

Australian Nursing And Midwifery Federation

SUBMISSION TO THE INQUIRY INTO THE PAID PARENTAL LEAVE AMENDMENT (FLEXIBILITY MEASURES) BILL 2020

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INTRODUCTION

The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 280,000 nurses, midwives and carers across the country.

Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

Thank you for providing the opportunity to respond to the Inquiry into the Paid Parental Leave Amendment (Flexibility Measures) Bill 2020 (the Bill).



THE BILL

The ANMF strongly supports any measures designed to improve women's workforce participation, economic independence and earning potential. The proposed amendments to the *Paid Parental Leave Act 2010* introduced in the Bill are welcome practical improvements to the scheme.

The Bill makes provision for the current 18 weeks of paid parental leave (PPL) to be taken in two parts. The first 12 weeks are taken as per the current scheme, the remaining 30 days, described as flexible PPL days, can be taken more flexibly. The proposed measures allow for the primary claimant to take the 30 days:

- up until the child turns two
- after a return to work
- to supplement a part-time or gradual return to work
- in periods of a day at a time and
- to be used by agreement by a secondary claimant or claimants

The ANMF acknowledges these changes will assist families in balancing child rearing responsibilities and work commitments.

Burden on the Individual

The ANMF is concerned however, that the burden of claiming the flexible component of PPL is too great for individual claimants. As the explanatory memorandum states:

'If an employee wishes to access flexible PLP they will generally need to negotiate time off work or a part time return to work with their employer'.

The ability to access flexible PPL is dependent on the individual employee negotiating a flexible work arrangement. This places the onus on the individual and in many workplaces, particularly for women in low paid roles, CALD backgrounds, low union density or insecure work, the ability to negotiate a flexible work arrangement is limited. It is unrealistic to expect individuals who are vulnerable in their employment to be able to negotiate on an even footing, or even to have the necessary access to negotiate a flexible work arrangement with their employer.

The PPL scheme sits alongside entitlements to unpaid parental leave under the Fair Work Act 2009. In his second reading speech, Minister for Population, Cities and Urban Infrastructure, Mr Alan Tudge noted:

'Pending passage of the changes to the Paid Parental Leave Scheme, the government also intends to make complementary amendments to increase the flexibility of the existing unpaid parental leave entitlement in the *Fair Work Act 2009*.'

The ANMF agrees that the *Fair Work Act* (FWA) requires amendment in order to give full effect to the proposed flexibility measures.



Section 65 – right to request a flexible work arrangement

The ANMF submits that employees' ability to negotiate a flexible work arrangement are inhibited by the provisions of the *Fair Work Act*.

Section 65 of the *Fair Work Act* sets out the circumstances under which a request for flexible work arrangements can be made.

Section 65(1B) provides:

to avoid doubt, and without limiting subsection (1), an employee who:

- (a) is a parent, or has responsibility for the care, of a child; and
- (b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

The above provision limits the time for making a request to the period when the person 'is returning to work after taking leave'. Once the return has occurred, the provision no longer applies. The period during which flexible PPL can be taken extends up until the child's second birthday. During this time, the primary and or secondary claimant may already have returned to work, thereby losing the benefit of s65 of the Act.

Section 65 (5) provides that an employer can refuse a request for flexible work arrangements on reasonable business grounds. Section 65(5A), sets out the business grounds under which a request can be refused. It is submitted that the grounds are so broad that employers have a very wide scope to refuse requests. Where an employer refuses a request for a flexible working arrangement there is little capacity for an employee to then seek to access flexible PPL.

Section 76 – right to request an extension of parental leave beyond initial 12 months

Section 76 provides that an employee who takes unpaid parental leave may request his or her employer to agree to an extension of unpaid parental leave for a period of up to 12 months, bringing the total period of unpaid parental leave up to a possible total of 24 months. Under section 76(4) the employer can refuse the request for an extension on reasonable business grounds.

It is submitted this provision may also act as a barrier to employees accessing flexible PPL as it may limit the capacity for parents to, for example, take a period of unpaid leave combined with flexible PPL in the second year of the child's life.



Section 44 – no capacity for FWC to review decisions under s65(5) or 76(4) and only limited right of review under model flexibility terms of Modern Awards

Section 44 of the Act provides that an order cannot be made in relation to a contravention of subsection 65(5) or 76(4).

The provisions of section 44 mean that for NES reliant employees, an employee has no capacity to challenge a refusal for a request for a flexible work arrangement or a request for an extension of the parental leave period. This places a significant barrier to employees seeking a flexible work arrangement, including in circumstances where they would be eligible to use the flexible component of PPL. The current provisions of the *Fair Work Act* are incompatible with the intent of the proposed flexibility measures.

The Full Bench decision in *Re Family Friendly Working Arrangements*¹ prescribes a model flexibility term for Modern Awards. The model term gives limited provision for review of requests for flexible working arrangements with respect to the process under which a decision is made. It is submitted, however, that the model term does not go far enough as it does not allow for review of the substantive reasons for a refusal. Again, this limits the ability to access flexible PPL.

Section 84 of the FWA – Return to work guarantee

The ANMF considers s84 of the Act which provides a return to work guarantee should also be reviewed in light of the proposed flexible PPL scheme. Section 84 creates an entitlement for an employee on return from unpaid parental leave, to return to

- (a) The employee's pre-parental leave position; or
- (b) If that position no longer exists- an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

The provisions of the return to work guarantee are conditional upon the employee taking and returning from unpaid parental leave.² As outlined above, a period of flexible PPL may occur after the conclusion of UPL. The protections of s84 should be extended to cover the period of flexible PPL and the return to work after the conclusion of flexible PPL.

Part 2-2 Division 5 – Parental Leave

Part 2-2 Division 5- Parental Leave and related entitlements, including to review under the Act, should be reviewed carefully to ensure all provisions of the Act are compatible with and support access to flexible PPL. This will ensure the maximum number of employees benefit from the proposed flexibility measures.

¹ [2018]FWCFB 5753

² *Scullin v Coffey Projects (Australia) Pty Ltd* (2015) 251 IR 28[2015]FCCA1514 [174]



CONCLUSION

The ANMF strongly supports further reform to address economic disadvantage experienced by women and care givers in the workforce, including:

- Increasing the period of paid parental leave under the Act from 18 weeks for both primary and secondary claimants to 18 weeks for each claimant
- Payment of superannuation on paid and unpaid parental leave
- Payment of superannuation on all periods of PPL

The ANMF commends the Bill and urges the Committee to recommend the Bill be passed. In order, however, for the flexibility measures to be accessed by as many working parents as possible, the ANMF submits that the *Fair Work Act* must also be amended to remove the barriers to obtaining flexible working arrangements and extended periods of parental leave. In addition, the protections under the Act for employees returning from unpaid parental leave should be extended to those who elect to utilise a flexible return to work after parental leave.

The combined effect of both providing flexible PPL and reforming the parental leave provisions of the NES would result in a scheme that promotes more flexible opportunities for parents to contribute to the workforce and to support and enjoy their family lives.