Senate Community Affairs Committee Inquiry into the Paid Parental Leave Bill 2010

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This brief submission deals with a very limited, but important, aspect of the scheme created by the Paid Parental Leave Bill 2010 – the relationship between that scheme and existing entitlements to parental leave. I will propose that either the Bill or the Fair Work Act 2009 be amended to clarify that relationship, so as to avoid creating confusion or uncertainty for employers and workers in relation to what is otherwise a very welcome initiative.

Eligibility for Parental Leave

A strong argument can be made that the title of the Bill is a misnomer, since the proposed scheme does not confer any entitlement to paid leave, as that concept would generally be understood.

As the draft *Employer Business Requirement Statement* issued by the Department of Families, Housing, Community Services and Indigenous Affairs makes clear, the right of a primary carer to receive parental leave pay "*is not a leave entitlement*, but will complement employees' entitlements to leave, such as unpaid parental leave under the National Employment Standards" (p 4, emphasis added).

Under the Bill, the eligibility to receive parental leave pay is much broader than the National Employment Standards (NES) entitlement to unpaid parental leave under Division 5 of Part 2-2 of the Fair Work Act, which arises only after 12 months' continuous service with the same or a related employer. This means that there will be workers who can receive payments, but cannot take leave from their existing jobs.

Consider the position of a pregnant employee who has worked regularly enough to be eligible for parental leave pay, but who has not quite completed 12 months' service with her current employer. Under the NES, she cannot insist on being granted leave. If her employer does not voluntarily agree to keep her job open, she faces the prospect of having to quit her job without any guarantee of a return to work.[1]

There is an obvious potential for confusion here – it is hardly unreasonable for employees (or indeed employers) to believe that a right to "paid parental leave" means what it says!

One way to resolve the inconsistency between the new scheme and the NES would be to broaden the eligibility for unpaid parental leave under the latter. This need not involve

[1] This is disregarding any possible arguments that might arise under anti-discrimination laws, or under the "general protections" in Part 3-1 of the Fair Work Act, concerning an employer's refusal to voluntarily grant leave.

making them completely coterminous. It might, for instance, be provided that a non-casual employee eligible for parental leave pay should be entitled to a period of leave that at least matches their eligibility period.

If that is not to be done, however, the Paid Parental Leave Bill should be amended to make it clear that the eligibility to receive parental leave pay does not of itself confer any entitlement to take leave from employment. That point should also be highlighted in any public information concerning the new scheme.

Existing Entitlements to Paid Leave

A significant minority of employees are currently entitled to paid parental leave under public sector legislation, enterprise agreements, awards or individual contractual arrangements. The question is how, if at all, the new scheme impacts on those entitlements.

It is apparent from the Minister's Second Reading Speech for the Bill on 12 May 2010 that the government envisages parental leave pay as an *additional* entitlement:

> "The government's paid parental leave can be taken in addition to existing employer funded schemes, either at the same time or consecutively. The government's scheme has been designed to complement and enhance the existing family friendly arrangements that many employers already offer."

So far as I am aware, however, there is nothing in the Bill itself that addresses the relationship between a payment made under the new scheme, and a payment made in satisfaction of an existing obligation to provide paid leave.

Suppose for instance that an employer is obliged by an enterprise agreement to provide 8 weeks' paid parental leave at an employee's ordinary rate of pay, and assume too that the employee is eligible for parental leave pay under the government-funded scheme. Can the employer take the government funding for those 8 weeks, pay it to the employee, then simply top it up so that it matches the employee's ordinary pay? The employer might argue that it has discharged its obligation under the enterprise agreement, and that it is no business of the employee's where it gets its funding from.

Now such an argument might or might not be legally sustainable. The point is simply that the Bill does not appear to say one way or another whether employers can do this.

Some employers may well choose, or be advised, to adopt this approach of "setting off" government-funded payments against their existing obligations. If they are wrong, they may be sued by their employees, or prosecuted by a body such as the Fair Work Ombudsman, for failing to comply with those pre-existing obligations. Or they may get away with the tactic, thus defeating the government's apparent aim of providing an *additional* entitlement.

Either way, rather than leave the matter uncertain, or wait for it to be raised in litigation, it would be advisable for the legislation to address the issue directly.

I recommend that the Bill be amended to state that, for the avoidance of any doubt, a payment made under the legislation is not to taken as discharging an obligation of an employer to provide paid leave under any other law, or under an industrial instrument, employment contract or other arrangement.

Just to be clear, my concern here is with the effect of a government-funded parental leave payment on any *existing* obligation to provide paid leave. The question of whether, and to what extent, such obligations might or should be altered or renegotiated to reflect the availability of payments under the new scheme is a separate issue.

By way of conclusion, I draw the attention of the Committee to what might be considered the principal drawback of a scheme that confers a right to payment, rather than a right to leave as such.

Suppose an employee already has an entitlement to (say) 14 weeks' paid parental leave, and assume that the government-funded payment is indeed to be treated as an additional entitlement. The employee may choose to use the government funding to allow them to take a total of 32 weeks off, 14 on their ordinary pay and 18 on the government's minimum wage payment. But they might just as likely take the bare 18 weeks off, or even just 14 weeks, effectively treating the government-funded payment as some sort of bonus that allows them to receive well above their ordinary pay for the period. In a strictly financial sense, they are better off returning to work earlier.

Now it may be that this will act as some sort of incentive for workers to have children, where they might not otherwise have done. But if the aim is to encourage new parents to take more time off work, in order to improve the health and wellbeing of both themselves and their babies, then it might make more sense to construct the new entitlement as a right to paid leave that must be taken in addition to pre-existing paid leave entitlements , as opposed to just being a handout.

But that, of course, would involve turning the Bill into something that it is currently not – legislation about leave from employment.