

Women in Combat Duties - Reservation Withdrawal

Submission to Joint Standing Committee on
Treaties

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry Women in Combat Duties - Reservation Withdrawal being conducted by the Joint Standing Committee on Treaties.
2. This submission comments on both of Australia's reservations to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),² encouraging the removal of both, as well as making further recommendations to ensure that Australia is compliant with its human rights obligations in relation to women and work.
3. Australia ratified the CEDAW on 28 July 1983, with two reservations. The reservation relating to women in combat and combat-related duties is made in respect of Australia's obligations under article 11(1)(b) and (c), and its removal is the subject of this inquiry. The other reservation relates to maternity leave with pay or with comparable social benefits pursuant to article 11(2)(b).
4. The ALA applauds the proposed withdrawal of Australia's reservation relating to women in combat duties. The appropriate test must be the ability to meet the physical and intellectual standards required, regardless of sex.
5. We further submit that, in line with the Government's stated 'deep commitment to women's human rights and gender equality domestically, across our region and globally',³ it should also withdraw the reservation relating to maternity leave with pay.

² *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13.

³ Consideration of reports submitted by States parties under article 18 of the Convention: Eighth periodic report of States parties due in 2014, UN Doc CEDAW/C/AUL/7.

6. In order to withdraw Australia's combat duties reservation, the Government has removed domestic policies and legislation which exclude women from combat duties in the military. In doing so, the Australian Government has demonstrated its ability and commitment to satisfy its obligations under the CEDAW and, therefore, its dedication to the elimination of discrimination against women. It logically follows that the Government can and should amend its domestic policies and legislation to satisfy its obligations under article 11(2)(b).

Steps taken to remove reservations

7. Australia commenced 'appropriate measures'⁴ to eliminate discrimination against women in the field of employment in 2012 when a comprehensive and phased implementation plan to open previously restricted employment categories was agreed by the Gillard Government.⁵ The current Government's policy to remove all gender restrictions from ADF combat roles was fully implemented from 1 January 2016.⁶
8. In addition to the withdrawal of the combat duties reservation, the current Government intends to repeal s43 of the *Sex Discrimination Act 1984* (Cth). This section exempts discrimination against women in connection with employment, engagement or appointment in ADF positions involving combat duties from the scope of the Act.⁷

⁴ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13, article 11(1).

⁵ Australian Government, Department of Defence, *Women in Defence* <<http://www.defence.gov.au/women/>>.

⁶ Summary Page, National Interest Analysis: Withdrawal of Australia's reservation under the CEDAW in relation to the exclusion of women from combat duties [2017] ATNIA 10 at [3].

⁷ *Ibid*, [4].

9. Here, the government demonstrated its ability to take measures required by the CEDAW and the ALA encourages it to do so with regards to article 11(2)(b).
10. Ensuring access to maternity leave with pay is essential to ensuring that women have equal access to the workforce and are not discriminated against on the basis of their reproductive status.
11. The removal of the reservations would contribute to the development of formal equality, but this must be supported by measures that create substantive equality.⁸

Australia's reservation regarding maternity leave with pay

12. The reservation relating to maternity leave with pay or with comparable social benefits is:
 - a. 'The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents; and

⁸ Right Now, *Australia's Reservations to CEDAW – Irrelevant and Unnecessary* (2012) <<http://rightnow.org.au/opinion-3/australias-reservations-to-cedaw-irrelevant-and-unnecessary/>>.

- b. The Government of Australia advises that it is not at present in a position to take the measures required by article 11(2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.⁹

13. The ALA believes that this reservation is no longer appropriate and perpetuates existing discrimination against women both in the workplace and more broadly.

Recommendations related to maternity and childcare

14. In 2010, the Committee on the Elimination of Discrimination against Women, which monitors States' implementation of the CEDAW, recommended that Australia withdraw both of its reservations.¹⁰ It further stated:

'The Committee calls on the State party to ensure that the statutory independent review of the Paid Parental Leave Act gives due consideration both to an increase in compensation and to the provision of superannuation on paid leave in order to protect better women's financial security and to encourage equal participation of both parents in childcare. The Committee urges the State party to develop a comprehensive childcare policy to include out of school hours and vacation care and to increase the supply of affordable and quality childcare.'¹¹

⁹ Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/SP/2006/2.

¹⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women CEDAW/C/AUL/CO/7, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fAUL%2fCO%2f7&Lang=en, [19].

¹¹ *Ibid*, [39].

15. The ALA wholeheartedly supports this recommendation and calls on the Government to implement it before the next Federal election.
16. In 2014, the Australian Human Rights Commission conducted an inquiry entitled *Supporting Working Parents: Pregnancy and return to work national review – report* (the AHRC Report or Report).¹² This Report revealed the considerable discrepancy between mothers and fathers/partners in the caring role taken directly after the birth or adoption of a child.¹³
17. According to the Report, 89 per cent of women take leave after birth/adoption, including 60 per cent who took leave in addition to the statutory 18 weeks allowed under the existing paid parental leave scheme. Employer-paid parental leave was taken by 48 per cent of mothers, while unpaid parental leave was taken by 46 per cent.¹⁴
18. By contrast, only 54 per cent of fathers and partners took addition leave than the statutory paternity/partner leave of two weeks. Of these, 61 per cent took annual leave, 23 per cent took unpaid parental leave and 19 per cent took employer paid parental leave. Overall, 85 per cent of fathers and partners took less than four weeks leave.¹⁵
19. It is clear from these figures that, overwhelmingly, the task of child-rearing in the first months or years of a child's life is carried by mothers, while fathers/partners

¹² Available at

http://www.humanrights.gov.au/sites/default/files/document/publication/SWP_Report_2014.pdf.

¹³ Note that the data collected for this Report related to people who had qualified for paid parental leave under the *Paid Parental Leave Act 2010* (Cth), s31. As such there is a chance that the statistics do not reflect the experiences of mothers and fathers/partners who do not meet the tests in s31, whose employment may also have been affected by pregnancy or new parenthood.

¹⁴ *Ibid*, 45.

¹⁵ *Ibid*, 55.

spend much more time at work. As such, paid parental leave is intimately related to gender equality and the Commonwealth's implementation of its obligations under article 11 of the CEDAW. Retaining the reservation relating to maternity pay in light of these statistics is incompatible with Australia's obligations under the CEDAW.

20. The AHRC Report went on to examine the serious financial implications that motherhood had for women; in particular, vulnerable women and women who lost employment as a result of pregnancy.¹⁶ It also detailed extensive experiences of discrimination reported by mothers. While this is a matter of great concern to the ALA, it is beyond the scope of this submission. It is essential, however, in devising a fair and equitable paid parental leave scheme that attention is paid to the various types of discrimination highlighted in the Report.
21. Implementing the Committee's recommendations in relation to removing the reservation regarding to paid parental leave, increasing the compensation available under the existing scheme, including access to superannuation, and developing a comprehensive childcare policy to include childcare out of hours and ensure that it is affordable, is essential to eliminating discrimination against women in the workplace and ensuring that Australia is respecting its obligations in relation to article 11 of the CEDAW.
22. Australia has already taken the first step in this regard, with its *Paid Parental Leave Act 2010* (Cth), which represents a solid foundation on which to build a more equitable paid parental leave scheme. Increasing entitlements from 18 to 20 weeks for qualifying parents and reforms to childcare entitlements demonstrate that the Government is genuine in its support for working parents. To adequately meet its

¹⁶ See, for example, *Ibid*, pp78, 87, 88.

obligations under the CEDAW, the Committee's recommendations must be implemented in full.

Recommendations

The ALA makes the following recommendations:

- Remove both of Australia's reservations to the CEDAW, in relation to women in combat positions in the military and in relation to maternity pay;
- Ensure the test for combat focuses on the ability to meet the physical and intellectual standards required, regardless of sex;
- Implement the Committee on the Elimination of Discrimination against Women's recommendations in relation to article 11 of the CEDAW in relation to maternity pay, including increasing the rate of compensation available under the paid parental leave scheme beyond the recent increase, the availability of superannuation during maternity leave and expanding access to quality affordable childcare;
- Prioritise implementing all concluding observations of the Committee on the Elimination of Discrimination against Women and eliminating discrimination against women in the Australian community. This should include adequate attention to the differing needs of women from diverse backgrounds and vulnerable women.