



**Submission
to
Inquiry into Paid Maternity, Paternity and
Parental Leave**

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Executive Summary

In summary, JobWatch Inc (“**JobWatch**”) makes the following recommendations:

1. A paid parental leave scheme be introduced in compliance with Australia’s international human rights obligations.
2. An entitlement to paid parental leave be included in the proposed National Employment Standards.
3. Recognition of same sex partners as persons eligible for paid parental leave.
4. All workers be entitled to paid parental leave.
5. No length of service conditions for workers to be eligible for paid parental leave.
6. Staggered introduction of paid parental leave commencing at 14 weeks of paid parental leave at worker’s full pay, with a view to increasing the duration of paid leave to 12 months.
7. Supporting parent paid leave of 4 weeks, allowed to be taken concurrently with the primary parent.
8. The option to extend the duration of paid parental leave by taking the leave entitlement at half-pay at the worker’s request.
9. Parental leave payments be transferable to the primary caregiver.
10. Federal government funded minimum payment for paid parental leave that is capped.
11. Implementation of an employer “parental leave top-up scheme” across all workplaces to top-up the balance between government funded minimum payment and the worker’s full pay.
12. Any period of paid parental leave be regarded as service.
13. Continuing superannuation payments for workers who are on parental leave.
14. Return to work guarantee strengthened to include employer obligations and right to request flexible return to work arrangements.
15. A national social security scheme provide assistance to non-working parents.

About JobWatch Inc.

JobWatch Inc (“JobWatch”) is an employment rights community legal centre which, since 1980, has operated as the only service of its type in Victoria. The centre is funded primarily by the Victorian State Government (the Department of Innovation, Industry and Regional Development – Industrial Relations Victoria).

JobWatch’s core activities include:

- The provision of assistance by way of information and referral to Victorian workers via a free and confidential telephone information service which received 17,939 calls in the 2006/2007 financial year;
- A community education program that includes publications, information via the internet and talks aimed at workers, students, lawyers, community groups and other organisations;
- A legal casework service provided by JobWatch’s legal practice for disadvantaged workers;
- Research and policy work on employment and industrial law issues.

JobWatch maintains a database record of our callers, which assists us to identify key characteristics of our callers and trends in workplace relations. JobWatch is uniquely placed to comment on the effects of legislation on a broad range of Victorian workers, particularly disadvantaged workers.

Our records indicate that our callers have the following characteristics:

- The majority are not covered by collective agreements and are only entitled to the minimum conditions under federal awards or the minimum Standard under the *Workplace Relations Act 1996*.
- The majority are not union members.
- A large proportion are employed in businesses with less than 20 employees.
- A significant number are engaged in precarious employment arrangements such as casual and part-time employment or independent contracting.
- Many are in disadvantaged bargaining positions because of their youth, sex, racial or ethnic origin, pregnancy status, socio-economic status, or because of the potential for exploitation due to the nature of the employment arrangement, for example apprenticeships and traineeships.
- Many are job seekers attempting to return to the labour market after long or intermittent periods of unemployment.

Introduction

JobWatch has a long standing interest and involvement in the improvement of rights and entitlements of vulnerable and disadvantaged workers. JobWatch welcomes the opportunity to respond to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave (**"the Inquiry"**). We congratulate the Australian Government for this much needed initiative on paid parental leave.

Scope of Submission

This submission will focus on the following issues:

1. Australia's international human rights obligations
2. The proposed National Employment Standards
3. Eligibility
4. Qualifying Period
5. Duration and Flexibility
6. Financing Options
7. Return to Work Guarantee
8. Interaction between social security and paid parental leave

With the exception of the Statistics section, in this submission we have used the term 'paid parental leave', as defined in the Inquiry Issues Paper, to refer to paid maternity and paternity leave provided to a parent around the time of the birth of their child, and leave taken when adopting a child under two years of age.

The case studies provided in this submission are those of actual but de-identified JobWatch clients or callers to the JobWatch Telephone Information Service. Names have been changed for reasons of confidentiality.

Statistical Analysis

The following information provides an overview of the demographics of callers to JobWatch Telephone Information Service. As illustrated below, the majority of callers inquiring about parental leave are women. As such, the case studies and other aspects of this submission focus on the experiences and issues faced by women workers. However, JobWatch supports a paid parental leave scheme that includes mothers, fathers and other primary carers.

Volume of enquiries about parental leave

JobWatch receives on average 569 enquiries each year about maternity and parental related issues and over the last five financial years has received approximately 3,000 enquiries in total (see Table 1). The main type of inquiry relates to maternity leave.

Table 1: Maternity and parental related enquiries to JobWatch, 2002 to 2007 financial years, number

Inquiry	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007
Maternity	294	338	273	258	262
Parental and carer Status discrimination	154	125	158	213	186
Pregnancy and breast feeding discrimination	158	143	163	141	135
Total	452	606	594	612	583

Source: JobWatch database

Gender

The overwhelming majority of callers to JobWatch about maternity and associated issues are women (see Table 2). Of the male callers who contact JobWatch a significant proportion call on behalf of their wife or partner.

Table 2: Maternity, parental and pregnancy discrimination callers to JobWatch by gender, 5 year period from 02/03 to 06/07, number and percentage

Gender	No.	%
Female	2727	90.9
Male	274	9.1
Total	3001	100

Source: JobWatch database

Age group

The main age groups of maternity and associated issue callers are women in the child bearing age group: 25 to 34 year age group (36.7 percent) and 35 to 44 year age group (25 percent) (see Table 3). Those aged 45 and over comprise approximately 23 percent of maternity and associated issues callers while those aged under 25 years of

age comprise 13 percent. The 45 and over age group are more likely to contact JobWatch about parental and carer status discrimination issues rather than maternity and pregnancy discrimination issues.

Table 3: Maternity, parental and pregnancy discrimination callers to JobWatch by age group, 5 year period from 02/03 to 06/07, number and percentage

Age	No.	%
15 - 18	14	2.5
19 - 24	170	11.3
25 - 34	1195	36.7
35 - 44	546	25.0
45 - 59	59	22.9
60+	5	1.7
Total	1989	100

Source: JobWatch database

Missing=1012

Industry

Over a fifth of maternity and associated issues callers to JobWatch are employed in the property and business services industry (see Table 4). There is also significant representation from the retail and health and community services industry, which have high female representation in their workforce, as well as the manufacturing industry.

Table 4: Maternity, parental and pregnancy discrimination callers to JobWatch by industry, 5 year period from 02/03 to 06/07, number and percentage

Industry	No	%
Accommodation, cafes and restaurants	137	5.7
Agriculture, Forestry and Fishing	33	1.4
Communication Services	105	4.4
Construction	40	1.7
Cultural and recreational services	63	2.6
Education	63	2.6
Electricity, gas and water supply	13	0.5
Finance and insurance	145	6.1
Government Administration and Defence	60	2.5
Health and community services	285	11.9
Manufacturing	240	10.0
Mining	5	0.2
Personal and other services	124	5.2
Property and business services	513	21.4
Retail trade	352	14.7
Transport and storage	85	3.6
Wholesale trade	129	5.4
Total	2392	100

Source: JobWatch database

Missing=609

Size of Company

Nearly half of maternity and associated issues callers to JobWatch are employed by companies with over 100 employees (49 percent) (see Table 5). However, there is also a significant representation of callers who are employed by companies with less than 20 employees (23.2 percent). The figures seem to suggest that maternity leave and related issues are a problem amongst large companies, despite their human resource capabilities; as well as small and medium sized companies.

Table 5: Maternity, parental and pregnancy discrimination callers to JobWatch by size of company, 5 year period from 02/03 to 06/07, number and percentage

Size of Company	No.	%
Less than 5 employees	93	5.8
5 to 19 employees	279	17.4
20 to 49 employees	240	14.9
50 to 100 employees	176	11.0
Greater than 100 employees	787	49.0
Caller doesn't know	31	1.9
Total	181	100

Source: JobWatch database
Missing=1395

Occupation

A large proportion of maternity and associated issues callers work in low skilled and low paid occupations such as clerks (21.1 percent) and sales/personal service workers (24.6 percent) (see Table 6). However, a significant proportion are also Managers and Administrators (20 percent) and professionals (14.9 percent).

Table 6: Maternity, parental and pregnancy discrimination callers to JobWatch by occupational group, 5 year period from 02/03 to 06/07, number and percentage

Size of Company	No.	%
Clerk	486	21.1
Labourers and related workers	160	6.9
Managers and Administrators	462	20.0
Not in labour force	2	0.1
Para-Professional	191	8.3
Plant and machine operators/drivers	35	1.5
Professional	343	14.9
Sales/Personal Service Workers	572	24.6
Tradespeople	57	2.5
Total	2308	100.0

Source: JobWatch database
Missing=998

Australia's international human rights obligations

Recommendation

- **A paid parental leave scheme be introduced in compliance with Australia's international human rights obligations**

A paid parental leave scheme should be introduced in compliance with Australia's international human rights obligations. Paid parental leave is a human rights issue.

Australia has ratified the United Nations *International Covenant on Economic, Social and Cultural Rights* (“**ICESCR**”) which pursuant to Article 10 imposes an obligation to protect all families. Specifically Article 10.2 of ICESCR provides that “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.” Further, Article 10.3 of ICESCR imposes an obligation to protect and assist all children without discrimination on the basis of their parentage or other conditions.

JobWatch calls on the Australian Government to withdraw its reservation against Article 11.2 of the United Nations *Convention on the Elimination of all Forms of Discrimination against Women* (“**CEFDW**”). Article 11.2(b) of CEFDW requires that parties to the convention “introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances”.

Further, JobWatch calls on the Australian Government to ratify the International Labour Organisation Convention 183, *Maternity Protection* (2000) (“**Maternity Protection Convention**”).

The proposed National Employment Standards

Recommendation

- **An entitlement to paid parental leave be included in the proposed National Employment Standards**

Currently, the minimum entitlement to maternity, paternity, adoption and other types of leave is protected by the Australian Fair Pay and Conditions Standard (“**the Standard**”) in the *Workplace Relations Act 1996* (“**the WR Act**”). As part of its industrial relations reform package the Australian Government has recently released an exposure draft of proposed National Employment Standards (“**NES**”), which will replace the Standard.

Among other things, the proposed parental leave NES increases the length of the current entitlement of 52 weeks unpaid parental leave (under the Standard) to up to 2 years. The Australian Government's stated objectives in expanding the entitlement is that the “Government recognises that many families want to have a parent care for a child during the first two years of the child's life. The Government also believes that

maintaining the links between new parents and the workforce will ensure strong workforce participation of parents to the benefit of business and the overall economic prosperity of Australia.”¹

In JobWatch’s experience the current entitlement to 52 weeks unpaid parental leave is often meaningless, as many workers cannot enjoy their full entitlement for financial reasons. On this view, it seems difficult for the Australian Government to be able to justify proposing to legislate to increase the entitlement to a minimum of 2 years unpaid parental leave but not also financially supporting working families to enable them to enjoy this entitlement.

JobWatch recommends that paid parental leave be included in the National Employment Standards in order to:

- a) Ensure a that all working families receive a minimum payment while on parental leave such that they can afford to enjoy their full entitlement to parental leave (see section titled ‘Duration and Flexibility’);
- b) Address disadvantage in workplace negotiations (see below);
- c) Address discrimination and inequality in the workplace (see below).

Addressing disadvantage in workplace negotiations

A statutory entitlement to paid parental leave would combat disadvantage that workers encounter in workplace negotiations.

Without a statutory entitlement to paid parental leave workers experience the following disadvantage:

- Unskilled and other disadvantaged workers negotiating common law contracts of employment or individual workplace agreements are generally unable to negotiate more favourable entitlements than the minimum provided by the Standard, or their award or collective agreement, due to their weaker bargaining position.
- Workers affected by childbearing in the workplace at any one time are generally in a minority. This means that at the time of negotiating collective agreements, entitlements related to these workers, such as paid parental leave are often traded away.

Given the introduction of the *Workplace Relations Amendment (Transition to Forward with Farness) Act 2008*² by the Australian Government, which phases out individual workplace agreements under the WR Act, with a view to abolishing them, a statutory entitlement to paid parental leave is essential to ensure that paid parental leave and related issues are an entrenched entitlement, rather than something up for negotiation.

Addressing discrimination and inequality in the workplace

Discrimination at work as a result of pregnancy and childbirth occurs throughout the workplace lifecycle; for example, in the recruitment, promotion, resumption and the

¹ “National Employment Standards Exposure Draft: Discussion Paper”, Department of Education, Employment and Workplace Relations, 2008.

² The *Workplace Relations Amendment (Transition to Forward with Farness) Act 2008* came into force on 28 March 2008.

termination of parents' employment. Paid parental leave is a positive step towards redressing this systemic form of discrimination for women and primary carers in the workplace.

A statutory paid parental leave scheme would address discrimination and promote equality in the workplace as it would serve to define and formalise the working relationship before, during and after parental leave has been taken. There is less scope for discrimination against a pregnant worker or her supporting partner where employer obligations are defined in legislation and these obligations are consistently and equitably applied to all workplaces. Addressing childbearing issues in the workplace in an equitable and non-discriminatory manner and would become part of the normal course of employment (as is the case for example of annual leave) rather than perceived to be an onerous burden.

Case Study
<i>"If you weren't pregnant the job would have been yours"</i> ³
<i>Jodi had worked in the retail sector for two years when she was offered a promotion to Assistant Manager. Jodi accepted the position but as she was two months pregnant at the time she felt she had an obligation to inform her employer of her condition.</i>
<i>Jodi had been performing the role of Assistant Manager for several months when her employer requested that she complete a formal application for the position. Believing that this was a mere formality, Jodi complied with his request. To her surprise she was informed that somebody else had been hired as Assistant Manager and that she was to return to her original position. Her employer later told her that if, "you weren't pregnant the job would have been yours, but you're leaving in January."</i>
<i>Jodi commenced her maternity leave when she was seven and a half months pregnant as standing for long periods was becoming increasingly difficult. When she applied for benefits with Centrelink she was told that she would be required to look for full-time work or she would not qualify for payments. Jodi stated that if she had been paid maternity leave, she wouldn't have experienced such a financial struggle. She also told JobWatch that paid maternity leave might have encouraged better relations between her and her employer in the last months of her pregnancy as she would have, "felt like a valued team member and not some one who was just going to leave."</i>

Jodi's case illustrates some of the issues that may be faced by expectant working women and their families. The case study highlights one of the many ways that expectant working women may be discriminated against in employment, in this case, the denial of opportunity for career advancement. The case study also demonstrates the financial struggle faced by these women and their families.

From a legal perspective, the case study above (as well as the others mentioned in this submission) show that often the attitudes and conduct of employers may amount to breaches of the:

³ 'Valuing Parenthood: Options for Paid Maternity Leave', JobWatch submission to the Human Rights and Equal Opportunity Commission – Interim Paper 2002

- WR Act on the basis of non-compliance with the Standard and unlawful or unfair dismissal;
- *Equal Opportunity Act 1995* (Vic) for discrimination on the basis of breastfeeding, employment activity, marital status, parental status or status of a carer, pregnancy and sex; and
- *Sex Discrimination Act 1984* (Cth) for discrimination on the basis of marital status, pregnancy or potential pregnancy, family responsibility and sex.

A statutory entitlement to paid parental leave for workers would ensure that employers take their legal obligations seriously.

Discrimination against same-sex families

Recommendation

- **Recognition of same sex partners as persons eligible for paid parental leave**

The current entitlement to unpaid parental leave in the WR Act, and the proposed entitlement in the NES discriminate against same-sex parents.

For example:

- The WR Act refers to unpaid parental leave in gender specific terms, that is “*maternity leave*” and “*paternity leave*”.
- The proposed parental leave NES refer to parents in terms of “*employee couple*” which is defined as “*a female employee and a male employee are an employee couple if each of the employees is the spouse of the other*”. “*Spouse*” is defined to include a former spouse, a de facto spouse and a forme de facto spouse.
- Section 15 of the proposed parental NES uses gendered language to infer that parents are made up of a female parent and a male parent.

In accordance with the commitment by the Australian Government to remove same-sex discrimination from a wide range of Commonwealth laws,⁴ a parental leave scheme should recognise same-sex partners as eligible parents. The use of the terminology such as “maternity”, “paternity” and gendered definitions of relationships, such as “employee couple”, should be replaced by gender neutral terms.

A suggestion of alternate terminology includes ‘primary parent leave’ and ‘supporting parent leave’.⁵

⁴ For example, the recent introduction of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws— Superannuation) 2008* Bill into the Federal Parliament on 28 May 2008.

⁵ This terminology was also used by the Human Rights and Equal Opportunity Commission’s submission to the Inquiry, Public Hearing, 20 May 2008.

Eligibility

Recommendation

- **All workers be entitled to to paid parental leave**

Paid parental leave should be a right for *all* workers. ‘Worker’ should be broadly defined to include full-time, part-time, casual and self-employed workers.

Good Business Sense

Access to paid parental leave should not be dependent on industry or occupation. As demonstrated by the statistics above, inquiries in relation to maternity, parental leave and discrimination issues are received by the JobWatch Telephone Information Service from a wide range of industries and occupations. While currently some Australian workers have access to paid parental leave, this entitlement it is dependent on the goodwill of employers.

Larger government departments and corporations offer paid parental leave because it makes good business sense. Employers offering paid parental leave are more likely to attract and retain good staff and therefore reduce the cost of training and associated costs as well as promoting high levels of productivity. Employer’s benefit from paid parental leave schemes due to a reduction in recruitment and associated training costs. Further, employers adopting family friendly policies are able to enhance their reputation and community image by being progressive and gain a competitive edge when recruiting workers.

Qualifying Period

Recommendation

- **No length of service conditions for workers to be eligible for paid parental leave.**

There should be no length of service conditions for workers in order to be eligible for paid parental leave. This is because rigid exclusion conditions inevitably exclude deserving recipients of the benefit, for example, those people who have been in paid employment for a period and have recently had to change jobs.

Further, workplaces are arguably more productive and profitable where workers are satisfied, motivated and valued. From an employer perspective, rigid length of service conditions can also be detrimental to a business if workers feel trapped in a particular job in order to ensure that they are eligible for parental leave.

Interaction with the proposed NES

If the paid parental leave scheme is incorporated into the proposed parental leave NES, as recommended in this submission, it is important to ensure that any notice period requirements do not serve as a default length of service provision to access paid parental leave.

Currently section 17 of the proposed NES requires workers to provide 10 weeks notice of intention to take unpaid parental leave, unless this is not reasonably practicable. This notice requirement essentially creates a default length of service condition of 10 weeks.

Duration and Flexibility

Recommendation

- **Staged introduction of paid parental leave commencing at 14 weeks paid parental leave at worker's full pay, with a view to increasing the duration of paid leave to 12 months.**
- **Supporting parent paid leave of 4 weeks, allowed to be taken concurrently with the primary parent.**
- **The option to extend the duration of paid leave by taking paid parental leave at half-pay at the worker's request.**

Australia has an opportunity to implement a best practice paid parental leave scheme and should consider international standards and the varied experiences in other countries. The Maternity Protection Convention establishes an international minimum standard of 14 weeks paid maternity leave.⁶ Further, Article 4.2 of the Maternity Protection Convention states that “[c]ash benefits shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living”. The World Health Organisation recommends exclusive breastfeeding a baby up to 6 months of age, followed by sustained breastfeeding as well as complementary foods. Breastfeeding is acknowledged to be beneficial to the health of both the mother and child.

This submission represents families with high disadvantage, primarily based on their low socioeconomic status. As explained above, callers to JobWatch are generally not covered by collective agreements and are only entitled to the 5 minimum provisions in the Standard, or if they are lucky, a federal award.

JobWatch believes that it is these workers and their families that need paid parental leave the most. Generally, women in these categories do not commence maternity leave until the last moment. This is because of their low income and their need for money to get them through their leave. Financial pressures also mean that these women often forgo their entitlement to twelve months unpaid parental leave, as it is an unaffordable luxury.

⁶ Article 4.1 and Article 6.1 of the Maternity Protection Convention.

A paid parental leave scheme should focus on providing an adequate level of paid parental leave, with reference to international standards, so that ensures that the most disadvantaged workers are able to enjoy their entitlement to parental leave.

Case Study

Forced to return to work⁷

Natalia is employed in the shipping industry. When she applied for maternity leave, she applied for her full entitlement of 52 weeks. Natalia was forced to return to work when her child was five months old for financial reasons. Natalia has returned to work on a part time basis while her mother-in-law takes care of her child. Natalia stated that without her mother in law, “I would not have been able to return to work, child care is too expensive.” Natalia believes that if she had received paid maternity leave she would not be in this position as she could have delayed her return to work. Natalia felt that when she returned from maternity leave the attitude of her fellow employees was, “as if I’d been on holidays.”

Paid parental leave would have enabled Natalia to remain at home with her son for a longer period of time by alleviating some of the financial burden. The benefits of paid parental leave would flow to the welfare of her child, herself and her family in general. Natalia faces a problem typically encountered by many of our callers, that taking 52 weeks unpaid maternity leave is an unaffordable luxury when no financial support is provided.

Paid parental leave alleviates the financial pressure on working families at the time of the birth of a child. Financial pressures are interlinked with family health and wellbeing. The duration, flexibility and amount of paid parental leave are crucial to ensure that parents are financially secure immediately post childbirth or adoption and therefore a realistic choice about their family arrangements.

The duration and flexibility of paid parental leave should be sufficient to enable:

- The mother to recover from childbirth and accommodate breastfeeding if she is able and desires;
- Both parents to enjoy a period of bonding with the child
- Mothers and primary carers to return to the workforce when they are ready, rather than prematurely due to financial strain.

The level of pay should be at the worker’s full pre-parental leave earnings, or at least in accordance with Article 6.3 of the Maternity Protection Convention which mandates a paid maternity entitlement of not less than two-thirds of the woman’s pre-parental leave earnings.

Supporting parents should be entitled to take paid parental leave concurrently with their partners. As well as obvious health benefits for children and their families, this entitlement encourages a period of shared responsibility for care of the child and

⁷ ‘Valuing Parenthood: Options for Paid Maternity Leave’, JobWatch submission to the Human Rights and Equal Opportunity Commission – Interim Paper 2002

would effect change in workplace culture and attitudes regarding work and family responsibilities.

Ultimately, a paid parental leave scheme has to provide enough money over a long enough period of time to ensure that all families have a genuine *choice* when making decisions about childbearing and childrearing.

Recommendation

- **Paid parental leave be transferable to the primary caregiver**

The entitlement to paid parental leave should be able to be transferred to the primary carer for the following reasons:

- To provide flexibility for families to enable them to meet family carer responsibilities and to enable participation by both parents in child rearing.
- Provides an alternative to further entrenching women in the role of primary carer.

Financing Options

Recommendation

- **A federal government funded minimum payment for paid parental leave that is capped**
- **An employer “parental leave top-up scheme” be implemented across all workplaces to top-up the balance between government funded minimum payment and the worker’s full pay**

A federal government funded minimum payment reduces the potential for discrimination against workers, generally women workers at child-baring age, on recruitment, promotion and termination. It would be able to accommodate all workers (including casual and self-employed workers) and also ensure that small businesses, or businesses that employ a high proportion of women are not inequitably burdened.

The government minimum payment should be capped to ensure that public funds are not expended on workers who do not need government support. For example, the government should not have to pay executive wages.

All employers should contribute to a “parental leave top-up scheme” for a number of reasons including that:

- Paid parental leave is a work-related entitlement;
- Employers benefit from a paid parental leave scheme by way of retention of staff and therefore reduction in retraining and recruitment costs; and
- Employer financial contributions inevitably generate a sense of responsibility towards workers and imbue employers with a real commitment to support workers to take paid parental leave and also successfully assist them to return to the workplace.

Superannuation and continuity of service

Recommendation

- Any period of paid parental leave be regarded as service
- Continuing superannuation for workers who are on parental leave

This recommendation recognises that primary carers, generally women, are retiring with less superannuation than men because of absence from the workforce to care for children, lower rates of pay and over-representation in casual and part-time work.

Further, workers on paid parental leave should not lose out on other entitlements such as long service leave merely because they are temporarily absent due to parental responsibilities.

Return to Work Guarantee

Although the right to return to work after parental leave is entrenched in legislation, many employers still perceive the taking of parental leave as a resignation by the worker or a termination due to redundancy. A paid parental leave scheme must include a robust right to return to work guarantee including employer obligations and the ability to return to work with flexible working conditions. An effective return to work guarantee should ensure that a worker's temporary absence from the workforce in relation to the birth of a child does not result in the severance of employment.

There is already recognition of the need for flexible family leave provisions. In 2005 the Australian Industrial Relations Commission handed down the Family Provisions Test Case decision.⁸ The decision established new award provisions that provide, among other things:

- A right to request that parental leave be extended, including the ability to return to work on a part-time basis until the child reaches school age;
- A right to request up to 8 weeks simultaneous parental leave (relevant to "Duration and Flexibility" above); and
- That while a worker is on parental leave, an employer must take reasonable steps to advise and discuss any significant workplace changes that will affect the worker's status or level of responsibility on return to the workplace.

The family leave provisions were incorporated into many federal awards, however were not included into the Standard. JobWatch recommends that these provisions be incorporated into the National Employment Standards as part of the paid parental leave scheme.

⁸ PRO82005.

Case Study

“Your job’s no longer available”⁹

Sieng was employed full time in the clothing and manufacturing industry when she took twelve months maternity leave. When she rang her employer to organise a date for her return to work she was informed that her job was no longer available. She was told that there might be a casual position available in the warehouse. The casual position offered was a demotion from her original position. Sieng spent several stressful weeks worrying about whether she had a job to return to. Eventually she was informed that her position was redundant.

Sieng told JobWatch that she felt she was, “forgotten” during her period of maternity leave and believes that if she hadn’t taken maternity leave she would not have been made redundant.

JobWatch’s recommendations (see below) address the issues faced by Sieng, that of lack of consultation by the employer about her position, the offer to return to an inferior position in comparison with her pre-leave position and ensuring that the redundancy is genuine.

Many of the enquiries to JobWatch from women about maternity leave are also enquiries about redundancies. Women on maternity leave are often the first to go when businesses restructure. These women often have no way of knowing whether these redundancies are genuine. Women in the workplace who apply for maternity leave are often perceived as having handed in their resignation and therefore the employer believes they are justified in severing the employment relationship. Paid parental leave would alter this perception and encourage employers to view parental leave as a natural part of a woman’s working life which merely involves a temporary absence, followed by a return to work.

Return to former position¹⁰

Recommendation
<ul style="list-style-type: none">• Workers entitled to return to work in the position that they held prior to commencing parental leave. Where that position no longer exists, the worker will be entitled to return to a position comparable in status and pay with that former position• A female worker transferred to a different position or reduced hours of work prior to taking parental leave for reasons associated with her pregnancy is entitled to return to the position and hours she held prior to the transfer or reduction

⁹ ‘Valuing Parenthood: Options for Paid Maternity Leave’, JobWatch submission to the Human Rights and Equal Opportunity Commission – Interim Paper 2002

¹⁰ This section is largely based a previous submission by JobWatch, the “NES Exposure Draft Submissions”, Submission to Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations, April 2008, prepared by Ian Scott, Catherine Whiddon, James Fleming & Vera Smiljanic.

Currently, subsection 280(5) of the WR Act states that “*where an employee’s pre-leave position no longer exists, she is entitled to return to a position nearest in status and remuneration to her former position*”. Section 23(1) of the proposed NES purports to change the wording of this section from “*no longer exists*” to “*no longer available*”.

JobWatch opposes the change in wording from “*no longer exist*” to “*no longer available*”. This seemingly subtle change may have a huge impact on the right of a person on parental leave to return to their former position. It is one thing for an worker to not be able to return to their former position because “*no longer exists*”, for example, because of redundancy. However, it is another thing entirely for an worker to not be able to return to their old position because it is “*no longer available*”, for example, because it has been filled by a permanent ongoing worker rather than a parental leave replacement worker.

JobWatch recommends that regardless of whether paid parental leave is incorporated into the NES the relevant wording of section 23(1) should be amended to read “*no longer exists*”.

Request for flexible working conditions¹¹

Recommendation

- **Workers have the option of returning to work part-time (until at least the child reaches school age) or with flexible working conditions**

A paid parental leave scheme should adopt measures such as are implemented by the *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic) (“**EO Amendment Act**”). From September 2008, under the EO Amendment Act, an employer must accommodate an workers’ reasonable request for flexible working arrangements due to an worker’s family responsibilities unless it is unreasonable for the employer to do so.

Section 14A(2) of the EO Amendment Act sets out the relevant considerations that must be taken into account in determining whether an employer unreasonably refuses to accommodate the responsibilities that an worker has as a parent or carer.

Amongst other measures, this entitlement will address discrimination against workers returning from paid parental leave who have ongoing carer or family responsibilities and require flexibility.

¹¹ See note 8.

Employer refusal based on ‘reasonable business grounds’¹²

Currently under the WR Act, where a worker has taken less than 12 months parental leave, that worker has a right to extend that parental leave up to the 12 month limit. Under the proposed parental leave NES, a worker who has taken less than the full amount of parental leave entitlement will only be able to increase the length of their parental leave subject to the vague notion of ‘reasonable business grounds’. In addition the proposed flexible working arrangements NES provides that the employer may refuse the request for flexible workplace arrangements on reasonable business grounds.

While the proposed parental leave NES provides superior length of entitlements (up to two years unpaid parental leave) than the current WR Act, JobWatch considers the inclusion of an employer’s right to refuse an extension of parental leave request on ‘reasonable business grounds’ to be a backward step compared to the WorkChoices amendments.

JobWatch opposes the inclusion of any similar qualification being placed on the ability to enjoy the full entitlement to paid parental leave the basis that under the proposed parental leave NES:

- there is no recourse to a third party by worker where a request was refused;
- the employer is not obligated to genuinely consider a request; and
- the employer may base a decision on subjective reasoning.

Any limitation, such as an employer’s right to refuse on ‘reasonable business grounds’, should be clearly explained such that it does not include anything in the way of or related to the concept of “managerial prerogative” and must relate to some type of objective necessity or requirement.

Further, if such limitations are introduced they should be limited to a set of defined set of circumstances to be considered such as in the EO Amendment Act.

¹² See note 8.

Employer Obligations

Recommendation

- **Employers obligated to consult a worker who is absent on parental leave about a decisions that is likely to significantly affect the status or pay of the worker's pre-leave position.**
- **Onus placed on the employer to ensure that a worker has fulfilled all of the notice and evidentiary requirements or else the parental leave request is taken to be automatically approved.**

Additionally, an employer should be obligated to inform any parental leave replacement worker that they are being employed on a temporary basis as a parental leave replacement worker.

Case Study

Theo worked as a chef on a permanent full-time basis and was covered by an AWA. His wife had a baby and the day following the birth Theo was forced to return to work. The AWA included parental leave for males but the employer told Theo that he needed to give 10 weeks notice to access it. Theo's employer knew his wife was pregnant.

JobWatch recognises that notice requirements are necessary to provide employer's with certainty about the availability of their workforce and enable them alternate arrangements where necessary. However, workers should not be disadvantaged due to not compliance with such requirements. Under JobWatch's recommendations, Theo would have been entitled to take parental leave notwithstanding that he did not satisfy the notice requirements.

Interaction with social security and other governmental programs

Recommendation

- **A national social security scheme provide assistance to non-working parents**

Although JobWatch advocates for workers, we recognise the need for people not participating in the labour force to have paid entitlements to assist families with carer responsibilities and expenses related to the birth or adoption of a child.

Conclusion

JobWatch urges the Australian Government to introduce a paid parental leave scheme for Australian workers that addresses the fundamental needs and objectives of working families, promotes health and wellbeing and values the carer and the family unit.

Paid parental leave will address pregnancy related discrimination in the areas of recruitment, career progression and termination. Further, paid parental leave creates and encourages a nexus between childbearing and work that serves to formalise the employment relationship and ensure its continuity. It will support the retention of primary carers in the workforce and also assist in improving their skills and increase their future earning prospects and superannuation for retirement.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

For further information, please do not hesitate to contact Deborah Itzkowic of JobWatch's Legal Practice on (03) 8643 1102.

Yours sincerely,

JobWatch Inc

Per:

A handwritten signature in black ink, appearing to read 'Z. Bytheway', with a large, stylized loop at the end.

Authorised by Zana Bytheway, Executive Director