

31 May 2013

Submission to the FaHCSIA Paid Parental Leave scheme review

These submissions are made by the Women Lawyers Association of New South Wales Inc (WLANSW) in response to the review of the Paid Parental Leave scheme being conducted by the Department of Families, Housing, Community Services, and Indigenous Affairs (FaHCSIA). In this submission we will refer to that scheme as Parental Leave Pay (PLP)

WLANSW is the peak body representing women lawyers in NSW. WLANSW has been committed to improving the status and working conditions of women lawyers since 1952. It has members (male, female and corporate) throughout NSW. Our members include solicitors, barristers, judicial officers, academics, corporate counsel, lawyers and law students. Members work in private practice, corporations, the public sector, the community legal sector, and at the Bar.

This submission does not necessarily reflect the view or views of all WLANSW members.

A number of issues identified for review are of particular interest to WLANSW members;

- a) the availability and amount of leave and payments provide by employers in relation to the birth or adoption of child, and the interaction of those entitlements with parental leave pay provided under the Act
- b) the administration of the Act
- c) any other matter relevant to the general operation of the Act, and in particular the income test.

Background to women lawyers in NSW

In 2011 the Law Society of New South Wales instituted a Thought Leadership initiative to identify barriers to the progression of women in the legal profession. As part of that initiative, they published a Report¹, which contains a useful snapshot women in the legal profession NSW.

The statistics collected in the report show that

¹ Thought Leadership 2011, Advancement of women the Profession, Report and Recommendations, The Law Society of New South Wales

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- The number of female solicitors has increased much faster than the number of males with the proportion of women approaching 50%
- The proportion of women is greater in the corporate and government segments than private practice
- Female practitioners outnumber males in younger age groups but are greatly outnumbered in the older age groups
- The proportion of female partners is much lower than the proportions in which females are represented in the general private practice population. However, the overall increase in the proportion of women partners since 2005 indicates a greater increase in new appointments
- Part time work is more common for women than men with one fifth of female respondents reporting they worked part time²

A graphic demonstration of the percentage of women in the profession can be seen in the attached Statistics (Schedule 1) extracted from the Report.³

It follows that there are many young lawyers in the legal profession, of child bearing age, who are potentially eligible to receive PLP, as well as any employer paid scheme their employers may have introduced in this area.

a) the availability and amount of leave and payments provide by employers in relation to the birth or adoption of child, and the interaction of those entitlements with parental leave pay provided under the Act

WLANSW has compiled its own table of publicly available partnership statistics, and employer provided parental leave. That table was first published on the WLANSW web-site in November 2012⁴ and is reproduced in Schedule 2.

It shows that while many of the larger private law firms in the list do offer paid parental leave, coverage is not universal and the level of coverage varies significantly.

Although it is not a snap-shot of the entire profession, it is fair to say that as a general rule, it is more likely that a law firm will provide some paid parental leave as its size increases, with small firms less likely to have any scheme, and large firms more likely. This leaves a significant number of employees with no employer provided parental leave, and only PLP. Barristers will have no employer scheme, unless they pay it to themselves.

It is also not known how these schemes might interact with PLP, and whether they are in addition to, or incorporate PLP, or what conditions they impose before an employee would qualify for the payment.

Some examples of interaction we are aware of are set out below.

² See Note 1 page 6

³ <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/461899.pdf>

⁴ http://www.womenlawyersnsw.org.au/sites/default/files/WLANSW_LawFirmComparison_2012_o.pdf

Example 1

One member firm decided to introduce a modest employer paid parental leave scheme to complement PLP. The initial intention was to top up the Government's payment to full replacement wage up to a total employer contribution of a set number of weeks' salary. In the end, it got too confusing for the payroll person to administer, with the PLP being taxable but not superable, while the employer payment was to include superannuation. The employer provided paid parental leave separately to the PLP, and at the end of the PLP period, as managing any interaction was too administratively difficult.

The need to provide the PLP as it was received also gave the employer no ability to pay it in a different way, such as part of a scheme to pay half-pay based on replacement income for a longer period than the PLP 18 weeks.

It also led to confusion within the firm's management team over the difference between unpaid parental leave rights under the *Fair Work Act*, the work test under PLP, and the subtle distinction between parental leave and parental leave pay.

Example 2

In another example, a sole practitioner expressed dissatisfaction that his long standing employee had come to ask him about her PLP, which he thought was a payment that she should be claiming directly from Centrelink. He felt she was using this as an opportunity to seek an additional employer paid parental leave benefit from him. He had failed to appreciate that he was no more than a post-box for the PLP payment, and the only requirement on his part was to pass on the funds once received.

Example 3

A large multidisciplinary professional services practice used its external payroll provider service to update its payroll software to accommodate PLP, and that the transition was not difficult, however, it did note that in administering the PLP, there were some practical issues;

- Centrelink reimburses the employer every 6 weeks while the employer pays employees on a monthly/fortnightly basis. This timing difference would be harder for small business to bear.
- The Government pays in arrears while the employer will pay whatever is due at the usual pay cycle of an individual.
- Two limitations is whoever is receiving the payment needs to be on the employer's payroll (i.e. spouses can only receive the payment if they are also an employee) and the payment cannot be extended beyond 18 weeks.

Recommendations:

There should be more information available to employers to explain the interaction between the Fair Work Act unpaid parental leave rules and the PLP scheme.

The distinction between parental leave and parental leave pay needs to be well understood and explained so that employers know how to deal with a situation where a worker may be entitled to, and be receiving PLP, but not actual unpaid parental leave (say because they have worked with another employer in the last 12 months, or been self-employed for part of that time).

Case studies showing how employers could develop their own paid leave schemes to sit with the PLP should be developed and communicated to employers, with as many options illustrated such as – topping up PLP to replacement wages, paying super on PLP and employer paid parental leave, showing how other forms of leave could be utilised as well in the unpaid parental leave period.

Some flexibility should be allowed to employers in paying the PLP provided the employee agrees, so that for example, it could be paid over a longer period than 18 weeks.

c) any other matter relevant to the general operation of the Act

Income test

One aspect of the operation of the Act which WANSW feels is significant for its members is the income test. The concept of an income test was not raised in the initial Productivity Commission report, which proposed a universal scheme provided the work test was met, but an income test was introduced into the Act. While one can speculate as to why (to avoid claims of middle class welfare, and benefits for the well paid, as well as to reduce the costs of the scheme) we believe it undermines the effectiveness of the Scheme for some of our members, and other highly paid women.

Currently a woman is not eligible to receive PLP if her adjusted taxable income was greater than \$150,000 in the financial year prior to the birth. This ignores any other family income that may be earned, or the woman's single or partnered status.

While conceding that there are not many women are in this privileged financial position, a number of women lawyers, and other professionals, are likely to be earning at this level. This is particularly so for women who have worked as lawyers who are over 30 years of age. Publically available salary figures⁵ from Mahlab legal recruiters are set out below, and while they are a guide only, they show that for the average law graduate who starts work at 24, it is entirely conceivable that by 30 she is earning \$150,000 or more.

Major Firms - Sydney

The figures below are drawn from **Survey 2012 Reshaping the Model The Push to Go Global**. For further information on private practice salaries at major, mid and small CBD firms in Sydney and other capital cities please go to [Survey 2012 Reshaping the Model The Push to Go Global](#).⁵

Year	Low	High	Mode
Grad	\$70,000	\$80,000	\$73,000
1	\$78,000	\$94,000	\$79,000
2	\$82,000	\$109,000	\$90,000
3	\$90,000	\$136,000	\$103,500
4	\$100,000	\$140,000	\$119,000

⁵ <http://www.mahlab.com.au/legal-career.asp?id=128&t=private-practice-salaries&cid=32>

5+ not (SA)	\$110,000	\$150,000	\$124,500
SA1	\$140,000	\$165,000	\$146,000
SA2	\$147,000	\$180,000	\$165,000
SA3	\$165,000	\$210,000	\$181,000
SA4	\$180,000	\$235,000	\$190,000
SA5/SpC	\$185,000	\$320,000	\$255,000

To assess eligibility based only on the woman's prior income means the following inequities arise in the Scheme;

- Single mothers, or those who are the major breadwinner in the relationship will not qualify for PLP if they earn over the threshold, despite the fact that their absence from the workforce means that there may be no income, or significantly reduced income at the time immediately after the birth.
- Women who have high earning partners are still eligible for PLP as it is assessed on the woman's income only, not any assessment of family or joint income during the woman's absence from work. During the period of parental leave the family may still have an income in excess of \$150,000 per annum.
- It could act as a disincentive for a woman who is pregnant, or knows that she wants to be pregnant, to seek a pay-rise if it would put her over the cap.
- We also believe it further entrenches the view that the cost of having a child is somehow exclusively associated with the mother and her earning capacity, rather than any concept of joint financial responsibility.

We appreciate that this will affect only a very small number of women who currently are not eligible, but many of our members and other professional women will be in that category. Therefore, the payment should be a universal one, irrespective of the woman's income. As the PLP is taxable, women with a higher income will be taxed on those payments at potentially a higher marginal rate, so there is some return on the payment.

This is consistent with the Productivity Commission's initial report, which did not impose an income test. It is also consistent with every employer funded parental leave scheme we have seen, as none impose an income test, rather tend to rely on service based tests only for eligibility.

It is also consistent with the characterisation of PLP as a work-related entitlement, rather than a welfare payment. We do not impose income tests on any other leave payments, yet the same argument could be made that those earning at that level should be able to provide for their own paid holidays and sick leave. If we truly want to entrench the concept of paid parental leave as a work benefit then it should be on the same footing as other entitlements.

Differing eligibility also creates problems for employers in designing and implementing an employer parental leave scheme. If PLP is ignored by an employer parental leave scheme, then it follows that some employees will receive much greater total parental leave benefits than others. If it is factored in, then high income earning employees who are not receiving the PLP may receive a lower total payment. If the employer wants to make sure all employees are on the same footing, then it must design a scheme that caters for both payments. This makes any scheme much more complex, and requires the employer to

assess whether the woman is eligible for PLP or not. Any payment also needs to take account of the baby bonus, which will usually be unknown to the employer.

If an income test is to be imposed, then it should not be based on the income period during the leave, not on a past measure. Any measure based on past income is open to manipulation and currently pregnant women may attempt to manipulate their own income to meet the income test. While this may seem fanciful, we are aware of one instance where a pregnant lawyer negotiated with her employer to defer the payment of a bonus into the following tax year so that she would fall within the income test for PLP.

Recommendations

There should be no income test, PLP should be a universal payment provided the work test is met.

If there is to be an income test, it should not be based on the woman's income in the last tax year prior to the birth, but on an assessment of likely income during the parental leave period.

Superannuation

As a wage replacement, we believe that the payment should attract superannuation, and this should be included on top of the payment. Women generally have substantially less superannuation available on retirement due to their working patterns and wage levels and any measure that assists to redress this should be encouraged.

Childcare and flexible work options

Although it is beyond the scope of this review, WLANSW notes that for many of our members childcare availability and affordability on their return to work, and the ability to access decent flexible work are greater inhibitors to their successful return from parental leave, and any measures the Government can consider to improve either of these is welcome.

Yours sincerely,



Margaret Holz
President