



Law Council
OF AUSTRALIA

Office of the President

19 March 2020

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Chair

Inquiry into the Paid Parental Leave Amendment (Flexibility Measures) Bill 2020

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission to the Senate Community Affairs Legislation Committee (**the Committee**) regarding its inquiry on the Paid Parental Leave Amendment (Flexibility Measures) Bill 2020 (**the Bill**), as referred by the Senate on 6 February 2020.
2. The Law Council acknowledges the Queensland Law Society for its assistance in the preparation of this submission.

Summary of changes proposed in the Bill

3. The Law Council is generally supportive of the key changes proposed under the Bill, which would allow eligible claimants under the *Paid Parental Leave Act 2020* (Cth) (**PPL Act**) to claim paid parental leave (**PPL**) for up to 30 “flexible” PPL days. Currently, an eligible claimant’s entitlement is for one continuous, 18-week initial block of PPL – in other words, there is no flexible component allowing the use of PPL following return to work.
4. Where a flexible PPL day falls within a “continuous flexible period”, eligible claimants may claim payment from an employer directly. According to the terms of the Bill, a “continuous flexible period” occurs when PPL is determined to be payable for one or more flexible PPL days, where this period starts on the first weekday after the initial PPL period ends, and the flexible PPL days are consecutive weekdays which end, at the latest, the day before the relevant child’s first birthday.
5. Where a flexible PPL day falls outside a “continuous flexible period”, the Secretary must pay the instalment. They must also do so if the PPL period or continuous flexible period is extended on review, once it has ended.
6. A flexible PPL day may occur up to 24 months after a child’s birth or adoption. This would be in addition to payment for weekdays falling within a person’s initial continuous 12 weeks’ PPL period, which is available as a block within 12 months of

birth or adoption. PPL is payable even if a claimant returns to work for a period between the initial PPL period and any “continuous flexible period” that comes after it.

7. The proposed changes also make consequential amendments to the *A New Tax System (Family Assistance) Act 1999* (Cth) and the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).
8. The Explanatory Memorandum (**EM**) to the Bill states that it is intended to increase women’s workforce participation, one of the aims announced in the Women’s Economic Security Package in the 2018—19 Mid-Year Economic and Fiscal Outlook.

Submission on the proposed changes

9. The Law Council is pleased to note that the Bill will offer greater flexibility to parents, particularly to self-employed parents, who will be able to access leave at any time during the first two years of their children’s lives.
10. As stated in the Law Council’s 2014 National Attrition and Re-Engagement Study (**NARS**) Final Report, the legal profession has been linked with a perception of both conscious and unconscious bias against women who take advantage of flexible working arrangements in order to accommodate family responsibilities.¹
11. The NARS Final Report found that a female lawyer’s invocation of flexible working arrangements in a large firm, particularly, was assumed by some colleagues to be tantamount to de-prioritising work.² It also found that poor flexible working options hindered career progression, given that many women typically seek more senior positions at a time when they may also wish to have children and work flexibly.³ Another key driver of dissatisfaction, for both male and female practitioners, was long working hours and poor work-life balance.⁴
12. Based upon the findings made in the NARS Final Report, the Law Council holds the view that the PPL Act should be drafted to make flexible working arrangements as accessible and normalised as possible. This will reduce attrition rates and promote the re-engagement of women in the workforce, as well as allowing parents to manage their work and family responsibilities according to the arrangements that suit them.
13. The Law Council acknowledges the need to balance these considerations against the risk of imposing undue administrative burden on employers. To this end, the Law Council supports the Bill’s intent and effect, as outlined in the EM, to reduce the regulatory burden on employers by requiring payment directly by the Secretary (as opposed to the employer) in cases where flexible PPL is not taken on consecutive weekdays.
14. Aside from the proposed legislative changes, the Law Council submits that as part of the implementation strategy, information should be provided to employers and the

¹ Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Urbis, 2014) (*‘NARS Report’*) 5.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

broader community in order to encourage workers to take the full period of available leave and to ensure that the changes do not inadvertently lead to workers taking only the initial period (for example, because they feel pressured not to make use of the flexible PPL days). Care should also be taken that “secondary claimants” are not deterred from taking leave due to any undue administrative complexity in the process. The take-up of flexible PPL should be regularly evaluated to ensure that the policy objectives are being achieved in this regard.

15. Further, whilst the Law Council supports the policy intent of the Bill, it considers that more could be done to improve Australia’s PPL scheme in a broader sense.

16. In particular, the Law Council recommends:

- a. The entire PPL scheme should be reviewed given that the last official review, performed by the Department of Social Services pursuant to s 307A of the PPL Act, was delivered in 2014.⁵ The following issues should be considered:
 - i. whether PPL periods should be extended and/or payment amount increased to become more in line with OECD averages;⁶
 - ii. the provision of ‘Dad and Partner pay’ under Chapter 3A of the PPL Act, and how it best fits within the overarching PPL scheme to encourage fathers and partners to take time out of the workforce to care for children. This may require reconsideration of the appropriateness of distinguishing between “primary” and “secondary” claimants, and how language can be used more inclusively to better reflect and respect the diversity of individuals and of family units;
 - iii. provision for mandatory superannuation contributions whilst parents are on PPL, to assist in strengthening longer term financial security;⁷
 - iv. how PPL can best be accessed in the context of the evolving characteristics of workforce participation, particularly the “gig economy” workforce; and
 - v. the process for applying for a claim – including the requirement that the birth mother make the initial application and then, when certain criteria are met, transfer the PPL to another parent – and how this impacts the take-up of PPL by all parents and guardians, and from the perspective of gender.⁸

17. The Law Council also considers that improved consistency in the eligibility criteria as between the PPL Scheme and the National Employment Standards (**NES**) is required, noting that access to flexible PPL may, in practice, be impeded by the restrictiveness of unpaid parental leave (**UPL**) entitlements under the FWA.

⁵ Department of Social Services, *Paid Parental Leave scheme: Review Report* (June 2014) <<https://www.dss.gov.au/families-and-children/benefits-payments/paid-parental-leave-scheme/review-of-the-paid-parental-leave-scheme/paid-parental-leave-review>>.

⁶ Note that the OECD average for paid maternity leave is 18.1 weeks, and for PPL for mothers, 35.8 weeks; making an average of 53.9 paid weeks. See, OECD Family Database, *PF2.1. Parental leave systems* <https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf> 3.

⁷ See, PPL Act s 70, which currently provides that the only permissible deductions from a PPL instalment may be made in accordance with ss 67 – 69A (which do not mention compulsory superannuation payments), despite the operation of any other law.

⁸ See, PPL Act s 54.

18. Under the current PPL Scheme, a parent who has worked the requisite 10 out of the last 13 months may be eligible to receive PPL; but if such a parent had not completed “at least 12 months’ continuous service”, they would not be entitled to the protections and entitlements required to take leave under the FWA (e.g. to take a separate period of up to 12 months of unpaid parental leave).⁹ Accordingly, the Law Council echoes the submission by the National Foundation for Australian Women that the NES should be amended so that they are brought it into line with the eligibility requirements for receipt of PPL.¹⁰
19. The Law Council also urges enduring commitment to delivering the practical measures to address “barriers that might limit women building their financial security” which the Government outlined in the Women’s Economic Security Package.¹¹ These include:
- a. reinstating the Australian Bureau of Statistics’ (**ABS**)’ *Time Use Survey*, “a contemporary evidence base to measure women’s economic security”.¹² An economics analyst at the Department of Jobs and Small Business (now the Department of Employment, Skills, Small and Family Business) recognised that such surveys are important tools in understanding “the economic value of unpaid work [including care work], a key factor in the workforce participation gap”.¹³ The ABS has publicly stated it would prepare for a new *Time Use Survey* in 2019 – 20, with information collection scheduled for July 2020 onwards.¹⁴ The Law Council emphasises the importance of this initiative and that it should be pursued; and
 - b. establishing a Forum on Reducing Barriers to Work.¹⁵ This should include consideration of issues associated with flexible work arrangements, including the barriers to accessing such arrangements and discriminatory responses when they are requested¹⁶ – and of the need, if any, for further legislative protections or measures to be taken.
20. Finally, gender discrimination continues to be cited as the largest factor behind the gender pay gap in Australia, at 39%.¹⁷ Women take up part-time employment at

⁹ All employees in Australia are eligible for unpaid parental leave if they have completed at least 12 months of continuous service with their employer. See, FWA ss 67 and 70.

¹⁰ See, National Foundation for Australian Women, *Submission to the Inquiry into the Paid Parental Leave Amendment (Flexibility Measures) Bill 2020* (3 March 2020) <<https://www.nfaw.org/document-repository/parental-leave>> Recommendation 2e.

¹¹ Commonwealth of Australia 2018, *Women’s Economic Security Statement 2018* (20 November 2018) <<https://www.pmc.gov.au/sites/default/files/publications/womens-economic-security-statement-2018.pdf>> (*‘Women’s Economic Security Statement’*) Foreword.

¹² *Ibid* 5.

¹³ Department of Education, Skills and Employment, *How we share unpaid labour at home informs employment policy* (22 February 2019) <<https://www.employment.gov.au/newsroom/how-we-share-unpaid-labour-home-informs-employment-policy>>.

¹⁴ Australian Bureau of Statistics, *1006.0 – Australian Bureau of Statistics – Forward Work Program, 2019-20* (18 October 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1006.0~2019-20~Main%20Features~Strategic%20Objective%20One:%20ABS%20Statistics%20are%20trusted%20and%20Used%20to%20inform%20important%20decisions~4>>.

¹⁵ *Women’s Economic Security Statement* n 11, 5.

¹⁶ Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Community Guide* (2014) <https://www.humanrights.gov.au/sites/default/files/SWP_Community%20Guide_2014.pdf> 2.

¹⁷ See, KPMG, Diversity Council of Australia and Workplace Gender Equality Agency, *She’s Price(d)less: The economics of the gender pay gap* (22 August 2019) (*‘She’s Price(d)less’*) at <<https://www.wgea.gov.au/data/wgea-research/shes-pricedless-the-economics-of-the-gender-pay-gap>> 25.

approximately three times the rate of men.¹⁸ Whilst this may be a family decision, social norms “and factors such as job segmentation and pay” often play a role in limiting the choices women make in the workforce.¹⁹ This illustrates that a broader consideration of measures is required in order to drive cultural change, recognise the economic value of caring work and support equitable parenting. Simply prioritising women’s workforce participation risks masking the range of issues contributing to the gender pay gap and long-term economic insecurity faced, disproportionately, by women.

21. Should you require any further information or wish to discuss, please contact Ms Alex Wormald, Policy Lawyer, in the first instance on (02) 6246 3724 or at alexandra.wormald@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President

¹⁸ *She's Price(d)less* n 17, Appendix A.

¹⁹ *Ibid* 31.