case on the question of foetal protection is known as the ‘Johnson Controls Case’.4

Title VII of the Civil Rights Act 1964 declares it unlawful for an employer to discharge or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges in employment because of the individual’s sex. In 1978 Congress enacted the Pregnancy Discrimination Act which provides that discrimination on the basis of pregnancy, childbirth, or related medical conditions

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constitutes sex discrimination under title VII. The purpose of the Pregnancy Discrimination Act was to prevent the differential treatment of women in employment based on the possibility of pregnancy. Interestingly, despite the Pregnancy Discrimination Act and the requirements under title VII, many foetal protection policies were permitted by the American court to remain in place.

The only defence available in relation to an allegation of discrimination under title VII is known as, bona fide occupational qualification (in Australia, under the Sex Discrimination Act there is a similar provision which refers to genuine occupational qualification, see section 30 of the Act). This defence provision is designed to admit only the most narrow of exceptions to the general prohibition against sex discrimination. The bona fide occupational qualification defence requires an employer to show that the class excluded by a certain policy is unable to perform the duties that are necessary to the normal operation of the particular business.

Analysis of Johnson Controls Case

In 1982, the Johnson Controls company implemented a policy which excluded women capable of bearing children from working in jobs within the company which exposed them to the possibility of their blood lead levels rising above 30 micrograms. Women were barred from jobs involving actual or potential lead exposure. Only those whose infertility was medically documented could be employed without “discrimination”. The policy was introduced after eight of its employees became pregnant.

A class action was filed in the district court by a number of employees affected by the company's foetal protection policy. They claimed that the policy constituted sex discrimination contrary to the rights specified in title VII of the Civil Act of 1964. Among the class was Mary Craig, a woman who had chosen to be sterilised in order to avoid losing her job. In reaching its decision the Supreme Court of the United States canvassed a number of arguments raised by Johnson Controls in relation to the defence bona fide occupational qualification. The majority held in dismissing Johnson Controls' arguments in relation to bona fide occupational qualifications, that fertile women participate in the manufacture of batteries as efficiently as anyone else.

The court stated:

Johnson Controls professed moral and ethical concerns about the welfare of the next generation, do not suffice to establish a bona fide occupational qualification of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them, rather than to the employers who hire those parents. Congress has mandated this choice through title VII, as amended by the Pregnancy Discrimination Act. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the Pregnancy Discrimination Act simply do not allow a woman’s dismissal because of her failure to submit to sterilisation ...

Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead... Johnson Controls has shown no “factual basis for believing that all or substantially all women would be unable to perform safely and efficiently, the duties of the job involved”. Weeks v. Southern Bell Tel & Tel Co., 408 F. 2d 228, 235 (CA 5 1969), quoted with approval in Dothard 433 U.S., AT 333.

Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women. Of the eight pregnancies reported among the female employees, it has not been shown that any of the babies have birth defects or other abnormalities.

Earlier in the decision the court highlighted the bias in Johnson Controls policy. It was fertile men and not fertile women who were given the choice as to whether they wished to risk reproductive health for a particular job. The court recognised the obligations of employers and the possibility of risks of injury to future children. It nevertheless concluded, that the bona fide occupational qualification concept was not so broad to transform what was “a deep social concern” into an essential aspect of “battery making”.

The court found that Johnson Control’s foetal policy classified workers on the basis of gender and child bearing capacity, not simply on the basis of fertility. The company did not attempt to protect the “unconceived children” of all its employees. The “protection afforded” to the foetus of female workers was provided despite the evidence of the debilitation effect of lead exposure on the male reproductive system. The court observed that Johnson Controls was concerned only with the harm that may befall the unborn children of its female employees.

The court concluded that Johnson Controls policy was discriminatory because it required only a female employee to produce proof that she is not capable of reproducing.

In a recent article by Joan E. - Bertin, entitled ‘People Protection not Foetal Protection’, she provides an analysis of the Johnson Controls case including discussion of the various “defences” raised by the company. She states:
The court rejected the argument that any additional costs associated with employing women could justify discrimination. Such costs might include both the expense of implementing workplace improvements and the costs of potential liability to the future children of workers. The court, however, rejected any cost-based defence, holding that employers must shoulder any "extra cost of employing" workers. The majority observed:

... The Occupational Safety and Health Act established a series of mandatory protections which, taken together, "should effectively minimize any risk to the foetus and newborn child" ... where the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

Bertin goes on to say:

This decision sends the clear message to employers and to the public officials who are involved in regulating toxic substances in workplace exposures, that women are entitled to work in all work environments, and that their health needs must be taken into account in fashioning safety and health regulations and policies.

This decision would apparently preclude any health and safety plan from making employment-related distinctions on the basis of sex or pregnancy, unless the plan distinguished among employees on the basis of their ability to perform the work. Thus plans that require women to sign waivers or provide medical certification to continue working, that discourage women from taking certain jobs, or that selectively recognise only health risks unique to women, would all likely be prohibited as a result of this decision ...

There is nothing in the opinion inimical to occupational health and safety goals. To the contrary, those goals could only be enhanced by the court’s recognition that the pre-existing right to workplace protection extends to all workers on a non-discriminatory basis and cannot be provided by exclusion of some sub-group ...

Foetal protection policies represent the employer’s admission that the work environment is unacceptably risky for women who are pregnant ... The Supreme court has plainly rejected the proposition that an employment health plan can protect foetuses more than it protects workers.

Foetal Protection Debated

In Australia, the current debate as to foetal protection rages. The National Occupational Health and Safety Commission is expected to release its final code of practice and guidelines for the lead industry later this year. When the National Occupational Health and Safety Commission released its draft code of practice and guidelines it stated that it was not possible to reconcile the objectives of maximising occupational health and safety standards and ensuring equality of opportunity. Accordingly, in its view, the only possible solution was, that if occupational and health and safety standards are to be pre-eminent, it would be necessary for an amendment to be made to the Sex Discrimination Act. That amendment in effect providing a permanent exemption from the operation of the Sex Discrimination Act for the lead industry.

A blanket exemption from the Act for the lead industry was clearly not considered appropriate by parliament in 1984 when the Act was passed. It certainly is not appropriate nor is it acceptable in 1991.

Broken Hill Associated Smelters Case

The case of the Broken Hill Associated Smelters Pty Limited (BHAS), the major manufacturer of lead in South Australia, illustrates the gains that can be achieved when occupational health and safety issues and sex discrimination issues are not regarded as mutually exclusive. The BHAS’ plant is situated in Port Pirie in South Australia. Certain processes at the plant exposed workers to lead emissions of varying degrees and intensity. In South Australia, until the proclamation of the Equal Opportunity Act, women had been completely excluded from employment in lead processing by virtue of the Industrial Safety Code Regulation 1975-1976. However, upon the proclamation of the South Australian Equal Opportunity Commission Act the regulation which excluded women no longer applied.

Accordingly, in 1987 the BHAS sought exemption under the State and federal legislation in relation to the employment of women in lead processing at its Port Pirie plant. A three-year exemption was granted under the State and federal legislation. The exemption expired in September 1990. When making its initial application BHAS referred to the fact that it was committed to the principles of equality of opportunity and aware of its obligations in respect of occupational health and safety issues.

In recognition of its commitment to its principles, the BHAS developed an environmental and economic improvement plan in conjunction with the BHAS combined unions council. In summary, the plan consisted of a seven-point strategy. The most significant aspects of the strategy were the development and establishment of a systematic program of site-wide monitoring of lead in air levels; the establishment of a system of classification of all jobs at the plant according to level of risk of lead contamination of workers; the establishment of an effective occupational health and safety scheme and work health education programs and the extension of the existing system of respirator use. When the BHAS had earmarked $58 million towards this plan.

In September 1990, the BHAS sought a further exemption for three years. One of the most significant achievements the BHAS made during the term of the previous exemption period was the reduction of lead in blood levels from an average of 39 ug/100 mls in January 1988 to 30.7 ug 100 mls in July 1990. Further, there had been a dramatic decrease in the number of workers in the higher range of blood-lead levels.

The representative of BHAS stated in evidence:

The important thing is that, as a result of the environment and economic improvement plan, its occupational health and safety policies and the lead in air monitoring we have had a great deal of success in reducing lead in blood levels, which is far in excess of our original expectations. Also it proves to us that we can do considerably better ... The average lead in blood level has reduced from 39, when we started the program ... to
30.7 ... I don't like to use dramatic terms, but it is a spectacular result.

Work Practice Safety

BHAS had completed 10 projects it had undertaken to complete, at a cost of approximately $26.85 million. The BHAS also referred to a variety of occupational health and safety policies which had been implemented. These policies included development of a variety of safer work practices which were increasingly accepted and implemented by the workers; these played a considerable role in reduction of the blood lead levels. They included ensuring workers and management paid closer attention to personal hygiene and respirator use. Part of the “paying closer attention to personal hygiene” included an assessment of such factors as smoking, eating and drinking in the workplace, beards/facial hair/moustaches, clothing and personal hygiene and implications for blood lead levels.

Workers were encouraged to give up smoking and were told that the hands and face must be thoroughly washed and scrubbed, if necessary, before eating and drinking. Further, they were informed that work clothing should be changed regularly, how regularly to be determined by the degree of contamination. In recognition of these policies, BHAS provided changehouses, showers, soaps and shampoo for all employees. It was with some pride that the BHAS also referred to the development, in line with its commitment to equality of opportunity, to the construction of female change room facilities. BHAS conceded that many of the improvements gained in the reduction of blood lead levels were attributable to the inexpensive measures it adopted which lead to improvements in personal hygiene.

Classification of Jobs

A further significant and thought provoking development for the employment of women at BHAS and the occupational health and safety of workers at the plant was the job classification program undertaken by the BHAS in accordance with the conditions imposed under the original exemption. The classification of jobs identified areas of lead risk and lead hazard. In so doing it identified those areas where BHAS considered women could safely be employed at the site.

The total workforce of BHAS was approximately 1286 employees. There was a total of 561 jobs classified as “A” category, that is non-risk jobs. Of these only 42 positions were occupied by women. Thirty-three of these 42 positions were clerical.

Both the Commission in the South Australian Equal Opportunity Tribunal granted an exemption which will expire on 31 December 1992 (see Appendix 9.1). The South Australian Equal Opportunity Tribunal in its reasons for decision stated:

We are concerned that to continue to grant such exemptions is to exclude women from a major and significant source of employment in the Port Pirie area, or at least, profoundly limit their access to such employment, merely on the ground of sex. In expressing this concern we draw attention to ... the recent decision of the Supreme Court of the United States in Automobile Workers v. Johnson Controls, Inc.7

The BHAS presented evidence at a joint hearing conducted between the Commission and the South Australian Equal Opportunity Tribunal in December 1990. The gains made by BHAS in relation to the significant drop in blood lead levels were acknowledged.

BHAS agreed the achievements were beyond their expectations and that further gains could be made. What was particularly significant was the fact that these gains were achieved, in large part, because BHAS was required to demonstrate and justify why it should obtain an exemption from the operation of State and federal anti-discrimination legislation. It did, to its credit, undertake and implement many changes.

However, these changes, strategies and policies should have been implemented many years ago. They were not implemented years ago. The changes, strategies and policies were implemented because State and federal governments had decreed that it was no longer appropriate for women to be excluded from employment opportunities. One can only contemplate what gains would have been made had BHAS not sought an exemption from the operation of the Act.

What is the real motivation behind foetal protection policies in Australia and elsewhere? Are such policies implemented due to employers genuine concern for the workers’ health and safety or is it simply an attempt by employers to minimise legal liability in respect of a foetus? Foetal protection is discrimination, not on the basis of objective differences between men and women. As Duncan observed in her article entitled “Foetal protection policies: further sex discrimination in the marketplace”:

... Foetal protection ... presumes that the employer rather than the woman is better suited to safeguard the interests of future offspring ... foetal protection ... is discrimination based on assumptions about a woman's ability to govern her sexuality and to make informed choices when informed of the risks involved ...
Foetal protection policies do, in large part, shift responsibility to maintaining safe working conditions from employers where it properly belongs, to women workers. Bertin also commented that foetal protection policies are an admission that the work environment poses an “unacceptable risk” for female workers who are pregnant.

It is not acceptable in 1991 that women should be required to make, what was in the case of Mary Craig and other women, unacceptable and quite tragic choices. Foetal protection policies render a woman’s right to work conditional on their willingness to forgo the right to bear children.

The Johnson Controls Case highlights the danger when companies are permitted to avoid issues of workplace safety. The Commission’s involvement with the BHAS highlights that occupational health and safety gains can be achieved for all workers when employers are required to demonstrate to an independent body the standard and appropriateness of its work practices. Such independent assessment is not possible when foetal protection policies are permitted to remain, to shield employers.

One of the problems involved in discussion of foetal protection and sex discrimination issues, is that both issues are emotive. People often ask: “How many women does foetal protection in the lead industry affect? Why would any women want to work in such a dirty job? You are talking about only a small percentage of the total workforce, why waste our time, why waste our effort?” It is not a waste of time. It is not simply a question of statistics or an assessment of how many women affected. It is not for me or you to judge what is an appropriate or suitable “occupation” for women.

The reality is that in many towns and cities the lead industry will be the only, or the major, source of employment. It certainly is often the most lucrative source of income available. Admittedly, in America when it became known that foetal protection policies affected millions of American women the issue became one of concern to many lobbyists. However, the issue of foetal protection goes beyond a mere statistical analysis. Foetal protection is at the very heart of equality of opportunity.

Equality of opportunity affects all workers. The right of all workers to a safe working environment is one which the Commission and all equal opportunity organisations strive to achieve. It is too easy to put such issues as foetal protection in the “too hard” basket. The danger in so doing is apparent.

**Conclusion**

The gains we have achieved in regard to occupational health and safety have, in large part, been achieved through legislation. But legislation is not enough, it requires the commitment of workers, of unions, of government and, most importantly of the employers.

We all must strive to ensure that issues such as sex discrimination and occupational health and safety remain in the public forum. We cannot permit such practices as foetal protection to go unchallenged for such practices are the tip of the iceberg and have ramifications for all workers.

All Australian workers are entitled to a safe and healthy work environment, which is what we must continue to strive to guarantee.

**REFERENCES AND NOTES**

1. Scheduled to the Sex Discrimination Act 1984
3. I am presently undertaking review of the statutory exemptions under the Sex Discrimination Act. This review includes an assessment of the need for the continued existence of certain exemptions in their present form and what amendments, if any, should be recommended. The review covers the operation of section 40 exemptions.
7. Foetal Protection Policies — Implications for Australia.