



SUBMISSION TO THE PRODUCTIVITY COMMISSION

Inquiry into Paid Maternity, Paternity and Parental Leave Issues Paper

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Submission to

Paid maternity, paternity and parental leave inquiry
Productivity Commission
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ABOUT AUSTRALIAN WOMEN LAWYERS

Australian Women Lawyers (AWL) is the peak representative body for women lawyers associations throughout Australia. Our membership is diverse and includes members of the judiciary, barristers, solicitors, government bodies, corporations, large and small city and country firms, legal centres, law reform agencies, academics and law students.

Since AWL was launched on Friday 19 September 1997, we have been dedicated to improving the status and working conditions of women lawyers in Australia. We have been active in advocating for and promoting law and policy reform, frequently making submissions on aspects of law and policy affecting women in the legal profession and women in the community.

Issues that impact on the capacity of women to participate equally in the workforce, such as paid parental leave, are a significant reason for the very existence of our organisation. Our dedication to equal opportunities for women in the legal profession in particular is demonstrated through our support for, and promotion of, equal opportunity policies for women in the profession, such as the National Equality of Opportunity Briefing Policy adopted by the Board of Australian Women Lawyers on 20 September 2003.

Paid parental leave has always been a key issue on the agenda of AWL. In 2002 we made a written submission in response to *A Time to Value – Proposal for a National Paid Maternity Leave Scheme (2002)*, report of the Human Rights and Equal Opportunity Commission (HREOC).¹

Among the major contributors to our organisation have been women on maternity leave, women who have taken a career break to have children, women with children, and women who look forward to becoming future mothers in a workforce where an adequate scheme of paid parental leave is universally available.

The weight of our experience informs our position on the issue of paid maternity leave.

OBJECTIVES OF PAID PARENTAL LEAVE

In our submission to HREOC in 2002,² it was our position that paid maternity leave should be paid parental leave. This continues to be our position.

¹ Australian Women Lawyers, Paid Maternity Leave submission, [Internet – <http://www.womenlawyers.org.au>. (Accessed 22 May 2008).].

² Australian Women Lawyers, Paid Maternity Leave submission, [Internet – <http://www.womenlawyers.org.au>. (Accessed 22 May 2008).].

In our view, the objectives of paid parental leave that should be accorded most weight include:

- Time for the mother to recover physically from the birth, establish feeding routines and bond with the child.
- Better health and development outcomes for the child. AWL has had the opportunity to consider the submission of the National Foundation for Australian Women (NFAW) to this Inquiry, and we additionally support the position of NFAW in relation to improved health and community services to support families with young children, and in relation to improved access to quality childcare and education to support the child's wellbeing and to assist parents to return to work, training or education.
- Maintaining the mother's longer-term attachment to the workforce. AWL is aware of strong anecdotal evidence that women are exiting the legal profession at a disproportionate rate to their male colleagues. While there are as yet no results available from any formal research on this issue in Australia,³ in the USA, the MIT study *Women Lawyers and Obstacles to Leadership* found that women leave private practice at all points along their career at a much higher rate than men. The study found that 22% of the women who left law firms, also left the law altogether. The most often cited reason for their departure was "difficulty integrating work and family/personal life".⁴

For women lawyers in particular, maintaining a longer-term attachment to the legal profession can have a major impact on a woman lawyer's career progression. Although women have now been graduating from university law schools in greater numbers than men for over a decade⁵, women still remain a noticeable minority in senior positions in the legal profession. In Victoria in 2006, 14% of partners in law firms were women.⁶ In NSW in 2001, 7.2 % of female solicitors were partners while 27% of male solicitors were partners.⁷ In 2004, 18% of barristers practising across Australia were women.⁸ In 2007, depending on which state, territory, or federal court

³ The Law Institute of Victoria and Victorian Women Lawyers are currently planning a study entitled *Where Are They Now?* that addresses this issue. The Victorian Bar has undertaken internal demographic research indicating women leave the bar at 7 years seniority on average compared to 15 years seniority for men.

⁴ MIT, *Women Lawyers and Obstacles to Leadership*, at 12.

⁵ On some accounts for more than 20 years women comprise equal numbers or a small majority of graduates from undergraduate law degrees with current trends towards an increased majority.

⁶ Law Institute of Victoria and Victorian Women Lawyers, *Bendable or Expendable? Practices and attitudes towards work flexibility in Victoria's biggest legal employers*, 2006, at 2.

⁷ The Law Society of New South Wales, *After Ada: A New Precedent for Women in Law*, 29 October 2002, at 25.

⁸ Statistic published by Victorian Attorney-General Rob Hulls, referred to in "How to Rip Through the 'Silk Ceiling'", *Lawyers Weekly*, 15 October 2004, at 18.

bench is being considered, from 11% to 34% of judges or magistrates were women.⁹

- Increasing opportunity for fathers to establish a bond with their child.
- Financial assistance for the mother and family around the time of the birth.
- Increasing options available for families on the birth or adoption of a child. It is realistically the case in the contemporary workforce that a woman may be in a higher paid job earning a higher income than her male partner. Today there are families that will be financially better off if the father of a child assumes the role of the primary carer of the child, rather than the mother. In our submission, Australian families should the greatest possible range of options available to ensure that their financial needs and needs in relation to caring for a newborn or newly adopted child are best catered for. These are some of the reasons why AWL maintains that any scheme of paid leave relating to the birth or adoption of a child, should be a scheme of paid parental leave, rather than a scheme of paid maternity leave or paid paternity leave.
- Ensuring adequate paid leave is universally available in all workplaces, and to all working parents. As the Women Lawyers' Association of New South Wales (WLA NSW) stated in its submission to the federal House of Representatives Standing Committee on Family and Human Services, Inquiry into Work and Family Balance (2005):¹⁰

Most law firms reflect the Australian business culture of generally not paying staff on maternity leave.¹¹ 28% of respondents to the Law Society of New South Wales 2002 inaugural Remuneration and Work Conditions Survey reported that paid maternity leave was available to them, with 41% of respondents being unsure if their organisation offered paid maternity leave, and 9% of women participating in the survey reporting that they had accessed paid maternity leave.¹²

- Encouraging cultural and attitudinal change in relation to flexible work practices. As WLA NSW expressed in its submission to the House of Representatives Standing Committee on Family and Human Services, Inquiry into Work and Family Balance (2005):¹³

⁹ "Speech to Women Lawyers Achievement Awards, Melbourne", Speech by the Honourable Justice Diana Bryant, Chief Justice of the Family Court of Australia, Melbourne, 8 May 2007.

¹⁰ Women Lawyers' Association of New South Wales, Submission to House of Representatives Standing Committee on Family and Human Services, Inquiry into Work and Family Balance, 2005, at 3 [Internet – <http://www.womenlawyersnsw.org.au/plr.asp?Page=V&ID=193>. (Accessed 22 May 2008).].

¹¹ The Law Society of New South Wales, above, n6, at 25.

¹² The Law Society of New South Wales, above, n 6, at 25.

¹³ Women Lawyers Association of New South Wales, above, n 9, at 6.

Within the culture of the legal workplace, as with other workplaces, attitudes that flexible work options belong on the “mummy track”¹⁴ or “never-to-be-promoted daddy track”¹⁵ persist, as do the attitudes that balancing work and family is a woman’s concern,¹⁶ the field of the less ambitious, slack or soft. More men may be expressing the desire to seek a better balance between paid work and family commitments,¹⁷ but the low uptake of family friendly practices by men continues.

In a survey of 1000 fathers, more than half believed that the major barrier to being the kind of father they wanted to be was the commitment to paid work.¹⁸ Until the differences in provisions for paid maternal and paternal leave are addressed, and sufficient education and training targeted at changing existing attitudes is introduced, it will be difficult to change the unwillingness and inability of men to forgo income. Workplace and managerial cultures impede men’s use of unpaid parental leave provisions. Income maintenance will assist in encouraging fathers to take time out of the workforce to care for children.¹⁹

Many women as well as men in the legal workplace feel pressured by their perception of how others in their workplace will perceive them. While various firms and organisations have come a long way in introducing flexible arrangements and programs to the legal workplace, the toughest barriers to overcome are attitudes based around the individual. Firms and organisations can introduce part time, job share, work from home or other arrangements, but until individual-based attitudes are overcome, men and women will not be encouraged to take advantage of the options that are available.

These are some of the additional reasons for why AWL maintains that any scheme of paid leave relating to the birth or adoption of a child, should be a scheme of paid parental leave, rather than a scheme of paid maternity leave or paid paternity leave.

- Recognising the diversity of contemporary family types. Families in Australia today consist of many types. There are families where the biological parents of the child are separated, families where step-parents and step-siblings are involved, families where the parents are married, families where the parents are in a de facto relationship, families where

¹⁴ The Law Society of New South Wales, above, n 6, at 9.

¹⁵ “Coming of Age: the Sex Discrimination Act, women, Men, Work and Family”, Address to the National Press Club in Canberra by Pru Goward, Federal Sex Discrimination Commissioner and the Commissioner Responsible for Age Discrimination, 9 February 2005, [Internet – http://www.hreoc.gov.au/speeches/sex_discrim/press_club.html]. (Accessed 13 March 2005).].

¹⁶ “Striking the Balance with Work and Family”, Media Release by Pru Goward, Federal Sex Discrimination Commissioner, 4 February 2005, [Internet – http://www.hreoc.gov.au/media_release/2005/04_05.html]. (Accessed 13 March 2005).].

¹⁷ “Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project”, [Internet – http://www.hreoc.gov.au/sex_discrimination/strikingbalance/snapshot.html]. (Accessed 13 March 2005).].

¹⁸ “Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project”, above.

¹⁹ “Striking the Balance: Women, Men, Work and Family, A Snapshot of Some of the Facts Informing the Project”, above, n 16.

the parents are in a heterosexual relationship, families adopting a child where different factors determine which parent is the primary care-giver and families where the parents are in a same sex relationship. In our view, two male partners in a same sex relationship who adopt a child should have the same rights when it comes to accessing paid leave on adoption of a child as a heterosexual couple adopting a child, or two women in a same sex relationship adopting a child. This is another reason why AWL maintains that any scheme of paid leave relating to the birth or adoption of a child, should be a scheme of paid parental leave, rather than a scheme of paid maternity leave or paid paternity leave.

It is AWL's submission that other objectives of paid parental leave that should be given significant weight include:

- Increasing the employment rate of women.
- Maintaining talent. As WLA NSW indicated in its submission in response to HREOC, *Striking the Balance: Women, Men, Work and Family Discussion Paper 2005*:²⁰

The head of the Human Resources Department at law firm Blake Dawson Waldron has conservatively estimated that replacing a lawyer with five or more years' experience costs the company at least \$75 000.²¹ Other estimates argue that it costs about \$120 000 to replace a lawyer with four years' experience.²² The legal workplace is a diverse one, but independent of their size or financial capacity, law firms, legal centres, legal organisations and legal bodies all rely heavily on the talent of their staff. The legal workplace is certainly one in which access to flexible and family friendly arrangements for men and women makes good business sense.

- Maintaining a quality workforce. In the past government initiatives such as the formerly non-means tested Baby Bonus, and the Family Tax Benefits, have been introduced as what might be considered a substitute for paid parental leave. In Australia there are families that rely significantly, or in some cases entirely on welfare benefits, such as the parenting payment, single parent pension, and Newstart Allowance. In contrast, Singapore is a country that could especially be identified by its government policies that encourage educated professional people to have families. This is because the people of Singapore want their country to be a country of highly educated people, with a high quality workforce. It might well be said that in

²⁰ Women Lawyers' Association of New South Wales, Submission in response to Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family Discussion Paper 2005*, at 2-3 [Internet – <http://www.womenlawyersnsw.org.au/plr.asp?Page=V&ID=190>. (Accessed 22 May 2008).].

²¹ Equal Opportunity for Women in the Workplace Agency, "Attract and Retain the Best Talent," [Internet – http://www.eeeo.gov.au/About_Equal_Opportunity/Why_EO_Makes_Business_Sense. (Accessed 28 March 2005).].

²² Australian Workplace, "Why Family Friendly Policies are Good for Business," [Internet – <http://www.workplace.gov.au>. (Accessed 28 March 2005).].

Australia, with our current welfare policies, that we do not place the same kind of emphasis on such values.

In our view, by ensuring skilled workers stay in the workforce, on the birth or adoption of a child, or indeed several children, paid parental leave has the potential to play a considerable role in maintaining a quality workforce in Australia.

- Supporting and encouraging self employed women, and women in small business. In Victoria in 2006, 22% of sole practitioner solicitors in Victoria were women.²³ Women barristers are in sole practice at the Bar. Women solicitors who are equity partners in a firm, like sole practitioner solicitors and barristers, are self-employed. AWL is aware that many models of paid parental leave only cater for working women who are employees, and not self-employed.

Having a family, particularly around the time of the birth of a child can have a significant impact on women sole proprietors especially. AWL has heard of many stories from women sole practitioners and partners among its membership who have taken their child to work and breast fed their child at work in between seeing clients, in order to maintain their work and family responsibilities on the birth of a child.

Women, like men, should be encouraged and supported to be self-employed, and to venture into small business. In the legal profession the role that a scheme of paid parental leave play in maintaining women at the Bar and ensuring that women progress to partnership level, is particularly important, given that it is traditionally lawyers at the Bar who are considered for appointments as judges or magistrates, and given that more recently lawyers at partnership level in top tier firms have been appointed to the judiciary.²⁴

- Supporting women in senior roles, and encouraging women into senior roles. As WLA NSW stated in its submission to House of Representatives Standing Committee on Family and Human Services, Inquiry into Work and Family Balance (2005).²⁵

Female solicitors do not share the same career aspirations as their male colleagues when it comes to partnerships. 50% of female respondents to the Law Society of New South Wales 2002 Remuneration and Work Conditions Survey identified commitment to family/personal responsibilities, compared to 23% of men, as a reason why they thought it was unlikely or very unlikely that they would become partners.²⁶

²³ Law Institute of Victoria and Victorian Women Lawyers, above, n 5, at 2.

²⁴ L Macintyre, "Solicitor appointed to Supreme Court," 16 May 2008, 387 *Lawyers Weekly* 1.

²⁵ Women Lawyers' Association of New South Wales, above, n 9, at 4-5.

²⁶ The Law Society of New South Wales, above, n 6, at 15-16.

- Reducing inequality of pay and working conditions for women generally.
- Reducing inequality between women working in different industries. As WLA NSW observed in its submission to House of Representatives Standing Committee on Family and Human Services, Inquiry into Work and Family Balance (2005):²⁷

On average female solicitors take nine weeks of paid maternity leave.²⁸ Anecdotal evidence suggests that women lawyers take less maternity leave than non-legal employees in legal organisations. Such decisions are influenced by systemic pressures within the profession such as the fact that promotion is based in part, on fee-earning capacity,²⁹ and the value placed on continuity of client contact.

In our submission a universal scheme of paid parental leave could go a long way towards reducing inequality between women working in different industries. The more widely acceptable it is for parents to take a break from their careers to have a family, the more likely that systemic pressures in industries like the legal profession will cease to be an incentive for women lawyers to take less parental leave than their sisters working in other industries.

- Enforcing the business case for flexible work practices. Identified benefits of introducing flexible work measures include:
 - competitive edge in recruiting and enhanced corporate image;
 - improved ability to retain skilled staff and increase return on training investments;
 - reduced absenteeism and staff turnover;
 - improved productivity;
 - reduced stress levels and improved moral and commitment; and
 - potential for improved occupational health and safety records.³⁰

RECOMMENDED MODEL OF PAID PARENTAL LEAVE

In order to appropriately satisfy all of the objectives mentioned above,³¹ AWL recommends the following model of paid parental leave.

²⁷ Women Lawyers' Association of New South Wales, above, n 9, at 3.

²⁸ "Law Society Report: Remuneration and Work Conditions", *Law Society Journal* (NSW Australia), March 2002, [Internet – <http://www.lawsociety.com.au>. (Accessed 31 March 2005).].

²⁹ Australian Law Reform Commission, ALRC 69 Part II Equality Before the Law: Women's Equality, 1 October 1994, [Internet – <http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol2/ALRC69.html>. (Accessed 8 April 2005).], at [9.23].

³⁰ Australian Workplace, above, n 21.

³¹ Above, at 3-8.

Recommendation 1

That there be a First Stage of the paid parental leave scheme to be immediately introduced where:

- (1) All employees be entitled to 14 weeks of government funded paid parental leave, and 12 weeks of employer and employee funded paid parental leave, at the federal minimum wage.***
 - (2) All persons who are self-employed be entitled to 26 weeks (6 months) of government funded paid parental leave, at the federal minimum wage.***
 - (3) All employees and self employed persons should be entitled to further 26 weeks (6 months) of unpaid leave in addition to (1) or (2).***
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AWL notes that NFAW in its submission to this Inquiry proposes a scheme of employer and employee funded paid parental leave to be obtained from a payment pool from which leave payments are made. We further note that NFAW suggests that this payment pool come from 0.5% of the wages or salaries of all employees, by each of the employer and employee, or 1 % by the employer alone. We support this proposal of NFAW to the extent that it could be applied to the employee and employer funded portion of the model of paid parental leave that AWL recommends.

Recommendation 2

That there be a Second Stage of the paid parental leave scheme where:

- (1) All employees be entitled to 28 weeks of government funded paid parental leave, and 24 weeks of employer and employee funded paid parental leave, at the federal minimum wage.***
- (2) All persons who are self-employed be entitled to 52 weeks of government funded paid parental leave, at the federal minimum wage.***

- (3) *All employees and self employed persons should be entitled to further 26 weeks (6 months) of unpaid leave in addition to (1) or (2).*
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Recommendation 3

That all employees be required to complete 12 months of continuous service with their employer before they are entitled to paid parental leave.

Recommendation 4

That persons who are self-employed be entitled to paid parental leave regardless of how long they have been self-employed.

AWL observes that most of the objects mentioned above,³² target cultural, attitudinal, and policy change.

In order for such cultural, attitudinal, and policy change to be effective, it must be supported by an appropriate legal framework.

AWL accordingly makes the following recommendations for legislative reform.

Recommendation 5

That Australia immediately ratify Article 11.2 of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979).

³² Above, at 3-8.

Recommendation 6

That Australia immediately ratify ILO Convention 183, Maternity Protection (2000).

Recommendation 7

That Division 6, Part 7 of the Workplace Relations Act 1996 (Cth) be amended to support Recommendations 1, 2, 3, and 4.

Recommendation 8

That Division 6, Part 12 of the Workplace Relations Act 1996 (Cth) be amended to support Recommendations 1, 2, 3, and 4.

Recommendation 9

That comprehensive amendments be made to the Sex Discrimination Act 1984 (Cth) (SDA), to ensure:

- (1) That the grounds of discrimination under the SDA, other the ground of discrimination on the ground of pregnancy or potential pregnancy, apply to men as well as women.***
 - (2) That employees who are men and women who are on parental leave or intending to take parental leave have a guaranteed entitlement to return to work in the same position as, or an equivalent position to, the position that they were employed in on commencing parental leave.***
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