

Commissioners Robert Fitzgerald and Angela MacRae
Paid Maternity, Paternity and Parental Leave Inquiry
Productivity Commission
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By email: parentalsupport@pc.gov.au

Monday 2 June 2008

Dear Commissioners,

RE: Inquiry into Paid Maternity, Paternity and Parental Leave

This submission proposes a national legislative standard which provides for a minimum of 28 weeks paid parental leave for employees, comprising of 2 weeks paid maternity leave prior to the date of birth, and a minimum of 26 weeks paid primary carer leave for Australian employees available for the primary carer after the birth of the child, and a further minimum period of 4 weeks paid leaver after the birth for the non-primary carer. This submission further proposes that all Australian employees have rights to flexible working provisions, to ensure both 'return to work' post parental leave rights, and an achievable balance of work and life across the life course.¹

The specifics of the scheme would comprise:

- 28 weeks paid leave to women who have engaged in paid employment of any kind, for twelve months prior to the birth of the child. Two weeks would be available to prepare for the birth of the child, and twenty six weeks available after the birth. Any time not used prior to the birth could be transferred to extend paid post birth time
- Government contributions would consist of an 'enhanced' Parenting Payment, which lifted the current (1st July) payment from \$5000 to \$7971.60, paid in fortnightly instalments over 28 weeks. This payment would be available to all women upon the birth of a child, whether they were in paid employment or not.
- **Women in paid employment** would be entitled to no less than their ordinary time earnings for the full period of leave, (including employer superannuation contribution) and the contribution of the \$7971.60 to their ordinary earnings whilst

¹ See Attachment One – Paper: Australian employee's rights to permanent part time work, published in 'Our Work, Our Lives', Conference Proceedings, September 2007.

on paid leave would reduce according to the level of ordinary time earnings they were entitled to arising from their previous labour market activity, paid for from the employers' pooled funds. The *earned* income entitlement payable during the minimum period of paid maternity leave should not be means tested.

- Women and men would be able to utilise other forms of leave to extend time with a child
- Women would be able to have two years 'maternity leave', meaning the right to return to their previous job after 24 months leave, which could be shared equally with a partner upon the expiry of the paid portion of the leave
- Employers would be required to pay into a 'pool' an annual payment based on payroll (around 1%) sufficient to meet 28 weeks for women in paid employment (less the \$7971.60), at a minimum
- The amount would be calculated in a way so as to enable men or another carer to take up the opportunity for paid leave in order to either assist the mother at birth, or take over prime responsibility for the care of the child where the parents decide to adopt this approach, dependent upon the non-primary carer being entitled by way of engaging in paid employment, and the agreement of the mother
- The non-primary carer should be entitled to at least 4 weeks paid leave post the birth or adoption
- Access to the parenting payment would be independent of the number of employers a woman worked for during the previous twelve months, and independent of the nature of the employment contract.

Due to the precarious nature of the majority of women's paid employment, the proposal supported envisages that women's earnings could be derived from more than one employer, and the hours could be worked in any pattern. The key issue for the purposes of the payment is that a woman's average ordinary time earnings for the previous twelve months are paid to her when she is on maternity leave for 28 weeks.

Budget outlays would amount to approximately \$2.34 billion dollars based on a payment of \$7971.60 to 291,876 women who either give birth or adopt each year.

Current budget outlays for the 'baby bonus' amount to around \$1.3 billion dollars.²

The provisions for primary carer's in employment to access 28 weeks paid leave at ordinary rates of pay should be a minimum standard in the proposed National Employment Standards. This national minimum standard would be required to be replicated in all industrial instruments, with parties to Enterprise Agreements maintaining the flexibility to increase this minimum.

Finally, all industrial instruments which provide more than this legislative minimum would retain these entitlements.³

International Instruments and the international practice of paid maternity leave

The principle of paid maternity leave is an internationally recognised labour right; endorsed by the ILO at its third convention in 1921. This right was revised in 1952, coming into effect in 1955 as the Convention Concerning Maternity Protection (Revised), which provided for 12 week's maternity leave; then further revised in 2000 as C183 Maternity Protection Convention 2000. Article 4 of the revised 2000 Convention states that "a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks". Article 6 further provides that women on maternity leave should be provided with 'cash benefits'.

An international debate nearly thirty years ago reaffirmed that paid maternity leave is a workplace right, through the international instrument of *CEDAW*.⁴ This Convention asserts the central right of women to work, and further protects this right by making illegal the discrimination against women at work on the grounds of maternity. The convention then outlines how nation states should ensure the fulfilment of these rights, by their realisation in national standards or provisions. HREOC notes that: "Paid Maternity Leave is explicitly included as a measure which is required to be introduced by states parties."⁵ Although Australia is a signatory to *CEDAW*, and has enacted some of the provisions of *CEDAW*

² Thanks to Linda Caruthers of the Rail, Train and Bus Industry Union, NSW for costing information.

³ Such as the parental leave entitlements in the Higher Education sector, which include a minimum of 26 weeks paid maternity leave, in many institutions comprising 36 weeks at 100% of salary

⁴ Art. 11(2)(b) *Convention on the Elimination of All Forms of Discrimination Against Women* GA Res (XXXIV 1970), 19 ILM 33 (1980).

⁵ HREOC: *Valuing Parenthood*, at page 28.

through the introduction of the *Sex Discrimination Act*⁶ in 1984, when Australia ratified CEDAW it did so by specifically excluding the provision concerning Paid Maternity Leave without explanation.”⁷

In June 2000 the ILO⁸ adopted a new Maternity Protection Convention (ILO 183) and Recommendation (Recommendation 191)⁹, which replaces the 1952 Maternity Protection Convention 103. This new Convention applies to all employed women¹⁰, and provides for a minimum of fourteen weeks maternity leave.¹¹ Australia has not ratified Convention 103, and the Report¹² which reviews comments from nation states, shows the former Australian Government resistant to the proposal of an international standard which proscribes paid maternity leave.¹³ It is hard to understand the former Australia Government’s concern for accommodating this entitlement economically, when the majority of our trading partners provide this entitlement back in 2002.¹⁴

In fact, “The OECD is made up of 30 developed countries. All of these countries, except for Australia and the United States, provide paid maternity leave.”¹⁵ In illustrating the international practice of paid maternity leave, HREOC has shown that, “Of CEDAW’s 163 signatories, 158 provide paid maternity leave.”¹⁶ Clearly, Australia can be assessed as being sufficiently economically developed to provide paid maternity leave. The distinction made by the Government in the commentary as to the protection of maternity leave, rather than delivery of the entitlement, shows the way in which the provision of a right is

⁶ *Sex Discrimination Act* 1984 (Cth)

⁷ Ratification of *CEDAW*, 28 July 1983, reservation lodged by the Australian Government to article 11.

⁸ International Labour Organisation.

⁹ International Labour Organisation *Convention Concerning the Revision of the Maternity Protection Convention (Revised) 1952 and Maternity Protection Recommendation* International Labour Conference (88th: 2000: Geneva Switzerland).

¹⁰ Art 2.

¹¹ Art 4.

¹² International Labour Organisation *Maternity Report IV (2A) Protection at Work Revision of the Maternity Protection Convention (Revised), 1952 (No.103) and Recommendation, 1952 (no.95)*

¹³ “The Government supports the adoption of revised international labour standards addressing maternity protection, but the new instruments should be principles-based rather than prescriptive...The new Convention should be confined to broad principles focused on its aims, and be flexible enough to accommodate different national situations and levels of social and economic development. The focus should be on the achievements of the actual protections, rather than the way in which protections are delivered.”, *ibid.* at page 4.

¹⁴ “18 (soon to be 19) of Australia’s top 20 trading partners provide some form of paid maternity leave. In 14 of these countries, paid leave is a statutory entitlement”, in *Valuing Parenthood*, at page 32

¹⁵ HREOC: *Valuing Parenthood*, at page 32

¹⁶ HREOC: *Valuing Parenthood*, at page 28

meaningless to working women, if it is not supported by the economic freedom to exercise it.¹⁷

On economic freedom to exercise choice, Edgar has noted in 2005 of the former Howard Government that it put: ‘.. great store in the notion of choice, as though every woman were free to make choices regardless of economic circumstances, educational levels or cultural backgrounds. Members of the government fail to see that choice is limited by the way that work itself is structured...’.¹⁸ The provision of economic freedom to make choice about paid workforce participation, may be provided by a legislative right to paid parental leave. A legislative standard for paid parental leave would mean that men are not constrained, through inequitable wages and their subsequent higher wages, in what choices they can make about work and care: ‘Men’s roles in paid work are similarly constrained. The figures on men’s full time work hours indicate that in spite of the range of roles and family arrangements potentially available to men, the breadwinner model continues to dominate the structure of many men’s lives.’¹⁹

International research has shown that women’s lower wages is a contributing factor to decisions about paid and unpaid work in families: ‘When both full time and part time employees are included... women only earn 66% of what men earn. This will have an impact on how dual income couples negotiate solutions to work and family conflicts (Haas, et al 1999)’.²⁰

The lack of adherence to these international standards, and the exclusion of paid maternity leave, has reduced the effective right of women to work in Australia, through constraint of economic choice. The Australian Council of Trade Unions has shown that, “In 2001, an OECD survey of mothers’ labour market participation showed that, of the 20 OECD countries Australia reported the lowest employment rates of mothers with children under six, and the lowest employment rates for employment of lone parents.”²¹

¹⁷ Individual rights and economic and power factors of realising rights from M Minow’s article, “Forming underneath everything that grows: Toward a History of Family Law” from *Wisconsin Law Review* 1985 p 819-898 in Law 402 *Family Law* Volume One Part A, Edited by Dr Archana Parashar; Sydney: Macquarie University, 2002, at page 30

¹⁸ Don Edgar, *The War Over Work, The Future of Work and Family*, 2005, at page 59

¹⁹ HREOC, *Its about time*, at page 51

²⁰ Graeme Russell and Lyndy Bowman, *Work and Family, Current Research, Thinking and Practice*, Prepared for the Department of Family and Community Services as a background paper for the National Families Strategy, February 2000, 11

²¹ ACTU Submission to *Valuing Parenthood*, 26 July 2002, page 8

Providing economic choice, and implementing the international standard of paid maternity leave at a minimum of 14 weeks, means our international competitors have implemented a range of paid parental leave for workers through many years. Australia remains one of the few countries (the others include the US, Lesotho, Liberia, Swaziland, and Papua New Guinea) that does not have some form of paid maternity leave for workers. Denmark and Norway have the highest level of maternity benefits - Norway provides ninety-six weeks of paid maternity leave while Denmark provides fifty two. Fathers are granted paid paternity leave or paid parental leave in sixty-five countries; and thirty one of these countries offer at least fourteen weeks of paid leave. British workers average twenty-five weeks and German employees thirty. In terms of countries that have low production and labor costs, Australia lags far behind - Vietnam provides for 4 – 6 months at 100% of wages, China provides for 90 days at 100% and Indonesia allows for 3 months at 100%. Both the Philippines and Republic of Korea allow for 60 days at 100% of wages, while Thailand allows 100% for 45 days, then 50% for another 45 days.²²

In terms of reviewing the benefits of implementing paid parental leave, countries with many affinities with Australia, such as the UK, have reviewed and increased their standards to 39 weeks.²³

Paid Parental Leave: why a national standard is required

The current legislative standard for parental leave in Australia is the right of access to unpaid maternity leave, for a period of 52 weeks leave at the birth of a child, provided by the *Industrial Relations Reform Act (Commonwealth) 1993*. This provision was then replicated in the *Workplace Relations Act 1996*, and become a Australian Fair Pay and Conditions Standard in 2006.

The OECD has noted that in Australia reliance is currently placed on enterprise initiatives rather than a legislative framework²⁴. But as the provision of paid parental leave via enterprise agreements illustrates below, relying on individuals or workplaces alone is insufficient to create a framework of equal access to paid parental leave. Legislation is required to affect this workplace change, illustrating to employers and employees that ‘the legislator restricted the entrepreneurial freedom of the employer’²⁵ for the purpose of

²² http://www.apesma.asn.au/women/maternity_leave_around_the_world.asp

²³ Workplace Express, Monday 14 March 2005, also Productivity Commission Issues Paper April 2008

²⁴ OECD, 2002

²⁵ Burri et al., 2003, at page 332.

ensuring workplaces structurally accommodate paid parental leave, and the women who require this right.

The inability of enterprise bargaining to provide a paid parental leave standard for all employees

Academics and unionists have noted for several years that the burden of women's paid work and unpaid caring work make participation in enterprise bargaining much more difficult, and acknowledge women's weaker bargaining capacities due to industry and structural workplace inequities.²⁶ Burgmann has stated in relation to women's capacity to bargain effectively in enterprise bargaining: 'Obviously the major problem for women is where they are located in the economy. Australia has the most sex-segregated workforce in the OECD. Women are in a small number of industries and occupations, mainly retail, clerical and personal services.'²⁷

According to Australia's Background Report to the OECD, in 2002, only 7% of Federal Agreements, and 32% of employees, have access to paid maternity leave.²⁸ Baird has assessed in 2008, six years later only 23% of Federal Agreements make reference to paid maternity leave.²⁹ A national legislative standard is required to provide a universal paid parental leave scheme.

Further, as other research has illustrated, in enterprise bargaining, employers will pit workers with caring responsibilities against those without, when negotiating a new enterprise agreement.³⁰ Pocock has concluded that the rare provision of quality permanent part time work and other substantive employment conditions in enterprise agreements are: '...islands of enterprise-based exemplary good practice, afloat in a sea of poor provision.'³¹ Legislative provision for paid parental leave is required to provide a universal benefit to all employees.

²⁶ Hall & Fruin, 1994

²⁷ Meredith Burgmann, "Women and Enterprise Bargaining in Australia" in S.Hammond (ed) *Equity under Enterprise Bargaining* (ACCIRT, Sydney, 1994) in *Labour Law*, Course Materials Volume Two, Edited by Frank Carrigan, Sydney: Macquarie University, at page p.226.

²⁸ OECD Review of Family Friendly Policies: The reconciliation of Work & Family Life, Australia's Background Report. Prepared by the Australian Department of Family and Community Services and Department of Employment and Workplace Relations with assistance from the Work and Family Life Consortium. August 2002.

²⁹ Baird, Long time coming, Paid Maternity Leave in 2008, University of Sydney, Special Colloquium, 7 March 2008

³⁰ Baird, 2004, at page 267

³¹ Pocock, 2003, at page 88

A legislative standard to provide parental leave for all workers

Further, a universal right is required to provide all workers with access to paid parental leave, regardless of employment type or mode. Non-permanent work is a growing problem in Australia's fragmented workforce, affecting both women and men, and their capacity to choose how they participate in paid and unpaid work. A fragmented workforce is a workforce consisting of employees who may be classified by their employer as casual, or fixed-term contract workers; or wage earners who do not have basic employment rights such as contractors, sub-contractors and labour hire employees.³² A fragmented workforce does not allow workers with caring responsibilities to access paid parental leave. As Buchanan has illustrated, the consequences of this fragmentation is that workers in 'standard' families are least likely to work in jobs which provide standard weekly hours, paid parental leave or other employment provisions for care.

In Australia's predominantly non-secure workforce, paid parental leave needs to be a universal legislative right for all women workers, specifically due to women's dominance of casual employment. Research in 2005 has shown that 71 per cent of part time jobs are filled by women, and confirms that two thirds of casual work is part time casual work.³³ Given the increase in casual work, and women's dominance of casual work, a legislative right to paid parental leave would have to be accessible to all women employees, including casual employees.

Why this legislative standard? Equal participation for women

In Australia, the cost of participating in a workforce designed for full time work is carried by women: 'On the whole, Australian mothers have made most of the adjustments to reconcile work and family responsibilities.'³⁴ Changing the structural foundations of Australian workplaces is important for women, who are in the main the workers with caring responsibilities, as confirmed by research.³⁵

The UK Government launched a review of maternity and parental rights in the early summer of 2000. The terms of reference of the review were to "consider the steps needed

³² Idea from John Buchanan, *The Workplace Context*, accirt, the University of Sydney, Labour Law Conference, Seminar Presentation, 8 September 2005

³³ Meg Smith, *The Promises and Pitfalls of Howard's New Industrial Relations Regime for Working Women*, Evatt Foundation Sunset Seminar Paper, presented Tuesday 5 July 2005, citing ABS Cat no. 6105.0

³⁴ OECD Report, 2002, at page 24

³⁵ Michael Bittman, *Dividing the Labour – gendered time use trends*, Seminar Paper, Social Policy Research Centre, University of NSW, 2004.

to make sure that parents have choices to help them balance the needs of their work and their children so that they may contribute fully to the competitiveness and productivity of the modern economy".³⁶ As a consequence of that review, the Government increased paid maternity leave from 14 weeks to 26 weeks in 2001, and extended these provisions again in 2005.³⁷

A minimum of 28 weeks paid parental leave for all Australian employees will increase women's participation in the workforce.

Why this legislative standard? Pay Equity for women

Women full time employees earn less than men who work full time: 'As at February 2001, the ratio of female-to-male full time adult average weekly ordinary time earnings was 84.7 per cent.'³⁸ There is no question that pay inequities exist in Australia today – and paid parental leave is one recognised as one way of remedying this injustice: "The time women take out of the workforce to have and look after children... contributes to the pay and earnings gap between women and men... Child rearing also effects the hourly wage rate in a number of ways. For instance, it impacts on womens labour market experiences, often restricting career progression for those with family responsibilities. Periods of absence from the labour market are also associated with a lessening in value of labour market skills, and there is evidence to suggest that this decreases women's wages relative to men's wages."³⁹

A minimum of 28 weeks paid parental leave for all Australian employees will improve women's wage equity.

Why this legislative standard? Health of mother and child

Providing paid maternity leave would be in accord with international conventions, not only of the ILO but also of the United Nations and the World Health Organisation (WHO), both

³⁶ Explanatory notes from the UK Employment Bill [Bill 44], as introduced in the House of Commons on 7th November 2001

³⁷ Workplace Express, 14th March 2005

³⁸ OECD Report 2002, at page 14.

³⁹ The OECD Review of Family-Friendly Policies: The reconciliation of Work and Family Life - Australia's Background Report prepared by DFACS & DWR - August 2002, at pages 14, 15

of which acknowledge the positive effects of paid maternity leave on the health and well being of both the mother and newborn child. As such, the WHO considers 16 weeks to be the minimum length of time for a woman to recover from childbirth and accommodate breastfeeding, and, in terms of child health, the WHO has found that children who are breastfed for at least four months *“have significantly less gastrointestinal and respiratory illness, including ear infections and asthma, than those who are not breastfed.”*⁴⁰ Thus a longer period of paid maternity leave would reduce the need for a woman to return to work before her child was able to reap the full health benefit of breastfeeding.

A minimum of 28 weeks paid parental leave for all Australian employees will increase women and children’s maternal health.

Why this standard? Retention of women in paid employment

ACCIRT has studied employee preferences for paid maternity leave, and reported on how paid maternity leave effects the right of women to work: "UK Research conducted prior to the recent extension of maternity leave in that country, found that the nature of maternity leave entitlements also affects the rate and form of women's return-to-work following childbirth."⁴¹

The above working paper outlines three main factors in UK women's return to the workplace after childbirth: women who qualify for maternity leave are more likely to return to the workplace after childbirth; the more generous the duration of leave, the higher the percentage who return to work, and finally the more generous the financial compensation for leave, the higher the percentage who return to work.⁴²

On the basis of these findings and other equity research, in 2001 the UK extended paid maternity leave from 18 to 26 weeks,⁴³ and again to 39 weeks in 2005. At the time of increasing the paid parental leave to 39 weeks, UK Trade and Industry Secretary Patricia Hewitt said these changes had the objective of: ‘helping to retain employees.’⁴⁴

⁴⁰ HREOC, at page 45.

⁴¹ Dr. Louise Thornthwaite, ACCIRT Work-Family Balance: International Research on Employee Preferences, September 2002, Working Paper 79, at page 31

⁴² Above, at page 31

⁴³ *Workplace Express*, Wednesday 28 November 2001.

⁴⁴ *Workplace Express*, 14 March 2005.

Retention of employees has also been a factor in increasing paid parental leave in the Higher Education sector to a minimum of 26 weeks. For example, in 2005 Monash University revised its paid maternity leave policy (as part of the Union negotiated collective agreement) to be 14 weeks at full pay and a further 38 weeks at 60% pay, on a pro rata basis. After 26 weeks' parental leave, staff on maternity leave may choose to return to work on a part-time basis and use the outstanding entitlement to be paid at a full salary. Additionally, where the Monash child-care facilities are used, staff have the option of requesting that any outstanding entitlement from the 38 weeks at 60% pay be directed towards the payment of child-care fees. As a result, Monash University has recorded that the return rate from maternity leave has improved significantly, measuring over 92% in 2006.⁴⁵

Conclusion

International research illustrates other nations introducing and improving their legislative provision of paid parental leave, and improving their ongoing attachment to employment.⁴⁶ In Australia, we are years behind other countries providing paid parental leave, thereby addressing factors of pay inequity for women, increasing work force participation for women, and recognising the social worth of reproduction. To remedy this injustice to women, and to improved productivity in the workforce,⁴⁷ we need to immediately implement a minimum of 28 weeks paid parental leave, universally provided to all women and primary carers in paid employment. Further, we need to ensure all workplace accommodate the caring needs of employees returning to work post parental leave, with a right to flexible working arrangements for all employees.⁴⁸

Thank you for your consideration.

Ms Jeane Wells

⁴⁵ EOWA 2007 *Leading Edge Initiatives publication*

⁴⁶ UK DTI, 2007

⁴⁷ UK DTI, Government response document 2006

⁴⁸ See: Attachment 1