

Paid Parental Leave Amendment Bill

ACTU Submission to the Senate Community Affairs Legislation
Committee on the Paid Parental Leave Amendment
(Improvements for Families and Gender Equality) Bill 2022

ACTU Submission, 23 January 2023
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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who work across all industries and occupations in the public and private sector.

Background

The ACTU welcomes the opportunity to make a submission on the Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022 (**the Bill**) to the Senate Community Affairs Legislation Committee. The Bill implements the first stage of changes promised by the Federal Government to the Commonwealth Paid Parental Scheme (**PPL**) in the October 2022-23 Budget, which will ultimately see PPL increased to 26 weeks by 2026 (increasing by two weeks per year).

The ACTU fully supports the Bill, which implements important reforms to the *Paid Parental Leave Act 2010* (Cth) (**the Act**) to make PPL more accessible, more flexible and gender-neutral, including:

- Combining the current maximum of 18 weeks of parental leave pay with the current 2 weeks of dad and partner pay into one 20 week entitlement which can be taken flexibly by claimants from 1 July 2023;
- Two weeks reserved on a 'use it or lose it' basis for each claimant, with single parents being able to access the full 20 weeks;
- Making the PPL scheme gender neutral and gender equitable by removing the notion of primary, secondary and tertiary claimants and the requirement that primary claimants of parental leave pay must be the birth parent, allowing families to decide who will claim first and how they will share the entitlement;

- Making PPL consist only of flexible PPL days, allowing claimants to take the payment in multiple blocks as small as a day at a time, within two years of the birth or adoption, and remove the requirement to not return to work in order to be eligible;
- Introducing a \$350,000 family income limit under which families can be assessed if they do not meet the individual income test;
- Expanding eligibility to allow a father or partner to receive parental leave pay regardless of whether the birth parent meets the income test or residency requirements.

The Bill is the first step in delivering crucial reforms to PPL that have been advocated for by unions and others for many years. The ACTU also welcomes and commends the commitment to increase PPL to 26 weeks by 2026.

However, there is a lot more to be done to improve and expand Australia's PPL scheme. Extending the scheme to 52 weeks by 2030, increasing the rate of pay from its low level of the National Minimum Wage, providing incentives for shared parenting, and paying super on top are all changes that are necessary to increase women's workforce participation, facilitate more equal sharing of caring responsibilities between men and women, and close the gender pay gap. Furthermore, more needs to be done to strengthen the rights of working parents and carers.

The ACTU makes the following recommendations that will strengthen both the Bill and Australia's PPL scheme and broader parental leave framework.

Summary of ACTU Recommendations

Recommendation 1 – the Bill, the EM and the Act are amended as follows:

- a) all occurrences of the words 'birth mother' in the Bill are replaced with the words 'birth parent';
- b) the EM is amended to replace all occurrences of the words 'birth mother' with 'birth parent', and is amended to avoid confusion as to the meaning of 'birth parent'; and
- c) all occurrences of the words 'birth mother' in the Paid Parental Leave Act are replaced with 'birth parent.'

Recommendation 2: In order to increase women's workforce participation, facilitate more equal sharing of caring responsibilities between men and women, and close the gender pay and retirement income gaps, the following further reforms should be made to the PPL scheme:

- Lift the entitlement to 26 weeks from commencement of the Bill;
- Phase it up to 52 weeks by 2030, eventually providing 52 weeks to every worker;

- Pay it at the greater of a replacement wage or the full time national minimum wage, with a possible phase up to a living wage first;
- Provide incentives for shared parenting such as bonus leave and expanded use it or lose it components;
- Pay superannuation on parental leave; and
- Remove or shorten the work test period (the requirement that a person has worked for 10 of the 13 months prior to the birth or adoption of a child).

Recommendation 3: Strengthen the rights and protections for working parents and carers through further legislative reform, including:

- Ensuring workers can access parental leave entitlements, and they are not discriminated against when accessing them or when seeking to return to work including:
 - Protection for employees taking parental leave through strict liability and/or increased penalties for terminations or adverse action during or shortly after parental leave;
 - A positive duty on employers to reasonably accommodate the needs of workers who are pregnant and/or have family responsibilities;
 - Adopt a reverse onus of proof model in state and federal anti-discrimination legislation consistent with the Fair Work Act;
 - Ensure consistent application of anti-discrimination laws at the state and federal level, including the Fair Work Act;
 - Ensure that the complaints process in anti-discrimination cases is more accessible, less costly and provides better remedies sufficient to act as a deterrent against discrimination;
 - Enable workers and unions to make complaints and bring claims regarding non-compliance with the new positive duty in s47C of the Sex Discrimination Act; and
 - Provide for independent enforcement of compliance notices in the courts by trade unions and workers where the Commission does not do so within a period of time.
- Recognition of periods of unpaid parental leave as active service to ensure the accrual of all entitlements including personal leave, long service leave, annual salary increments, superannuation and payment of public holidays during periods of paid and unpaid parental leave;
- Paid breastfeeding breaks and appropriate breastfeeding facilities;
- Access to paid bereavement leave for parents who have lost a child through miscarriage;
- Access to a new entitlement to Grandparental Leave which would provide for an eligible employee to access 52 weeks unpaid leave for each grandchild during the period up until the child's 5th birthday; and

- Ratification of ILO Maternity Protection Convention (C183) and compliance with the guidance in accompanying Recommendation 191.

Recommendations relating to this Bill

Inclusive and consistent language

There are numerous sections of the Bill that use the term 'birth mother'. The Explanatory Memorandum (EM) on the other hand, mostly uses the term 'birth parent', although still contains some references to 'birth mother.'

The term 'birth parent' is inclusive of transgender, intersex, and gender diverse parents. The term 'birth mother' excludes some people. The entitlement to PPL, and the language used to describe the entitlement, should include all people who give birth. There is also a strong policy rationale for using consistent language to avoid confusion.

As well as using inconsistent language, the EM (Schedule 1, Main amendments) uses inconsistent concepts of birth parent. On page 4, there is an example given under the heading of "Separated birth parents, one birth parent re-partnered" which refers to both parents as "birth parents". However, further down on page 4, the EM sets out who may make a PPL claim, including: "the child's birth parent", and "a parent who is a parent of the child but is not the birth parent". The language used in the EM should be clarified to ensure that "birth parent" is only used to refer to the parent that gives birth to a child, not to both biological parents as implied in the example of "Separated birth parents, one birth parent re-partnered" at page 4.

The Bill uses the term 'birth mother' in the following sections:

Schedule 1

- Item 1, section 3A(2)(c)(ii)
- Item 48, section 13(2)(b)
- Item 48, section 13(3)(a) and (b)
- Item 48, section 15(1)(a)
- Item 118, section 54(1)(a), (c) and (d)
- Item 126, section 59A(1)(a) and (b)

Schedule 3

- Section 2(8)(a)

Recommendation 1 – the Bill, the EM and the Act are amended as follows:

- a) all occurrences of the words ‘birth mother’ in the Bill are replaced with the words ‘birth parent’;
- b) the EM is amended to replace all occurrences of the words ‘birth mother’ with ‘birth parent’, and is amended to avoid confusion as to the meaning of ‘birth parent’; and
- c) all occurrences of the words ‘birth mother’ in the Paid Parental Leave Act are replaced with ‘birth parent.’

Recommendations for further reform

Current PPL scheme

Australia currently has the second-worst paid parental leave scheme in the developed world, being just 18 weeks paid at the national minimum wage, with no compulsory superannuation paid on top. Australia ranked 40th of 41 comparable EU and OECD countries on paid parental leave provided to mothers – providing the full-time average wage equivalent of only eight weeks paid leave – and 27th on the amount of parental leave provided to fathers, providing the full-time average wage equivalent of 0.8 weeks paid leave.¹ Compounding this inadequacy, the superannuation guarantee is not applicable during either paid or unpaid parental leave. Men account for only 6.5% of all primary carer’s leave taken, with the vast majority of paid parental leave undertaken by women.²

The impact of this is that mothers end up doing the lion’s share of parenting for a newborn, both in terms of the initial leave taken, and then by taking on part-time work to balance care and work responsibilities. While men rarely take more than a couple of weeks to look after a newborn and return to full-time work, women’s careers are often put on hold. It is at this point that the participation and pay gaps between women and men start to widen the most.

Need for further reform

The ACTU commends and welcomes the Government's commitment in the October 2022-23 Budget to expand the PPL scheme to 26 weeks by 2026. This is a highly significant and overdue reform to modernise and expand the PPL scheme – but more needs to be done to advance gender equality. The delay to the increase to 26 weeks will disproportionately impact low income

¹ Yekaterina Chzhen, Anna Gromada and Gwyther Rees (2019) Are the world’s richest countries family friendly? Policy in the OECD and EU, UNICEF Office of Research, Florence

² WGEA (2017) Towards gender balanced parental leave – Australian and International Trends – Insight Paper

workers and families, for whom the length of paid leave available largely dictates the amount of time in total that they can take as parental leave to care for children.

Even once the Government's PPL reforms are fully implemented and the scheme is expanded to 26 weeks from 1 July 2026, Australia will still rank in the bottom third of parental leave entitlements offered internationally.³ In fact, the changes, which would lift the payment from about 8 weeks of full-time average wage equivalent up to 10.3 weeks, only lifts Australia from the 2nd worst position in the OECD, up to the 4th worst position based on 2022 figures.⁴ The rate of payment of PPL at the National Minimum Wage is likely to impede high take up rates by fathers and partners.⁵ Further reforms will be required to bring Australia in-line with international best practice. Future reforms will also need to translate international experience to the Australian social and cultural context, so as to successfully shift gender norms and encourage more equitable sharing of care between women and men. The ACTU calls on the Government to maintain momentum and ambition in expanding the PPL scheme, being a critical lever for driving gender equality in Australia.

There is strong and clear evidence of the significant child and maternal health and welfare benefits of an absence from work for parents of 6-12 months.⁶ Fathers' involvement in childcare has been linked to improved wellbeing, happiness and commitment to family.⁷ The participation of both parents in the early care of children has beneficial impacts for the long-term sharing of the care of children and household duties. This in turn supports the health and well-being of children and both parents, and improves gender equity in the workplace, home and society.⁸

Research from comparable economies shows that best practice PPL systems include a reserved and non-transferable ("use it or lose it) portion of paid parental leave for fathers and partners. The evidence is that when paid at, or close to full wage replacements rates, men increase their uptake of parental leave and unpaid care, which over time changes gender norms around the division of paid and unpaid work.⁹ Barriers to increasing the uptake of parental leave by fathers and partners are the rate at which it is paid, organisational stigma, and gender norms.¹⁰ The

³ Marian Baird and Elizabeth Hill (2022) Next Steps for Paid Parental Leave in Australia

⁴ https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf

⁵ Baird and Hill (2022)

⁶ Australian Government Productivity Commission, Paid Parental Leave: Support for Parents with Newborn Children No. 47, 28 February 2009, p 18

⁷ Norman, H., Elliot, M., and Fagan, C., (2018), "Does Fathers' Involvement in Childcare and Housework Affect Couples' Relationship Stability?" *Social Science Quarterly* 99.5: 1599–1613, as cited in Baird and Hill (2022)

⁸ Baird and Hill (2022)

⁹ Patnaik, A. (2019) 'Reserving Time for Daddy: The Consequences of Fathers' Quotas', *The Journal of Labor Economics, Journal of Labor Economics*, 37(4): 1009-1330, as cited in Baird and Hill (2022); and *Nordic Labour Journal* (August 2022) 'Dads on equal footing with mums in Denmark's new parental leave law' — *Nordic Labour Journal*

¹⁰ Baird and Hill (2022)

gender pay gap is also a barrier as the loss of family income tends to be less when women take parental leave, as women on average earn less than men.¹¹

The highest rates of utilisation by fathers are in countries with designated periods for men that provide paid parental leave at high income replacement levels as well as incentives for fathers to take leave, for example the Nordic countries and the Canadian Province of Quebec.¹²

The ILO's Maternity Protection Convention (C183) establishes the right of women to a minimum 14 weeks' maternity leave paid at no less than two-thirds of the person's earnings prior to taking leave, with paid nursing breaks or a reduction of hours of work for breastfeeding which is to be counted as working time and remunerated accordingly. Recommendation 191, the accompanying Recommendation to Convention 183, provides further guidance on the implementation of the Convention, stating that maternity leave should be at least 18 weeks paid at the full replacement wage, and that in addition to paid nursing breaks or time, appropriate nursing facilities should be provided upon return to work. Australia has not ratified this Convention.

Discrimination against women, particularly in relation to pregnancy, parental and caring responsibilities is pervasive and widespread and despite decades of legislation making it illegal, the level of discrimination remains relatively unchanged.

Tensions in the objectives of Paid Parental Leave

Section 3 of the Act sets out the objectives for Paid Parental Leave, which include:

- to allow parents to take time off work to care for children;
- to enhance the health and development of birth mothers and children;
- to encourage women to continue to participate in the workforce;
- to promote equality between men and women, and the balance between work and family life; and
- to provide carers with greater flexibility to balance work and family life.

These objectives can be in conflict or tension with each other. For example, there can be tensions between maternal and baby health, enhancing female workforce participation, and achieving greater gender equality by encouraging fathers to share in the care of young children. This can necessitate the prioritising of one of these goals over the others, especially within the

¹¹ Baird and Hill (2022)

¹² Baird and Hill (2022)

limits of 26 weeks. The longer the total period of paid leave, the easier it will be to adequately resource and achieve all objectives of the Act.¹³

Proposed reforms

The ACTU calls on the Government to incrementally expand and improve the PPL scheme, and strengthen the rights of working parents and carers, to align Australia with best practice in other OECD and European nations. As a first step, the 26 week entitlement should be available to workers from the commencement of the Bill, which would make a significant difference to low income workers and families.

By 2030, every employee should have access to 52 weeks paid parental leave at full-wage replacement or the national minimum wage, whichever is greater. An increase to the rate of pay could be done incrementally, by phasing the payment up first to a living wage (60% of the median wage), before increasing it further to a replacement wage.

Superannuation should be paid at the Superannuation Guarantee rate on all periods of paid and unpaid parental leave. Under this proposed system, a single parent could access up to 52 weeks paid leave and a two-parent household could access up to 104 weeks paid leave, which they could share between them. This aligns with the amount of unpaid parental leave parents currently have the right to access under the National Employment Standards.

Parents should have flexibility to take their paid parental leave entitlements as they choose, including double the time at half-pay. The scheme should incentivise parents to share care more equally though providing expanded 'use it or lose it' portions, and additional paid 'bonus' leave if both parents take their portions of leave.

Paid parental leave should be made available to every worker who needs it, including workers on casual, temporary or fixed term contracts; workers on visas; workers on any period of paid or unpaid leave; parents of children on permanent care order; parents who need paid parental leave for pregnancy, childbirth, assisted reproduction or fertility treatment, adoption, bonding, surrogacy, fostering, kinship placements and breastfeeding. There should be no minimum period required to qualify for paid parental leave.

Further legislative reform is also needed to improve rights and protections of working parents and carers, including:

¹³ Baird and Hill (2022)

- Ensuring workers can access parental leave entitlements, and they are not discriminated against when accessing them or when seeking to return to work (it is not uncommon for women to find themselves either unemployed, demoted or the victim of some adverse action during or shortly after a period of parental leave);
- Recognition of periods of unpaid parental leave as active service to ensure the accrual of all entitlements including personal leave, long service leave, annual salary increments, superannuation and payment of public holidays during periods of paid and unpaid parental leave;
- Paid breastfeeding breaks and appropriate breastfeeding facilities;
- Access to paid bereavement leave for parents who have lost a child through miscarriage;
- Access to a new entitlement to Grandparental Leave which would provide for an eligible employee to access 52 weeks unpaid leave for each grandchild during the period up until the child's 5th birthday; and
- Ratification of ILO Maternity Protection Convention (C183) and compliance with the guidance in accompanying Recommendation 191.

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- Provide incentives for shared parenting such as bonus leave and expanded use it or lose it components;
- Pay superannuation on parental leave; and
- Remove or shorten the work test period (the requirement that a person has worked for 10 of the 13 months prior to the birth or adoption of a child).

Recommendation 3: Strengthen the rights and protections for working parents and carers through further legislative reform, including:

- Ensuring workers can access parental leave entitlements, and they are not discriminated against when accessing them or when seeking to return to work including:
 - Protection for employees taking parental leave through strict liability and/or increased penalties for terminations or adverse action during or shortly after parental leave;

- A positive duty on employers to reasonably accommodate the needs of workers who are pregnant and/or have family responsibilities;
 - Adopt a reverse onus of proof model in state and federal anti-discrimination legislation consistent with the Fair Work Act;
 - Ensure consistent application of anti-discrimination laws at the state and federal level, including the Fair Work Act;
 - Ensure that the complaints process in anti-discrimination cases is more accessible, less costly and provides better remedies sufficient to act as a deterrent against discrimination;
 - Enable workers and unions to make complaints and bring claims regarding non-compliance with the new positive duty in s47C of the Sex Discrimination Act; and
 - Provide for independent enforcement of compliance notices in the courts by trade unions and workers where the Commission does not do so within a period of time.
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 - Ratification of ILO Maternity Protection Convention (C183) and compliance with the guidance in accompanying Recommendation 191.

Conclusion

The ACTU fully supports the Bill, which implements significant reforms to the Act which make PPL more accessible, more flexible and gender-neutral. The ACTU recommends that the Bill and EM are amended to provide for inclusive and consistent language by referring to 'birth parent' rather than 'birth mother', and that clarity is provided as to the meaning of 'birth parent.'

The ACTU welcomes and commends the Government's commitment to increase PPL to 26 weeks by 2026. However, there is more to be done to improve and expand Australia's PPL scheme. The longer the total period of paid leave, the easier it will be to achieve all objectives of the Act such as maternal and baby health, enhancing female workforce participation, and greater gender equality in care, which are in conflict with each other in the current limit of 26 weeks.

The ACTU recommends that the scheme is expanded to 52 weeks by 2030, that the rate of pay is increased, that incentives for shared parenting are provided, that super is paid on top, and that the work test period is removed or shortened. These changes are necessary to increase women's workforce participation, facilitate more equal sharing of caring responsibilities between men and women, and close the gender pay gap. The ACTU also recommends further legislative reform to improve the rights and protections of working parents and carers, and the ratification of C183 and compliance with the guidance in its accompanying Recommendation 191.

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