



ACTU SUBMISSION IN RESPONSE

to the

**PRODUCTIVITY COMMISSION
INQUIRY DRAFT REPORT**

**PAID PARENTAL LEAVE:
SUPPORT FOR PARENTS WITH NEWBORN
CHILDREN**

NOVEMBER 2008

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PART A. INTRODUCTION AND EXECUTIVE SUMMARY

The model proposed by the Productivity Commission is a positive first step in the provision of Australia's first statutory paid parental leave scheme.

The ACTU welcomes the Draft Report of the Productivity Commission. We support, with some reservations, the proposal for a paid parental leave scheme consisting of 18 weeks paid leave for the primary carer and 2 weeks paid leave for the secondary carer of a new born infant.

The Commission's Draft Report acknowledges the need to provide financial assistance for parents to be able to afford to take time off work to have and care for a baby in the first six to nine months of its life. In doing so, it signals that we are a society that values the care and development of our infants.

The Report recognises that, paid parental leave will encourage labour force participation prior to parenthood (to gain access to the scheme), and after parenthood (due to the return to work and labour force attachment aspects of the scheme).

The Draft Report also confirms paid parental leave as an important workplace right which should not be an entitlement only for workers who are able to bargain for it. It recognises that, despite changed social norms, women face systemic disadvantage when they combine motherhood and paid work, including in retirement.

In drafting its Report, the Commission has acknowledged modern family structures and the desirability of assisting parents to share the care of infants.

In particular, we welcome the following design features of the model which provide:

- Recognition of Paid Parental Leave as a form of employment related leave for parents in paid work;
- Acknowledgement of the role of employers in contributing to paid parental leave for parents in paid work;
- Inclusion of superannuation contributions in paid parental leave;
- Access to paid parental leave for parents in non-permanent jobs and in multiple jobs irrespective of income earned;
- Application of the entitlement equally to all carers including same sex and adoptive parents;
- Capacity to share the leave between primary carers and provision for a period of paid concurrent leave;
- Provisions for maintaining workforce links; and
- Prompt and efficient payment of the entitlement via the employer's PAYE system.

In this submission, we make a number of recommendations which we believe would improve the proposed scheme. They can be broadly summarised as:

- a. Reducing the workforce participation criteria required for eligibility for paid parental leave to an average of one (7 hour) day over 6 months;
- b. Providing parents with greater flexibility to take their leave entitlement prior to the expected date of birth and at half pay;
- c. Ensuring employee's existing parental leave entitlements are explicitly protected; and
- d. Ensuring the net entitlements for parents in paid or unpaid work are equitable including for those employees earning less than the federal minimum wage.

These recommendations are discussed in more detail in Part B of this submission.

In addition, the ACTU continues to advocate that parents receive their full income while on paid leave

The reasons for this include:

- Less than full replacement wage jeopardises child and maternal health as some families will not take the full period of leave unless they are assured income maintenance.¹
- Less than full replacement wage undermines the objective of “normalising” parental leave because payment at less than ordinary income is a significant contra indicator of the scheme a normal form of leave.²
- Less than full replacement wage entrenches gender roles further because of the gap between actual earnings and the paid parental leave payment.
- Full income replacement builds a work incentive.³

Whilst the Productivity Commission's recommendation falls short of this model we nevertheless welcome it as a first step for paid parental leave. Unions will continue to campaign for 26 weeks' paid parental leave at full income replacement over the next five years.

¹ Australian Institute of Family Studies (AIFS) Submission to the Productivity Inquiry into Paid Parental Leave, August 2008.

² As we argued in our original submission the ACTU would require employers to fund the gap between FMW and actual earnings. We estimated that in respect of one third of employees taking leave employers would pay no top up and over half of all employees taking leave employers would pay less than \$600 top up (including superannuation) per employee on parental leave. The remaining employees earning above \$40,000 per annum are most likely to already have access to paid maternity leave as part of their employment package, thus substantially reducing the cost to employers of higher paid parents.

³ Under the ACTU model, the government entitlement is equitable for parents in paid and unpaid work, with a work incentive for mothers with sufficient workplace attachment received through employer top up to full income replacement.

We note the European Commission's current proposed Directive to increase the minimum period of maternity leave to 18-24 weeks at 100% of salary levels by 2011. A staged increase over the next two budget cycles would ensure Australia maintained alignment with European standards.

PART B: RECOMMENDATIONS

1. INCREASED ELIGIBILITY

Workforce participation

Broadening eligibility for the scheme enhances long term labour market attachment.

- 1.1 The Commission's model proposes differential payments for mothers who meet the workforce participation requirement (paid parental leave) and those who do not (revised Maternity Payment and Family Tax B). Workforce participation is defined as an average of 10 hours per week of paid work for 12 months.
- 1.2 The Draft Report suggests that the primary reason the Commission adopted this design feature was to encourage higher workforce participation by women in the 12 months prior to birth, in order to ensure they are eligible for the payment.
- 1.3 In our view, the primary participation benefits of paid maternity leave is its association with attachment to the labour market in the long term. Broadening the eligibility requirements for attachment prior to birth will have a positive effect on the motivation of parents to retain a connection to the paid labour market in the long term through a timely return to employment post birth.

The proposed workforce participation requirement may exclude women who are engaged in paid work

- 1.4 The ACTU welcomes the Commission's recognition that workforce participation will include all forms of paid work including self employment, casual work and work for multiple employers. By acknowledging the diversity of mothers' working arrangements, the Commission model is more equitable than the current arrangements for unpaid leave.
- 1.5 However, the requirement for parents to have 12 months' workforce tenure may exclude a proportion of women. The Commission estimates that reducing the workforce tenure requirement from 12 months to 6 months will include an additional 11% of employees.⁴
- 1.6 These employees should be able to access the scheme. In many circumstances these mothers will be already be mothers of young children who have broken employment patterns following a period, or periods, of parental leave.⁵ Access to paid parental leave may have a significant impact on the motivation of these mothers to remain attached to the labour market in the long term.

⁴ Productivity Commission Draft Report , September 2008, Appendix E, p.9

⁵ The Shop, Distributive and Allied Employees Association (SDA) estimates that in the 21-45 age group around 16,000 women working in the retail sector have less than 12 months service and 6,500 would not work more than 10 hours per week. Submission of the Shop, Distributive and Allied Employees Association (SDA) to the Productivity Commission Inquiry into Paid parental leave, November 2008.

Recommendation 1: The workforce tenure criteria for paid maternity leave should be 6 months employment across any number of employers.

The hours of work test

- 1.7 Similarly, the requirement to work an average of 10 hours per week would disadvantage those parents who regularly work one (7 hour) day per week. An average of one day's work per week should be sufficient indication of a connection to paid work.
- 1.8 In addition, provision should be made for casual employees whose total hours required to meet the test should be decreased by the average combined annual leave, public holiday and sick leave entitlements received by permanent employees.

Recommendation 2: The eligibility criteria of average number of hours worked in the year prior to birth should be 7 hours per week.

- 1.9 The requirement to be in continuous employment may disadvantage workers who work seasonally. Their average hours may well exceed 10 hours per week, but they are performed on an irregular basis. Continuous employment should not be a requirement to meet the workforce participation test.

Interaction with the National Employment Standards

- 1.10 The Commission has proposed a *workforce* participation test for eligibility for paid parental leave, whilst retaining a *workplace* participation test for eligibility for other elements of its scheme. This means that parents will be eligible for:
- *Paid parental leave* for employees who have worked continuously for an average of 10 hours per week for any number of employers over a 12 month period; but
 - *Unpaid parental leave* only for employees who have 12 months service with the same employer.
- 1.11 This will create significant confusion regarding eligibility for the two forms of parental support.
- 1.12 Under this model some parents will be eligible paid leave, but not for unpaid leave. It seems perverse that the taxpayer would fund a mother's income replacement for 18 weeks but not require her employer to hold her job open for at least the same period.
- 1.13 This anomaly undermines the integrity of the paid parental leave scheme. While it is difficult to disaggregate the elements, it seems that the positive employment effects of paid parental leave scheme are achieved when the scheme contains the optimal duration and level of income replacement with a time limited job security guarantee.

Recommendation 3: The National Employment Standards should be amended to provide that all parents entitled to 18 weeks paid parental leave be concurrently entitled to at least 18 weeks unpaid parental leave.

- 1.14 A key policy objective identified by the Productivity Commission was that the “average desirable duration of post natal absence from work would be around six to nine months.”
- 1.15 Amending the National Employment Standards to provide 18 weeks unpaid leave for parents eligible for paid leave will nevertheless leave some parents ineligible for *unpaid* leave for the critical six to nine month period.
- 1.16 The effect of the limited provision of unpaid leave to 18 weeks should be a subject of the first scheduled review of the scheme.

2. FLEXIBILITY IN TAKING LEAVE

There should be no restrictions on when parents can take paid parental leave.

- 2.1 Families should be able to take paid parental leave prior to the birth of the child if they need to. Alternative forms of leave such as antenatal leave, personal/carer's leave, special maternity or no safe job leave, recreational, annual or long service leave may not be available to some parents.
- 2.2 Further, there is substantial evidence of the need of primary carers to have access to a bank of paid leave in order to manage ongoing caring responsibilities and their own personal and health issues upon return to work when they need it the most.

Recommendation 4: Parents should be able to access paid parental leave up to six weeks prior to the expected birth date of the child.

Entitlements (including leave entitlements) should accrue during the period of paid parental leave.

- 2.3 The Commission acknowledges that paid parental leave should be perceived as a normal leave entitlement and that “*a scheme that intends to signal such normalcy should be structured like other normal leave arrangements such as those for recreation, illness and long service leave, rather than being structured as a social welfare measure*”.⁶
- 2.4 This objective is more likely to be achieved if periods of paid parental leave, as any other leave entitlement, accrue annual, sick, long service leave entitlements, superannuation and incremental salary progression.

⁶ Productivity Commission Draft Report , September 2008

- 2.5 The accrual of leave and other entitlements during paid parental leave promotes greater gender pay equity by ensuring women are not further disadvantaged by taking periods of birth related leave and is not an onerous cost to employers given the short (18 weeks) period of time.
- 2.6 Amendments should be made to the definition of service in the National Employment Standards and in relevant long service leave legislation to this effect. As both the National Employment Standards and the long service leave legislation are subject to review it is an ideal opportunity to effect these amendments.

Recommendation 5: Amend the National Employment Standards and long service leave legislation to provide that unpaid leave for the purposes of taking statutory parental leave is counted as service for the purpose of accrual of annual leave, sick leave, and incremental salary progression.

Time attending work under the “keeping in touch” provision should be counted as paid work.

- 2.7 Time spent attending work whilst on paid or unpaid parental leave should be treated as paid work time. Such days should be a separate arrangement to paid parental leave payments, fully paid by the employer.

Recommendation 6: Time spent attending work whilst on paid or unpaid parental leave should:

- ***not be deducted from the parental leave entitlement;***
- ***be paid at the ordinary time rate or applicable penalty rates; or***
- ***may be counted as time off in lieu of payment.***

- 2.8 Although parents can work up to 10 days during their parental leave by “mutual consent”, in certain circumstances, such as where there are negotiations around return to work arrangements, they may feel unable to refuse requests to work.

Recommendation 7: The provision for time spent attending work whilst on paid or unpaid parental leave must include appropriate anti-coercion and anti-discrimination protections and an employees’ right to refuse an employer’s request to attend work whilst on paid or unpaid parental leave.

3. SUPERANNUATION

The ACTU supports the model’s inclusion of superannuation contributions

- 3.1 Providing superannuation payments during paid parental leave aligns paid parental leave with other forms of leave and is a mechanism to address the discriminatory effect of childrearing on women’s retirement income savings.
- 3.2 Women have just half the amount of superannuation men have accumulated in their superannuation accounts.⁷ This gender gap is largely due to women’s broken

⁷ Clare, Ross., Retirement Savings Update, pp.1,9, Australian Association of Superannuation Funds (ASFA) Research and resource Centre, February 2008.

service patterns during their child rearing years. The provision of superannuation payments to parents on paid parental leave is not an onerous cost to employers given the short period of time (18 weeks) and the tax deductibility of the contributions.

- 3.3 The Commission has proposed a workforce participation test which is cognisant of women's fluctuating employment patterns during child rearing years, and yet has retained the eligibility requirement in relation to superannuation which requires 12 months service with an employer.
- 3.4 To address the gender gap in retirement savings, the requirement to meet the current unpaid parental leave provisions of the National Employment Standards in order to be eligible for superannuation contributions should be removed.

Recommendation 8: Superannuation contributions equal to the current Superannuation Guarantee amount should be provided to all employees entitled to the paid parental leave scheme.

- 3.5 Eleven percent of employed women are not entitled to superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) because they earn less than the \$450.00 per month threshold in their main job.⁸
- 3.6 The requirement that, in order to be eligible for superannuation contributions during paid parental leave, the parent must already be eligible for superannuation contributions under the SGAA, further disadvantages this group of women.

Recommendation 9: The Superannuation Guarantee (Administration) Act 1992 (SGAA) must be amended to remove the current minimum earnings threshold.

- 3.7 The Productivity Commission model requires employers to pay 'capped' superannuation contributions at the current SG of 9%. It should be clear that the Superannuation Guarantee is the *minimum* contribution required to be made by employers and that parties are free to negotiate for superannuation contributions on paid parental leave above the minimum SG.
- 3.8 The ACTU continues to advocate that superannuation contributions whilst on paid parental leave should be paid at the legal or industrial entitlement of the employee prior to commencing paid parental leave.⁹

4. PROTECTION OF EXISTING PAID PARENTAL LEAVE ENTITLEMENTS

Parental Leave entitlements achieved through workplace bargaining must not be undermined by the introduction of the new scheme.

- 4.1 It would be a perverse outcome if the efforts of employees and employers to develop workplace entitlements to support working families, including paid parental

⁸ ABS Employee Earnings, Benefits and Trade Union Membership, Cat no. 6310.0 August 2007

leave entitlements, were undermined by federal government reform to that same end.

- 4.2 Whilst it may well be the case that the majority of employers seeking to maintain their position as employers of choice would not use the new scheme to undermine employee's entitlements, the reality of workplace bargaining is that often employers have acceded to claims for paid maternity leave as a result of protracted negotiations. It must not be assumed that employers will honour existing entitlements or not use them as a bargaining chip in future negotiations. Nor should employees who may have traded a number of entitlements in exchange for their paid parental leave entitlements be disadvantaged by the introduction of the government scheme.
- 4.3 Recent media reports highlight the uncertainty employees have as to the protection of their existing entitlements, with one report indicating two thirds of employers refuse to commit to keeping their existing paid maternity leave schemes once the government introduced its own.¹⁰
- 4.4 It is essential that existing parental leave entitlements, whether in enterprise agreements, company policy, common law employment contracts or elsewhere are explicitly protected by legislation providing a requirement that no employee will be disadvantaged by the introduction of the new scheme.
- 4.5 Protection of existing entitlements should be expressed in a broad sense so as to allow employers and employees to tailor existing workplace entitlements around the new scheme, for example, the ability to use a component of existing paid parental leave as a top up of the new entitlement to full income replacement including superannuation.

Recommendation 10: Inclusion of a specific provision in the legislation which ensures that there will be no disadvantage to employees with respect to their existing parental leave entitlements as a result of the implementation of the new scheme.

- 4.6 The proposed model requires the leave be "*commenced after any period of continuous leave available at the birth of the child and before 6 months after birth.*"¹¹

⁹ In addition, The ACTU welcomes the Draft Superannuation Guarantee Ruling by the ATO which provides that any paid parental leave will be included in the definition of ordinary time earnings and salary and wages for the purposes of employer calculations on contributions necessary to meet their SG obligations.

¹⁰ "Business Doubts Over Private Maternity Leave", in The Daily Telegraph, October 9, 2008

¹¹ Productivity Commission Draft Report Fact Sheet, 29 September 2008, p.5

- 4.7 Whilst we support the recommendation that employees should exhaust their existing paid parental leave entitlements prior to accessing the government entitlement, this requirement should not prevent employees with existing workplace entitlements from accessing the government entitlement.
- 4.8 For example, employees currently entitled to take paid parental leave at half pay over a longer period in their workplace agreement may not be able to do so without it negatively affecting their access to the government entitlement because they will not have commenced the statutory leave within six months of the birth of their child.
- 4.9 In the longer term, the six month limit may restrict the capacity of both employees and employers of choice to gain additional entitlements through bargaining in the future and may have the unintended effect of dampening the extent to which workplace bargaining is able to deliver further improvements in paid parental leave.

Recommendation 11: The requirement to commence the government entitlement within 6 months of the birth should be amended to include the additional words 'or upon expiry of existing workplace entitlements, whichever is the latter'.

- 4.10 The legal status of employees' existing entitlements contained in specific legislation, policies and awards following the introduction of the new scheme should be explicitly protected, in particular:
- Employee's rights to take employer provided paid parental leave at half pay extending leave to beyond six months from birth; and
 - Employee's rights to commence employer provided paid parental leave prior to the expected birth date.
- 4.11 The requirement to exhaust "any period of other continuous leave available at the birth of the child" must be amended to read "any available *paid parental leave* entitlements" and should not include any personal, recreational, annual or long service leave or any other form of leave.¹² The importance of maintaining a bank of leave for parents upon their return to work was discussed at paragraph 2.2.

Recommendation 12: The requirement to exhaust 'any period of other continuous leave available at the birth of the child' must be amended to read 'any period of other continuous paid parental leave available at the birth of the child.'

¹² Productivity Commission Draft Report, September 2008, p.1

5. LEGISLATION AND ENFORCEMENT

- 5.1 The Government is currently developing the new *Fair Work Bill*, which will address the terms of unpaid parental leave. It is logical that terms of paid parental leave be contained in the same legislation.
- 5.2 The Government's intention is that Fair Work Australia (FWA) will be the new one stop shop for dealing with all employment related matters, and it is logical that parental leave matters relating to eligibility of paid and unpaid leave, payment and superannuation be dealt with by FWA.
- 5.3 The proposed Fair Work Bill may not extend to all areas of employment, however, since 1994 the Government has relied on its external affairs powers to give effect to unpaid parental leave entitlements for all employees, thus ensuring coverage of all employees.

Recommendation 13: That employment related matters of the statutory paid parental leave scheme be regulated by the Fair Work Bill.

- 5.4 The enabling legislation for the scheme should provide for appropriate amendments to the social security legislation in respect of payments to beneficiaries of the maternity payment who are not in paid work, superannuation legislation in respect of superannuation contributions and to the National Employment Standards in respect of the rights and obligations of employers and employees.
- 5.5 The capacity for regular review of the scheme is important to ensure relativities with wage movements are maintained; and community standards and the needs of parents are adequately met. The capacity for review upon application is also important to ensure that interested parties are able to bring forward unforeseen issues.

Recommendation 14: The legislative scheme should ensure regular review and review upon application.

6. COMPLEMENTARY NATIONAL EMPLOYMENT STANDARDS

- 6.1 In addition, we recommend amending the National Employment Standards:
 - To strengthen the return to work to provision for more secure rights for parents to return to their original job, including adoptive, foster and relinquishing parents;
 - The right to request flexible work arrangements to require employers to reasonably consider an employee's request and for the employer to be able to reject a request on a limited set of reasonable business grounds;
 - Provide carers leave for the care of all dependents and remove the requirement that care be for illness or injury;

- Provide for breastfeeding breaks and antenatal leave; and
- Give consideration to reducing the current eligibility criteria for unpaid parental leave from 12 to 6 months employment with the same employer.

7. ADMINISTRATION

The ACTU supports the proposal that payments are made via the PAYE system.

- 7.1 The administration of the scheme through the employer is an important symbol of paid parental leave as a regular form of work related leave.
- 7.2 The requirement on employers to make payments for employees in compliance with a government scheme has precedent such as in the operation of the Superannuation Guarantee Act.
- 7.3 The proposal to require employers to provide payment of the scheme through the PAYE scheme is not costly as the payroll systems already exist. The only requirement is the modest contribution to superannuation at a modest average net cost of less than \$30 per week for employers.
- 7.4 Small businesses should be able to claim reimbursement from the Government in advance of parental leave payments liable to be paid to an employee.

8. IMPLEMENTATION MATTERS

Definition of parents

- 8.1 The ACTU supports the eligibility of a wide range of families for paid parental leave, including same sex and adoptive parents and proposes the inclusion of relinquishing parents, parents of foster children and children on placement orders.

Transfer of leave entitlements

- 8.2 The ACTU supports the proposal that the paid parental leave entitlement can be transferred from one primary carer to another nominated primary carer or shared between primary carers. This allows families to tailor their child care arrangements and facilitates greater involvement of fathers as primary carers.

Consecutive periods of leave

- 8.3 The ACTU supports the provision that counts paid parental leave as service for the purposes of meeting the employment test for subsequent period(s) of paid parental leave. Parents who have children close together should be eligible for a subsequent paid parental leave entitlement. Periods of unpaid parental leave should be counted as service for the purposes of determining eligibility for paid parental leave.

Notice

- 8.4 The ACTU opposes the proposed amendment to extend the notice requirement for employees seeking an extension to unpaid parental leave from four weeks to six weeks.

Multiple employers

- 8.5 A provision should be included which stipulates which employer is responsible for the initial payment of the leave entitlement. Consideration could be given to using the lodgment of tax free threshold forms by employees as a guide to which employer should carry the obligation of payment.

Evidentiary requirements

- 8.6 Consideration should be given to the evidentiary requirements necessary to establish meeting the employment test and to the obligations of the parties in providing evidentiary material in a timely manner.

Self employed workers

- 8.7 A Statutory declaration accompanied by supporting documentation is an appropriate basis for establishing eligibility of self employed workers for paid parental leave.

Provision for parents to take the paid parental leave entitlement at half pay

- 8.8 This ensures a better budgeting strategy for many families, is not overly onerous to administer, has minimal impact on tax or welfare structures and aligns with many employed parents' existing entitlements to take the paid maternity leave at half pay.

9. *EQUITABLE ENTITLEMENTS*

Equity of entitlements between parents in paid and non-paid work

- 9.1 The original model proposed by the ACTU provided for an equitable minimum contribution by the government at the federal minimum wage rate in recognition of the contribution most primary carers have made to the labour market¹³ and as a matter of equitable assistance irrespective of families choices as to caring arrangements for their children.
- 9.2 Similarly, the ACTU proposes that the net position of parents in paid and non-paid work (accounting for tax, Family Tax Benefits A and B and other welfare payments) under the scheme should be equitable.

¹³ The significant majority of mothers were in the paid workforce prior to the birth of their first child and moist return once their children reach school age.

Recommendation 16: The net government parental leave entitlement should be equitable for all parents.

Payment of the scheme should be at least at the federal minimum wage for all parents in paid work, including those earning less than the federal minimum wage.

- 9.3 Trainees, juniors, apprentices and cadets earning less than the federal minimum wage are entitled to equitable treatment. Workers earning less than the minimum wage are currently entitled to the baby bonus and family tax schemes as any other parent and should not be disadvantaged by the introduction of the new scheme.
- 9.4 The costs of having a baby are not lower for employees earning less than the minimum wage and it is important to note that many employees earning less than the minimum wage are not necessarily in the 15-21 age group.
- 9.5 There is no evidence to support the proposition that young people will be encouraged to have children as a result of an entitlement to paid parental leave. To allay concerns of perverse encouragement of juvenile pregnancies, the baby bonus was paid fortnightly to this group and will continue to do so in the paid parental leave entitlement.

Recommendation 17: Payment of the scheme should be at least at the federal minimum wage for all parents in paid work, including those earning less than the federal minimum wage.

10. NO FAMILIES SHOULD BE WORSE OFF UNDER THE NEW SCHEME

- 10.1 The model should ensure no parent will be worse off under the new scheme as a result of any impact the new entitlement may have on existing tax and welfare provisions. The ACTU supports the 'opt out' provision only as last resort for unforeseen circumstances.

Recommendation 18: Further modeling should be conducted to ensure no parents will be worse off as a result of the introduction of the new scheme.

- 10.2 The ACTU supports the proposal for ongoing assessments of the interaction of paid parental leave with the tax and welfare system and a series of evaluations of the scheme. However, we regard the limitation of the first evaluation of the scheme (in two years) to administrative aspects as unduly restrictive. This evaluation should include some assessment of the overall operation of the scheme, including industrial matters, followed by a second comprehensive evaluation of the impact of the scheme five years into its life.

Recommendation 19: The evaluation of the scheme two years into its life should include overall assessment of the scheme, including industrial matters.