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Time to Deliver: A National Paid Parental Leave Scheme

Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC receives funding from the NSW Government Department of Energy and Water for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's interest in paid maternity leave

PIAC welcomes the opportunity to contribute to the debate and discussion surrounding paid maternity leave and other forms of paid parental leave.

PIAC has a long history of interest in and concern over areas in which women face systemic discrimination and disadvantage. Over the years, PIAC has played an active role in advocating the appropriate protection of women's rights, particularly the rights of disadvantaged and marginalised groups of women.

PIAC has advised and acted for clients in a number of matters involving alleged systemic discrimination against women in employment and other areas of public life. Between 1983 and 1994, PIAC represented the applicants in the ground-breaking indirect sex discrimination case: *Australian Iron and Steel v Banovic* (1989) 168 CLR 165. In 2001, PIAC acted for the applicant in *Fernely v The Boxing Authority of New South Wales* [2001] FCA 1740. Typically, the clients that PIAC represents in such matters are women who are economically and socially disadvantaged, often from non-unionised workplaces, and unable to afford legal representation.

In addition, PIAC has undertaken numerous policy projects concerning women's rights. In 2001, PIAC and Warringa Baiya Aboriginal Women's Legal Service launched a report on the barriers faced by Indigenous women using anti-discrimination laws in New South Wales: *Discrimination... have you got all day? Indigenous Women, discrimination and the complaints process in NSW*. In 2003, PIAC joined with the National Network of Indigenous Women's Legal Service to deliver training to 200 Indigenous Women across Australia in the 'Our Strong Women – Indigenous Women, Law and Leadership' project. Also in

2003, PIAC co-convened the National Working Group for Shadow Report on the UN *Convention on the Elimination of All Forms of Discrimination Against Women*.

PIAC has also been an active campaigner for women's rights as consumers of health care services and products. In the late 1980s, PIAC provided assistance to Australian women to pursue claims of compensation in US Courts for injuries caused by the Dalkon shield contraceptive device. PIAC has also helped to develop a protocol for information-giving to breast implant recipients, and in 1993, successfully defended the Canberra Women's Health Centre against an allegation that the services operated by the Centre contravened the *Sex Discrimination Act 1984* (Cth).

The Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave

PIAC welcomes the opportunity to make a submission to the Productivity Commission's Inquiry into Paid Maternity, Paternity and Parental Leave (the Inquiry).

PIAC notes, however, that the issue of paid leave entitlements for parents is one that has already been subjected to prolonged and extensive public scrutiny and inquiry.¹ The Human Rights and Equal Opportunity Commission (HREOC) first called for the immediate introduction of a national paid maternity leave scheme in 2002². In 2007, it reiterated this call.³ Draft legislation for a national paid maternity leave scheme was introduced into Federal Parliament by the Australian Democrats in May 2002⁴, and updated in 2007.⁵ Recent surveys have indicated overwhelming community support for some form of paid parental leave.⁶

To date, however, the major political parties have failed to take a clear and supportive stand on this issue. This is disappointing, and difficult to reconcile with the concern that each party has professed to have about the 'barbeque stopper'⁷ issue of work/family balance.

While PIAC welcomes the Inquiry, it is concerned that the Productivity Commission is not due to report until February 2009. PIAC urges that the Inquiry process not be used by the Government as a means of further delaying or avoiding the introduction of some form of paid parental leave for Australians.

Summary of recommendations

Recommendation 1: PIAC recommends that the Federal Government take immediate steps to pass legislation to establish a national scheme of paid parental leave.

¹ See, for example, Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999), and *Valuing Parenthood: Options for paid maternity leave: Interim Paper* (2002); Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, Workplace Relations Amendment (Paid Maternity Leave) Bill 2002.

² Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Maternity Leave Scheme* (2002).

³ Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family* (2007).

⁴ Workplace Relations Amendment (Paid Maternity Leave) Bill 2002 (Cth).

⁵ Workplace Relations (Guaranteeing Paid Maternity Leave) Amendment Bill 2007 (Cth).

⁶ A July 2007 survey commissioned by the National Foundation of Australian Women found that 76% of respondents were in favour of all working women having access to some form of paid maternity leave: *Newspoll survey June 2007* (2007) National Foundation for Australian Women <<http://www.nfaw.org/newspoll-survey-june-2007/>> at 17 June 2008. Interestingly, the results indicated a strong level of support even among those who are unlikely to benefit directly, such as older people, those who have already had their children and those not in the workforce.

⁷ John Howard, 'Address at Aston Electorate Dinner, Melbourne', 16 July 2002, <<http://pandora.nla.gov.au/pan/10052/20020821-0000/www.pm.gov.au/news/speeches/2002/speech1749.htm>> at 17 June 2008.

Recommendation 2: PIAC recommends that the Government withdraw its reservation to Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*.

Recommendation 3: PIAC recommends that the Government take steps to ratify the ILO *Maternity Protection Convention 2000 (No 183)* and ensure compliance with other provisions of that Convention.

Recommendation 4: PIAC recommends that a national scheme of parental leave should include both a paid maternity leave component and a supporting parent component.

Recommendation 5: PIAC recommends that all women who can demonstrate consistent workforce attachment (including casuals, self-employed and temporary workers) should be eligible for paid maternity leave in respect of the birth or adoption of a child.

Recommendation 6: PIAC recommends that all persons who can demonstrate consistent workforce attachment (including casuals, self-employed and temporary workers) should be eligible for paid supporting parent leave in respect of the birth or adoption of a child.

Recommendation 7: PIAC recommends that paid maternity leave be available for a minimum period of 26 weeks.

Recommendation 8: PIAC recommends that supporting parent leave be available for a minimum period of 4 weeks on a 'use it or lose it' basis.

Recommendation 9: PIAC recommends that there be provision for longer periods of paid maternity leave to be available in the case of parents and/or children with disabilities.

Recommendation 10: PIAC recommends that maternity leave and supporting parent leave should be paid at wage replacement level and should include superannuation at the relevant levels required under the superannuation guarantee legislation.

Recommendation 11: PIAC recommends that paid maternity leave and supporting parent leave should be considered as service for the purpose of accruing long service leave and other entitlements.

Recommendation 12: PIAC recommends that the Federal Government should fund 26 weeks' paid maternity leave and four weeks' paid supporting parent leave at minimum wage level. The gap between minimum wages and the worker's actual wages should be funded from a central pool to which employers would be required to contribute on the basis of their staff numbers or the size of their payroll.

Recommendation 13: PIAC recommends that the Federal Government provide adequate funding for more childcare services, particularly not-for-profit services.

Recommendation 14: PIAC recommends that any decisions by employers to make employees redundant while they are on parental leave should be open to scrutiny by an appropriate Government body with specific and sufficient government resourcing to undertake this function.

Recommendation 15: PIAC recommends that the National Employment Standards be amended so as to explicitly set out a list of the factors to be taken into account by employers when considering requests for flexible working arrangements and to allow an employee to refer unresolved disputes about such requests to a conciliatory body for review.

Recommendation 16: PIAC recommends that the Federal Government amend the Sex Discrimination Act 1984 (Cth) to empower the Human Rights and Equal Opportunity Commission to publish enforceable standards in relation to pregnancy and potential pregnancy.

Recommendation 17: PIAC recommends that federal legislation be introduced to provide protection against both direct and indirect discrimination for employees with family and carer responsibilities in all aspects of the employment relationship.

Overview of PIAC's response to the Inquiry

PIAC strongly supports the introduction of a national scheme of paid leave for parents. It is in the public interest for working families to be able to access some form of paid leave upon the birth of a child.

The current system—where there is paid maternity leave in the public sector but it is essentially left up to employers in the private sector to decide whether or not to provide it—is both inequitable and inadequate. Paid parental leave tends to be enjoyed primarily by women and men in the public sector⁸, and by those on relatively high incomes.⁹ It is less available for women who have lower skills or are in part-time or casual work¹⁰, women who work in the retail, accommodation and food services industries¹¹ and women who work for small or medium businesses.¹² Arguably, this is where it is needed most. Where leave *is* offered by private sector employers, it is usually below minimal international standards¹³ and may not be available to all staff.¹⁴

In order to ensure uniformity and national coverage, a scheme of paid leave for parents should be legislated for federally. It should be available to all Australians, irrespective of their background, education, income-level and sexual orientation.

In PIAC's view, such a scheme is long overdue, and should be introduced as a matter of priority.

This submission outlines what PIAC considers to be the fundamental objectives of a national scheme of paid parental leave. We then outline the features that the scheme should incorporate in order to best achieve these objectives. Finally, in Part 6, a range of initiatives are set out that should be put in place in order to ensure that a national scheme of paid parental leave is actually effective.

Recommendation 1

PIAC recommends that the Federal Government take immediate steps to pass legislation to establish a national scheme of paid parental leave.

⁸ In 2005, just over 76% of women who had worked as employees in the public sector in their last main job while pregnant used paid maternity leave, compared with 27% of women employees in the private sector: Australian Bureau of Statistics, *Australian Social Trends*, Cat. No. 4102.0 (2007).

⁹ In 2005, paid maternity leave was used by 60% of women employees who were professionals, but by only 31% of women employed as clerical, sales or service workers: *Ibid.*

¹⁰ Human Rights and Equal Opportunity Commission, above n2, [3.3.6].

¹¹ Among the 51.1% of organisations reporting to the Equal Opportunity for Women in the Workplace Agency (EOWWA) that do not provide paid maternity leave, many are in sectors that are high employers of women, particularly the retail, accommodation and food services sectors: Equal Opportunity for Women in the Workplace Agency, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave* (2008) 4.

¹² Only 19% of small and medium enterprises provide paid maternity leave: Australian Government Office of Women, *Better Conditions, Better Business – A Report on carer and family friendly provisions in Australian small and medium enterprises* (2007) 35.

¹³ For example, Woolworths recently introduced paid maternity leave of eight weeks on full pay: Sue Mitchell, 'Woolies sets pace on maternity leave' *The Australian Financial Review*, (Sydney) 6 June 2008, 7. However, the minimal period stipulated by the International Labour Organisation is 14 weeks: International Labour Organisation, *Maternity Protection Convention, 2000* (No 183) Article 4.1.

¹⁴ Sixty-three percent of organisations reporting to EOWWA that provide paid maternity leave do not make it available to all staff. Eighty-four percent confirmed that it is not available to casual employees or contractors: Equal Opportunity for Women in the Workplace Agency, above n11, 6.

Objectives of a paid parental leave scheme

PIAC believes that the key objectives of a paid parental leave scheme are to protect human rights, to promote gender equity and to achieve optimal health outcomes for mothers and children.

Protection of human rights

Paid maternity leave is a basic human right enshrined in Article 11(2)(b) of the UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and also in the International Labour Organisation *Maternity Protection Convention* (2000) (No 183) (the ILO Convention 183).

Although it has ratified CEDAW, Australia has made a reservation to that Convention so that it is not bound by Article 11(2)(b). Australia has also refused to ratify ILO Convention 183.

Despite this, there are a number of other international human rights provisions that arguably require Australia to take measures to introduce a system of paid leave for parents.

The *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) all recognise the right to work and the right to equality, regardless of sex. In particular, Article 10(2) of ICESCR provides that the Government is under an obligation to provide special protection to:

Mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits (emphasis added).

The UN *Convention on the Rights of the Child* (CRC) requires States Parties to assist parents and legal guardians 'in the performance of their child-rearing responsibilities' and to take 'all appropriate legislative and administrative measures' to ensure protection of the best interests of the child.¹⁵ In 1997, the Committee on the Rights of the Child expressed concern about Australia's compliance with CRC, on the basis that its failure to make paid maternity leave mandatory for employers in all sectors 'could result in different treatment between children of State employees and those in other sectors'.¹⁶

A national scheme for paid parental leave in Australia should seek to give effect to the human rights protections set out in international instruments. However, such a scheme will have little credibility or substance unless Australia also takes steps to remove its reservation under CEDAW and to ratify ILO Convention 183. Australia's failure to take these steps to date has attracted international criticism¹⁷, and is at odds with our commitment to human rights instruments and obligations in other areas.

Recommendation 2

PIAC recommends that the Government withdraw its reservation to Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Recommendation 3

PIAC recommends that the Government take steps to ratify the ILO Maternity Protection Convention 2000 (No 183) and ensure compliance with other provisions of that Convention.

¹⁵ United Nations *Convention on the Rights of the Child*, 1577 UNTS 3, ratified by Australia on 17 December 1990, entered into force for Australia on 16 January 1991: Articles 3.1 and 3.2.

¹⁶ Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Australia* 10/10/97 CRC/C/15/Add.79.

¹⁷ Committee on the Elimination of Discrimination Against Women, *Concluding Comments on the Committee on the Elimination of Discrimination against Women*, 34th Session, 16 January - 3 February 2006.

Promotion of gender equity

PIAC believes that a fundamental objective of a national paid leave scheme for parents should be to promote greater gender equity between men and women not only in the workplace, but also in the home.

For many women, maternity triggers a cycle of disadvantage that continues throughout their working lives. Caring responsibilities may result in a woman having an intermittent attachment to the workplace, reducing the opportunity to build up assets such as superannuation. In addition, maternity makes women more vulnerable to systemic workplace discrimination.¹⁸ All of these factors contribute to gender-based pay inequity and increase the risk of poverty for women.

One-off maternity payments such as the 'Baby Bonus' do not break the cycle of disadvantage, because they do not encourage workplace attachment. Nor do they redress inequality in retirement savings. While unpaid parental leave gives parents the right to continued employment, it does not contribute directly to family incomes.

A scheme of paid parental leave should seek to provide greater economic security for families at the time of giving birth. This will improve gender equity by raising women's workforce participation and promoting their workplace attachment. Over time, this is likely to reduce gender-based pay inequity and to remove some of the systemic barriers that women with children face in the workplace. It will also have positive flow-on effects for the general community by increasing the tax base, helping to address the current skills shortage and reducing the need for women to draw on social security payments.

Gender equity is not only an issue for women in the workplace. Many women struggle with an unequal division of labour in the home when they become mothers.¹⁹ In 2006, mothers in full-time employment (with children under the age of 15) spent on average 18 hours per week on domestic activities: twice as much as fathers employed full time.²⁰ A national scheme of paid parental leave should seek to redress this imbalance by promoting increased involvement of partners (especially fathers) in child rearing.

Optimal health outcomes

So far as possible, a paid parental leave scheme should seek to achieve optimal health outcomes for children and mothers. The World Health Organisation (WHO) has stated that the:

Period of absence from work after birth is of utmost importance to the health of the mother and infant. This is conducive to both the optimal growth of the infant and the bonding between mother and infant.²¹

PIAC is disturbed by evidence given to this Inquiry about large numbers of women being forced to return to work within a few months of giving birth because of lack of paid leave entitlements.²² This

¹⁸ The National Inquiry into Pregnancy and Work found significant evidence of direct and indirect discrimination on the ground of pregnancy and potential pregnancy: Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999) viii.

¹⁹ Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family* (2007) [5.1].

²⁰ Australian Bureau of Statistics, *How Australians Use Their Time, 2006* Cat. No. 4153.0 (2008).

²¹ World Health Organisation, *Health Aspects of Maternity Leave and Maternity Protection*, Statement to the International Labour Conference, June 2000.

²² See for example, *Productivity Commission, Inquiry into Paid Maternity, Paternity and Parental Leave*, Transcript of Proceedings, 20 May 2008, evidence of Unions New South Wales (Amanda Tattersall and Sariah Giblin) 385-401.

may have a detrimental impact on the mother's physical and emotional health and wellbeing, which may also impact upon the health and wellbeing of the child.

By easing the financial stress on families, a national scheme of paid parental leave would ensure that mothers are able to spend time at home fully recovering from the impact of pregnancy and birth. In addition, it would provide an important, symbolic recognition that the birth of a child is a significant life event that does require time out of the paid workforce.

There is evidence that infant health would be improved by mothers staying at home with their children in the first few months of infancy, as would breastfeeding rates and infant development.²³ It is known that breastfeeding has significant health benefits for children.²⁴ A national scheme of paid parental leave would enable women to establish and continue breastfeeding. It would also support maternal and paternal bonding and attachment and result in improved infant health outcomes.

Features of PIAC's preferred scheme

PIAC supports legislation for a national paid parental leave scheme that incorporates the following features:

- paid maternity leave and supporting parent leave components;
- eligibility criteria that embrace all categories of employment but require some evidence attachment to the workforce;
- a minimum period of 26 weeks' paid maternity leave;
- a minimum period of four weeks' paid supporting parent leave (to be taken on a 'use it or lose it' basis);
- provision for longer periods of leave to be available in the case of parents and/or children with disabilities;
- payment at wage replacement level, and to include superannuation;
- funding by the Government at minimum wage level, with the gap between minimum wages and real wages to be paid out of an employer-funded pool.

Components of leave

PIAC believes that a scheme for paid parental leave should incorporate both paid maternity leave and paid leave for supporting parents.

Paid maternity leave

PIAC endorses a period of paid leave for the exclusive use of the mother (paid maternity leave) to be taken at or around the birth or adoption of a child. This gives recognition to the important health considerations associated with birth, recovery from birth and establishment, where possible, of breastfeeding and is also consistent with Article 4.4 of ILO Convention 183, which stipulates a compulsory period of leave after childbirth 'with due regard to the health of the mother and the child'.

However, in circumstances where the mother is unable to act as the primary carer of the child it should be possible for the supporting parent or other primary carer to access her paid maternity leave entitlements. This may be the case, for example, if the mother has a temporary or permanent condition that prevents her from caring for the child.

Supporting parent leave

In addition, PIAC supports a period of paid leave for supporting parents. There is evidence that babies benefit from close attachment to their father independent of their attachment to their mother and that

²³ Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) [5.3].

²⁴ Australian Breastfeeding Association, *Submission to Parliamentary Inquiry into Breastfeeding* (2007) 7-24.

fathers can also offer important support to mothers with postnatal depression.²⁵ PIAC is concerned by evidence that shows that fathers are unlikely to take unpaid paternity leave.²⁶ A paid leave entitlement should increase the percentage of partners actually taking leave, and this in turn should promote a better sharing of family responsibilities between men and women, hopefully leading to shifts in workplace culture.

PIAC prefers the terminology 'supporting parent leave' to 'paternity leave', as this takes account of same-sex relationships.

PIAC recognises that in some families—such as Aboriginal and Torres Strait Islander families—care may be provided by extended family, such as grandparents and aunts. In these circumstances, it should be possible for these carers to access supporting parent's leave, if necessary.

Recommendation 4

PIAC recommends that a national scheme of parental leave should include both a paid maternity leave component and a supporting parent component.

Eligibility criteria

Paid maternity leave

PIAC believes that women should only be eligible for paid maternity leave if they are currently in, or have recently engaged in, paid employment. This flows from the fact that a fundamental objective of paid maternity leave is to replace lost earnings and to redress women's disadvantage and inequality in the workforce. Women who are not in the paid workforce should still be able to access payments such as the 'Baby Bonus' and Family Tax Benefits A and B.

PIAC rejects any approach that seeks to exclude women from the scheme on the basis of employment categorisation. In PIAC's view, the payment should be available to all categories of employment, including casuals, self-employed workers, contractors and fixed-term workers. This is consistent with Article 2 of ILO Convention 183, which is worded very broadly to apply to '*all employed women, including those in atypical forms of dependent work*' (emphasis added). It also reflects the nature of the female labour force in Australia today, which comprises a large and growing proportion of women who are self-employed, or work on a casual or temporary basis.²⁷

PIAC does not believe that paid maternity leave should be tied to a continuous period of service with one employer as this has the potential to exclude many women who have transient working arrangements, have worked for a number of different employers or who have recently left work. Rather, a woman should simply have to demonstrate a consistent attachment to the workforce. PIAC has not yet formed a view on how this would have to be demonstrated, though it is noted that the National Foundation for Australian Women suggests a test of ten months in the previous 12 months. It is unclear how this would apply to part-time and casual workers.²⁸

²⁵ Fathers and Families Research Program, The Family Action Centre, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave* (2008).

²⁶ G Whitehouse, M Baird and C Diamond *The Parental Leave in Australia Survey: November 2006* (2006) <<http://www.uq.edu.au/polsis/parental-leave/level1-report.pdf>> at 19 June 2008.

²⁷ Australian Bureau of Statistics, *Labour Force* No.6291.0.55.001.0 (2008).

²⁸ National Foundation of Australian Women, *Submission to the Inquiry into Paid Maternity, Paternity and Parental Leave* (2008) 4.

Supporting parent leave

Similarly, persons seeking to access supporting parent leave should have to demonstrate a consistent attachment to the workforce, rather than a continuous period of employment. Entitlements should be available to all employment categories.

Recommendation 5

PIAC recommends that all women who can demonstrate consistent workforce attachment (including casuals, self-employed and temporary workers) should be eligible for paid maternity leave in respect of the birth or adoption of a child.

Recommendation 6

PIAC recommends that all persons who can demonstrate consistent workforce attachment (including casuals, self-employed and temporary workers) should be eligible for paid supporting parent leave in respect of the birth or adoption of a child.

Duration of benefits

PIAC supports a model that provides paid maternity leave for a minimum period of 26 weeks and paid supporting parent leave for a minimum period of four weeks.

Paid maternity leave

PIAC notes that many submissions to this Inquiry, including those of the Human Rights and Equal Opportunity Commission and the Australian Council of Trade Unions, have called for a minimum period of 14 weeks' paid maternity leave, with the aim of this gradually being extended over time. PIAC acknowledges that this reflects the minimum standard recommended in Article 11(2)(b) of CEDAW and ILO Convention 183. However, PIAC rejects this minimalist approach for the following reasons:

- the World Health Organisation recommends approximately 16 weeks of absence from work after childbirth, as a minimum, to recover from childbirth and fully establish breastfeeding;²⁹
- ILO *Maternity Protection Recommendation 191, 2000* (which supplements the ILO Convention 183) recommends that members endeavour to extend the period of paid maternity leave in Article 4 of the ILO Convention 183 to at least 18 weeks;³⁰
- the World Health Organisation recommends exclusive breastfeeding for the first six months of life for optimal health outcomes;³¹
- there is evidence that many Australian female public servants who already have 14 weeks' paid maternity leave have found this to be inadequate, forcing them to use annual leave, long service leave and other forms of leave entitlements after the birth of a child;³²
- many other countries, including the United Kingdom, have already moved to extend the period of paid maternity leave beyond 14 weeks.³³

²⁹ World Health Organisation 'Health Aspects of Maternity Leave and Maternity Protection' *Statement to the International Labour Conference 2 June 2000* <http://www.who.int/reproductive-health/publications/maternal_mortality_2000/Health_aspects_of_maternity_leave.en.html> at 19 June 2008.

³⁰ R191 *Maternity Protection Recommendation, 2000*, art. 1(1).

³¹ *Health Topics – Breastfeeding* (2008) World Health Organisation <<http://www.who.int/topics/breastfeeding/en/>> at 18 June 2008.

³² See Community and Public Sector Union, *Submission to the Productivity Commission Inquiry into Paid Maternity, Paternity and Parental Leave* (2008). Just 2.8% of CPSU women who had had a baby in the last five years felt that three months was sufficient paid time. Fifty-six percent said six months would be sufficient.

³³ The United Kingdom now provides paid maternity leave of 39 weeks. Periods of paid leave in excess of 14 weeks are also provided by Sweden, Croatia, Finland, Russia, Estonia, Thailand, Belarus, Chile, Cuba, Uzbekistan, Lithuania, Moldova, Romania, Ireland, South Africa, Poland, Latvia, France, Mongolia, Slovenia and Belgium.

Supporting parent leave

PIAC recommends a minimum period of four weeks to promote the increased involvement of the father, or other carer in the care of the mother and the child. Such leave should be compulsory and to be taken on a 'use it or lose it' basis. In countries that have adopted similar models, such as Norway, Iceland, Denmark and Sweden, leave taking by fathers has almost doubled in recent years.³⁴

Provision for flexibility

In some circumstances longer periods of leave may be required, for example, in the case of multiple births, or where they child or one of the parents has a disability. In these circumstances, it should be possible for either parent to apply for an extension to the period of paid leave.

Recommendation 7

PIAC recommends that paid maternity leave be available for a minimum period of 26 weeks.

Recommendation 8

PIAC recommends that supporting parent leave be available for a minimum period of 4 weeks on a 'use it or lose it' basis.

Recommendation 9

PIAC recommends that there be provision for longer periods of paid maternity leave to be available in the case of parents and/or children with disabilities.

Generosity of benefits

PIAC believes that paid parental leave benefits should be at income replacement level. It is noted that a number of commentators to this Inquiry have advocated that benefits be paid at minimum wage level. In PIAC's view, this minimalist approach cannot be supported, for the following reasons:

- Article 2 of the *ILO Maternity Protection Recommendation 191, 2000* states that where practicable, and after consultation with the representative organisations of employers and workers, the cash benefits to which a women is entitled during leave should be raised to the full amount of the woman's previous earnings or such of those earnings as are taken into account for the purpose of computing benefits.
- Payment at minimum wage level may place an unreasonable strain on family finances at a time when parents need to provide not just for themselves, but also for a child.
- Studies have shown that in countries where paid maternity leave is offered, the greater the financial compensation and the longer the leave time provided, the more likely women are to return to work.³⁵

Superannuation payments should continue during the period of leave. The period of paid parental leave should be considered as a period of service for the purpose of accruing long service leave and other entitlements.³⁶

³⁴ J Ekberg, R Erikksson and G Friebe, *Sharing Responsibility? Short and long-term effects of Sweden's 'Daddy Month' reform*, Working Paper No 3, Swedish Institute for Social Research (2004).

³⁵ D Smeaton and A Marsh, *Maternity and Paternity Rights and Benefits: Survey of Parents 2005*, British Department of Trade and Industry (2005).

³⁶ International Labour Organisation *Maternity Protection Recommendation* International Labour Conference (88th: 2000: Geneva Switzerland) Art 5. <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R191>> at 18 June 2008.

Recommendation 10

PIAC recommends that maternity leave and supporting parent leave should be paid at wage replacement level and should include superannuation at the relevant levels required under the superannuation guarantee legislation.

Recommendation 11

PIAC recommends that paid maternity leave and supporting parent leave should be considered as service for the purpose of accruing long service leave and other entitlements.

Financing options

In PIAC's view, a paid parental leave scheme should be primarily funded by the Federal Government from taxation revenue. This would ensure national coverage, provide greater certainty and greater social equity. It would allow for a wider range of workers to be covered, including casual and self-employed workers, and would decrease the potential for discrimination against women of child-bearing age.

However, to require the Federal Government to fully fund 26 weeks' leave at wage replacement level may be too onerous in the current financial climate. Therefore, PIAC proposes that the Federal Government fund 26 weeks' paid maternity leave at the minimum wage level and that employers should pay the gap between minimum wages and the worker's actual wages; this could be achieved by employers paying a contribution into a central pool, to be distributed as needed. The size of the contribution employers would be required to make would be determined by staff numbers or payroll size, thus relieving the burden on small business. Potentially, businesses deemed too small to pay payroll tax could even be exempt.

This type of arrangement, which creates a collective responsibility for funding paid maternity leave, reduces the prospect of discrimination against women of child-bearing age.

PIAC does *not* support a scheme that relies on employee contributions. Employees have already contributed to the funding of their leave through the tax system and in any event, should not have to pay for what is essentially a basic human right.

Recommendation 12

PIAC recommends that the Federal Government should fund 26 weeks' paid maternity leave and four weeks' paid supporting parent leave at minimum wage level. The gap between minimum wages and the worker's actual wages should be funded from a central pool to which employers would be required to contribute on the basis of their staff numbers or the size of their payroll.

Initiatives to facilitate a paid parental leave scheme

A scheme of paid parental leave will only be effective if it is underpinned by other measures that promote effective work and family strategies. Some of these are outlined below.

Adequate child care

In order to be successful, a paid parental leave scheme must be backed up by affordable and accessible childcare. PIAC welcomes the Rudd Government's recent announcement of a commitment to reform early childhood education and care services.³⁷ However, in the meantime, PIAC remains concerned

³⁷ Australian Government, Statement 1: Budget Overview in *Budget Paper No. 1: Budget Strategy and Outlook 2008-09* (2008) 11, 17 and 18.

that many working mothers who want to return to work are unable to do so, because of the prohibitive cost of childcare and the scarcity of childcare places.³⁸

Recommendation 13

PIAC recommends that the Federal Government provide adequate funding for more childcare services, particularly not-for-profit services.

Protecting the right to return to work

PIAC is concerned by the extensive evidence given to this Inquiry about the difficulties being experienced by women who are seeking to return to work from maternity leave.³⁹ The objectives of a paid parental leave scheme will be seriously undermined if women are unjustifiably made redundant while they are on paid maternity leave, or if they are offered lower positions with less responsibility when they return.

Although it is open to women in these circumstances to bring discrimination complaints under state or Federal legislation, they face a number of significant barriers, including:

- the need to obtain (and pay for) legal advice and representation;
- the risk of incurring an adverse costs order in the event of an unsuccessful complaint in the Federal jurisdiction;
- the difficulty of proving that sex, pregnancy, maternity leave and/or family responsibilities was a reason for allegedly discriminatory conduct;⁴⁰ and
- the difficulty of applying an appropriate comparator for the purposes of a direct discrimination complaint.⁴¹

PIAC notes the suggestion of Kingsford Legal Centre in its Submission to this Inquiry that any redundancies following an announcement of pregnancy, announcement of intention to take parental leave or return from parental leave should be able to be scrutinised by the Ombudsman or a Government body.⁴² PIAC supports this suggestion as it would ensure that more employers are made accountable for such decisions, and would also mean that fewer women would have to resort to the costly, time consuming and uncertain process of using discrimination law to enforce their rights. PIAC recommends that this should be the responsibility of a Government body other than the Ombudsman, given the specific responsibility of the Ombudsman to review government decisions only.

Recommendation 14

PIAC recommends that any decisions by employers to make employees redundant while they are on parental leave should be open to scrutiny by an appropriate Government body with specific and sufficient government resourcing to undertake this function.

³⁸ State Government of Victoria, Department of Human Services, 'Howard's child care neglect a barrier to mothers returning to work' (Media Release, 3 September 2007).
<http://www.dpc.vic.gov.au/domino/Web_Notes/newmedia.nsf/35504bc71d3adebcca256cfc0082c2b8/2ac7a95b15e78370ca25734a007eff9a!OpenDocument> at 18 June 2008.

³⁹ See for example, Kingsford Legal Centre, *Submission into the Inquiry into Paid Maternity, Paternity and Parental Leave* (2008) Appendix.

⁴⁰ See *Sterling Commerce (Australia) Pty Ltd v Iliff* [2008] FCA 702 (21 May 2008)[46] in which the Federal Court found that Ms Iliff had been replaced by another employee while on maternity leave because of the company's commercial interests, not because of her sex, maternity leave or family commitments. The Court did find, however, that in failing to reinstate Ms Iliff, the company had breached Schedule 1A of the *Workplace Relations Act 1996* (Cth).

⁴¹ *Ibid*, [40]–[50].

⁴² Kingsford Legal Centre, above n39.

Access to flexible work arrangements

A national scheme for paid maternity leave should also be backed with adequate return-to-work programs including access to flexible work arrangements and part-time work in recognition of the employee's continued need to balance work and family responsibilities.

The new National Employment Standards include a Flexible Working Arrangements Standard that gives an employee the right to request flexible working arrangements.⁴³ Employers are required to respond in writing to such requests within 21 days and may only refuse the request on 'reasonable business grounds'. Unfortunately, the Standard provides no definition of what is meant by 'reasonable business grounds', nor is it enforceable. Its usefulness to parents seeking to access flexible work arrangements is therefore very limited.

By contrast, the United Kingdom's legislation regarding the right to request flexible working provisions (as set out in section 80 of the *Employment Rights Act 1996* (UK)) is much more specific. It explicitly sets out the grounds on which an employer may refuse a request⁴⁴, and provides detailed procedures for employers and employees to follow regarding right-to-request applications.⁴⁵ It also includes a procedural review mechanism. In PIAC's view, this is a preferable model.

Recommendation 15

PIAC recommends that the National Employment Standards be amended so as to explicitly set out a list of the factors to be taken into account by employers when considering requests for flexible working arrangements and to allow an employee to refer unresolved disputes about such requests to a conciliatory body for review.

Enhanced protection against discrimination

Paid parental leave should be backed up by adequate protection against discrimination faced by parents as a result of their family responsibilities. PIAC notes with concern that women who are pregnant and seeking to obtain employment suffer high levels of discrimination.⁴⁶

One means of strengthening legislative protection in these circumstances may be for HREOC to publish enforceable standards in relation to pregnancy and potential pregnancy, including return to work issues. It is noted that this was recommended by HREOC almost ten years ago in its report *Pregnant and Productive: it's a right not a privilege to work while pregnant*.⁴⁷ PIAC endorses this recommendation.

Male carers are also vulnerable to discrimination on the ground of their family responsibilities. Currently, they have inadequate protection against such discrimination under Federal discrimination laws. The *Sex Discrimination Act 1984* (Cth) (the SDA) makes discrimination on the ground of family responsibilities unlawful only in circumstances where there is dismissal, and the particular discrimination is direct (rather than indirect).⁴⁸ Protections for male carers are effectively confined to

⁴³ Department of Employment and Workplace Relations, *The National Employment Standards*, Division 3 Part 13 <http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf> at 18 June 2008.

⁴⁴ These include the burden of additional costs; detrimental effect on ability to meet customer demand; inability to reorganise work among existing staff; inability to recruit additional staff; detrimental impact on quality; detrimental impact on performance; insufficiency of work during periods the employee proposes to work; and planned structural changes.

⁴⁵ *Flexible Working (Procedural Requirements) Regulations 2002*.

⁴⁶ Australian Bureau of Statistics, *Pregnancy and Employment Transitions*, Australia Cat No.4913.0 (2005).

⁴⁷ Human Rights and Equal Opportunity Commission, *Pregnant and Productive: It's a right not a privilege to work while pregnant* (1999).

⁴⁸ *Sex Discrimination Act 1984* (Cth), ss 7A and 14(3A).

these provisions of the SDA. This is to be compared to the protections that have been extended to women carers through the courts' interpretation of other sections of the SDA.⁴⁹

Despite the limited utility of the SDA for male carers, PIAC does not believe that it is appropriate to amend the SDA by strengthening protections against family responsibilities discrimination. PIAC agrees with the view expressed by HREOC, in the *It's About Time* report, that family responsibilities discrimination is distinct from sex discrimination and warrants its own legislative framework and policy support.⁵⁰ Continuing to include family responsibilities discrimination provisions in the SDA simply entrenches the idea that caring is women's work.

Recommendation 16

PIAC recommends that the Federal Government amend the Sex Discrimination Act 1984 (Cth) to empower the Human Rights and Equal Opportunity Commission to publish enforceable standards in relation to pregnancy and potential pregnancy.

Recommendation 17

PIAC recommends that federal legislation be introduced to provide protection against both direct and indirect discrimination for employees with family and carer responsibilities in all aspects of the employment relationship.

Conclusion

It is to be hoped that the Productivity Commission Inquiry will finally lead to the adoption by the Federal Government of a national system of paid parental leave.

PIAC advocates a paid parental leave scheme that complies with international human rights standards, promotes gender equity and ensures optimal health outcomes for mothers and children.

In PIAC's view, this will not be achieved by taking a cautious, minimalist approach.

Rather, Australia should now seize the opportunity to be a world leader in this area by adopting a 'best practice' approach. In PIAC's view, this can best be achieved by a scheme that incorporates the following features:

- paid maternity leave and supporting parent leave components;
- eligibility criteria that embrace all categories of employment but require some evidence attachment to the workforce;
- a minimum period of 26 weeks' paid maternity leave;
- a minimum period of four weeks' paid supporting parent leave (to be taken on a 'use it or lose it' basis);
- provision for longer periods of leave to be available in the case of parents and/or children with disabilities;
- payment at wage replacement level, and to include superannuation;
- funding by the Government at minimum wage level, with the gap between minimum wages and real wages to be paid out of an employer-funded pool.

⁴⁹ See for example *Mayer v A.N.S.T.O* [2003] FMCA 209 (6 August 2003) at [67] where the Federal Magistrate's Court found that the respondent's refusal to allow the applicant to work part-time constituted indirect sex discrimination under section 5(2) of the SDA.

⁵⁰ Human Rights and Equal Opportunity Commission, *It's About Time: Women, Men, Work and Family* (2007) [3.4].