



Equality Rights Alliance

Women's Voices for Gender Equality

**Submission to the Review of the
*Maternity Leave (Commonwealth Employees) Act 1973***

4 February 2022

Equality Rights Alliance

Equality Rights Alliance (ERA) is Australia's largest network of organisations advocating for women's equality, women's leadership and recognition of women's diversity. We bring together 66 non-government organisations and social enterprises with a focus on the impact of policy or service delivery on women, with a focus on women's economic security and leadership. We are one of the six National Women's Alliances, funded by the Commonwealth Office for Women.

This submission is endorsed in whole or in part by the following members of Equality Rights Alliance

- 2020 Women
- Aboriginal Legal Rights Movement
- Alevi Federation of Australia
- Australasian Council of Women and Policing
- Australian Baha'i Community – Office of Equality
- Australian Centre for Leadership for Women
- Australian Graduate Women
- Australian Federation of Medical Women
- Australian Motherhood Initiative for Research and Community Involvement
- Australian National Committee for UN Women
- Australian Women's Health Network
- CARE Australia
- Children by Choice
- COTA Australia
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- Gender Equity Community of Practice
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- Migrant Women's Lobby Group of South Australia
- Multicultural Women's Advocacy ACT
- National Association of Services Against Sexual Violence
- National Council of Churches of Australia Gender Commission
- National Council of Jewish Women of Australia
- National Council of Single Mothers and Their Children
- National Foundation for Australian Women
- NSW Council of Social Services
- National Older Women's Network
- National Union of Students (Women's Department)
- Project Respect
- Public Health Association of Australia (Women's Special Interest Group)
- Reproductive Choice Australia
- Of One Mind
- Safe Motherhood For All Inc
- Sexual Health and Family Planning Australia
- Soroptimist International
- Sisters Inside
- Union of Australian Women
- United Nations Association of Australia Status of Women Network
- Victorian Immigrant and Refugee Women's Coalition
- VIEW Clubs of Australia
- Women in Adult and Vocational Education
- Women in Engineering Australia
- Women on Boards
- Women with Disabilities Australia
- Women's Climate Congress
- Women's Equity Think Tank
- Women's Electoral Lobby
- Women's Environment Network Australia
- Women's Housing Ltd
- Women's Information Referral Exchange
- Women's International League for Peace and Freedom
- Women's Legal Services Australia

- Women’s Property Initiatives
- Women Sport Australia
- Working Against Sexual Harassment
- YWCA Australia
- Zonta International Districts 22, 23 and 24

INTRODUCTION

Maternity Leave (Commonwealth Employees) Act 1973

ERA welcomes the [Public Service Commission review](#) into the pace-setting Maternity Leave (Commonwealth Employees) Act 1973 (‘ML Act’) which, nearly forty years ago, legislated for minimum leave entitlements for women having a child in the Australian Public Service (APS).

A review of the ML Act is a rare opportunity to enhance the legislation given changed attitudes and expectations of government regulation for fair and gender equitable family and work life. ERA shares the Commission’s hope that the APS remains an employer of choice, “well equipped to offer working parents an opportunity to serve the Australian public now and into the future”.ⁱ

The review comes at a time when APS employees and managers have been increasingly working from home, focusing on productivity, workplace health and safety and worker preferences. Parental leave should be considered in the light of expectations of work being increasingly hybrid.

ERA offers 18 recommendations for the Commission to consider.

The Act was groundbreaking in its time

The ML Act, legislated by the Whitlam Government, was the first formal provision for maternity leave in Australia, providing a block of 12 weeks paid maternity leave for employees in the Commonwealth public service and statutory authorities.ⁱⁱ It is supported by the Australian Public Service Award 1988 and sets out a 12 month qualifying period for full and part-time workers and a maximum total maternity leave period of 52 weeks.

By protecting individual leave entitlements for mothers, the ML Act recognised the substantial investment in human capital made by women through their unpaid work bearing and raising young children.ⁱⁱⁱ

Subsequent developments

Trade union test cases in 1985 and 1990 saw men and women granted access to unpaid leave to care for a child following adoption and achieved award provisions for parental leave, maternity, paternity and adoption leave. Various Commonwealth agencies extended provisions in their own employment agreements (EAs) and State and Territory governments also caught up.^{iv}

The Fair Work Act 2009 (Cth) established 11 minimum employment entitlements in the [National Employment Standards](#), including parental leave (up to up to 24 months of leave between couples), related entitlements and protection from discrimination on the basis of pregnancy and maternity.^v

In 2011, a universal Paid Parental Leave (PPL) scheme was enacted by the Federal Government. Under the statutory scheme, women are offered a flat rate of pay at the federal minimum wage for 18 weeks, covering the prenatal and postnatal period at full or half pay. It is available to all families with an annual income of less than \$150,000. To be eligible, relevant employees must have accrued a minimum period of 12 months continuous employment with one employer. Adoptive parents are also entitled to the same parental leave benefits as biological parents, namely 18 weeks of paid leave at the national minimum wage (\$772.60 per week, for a 38 hour week, or \$20.33 per hour as of August 2021). Australia was late to embrace such a scheme compared to like-countries. The introduction of the PPL scheme greatly improved Australia’s Gender Equality Index score.^{vi}

Two years later, in 2013, two-week paid leave for partners was added with Dad and Partner Pay (DaPP).^{vii}

Today, on average, women in the public sector (and large private sector employers within CPSU coverage) receive 14 weeks paid leave at the employee's usual salary.^{viii} Some agencies have secured up to 26 weeks. The 14 week entitlement meets International Labour Organisation (ILO) minimum standards but falls below World Health Organisation (WHO) standards of at least 18 weeks.^{ix} The WHO recommends at least six months of breastfeeding, which is facilitated by paid leave (WHO recommends exclusive breastfeeding - no other fluids or solids - for six months and then continued breastfeeding combined with solid foods for two years or as long as mother and baby desire).

An amalgam of measures

Parental leave policy in Australia is hybrid, combining three domains or pathways - 'welfare', 'bargaining' and 'business'.^x In the main, PPL provisions in collective agreements (to meet work and family responsibilities) supplement statutory entitlements to increase the number of women with maternity leave and secondary carers with paternity leave, with the welfare system used as a (worryingly inadequate) safety net for those without employment or government entitlements.^{xi}

The fact that there are multiple components (government-paid PPL and employer-paid PPL) has generated debate about so-called 'double dipping' with attempts by various parties to characterise the government / employer system as an unintended loophole and to reduce employee entitlements overall. The debate highlighted the competing roles of government as regulator, employer and funder, and the dangers associated with unilateral government control to determine public sector pay and conditions.^{xii}

Provisions fall short

The evolutionary development of paternity leave in Australia has had an implicit goal of promoting equality between men and women. The universal PPL scheme made that goal more explicit. Evaluations of PPL show that the scheme has supported families' financial survival and parents' and babies' well-being.^{xiii} It has been shown to support parents in combining jobs with care and as being good for equality.^{xiv}

But parental leave provisions are predominantly used in a way that continues to sharply reinforce women's primary carer role. The current model represents a gendered division of labour whereby men are seen as the primary breadwinner and women the primary caregiver.^{xv} Too few men have utilised their entitlements, with take up highly dependent on a supportive workplace culture.^{xvi}

According to Ramona Vijayarasa (Law faculty research fellow at the University of Technology Sydney and architect of the global Gender Legislative Index) provisions available under the PPL "fundamentally fail to challenge unequal distributions of labour in the family", as it names mothers as primary carers.^{xvii} The PPL scheme is parental leave in name, but not in practice, as it is used overwhelmingly by mothers. Men and non-birth parents are not being given the opportunity to learn the parenting skills necessary to share effectively in child raising activities.

An analysis of PPL by Lyndall Strazdins and Belinda Townsend of the Menzies Centre for Health Governance shows Australia lags well behind other OECD countries on the length and amount of paid leave available for parents, with growing class and gender inequities. The length of available paid leave (both maternity and parental) in the OECD is, on average, 53 weeks for mothers and 8 weeks dedicated leave for fathers. This is generous when compared to Australia's government-funded leave, which provides only 18 weeks for the primary caregiver, and 2 weeks dedicated leave to fathers. Compared to other OECD countries, Australia's public expenditure on PPL is also much less, partly explained by Australia's hybrid scheme, with expectations that employers will voluntarily provide employer paid leave in addition to the government-funded scheme.^{xviii}

Where to from here?

While a game-changer in its time, the ML Act needs to be reset to better reflect subsequent developments, to better reflect current expectations and practice in the APS and to anticipate future needs.

The ML Act needs to be amended to reflect contemporary expectations around the duration, the benefit paid and the scope of government parental leave entitlements so the policy is truly inclusive and meets

current and international best practice. Fathers and partners have been able to take leave under the ML Act, although the period is short and barriers to uptake exist that set normative standards for fathers or partners as 'supporters' rather than recognising substantive involvement in care.^{xix}

Rather than see publicly-funded, legislated paid parental leave in purely welfare terms or in economic terms alone, the APS Commission has a window to advocate for a 'new equity orientation' whereby paid maternity and parental leave is achieved with the rights and women workers at its core. This typology (named and advocated for by Marian Baird) is linked to a shared responsibility for care between a child's parents, a standard set in international law (CEDAW).^{xx} Priority here is supporting and enabling diverse families to care for children and each other, while creating the conditions for a more equitable distribution of caring work across the genders.

Review should not lower standards

While it's expected the review will look at how the Commonwealth PPL scheme and the APS scheme interact and how to streamline existing provisions, **the review should not undermine more generous enterprise agreements nor should reforms trade off PPL scheme benefits for improvements in the public sector.** We expect the Commission to work flexibly within the current leave framework. The updated ML Act should explicitly recognise that there is scope for adding to the legislated leave entitlement through bargaining (Recommendation 10). It should not limit employees' ability to negotiate a better deal that reflects their needs and the times.

As a high income country, Australia can do more to advance gender equality with an updated ML Act as a tool. Further, with Australia's birth rate falling, strengthening the Act could go some way to arresting the decline.^{xxi} To do this, an updated ML Act would need to be generous and rectify a patchwork system.

The need for equality enabling legislation

ERA supports an expanded scheme that is equality enabling: that is, a scheme which supports and encourages behaviour change within the household. To do this, a renewed ML Act would need to include legislative provisions for greater leave coverage that includes both non-transferrable leave for mothers and fathers (other parent/carer) and transferable leave shared by parents/carers. A non-transferrable period is an efficient way of encouraging men to take leave which would otherwise be forfeited, in turn encouraging men to commit to a period of learning how to be a primary carer.

The Commission is urged to recognise and consider Iceland's PPL scheme, which is particularly generous. The current scheme in Iceland replaced a previous complicated system with a streamlined scheme offering 9 months of paid parental leave, at 80 per cent of earnings up to a ceiling payment, with 3 months reserved for mothers and 3 months reserved for fathers. Leave can be taken part-time, with a proportionate reduction in payment, until the child is 18 months. In 2021, Iceland introduced notable amendments, providing a total of 12 months paid parental leave, with 5 months of non-transferable leave for each parent. Individuals not in the labor market, or working less than quarter-time, still receive some financial benefits from the government. In Iceland, a majority of fathers take parental leave. The success of the scheme is owed, in part, to birth-mothers seeing that they are not disadvantaged by what is allocated to their partner.

A improved ML Act would:

- Adopt the best standards for PPL based on evidence from overseas (especially from comparable countries in the global North) of schemes that have been shown to make it easier for fathers/support partners/other carers to take leave.
- Recognise the different approaches currently used in various Commonwealth departments and seek to adopt the approaches that are most family-friendly, to help set standards.
- Maintain the provision of leave specifically for pregnant women, birth mothers and breastfeeding mothers to facilitate physical recovery after birth and provide the opportunity to breastfeed,
- Make available paid parental leave for each parent/carer to foster an equal division of unpaid care and improve family work-life balance, and,

- Provide parental leave schemes that are flexible and generous so benefits flow to individuals, families, organisations and society.

Gender neutrality v gender equality?

ERA recognises and distinguishes between gender neutrality and gender equality. There are two competing interests which must be balanced when considering the language of the ML Act. On the one hand, the language of the ML Act must not undermine space for women to recover from birth, bond with their baby and to breastfeed. On the other, the language of the ML Act can contribute to gendering parenting roles in a manner which reinforces an unequal distribution of unpaid care between men and women. We support the use of gender neutral language in the ML Act in order to encourage the uptake of parental leave by partners both as a measure to address the unequal gender distribution of caring responsibilities and also to recognise the reality of diverse family structures. However, it is critical that the use of gender neutral language does not undermine a leave scheme's role in providing space for women to recover from birth, bond with their baby and to breastfeed.

A revised ML Act should:

- Ensure the wellbeing of mothers and their newborns (recognising their unique physical and mental needs);
- Enable women to successfully combine their reproductive and economic roles, and
- Promote the principle of equality of opportunity, treatment and distribution of unpaid care work between women and men.

Recommendations

ERA recommends:

1. That the language in the Act becomes gender neutral where appropriate to reflect the diverse nature of families in Australia, including same sex couples, grandparents with primary care of a new baby and couples with one or more non-binary, gender diverse or non-gendered person.
2. That the duration of paid leave for both primary carer and partner be extended to a minimum total of 26 weeks (which is in keeping with ERA's federal pre-budget submission 2022-23 and the recommendation of many other advocates including the CPSU and Chief Executive Women).
3. That parents/partners are able to use their leave flexibly, including concurrently; able to share primary leave entitlements, with some capacity for the designated primary carer to be switched from one parent to another during the period of leave.
4. That those eligible for leave have the ability to use their leave over an extended period of time, up to 24 months.
5. That a broad range of family types should be eligible for PPL, including heterosexual couples, lone parents, non-familial adoptive parents, same sex and gender diverse couples, and, in exceptional cases, non-parental primary carers, provided they meet the employment test.
6. That a bonus period of leave is offered, only available if it is taken by the non-birth / non-primary parent / father (or same sex-partner) who shares in the daily care of the child as a mechanism to encourage men to take on parenting responsibilities to change gender norms about care.

7. That entitlements are updated to include miscarriage leave, preterm births, surrogacy and adoption.
8. That there be provision for a supported transition to return to work.
9. That the ML Act aligns with national standards in the *Fair Work Act (2009)* in terms of flexible unpaid leave and return to work provisions.
10. That the updated ML Act explicitly recognises scope for adding to leave entitlements through bargaining.
11. That sole parents be given double the leave a couple is offered (to account for family structures with no additional income earner and to enable more single mothers more time bonding with a new baby).
12. That superannuation is paid on parental leave.
13. That qualifying periods of work/service are consistent and minimised for all people accessing leave under the ML Act.
14. (Related to the above) That all those employed with a reasonable degree of attachment to the APS be eligible, including casual employees.
15. That provisions include breastfeeding support in the workplace following a soft return to work (recognising that WHO recommends exclusive breastfeeding no - other fluids or solids - for six months and then continued breastfeeding combined with solid foods for two years or as long as mother and baby desire).
16. That parental leave is available to Aboriginal and Torres Strait Islander primary carers with kinship responsibilities to a baby, even if they are not a parent. The APS Commissioner should seek specific advice from Aboriginal and Torres Strait Islander communities regarding the language, operation and definitions for parental leave for kinship carers.
17. That return to work arrangements include a focus on offering flexibility to all employees, particularly in relation to roles being available part-time or on a job-share basis, regardless of their level.
18. That primary carers who are eligible for PPL receive 100% of their pre-leave income during their period of leave.

ⁱ Peter Woolcott, public statement, December 10, 2021.

ⁱⁱ At the time, they employed over 64,000 women.

ⁱⁱⁱ The first six months after birth is critical for how children develop, and for parents' well-being as well, with the greatest potential benefit on the health of more disadvantaged parents and children (Barbara Broadway et al. "Paid Parental Leave and Child Health in Australia." *The Economic Record* 93.301 (2017): 214–237).

^{iv} Further, on ratification of the UN treaty, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1983, Australia made a statement and reservation that: 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. CEDAW sets out the right to non-discrimination on the basis of pregnancy and child caring and in the workplace.

^v [Parental leave & related entitlements - Fair Work Ombudsman](#). Drawing on the international experience, the scheme is most similar to what is on offer in Denmark and Estonia. In Slovenia, there is an additional 75 days of leave for a father to be taken before their child is 3 years old while in Finland, 54 days of paternity leave are provided, one to 18 days of which may be taken simultaneously with the mother during her maternity leave).

^{vi} S Blum et al (2018), *International Review of Leave Policies and Research 2018*. http://www.leavenetwork.org/lp_and_r_reports

^{vii} [Parental leave | Ministerial and Parliamentary Services \(finance.gov.au\)](#)

^{viii} <https://www.aph.gov.au/DocumentStore.ashx?id=07f9b455-3ce7-46fa-9895-e6fc115919a4>

^{ix} [wcms_410183.pdf \(ilo.org\)](#)

^x Sue Williamson, A Case study if regulatory confusion: Paid Parental leave and public servants. *The Economic and Labour Relations Review*. 2015;26(3):430-447. doi:[10.1177/1035304615597838](#)

^{xi} Marian Baird et al, "Gender equality and paid parental leave in Australia: a decade of giant leaps or baby steps", *Journal of Industrial Relations* 2021, Vol. 63 (4) 546-567.

^{xii} Ibid.

^{xiii} An evaluation by DSS: <https://www.dss.gov.au/our-responsibilities/families-and-children/programmes-services/paid-parental-leave-scheme/paid-parental-leave-evaluation-phase-4-report>. There have been improvements for women's labour force participation and for maternal and child health, especially for women in low paid work. Paid parental leave has encouraged and supported women and men in their role as both employees and carers.

^{xiv} Workplace Gender Equality Agency (WGEA), [Insight Paper: Designing and supporting gender equitable parental leave](#), 3 September 2019. Organisations that provide strong parental leave schemes are more likely to enjoy better recruitment and retention.

^{xv} The primary and secondary caregiver distinction embedded in the policy makes the equal sharing of leave and care responsibilities so difficult that women currently take 99.4% of primary carer leave. Lucie Newsome, [Parental Leave scheme marred by 1950s sentimentality - BroadAgenda](#), 19 February 2020.

^{xvi} Workplace Gender Equality Agency, [Towards gender balanced parental leave](#), October 2017.

^{xvii} [Gender Law Index - Law Detail](#). Vijayarasa says there is also not enough access to information about carers' rights, which may be a barrier for marginalised women in understanding their entitlements.

^{xviii} Strazdins and Townsend, [Australia falls behind OECD on paid parental leave](#), 2019.

^{xix} Marian Baird et al, "Gender equality and paid parental leave in Australia: a decade of giant leaps or baby steps", *Journal of Industrial Relations*. 2021;63(4):546-567. doi:[10.1177/00221856211008219](#)

^{xx} Marian Baird, Orientations to Paid Maternity Leave: Understanding the Australian Debate, 46 *Journal of Industrial Relations*. 2004; 46: 259-274.

^{xxi} Figures released by the Australian Bureau of Statistics in December 2021 show registered births dropped below 300,000 for the first time in 14 years. There were 294,369 registered births in 2020, a decrease of 3.7% from 2019. The previous year's decline was 3%.