

Victorian Equal Opportunity & Human Rights Commission

submission to

Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

November 2008

Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Productivity Commission's *Inquiry into Paid Maternity, Paternity and Parental Leave*.

The Commission is an independent statutory body that administers both the *Equal Opportunity Act 1995* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). Functions undertaken by the Commission include conciliating individual and representative complaints about discrimination, sexual harassment and racial and religious vilification; providing education about equality of opportunity, racial and religious tolerance and human rights; undertaking projects and activities aimed at eliminating discrimination and racial and religious intolerance; conducting research and providing legal and policy advice.

In addition the Commission undertakes specific functions in relation to the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These include providing an independent assessment of how well State and local Government comply with the Charter, and investigating particular human rights issues and concerns.

Consistent with the Commission's obligations, this submission adopts a human rights framework in examining the issues under consideration by the Productivity Commission.

Human rights context

The Commission supports the introduction of a statutory scheme to provide paid parental leave. We consider this a long overdue and significant step in the realization of women's human rights.

It is well understood that women's workforce disadvantage is perpetuated through reduced workforce participation and loss of income associated with giving birth and fulfilling caring responsibilities. In 2007.08 the Commission reported a 40% increase in formal complaints relating to parental/carer status, with complaints by women accounting for around 70% of the total in this category.¹ This inequity is exacerbated by pregnancy discrimination, which although unlawful still permeates some sectors of the economy.²

These issues go directly to human rights of Australian women at both international and domestic law.³ Gender inequity offends both equality before the law⁴; freedom from discrimination⁵, the right to just and favourable conditions of work⁶ and the right to an adequate standard of living.⁷

The introduction of a statutory scheme is consistent with international human rights obligations, including the *International Covenant on Economic, Social and Cultural Rights*.⁸ Under art 10(2),

1 Extrapolated from Commission data see Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2007/2008* p 25

2 Charlesworth S & Macdonald F, *Hard Labour? Pregnancy, Discrimination and Workplace Rights*, 2007 pp v-vii

3 *Sex Discrimination Act 1975* (Cth); *Equal Opportunity Act 1995* (Vic); *Charter of Human Rights and Responsibilities Act 2006* (Vic)

4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 3 (entered into force 23 March 1976), *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966), 993 U.N.T.S. 3, art 3 (entered into force 3 January 1976), *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 U.N.T.S. 13, art 15 (entered into force 3 September 1981)

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976), *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966), 993 U.N.T.S. 3, art 3 (entered into force 3 January 1976), *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 U.N.T.S. 13, art 2,11 (entered into force 3 September 1981)

6 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966), 993 U.N.T.S. 3, art 7 (entered into force 3 January 1976)

7 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966), 993 U.N.T.S. 3, art 11 (entered into force 3 January 1976)

8 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children' *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 Dec. 1966), 993 U.N.T.S. 3, art 10 (entered into force 3 January 1976). The protection of the family and the right to found a family is further defined in Art 23(2) *International Covenant on Civil and Political Rights*

the Government is under an obligation to provide special protection 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.

The *Convention for the Elimination of All Forms of Discrimination Against Women* further requires that ‘In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, appropriate measures should be taken to ‘introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances’.⁹

The Commission notes that the Australian Government made a reservation against this article when it ratified the convention in 1983. Similarly the Australian Government has voted for, but not ratified the relevant International Labour Organisation convention.

The human rights of children are also engaged by the issue of adequate paid parental leave. Australia has ratified the *Convention of the Rights of the Child* which requires state parties to take ‘all appropriate legislative and administrative measures’ to ensure protection of the best interests of the child.¹⁰ In 1997, the Committee on the Rights of the Child expressed concern in relation to Australia’s compliance with its international obligations. The Committee noted that women in the private sector are not systematically entitled to maternity leave and encouraged the Australian Government to make paid maternity leave mandatory for employers in all sectors.¹¹

Policy outcomes

The issue of statutory paid parental leave is an example of how human rights make good policy and business sense. Evidence from employers indicates that paid maternity leave (where it currently exists) results in a greater return to work rate.¹² A statutory scheme has the capacity to translate this experience of skills retention more broadly. This will provide both equity and economic outcomes in the form of direct commercial benefits to employers and increased productivity across the economy.

Further, the provision of statutory paid parental leave will address a number of equally important policy objectives which are valuable to society as a whole. These include: recognizing the value of giving birth and raising children; promoting work and life balance and contributing to the health and wellbeing of children and families.

Similar to the implementation of unpaid parental leave in 1979, a paid parental leave scheme aims to reflect the dual role men and women currently play in the areas of family and employment. Especially for mothers, a balance is sought between their participation in the work force and their responsibilities of caring for their families. Current entitlements such as family income support and child care benefit, aim to address difficulties that may arise in life balance but do not adequately address the issue of postnatal leave.

Paid parental leave as implemented in other developed countries, establishes a consolidated form of entitlement with the goal of ensuring postnatal leave in the achievement of an appropriate length of absence from work for most families. This will contribute to the better health and wellbeing of children, especially in the early years with associated gains in child development.

⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 U.N.T.S. 13, art 11(2) (entered into force 3 September 1981)

¹⁰ *Convention on the Rights of the Child*, opened for signature on 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), ratified by Australia 17 December 1990, art 3(2) (entered into force 16 January 1991)

¹¹ Concluding observations of the Committee on the Rights of the Child: Australia 10/10/97 CRC/C/15/Add.79

¹² Finance Sector Union *Submission to the Senate Employment, Workplace Relations and Education Legislation Committee*, 2002 p 4

The Commission notes that there is general community support for paid maternity leave. A Newspoll survey undertaken in June 2007 showed that 76% of respondents were in favour of paid maternity leave, with 17% opposed.¹³ Such schemes are seen as sending strong messages that women are 'valued employees worth retaining, that they deserve financial support at a time when they most need it, that motherhood is a significant, critical role worthy of society's collective support'.¹⁴

Integrating paid parental leave with a suite of measures to deliver equity

The Commission strongly supports the introduction of statutory paid parental leave and urges the Australian Government to proceed with implementation.

While such a scheme would provide welcome financial support for eligible families, of itself it does not and cannot address and resolve all of the issues associated with parental obligations and the world of work. For the policy goals of the statutory parental leave scheme to be fully realized, a suite of complementary policy and legislative measures will be required.

Recent amendments to the *Equal Opportunity Act 1995* (Vic)¹⁵ provide a good example of legislative improvements that can facilitate a fair and effective response to the needs of employees and employers as regards parental responsibilities.

The Act now provides that an employer should not unreasonably refuse to accommodate an employee's parental or carer responsibilities, in relation to their work arrangements. This means that an employer should not refuse flexible work arrangements for workers with family responsibilities, without considering all of the circumstances. Requests should be seriously considered. Unlike those contained in the *National Employment Standards*¹⁶ these protections apply to all employees regardless of tenure and have full legal force in the sense that a person may bring a complaint of discrimination if they consider the refusal to be unreasonable.

An employee includes a person offered employment, a contract worker, a partner or person invited to be a partner. A parent may be a biological parent, a step-parent, adoptive parent, foster parent, guardian, or the spouse or domestic partner of a parent.

To help employers and employees strike a balance between business needs and family responsibilities, the Commission and Industrial Relations Victoria have published guidelines to provide practical information to employers and employees about the new rights and responsibilities. These Guidelines were developed with the support of peak bodies, industry groups, trade unions and community groups.¹⁷

Efforts to harmonize anti-discrimination laws being coordinated by the Standing Committee of Attorneys-General provide an opportunity for states, territories and the Commonwealth to consider how equal opportunity laws can be modernized and improved.

Such reforms are currently under consideration in Victoria. The *Equal Opportunity Act Review*, chaired by Julian Gardner published its final report in July 2008.¹⁸ This review recommended a new Equality Act which, amongst other things, would provide a shift in focus away from formal equality towards substantive equality; include a positive duty on private and public sectors to be proactive in eliminating discrimination; make changes to the functions of the Commission including a stronger emphasis on systemic discrimination and make changes to complaints handling processes.

The Commission is of the view that these changes if implemented, will substantially improve protections in Victoria. By shifting the onus from the individual complainant to more systemic and proactive interventions, including getting policy settings right we consider the likelihood of realizing substantive equality is considerably advanced.

¹³ < <http://www.nfaw.org/paid-maternity-leave/>

¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Women, Rights and Equality : What do they want now?* 2008 p 9

¹⁵ *Equal Opportunity Amendment (Family Responsibilities) Act 2008* (Vic)

¹⁶ *National Employment Standards* s13

¹⁷ They are available at <http://www.humanrightscommission.vic.gov.au/publications/employer%20guidelines/>

¹⁸ Department of Justice [Victoria], *Equal Opportunity Review Final Report: An Equality Act for a Fairer Victoria*, 2008

Below we set out our response to the recommendations in the draft Inquiry Report. The Commission does not comment on all recommendations.

Draft recommendation 2.1

The Commission supports this recommendation and notes the following:

Rate of payment

The proposal to set the paid leave rate at the adult minimum wage (currently \$543.78 per week) differs to some overseas models where full income replacement is provided or where average weekly earnings are used as the base payment.

By limiting the payment to the minimum wage the fiscal impost is minimized and the risk of the state subsidizing higher income earners is reduced. However, this model also relies heavily on employers topping up entitlements if families are to have a reasonable standard of living at a time when the additional costs of a child need to be factored into the family budget. Whilst the Commission supports the principle that employers contribute in this way, we note that limiting the statutory payment to the minimum wage may entrench existing inequities between lower and higher paid women.

As noted in the Productivity Commission report, only 53% of female employees currently have access to employer provided paid parental leave. Access is significantly higher in full time (69%) compared to part time employment (34%).

Casual, part-time and new employees are often not eligible under current policies. The 2004 EOWA Paid Maternity Leave survey indicated that 63% of organisations providing paid maternity leave don't make the benefit available to all staff. 84% of these employers confirmed it is not available to casual employees or contractors.¹⁹

Further only 10% of women on low wages have access compared to 80% of women on high wages. By pitching the rate of payment at minimum wages, recipients will receive more than they would on welfare payments, however these low paid women (and their children) will still remain on the margins of poverty.

The Commission also notes the proposal to limit the rate of payment to juniors and 'others with hourly wages below the adult minimum' such as trainees. The report suggests that having the same rate for all workers might create a perverse incentive. It proposes to set the rate administratively at an appropriate rate (say 60% of adult minimum wage). While the Commission recognizes that any parental leave scheme needs to be crafted in such a way that fertility decisions are not materially affected there remains a concern that the lowest paid will receive the least support.

Superannuation contributions

It is well understood that economic disadvantage and gender inequity is further entrenched in women's later years due to the loss of superannuation and other entitlements associated with a break in employment during child rearing years. For this reason the Commission supports the proposal that employers continue to make superannuation contributions during the 18 week period.

Given that employers also benefit from paid parental leave, through increased skills retention and productivity it is reasonable that they make a contribution by way of superannuation contributions. We note that under the proposals 'the business contribution to the total package of parental leave benefits would be small, with the lion's share being the cash contribution by the Australian Government'.²⁰

¹⁹ Equal Opportunity for Women in the Workplace Agency *Submission to Productivity Commission Inquiry into paid maternity, paternity and parental leave* p 6

²⁰ Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children: Draft Inquiry Report*, 2008 p2.11

The Commission notes that under the model proposed only 85% of women eligible for paid parental leave would enjoy this entitlement. Some of these women are employers/ self employed, however at least some of this group would not be entitled because of the proposed 12 month pre-employment rule or have been employed on an average of less than 10 hours per week. There is a risk that these eligibility requirements (both for superannuation contributions and paid leave itself) will particularly impact on low paid, casual and part-time working women.

Draft recommendation 2.4

Eligibility

The Commission welcomes the proposal that a broad range of family types be eligible for the scheme including lone parents, adoptive parents, surrogacy custodians and same sex couples.

Parameters relating to eligibility should be intensely scrutinised to ensure they do not impact adversely on certain members or groups in the community or operate according to inappropriate criteria.

As noted above the ten hour per week requirement may impact on some lower paid working women juggling several part time jobs, and those in industries typified by a high level of casualised, short-term work, or uncertain shift work.

The report argues that the scheme is targeted at parents with a 'genuine attachment to the labour force, rather than those with precarious links' and wishes to avoid perverse incentives for people to engage in as little as one hour per week work in order to gain eligibility. However, it is also important that eligibility requirements do not drive further marginalisation of female workers, particularly the low paid.

For example, the 10 hour rule may create an incentive for employers to limit hours of work so as to avoid obligations under the scheme, thereby contributing to further fragmentation in women's patterns of work.

There may be value in allowing some flexibility as regards eligibility to reflect the complex working arrangements that women find themselves in and so as not to further disadvantage women in feminised occupations associated with high level of casualisation and uncertain shift patterns.

The Commission supports the recommendation of the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) that eligibility be set at 40 weeks within the last 52 weeks employment.²¹ We further note that the AHRC recommendation does not include a minimum 10 hours per week eligibility requirement.

Draft recommendation 2.5

The Commission supports the proposal to allow mothers to transfer the entitlement to eligible partners who take on the role of the primary carer.

We also support the proposal that fathers (and other eligible partners) are provided with a two week period of exclusive paternity leave including where the mother is not eligible for statutory paid parental leave.

The Commission supports the proposal that father's have access to paid parental leave if the mother is not eligible where fathers meet the employment and primary carer eligibility requirements, noting our concerns about eligibility described above.

However, we note the assumption contained in the report that if a women is not eligible due to employment tenure or hours of work, that she will most likely take role of primary carer. This will not always be the case, particularly for low income families juggling multiple part-time positions. The report proposes a 'special circumstances' provisions to deal with circumstances

²¹ Human Rights and Equal Opportunity Commission *Submission to Productivity Commission Inquiry into paid maternity, paternity and parental leave*, June 2008 p 75

where the male fulfils the primary carer role. It is not clear if these provisions also deal with same –sex partners who are the non-biological parent of the child.

The Commission notes that dealing with this circumstance through ‘special circumstances’ relies on administrative discretion. Clarification is sought as regards discretionary powers of the administrative decision maker and associated appeals mechanisms.

There is also a risk that the community does not understand this potentially complex rule. As noted by the Report ‘the asymmetric treatment of men and women might raise concerns about gender equity’.²² This suggests that there may be value in having a gender neutral system. This would avoid the risk of males, who are otherwise eligible being discriminated against in the operation of the scheme.²³

However, the Commission notes that one of the functions of paid leave is to provide the mother with time to recover from childbirth and to facilitate other health outcomes. The time required by mothers to fully recover from childbirth is dependent on a range of factors, but may take several months. For this reason the Commission supports the principle that mothers have paid leave during that period.

The Commission notes that under the Australian Human Rights Commission model, detailed in their previous submissions to the Inquiry, the period following birth is reserved for paid maternity leave in stage one. The AHRC recommends a second phase of reform to be introduced two years later. Stage Two would provide parents with the ability to choose who may take the paid parental leave entitlements for the balance of one year of paid leave. This model may provide a better balance between the health needs of the birthing parent and the choices families make around who takes on the primary carer role when the mother is not eligible for the scheme.²⁴

Transfer of leave, part time leave and leave shared between partners

The Commission supports the principle that transfer of leave to the father or same sex partner be available so that families can make arrangements that best suit their particular needs, and those of the child. We are disappointed that the Report does not recommend provision for part-time paid parental leave as operates in New Zealand.²⁵

Draft recommendation 2.7

Duration

Paid parental leave for the duration of 18 weeks meets International Labour Standards. The Commission notes that Australia failed to ratify the *Maternity Protection Convention* when it was promulgated in 2000. The introduction of a statutory scheme will remove any barrier to ratifying this important international human rights instrument and would also allow the Australian Government to withdraw its reservation to Article 11(2) of *Convention on the Elimination of All Forms of Discrimination Against Women*.

The Commission notes that under the proposed model:

- (a) the period of leave must commence at birth, or after a period of other continuous leave that commences at the birth of the child
- (b) must be commenced within six months of birth
- (c) leave must be taken in one block
- (d) only one transfer of paid parental leave between parents would be permitted, and

²² Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children: Draft Inquiry Report*, 2008 p2.19

²³ It would also be consistent with the gender neutral provisions in the National Employment Standards in regards to unpaid parental leave. *National Employment Standards* S14

²⁴ Human Rights and Equal Opportunity Commission *Submission to Productivity Commission Inquiry into paid maternity, paternity and parental leave*, June 2008 p76

²⁵ Productivity Commission *Paid Parental Leave: Support for Parents with Newborn Children: Draft Inquiry Report*, 2008 p2.17

(e) there be no concurrent use of paid parental leave by parents.

While the Commission recognises that the scheme needs to target parents of new born children, some flexibility may be prudent in order to reflect the wide range of circumstances applicable to families managing leave arrangements in the first year of the child's life.

For example, allowing women the choice to take 18 weeks paid leave at half pay over 36 weeks may better suit the needs of some families. Similarly flexibility to allow women to take some of the 18 weeks paid leave prior to birth may assist those families where complications in pregnancy may require an earlier leave date (for example when sick leave is not available or has been used up).

Draft recommendation 2.8

The Commission notes the proposal that when the National Employment Standards are next reviewed, the notice period for an extension of leave should be increased from four weeks to six weeks.

While the Commission recognizes that employers need to have adequate notice in order to ensure proper workforce planning we also note that extending the period of notice will create an additional burden on families who may not always be able to adequately predict an exact return to work date, for example where childcare arrangements have not been finalized due to gaps in provision in the local area.

The Commission supports the recommendation that return to work guarantees to adoptive parents be equivalent to birth parents.

Draft recommendation 2.9

The Commission supports the principle that employers, particularly small businesses should be provided with evidence based advice on how to reduce potential disruption burdens associated with the scheme. Such education should also include anti-discrimination education in regards to pregnancy and family/carer responsibilities.

The Commission notes that non government organisations may face particular burdens if government funding levels do not allow for an employer top up above the statutory minimum payment. In highly gendered professions, such as the non government sector, aged care, disability services and child care industries, women who already earn comparatively low wages will be likely to be solely reliant on the statutory scheme at the minimum wage because their employers are not funded to pay the difference. This acts as a further disincentive for people to enter and stay these professions, contributing to human services labour shortages.

In addition to advice to employers, general community education will also be required. A comprehensive education and awareness-raising campaign that meets the diverse communication needs of the community will be essential. Such promotion and education strategies must be tailored for, and targeted towards, groups less likely to have information about the new entitlements. All information should be culturally appropriate and made available in an accessible format.

Draft recommendation 2.10

The Commission supports the 'keeping in touch' provision for the primary carer to work up to 10 days during the leave period where that work strengthens the connection to the workplace and where both parties consent. However we note that employer education may be required to ensure that employers do not attempt to coerce parents to use this provision.

Draft recommendation 2.12

The Commission supports the ongoing monitoring and evaluation of the scheme to determine its outcomes, including any unintended consequences.

The Commission supports a comprehensive five year evaluation which should consider and report on: gender equity outcomes; interrelationships with pregnancy and sex discrimination; interrelationships with carer/family responsibility discrimination; impacts employer attitudes including education needs and impacts upon community acceptance of the dual roles of women as mothers and employees.

Conclusion

The Commission considers that a universal scheme will achieve a number of key objectives which are grounded in the promotion of human rights. These include ensuring the health and wellbeing of families; addressing women's workplace disadvantage as a result of their maternal role; promoting gender equality and complying with international human rights obligations.

The scheme will also deliver economic and social benefits for the community as whole. For this reason we support the implementation of this long overdue initiative.