

Submission to the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training: Inquiry into the Operation and Adequacy of the National Employment Standards (NES)

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I write this submission as an academic specialising in Australian labour law, who has written on the regulation of parental leave in Australia and its gendered implications.¹ I draw on that research in this submission.

Executive Summary

I appreciate that Division 5, Subdivision B of the *Fair Work Act 2009* (Cth) (FW Act) has been excluded from the scope of this inquiry. However, I would like to bring attention to provisions relating to parental leave located in Division 5, Subdivisions A and C. Specifically, the 12-month continuous service requirement in s 67 of the Fair Work Act (Division 5, Subdivision A) and how this interacts with the return to work guarantee in s 84 (Division 5, Subdivision C) as well as eligibility requirements under the *Paid Parental Leave Act 2010* (Cth) (PPL Act).

In this submission, I argue that a 12-month continuous service requirement with an employer to access unpaid parental leave is out of step with the objective of promoting gender equality under s 3 of the FW Act as well as contemporary patterns of work. I also explain how the interaction between the provisions outlined above produces a significant gap in the NES safety net. In essence, employees may qualify for parental leave payments, either through the government's payments or employer arrangements, yet have no statutory right to return to their pre-leave position. This is explained further below. This is an inconsistency that could and should be resolved by removing the 12-month continuous service requirement from unpaid parental leave under the NES.

1. The Interaction Between s 67 and s 84: An Internal Incoherence in the NES

Section 67 of the Fair Work Act imposes a 12-month continuous service requirement before an employee can access unpaid parental leave under the NES (subject to limited exceptions). Section 84, in turn, provides a return to work guarantee but only for employees who have taken unpaid parental leave under the NES. Job protection is therefore conditional on satisfying the s 67 12-month continuous service requirement.

This interaction produces outcomes that undermine the coherence and adequacy of the NES as a safety net. There are employers who voluntarily grant paid parental leave without a 12-month continuous service requirement.² An employee who accesses this leave would be accessing parental leave that exists outside the NES framework and would therefore fall outside the protection of the s 84 return to work guarantee. The counterintuitive result is that

¹ Amanda Darshini Selvarajah, 'The Regulation of Paid Parental Leave in Australia: Delivering Gendered Patterns of Care' (2024) 52 *Federal Law Review* 412-434 <https://doi.org/10.1177/0067205X241305797>.

² See, eg, Victorian Public Service Enterprise Agreement 2024, which recently removed the eligibility service period to access paid parental leave effective 19 August 2024 <<https://www.dtf.vic.gov.au/victorian-public-service-enterprise-agreement-2024>>.

an employee may receive more generous paid leave from their employer, yet have weaker statutory job protection than a colleague who accesses the NES entitlement directly. Research suggests that pregnant workers continue to face discrimination upon their return to work from parental leave including changes to their pay, conditions of work and workplace duties, emphasising the importance of section 84.³ The conditional nature of section 84 reveals a significant gap in workplace protections for returning parents.

2. The Interaction Between the NES and the Paid Parental Leave Act

The incoherence deepens when the NES is considered alongside the PPL Act as part of the legislative framework within which the NES operates.

Eligibility for Parental Leave Payments under the PPL Act is determined by a work test rather than a continuous service requirement.⁴ To qualify, an individual must have worked 10 of the 13 months prior to the birth or adoption and completed at least 330 hours of paid work in that period.⁵ Crucially, work may be performed across multiple employers, gaps of up to 12 weeks between working days are permitted, and paid leave and certain approved activities count toward the threshold.⁶ This reflects a deliberately flexible and inclusive conception of workforce attachment, accommodating non-linear employment patterns.

The interaction between this framework and the NES, however, produces a mismatch. The PPL Act only provides parental leave *payments* but not a right to parental leave.⁷ An employee may therefore find themselves in the unusual situation of satisfying the PPL Act work test and qualifying for government-funded income support during parental leave without actually qualifying for parental leave under s 67 of the NES and by extension, having no entitlement to a ‘return to work guarantee’ under s 84.

In effect, the law in Australia recognises that an employee is sufficiently connected to the workforce to warrant income support while on parental leave, but not sufficiently connected to warrant unpaid parental leave or job security. This misalignment undermines the coherence of Australia's parental leave framework, creates uncertainty for employees navigating overlapping entitlements, and weakens the practical value of the PPL Act's flexible eligibility design.

3. Implications for Gender Equality and the Object of the Fair Work Act

These structural inconsistencies have direct implications for the Fair Work Act's objective of promoting gender equality under s 3.

Women remain more likely to take primary responsibility for caregiving, to access parental leave earlier in an employment relationship, and to experience interrupted or non-linear

³ See, eg, Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014) 29; Dominique Allen and Adriana Orifici, ‘Understanding Pregnancy Discrimination: A Pilot Study of Victorian Women’s Experiences at Work’ Monash University (2022) 12–13, 15.

⁴ *Paid Parental Leave Act 2010* (Cth) s 32.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See Amanda Darshini Selvarajah, ‘The Regulation of Paid Parental Leave in Australia: Delivering Gendered Patterns of Care’ (2024) 52 *Federal Law Review* 412-434 <https://doi.org/10.1177/0067205X241305797>.

career trajectories. By conditioning job protection on 12 months of continuous service with a single employer, the interaction between ss 67 and 84 excludes many workers precisely at the point they most need protection. It creates practical disincentives to take parental leave where job security is uncertain and limits the real-world effectiveness of employer-funded parental leave and the government's parental leave payments.

International developments reflect a growing recognition that workforce participation, rather than tenure with a single employer, is the appropriate basis for parental leave entitlement. The United Kingdom, for example, has extended parental leave rights from the first day of employment, effective April 2026.⁸ Australia's current framework lags behind, maintaining a rigid eligibility threshold that disproportionately excludes workers with non-linear employment histories, where women are overrepresented.

Moreover, while some employees may at least be able to access parental leave arrangements at their workplace without a length of service requirement, according to the Workplace Gender Equality Agency (WGEA) most organisations that do offer any parental leave of their own, mirror the NES in requiring at least 12 months of continuous service before employees can access their employer-funded parental leave entitlements (approximately 85% of organisations offering employer-funded parental leave).⁹ These employer-funded parental leave offerings are also typically offered for a much shorter period of time than the 12 months offered under the NES (an average of approximately 14 weeks).¹⁰

There also continues to be many organisations that offer no parental leave offerings of their own at all. In the latest WGEA report, only 67% of reporting organisations offered employer-funded paid parental leave (a 1% decrease from the previous year).¹¹ These figures do not capture organisations that fall outside WGEA reporting obligations. WGEA data represents the workplace policies of only approximately 40% of Australia's workers.¹² Employer-funded parental leave entitlements are likely even rarer in non-reporting, smaller organisations.

For many Australian workers, the NES represents their only avenue to parental leave. A length of service requirement could prevent many workers from being able to access much needed leave at this critical life stage. These employees would also be deprived of accompanying job protection when returning from leave, emphasising the importance of a universal and accessible right to parental leave and a right to return to work.

The NES is intended to function as a universal safety net. An entitlement framework that denies job protection to employees who qualify for income support under a parallel Commonwealth statute is not a framework that functions coherently, adequately, or consistently with the Act's newly introduced gender equality objective.

⁸ GOV.UK, 'Unpaid Parental Leave' <https://www.gov.uk/parental-leave/eligibility>.

⁹ Workplace Gender Equality Agency, 'Australia's Gender Equality Scorecard' (November 2025) 70 <https://www.wgea.gov.au/sites/default/files/documents/WGEA-Gender-Equality-Scorecard-2024-25.pdf>.

¹⁰ Ibid 69.

¹¹ Ibid 67.

¹² Workplace Gender Equality Agency, Australia's Gender Equality Scorecard 2021-22 (December 2022) 1 <https://www.wgea.gov.au/sites/default/files/documents/WGEA-Gender-Equality-Scorecard-2022.pdf>.

Moreover, research has found that the relevant legislative framework is influential in how employers conceptualise and design their own parental leave policies.¹³ Removing the length of service requirement from the NES could therefore encourage organisations to be similarly more generous in their parental leave offerings.

4. Addressing the Gap: Options for Reform

Reform should focus on resolving the interaction between s 67 and s 84 to restore coherence to the NES framework. Options include:

- extending the return to work guarantee in s 84 to all employees who take parental leave, regardless of whether they have accessed ‘unpaid’ parental leave and therefore satisfied the s 67 continuous service requirement;
- aligning eligibility for unpaid parental leave more closely with the PPL Act work test, which measures broader workforce attachment rather than tenure with a single employer;
- removing the 12-month continuous service threshold in s 67.

Any of these approaches would address the interaction problems identified in this submission. However, removing the 12-month continuous service threshold would represent the most positive shift in reflecting the newly added objective of promoting gender equality in the FW Act and ensuring that the right to parental leave is truly a universal and accessible right.

Conclusion

The interaction between s 67 and s 84 of the Fair Work Act, viewed alongside the Paid Parental Leave Act 2010 (Cth), reveals a significant structural incoherence in Australia's workplace framework. Employees may qualify for paid parental leave through government or employer schemes yet have no statutory right to return to their pre-leave position. This outcome undermines the NES as a coherent and adequate safety net, conflicts with the Fair Work Act's gender equality objective, and is out of step with contemporary workforce patterns and international developments. Addressing this inconsistency is a necessary step toward ensuring that Australia's workplace laws provide coherent, accessible, and meaningful protection for working parents.

¹³ Amanda Darshini Selvarajah, ‘The Regulation of Paid Parental Leave in Australia: Delivering Gendered Patterns of Care’ (2024) 52 *Federal Law Review* 412-434 <https://doi.org/10.1177/0067205X241305797>.