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Greg Lynn

*The University of Notre Dame Australia*

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The University of Notre Dame Australia

School of Law

**PAID PARENTAL LEAVE: AN INVESTIGATION  
AND ANALYSIS OF AUSTRALIAN PAID  
PARENTAL LEAVE FRAMEWORKS WITH  
REFERENCE TO SELECTED EUROPEAN OECD  
COUNTRIES**

Greg Lynn

LLB (Murdoch University)

MA (The University of Notre Dame Australia)

This thesis is submitted in fulfilment of the requirements of  
the

Degree of Master of Laws by Research

2018

## **DECLARATION**

This thesis does not, to the best of my knowledge, contain previously published or written material by another person except where due reference is made in the text, or any other material previously submitted for a degree in any other higher education institution.

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Greg Lynn

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Date

## ACKNOWLEDGEMENTS

Love righteousness, you rulers of the earth,  
think of the Lord with uprightness,  
and seek him with sincerity of heart;  
because he is found by those who do not put him to the test,  
and manifests himself to those who do not distrust him.<sup>1</sup>

First and foremost, I wish to thank The University of Notre Dame Australia Fremantle School of Law for making this thesis possible. The School of Law has consistently shown interest in the area of research undertaken in this thesis, particularly through the generous funding of this research through the 2014-2018 HDR RTS government research grant program which gave me the financial resources and the opportunity to do conduct my research. I have found Notre Dame to be a supportive and nurturing environment as a student in my time studying and researching there for the duration of this project.

Secondly, I wish to particularly thank my academic supervisor Professor Joan Squelch for her spirit of open generosity and valuable input which has guided this thesis from beginning to end and without which this project would not have been possible. Professor Squelch was the first person to suggest my original rough ideas on parental leave in Australian employment law had the potential to become a major research project in its own right and encouraged me to formulate my ideas in a rigorous way in a Master of Laws degree. Professor Squelch has always been particularly generous with her time and patient with me as a student given her demanding roles as Dean and research supervisor in the Law School at Notre Dame. The author of this thesis cannot thank Professor Squelch enough for her professionalism, insight, support, clarity along with her invaluable feedback given by her on many occasions to this student.

I would also like to thank the staff of the Employment Law Centre of Western Australia for their continuous support for this project. I would like to particularly my supervisors Ms Toni Emmanuel, Ms Jessica Smith, and Ms Anna Creegan

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<sup>1</sup> Wisdom of Solomon, 1:1-1:2.

of the Employment Law Centre of WA. These solicitors were generous to me in providing resources and time to complete this project and access to an excellent Industrial Law Case library which was essential to writing this thesis and also in providing me with valuable feedback on case law and legislation relating to employment law and paid parental leave. It is my hope this thesis will repay their support in a small way to helping create more gender-equal workplaces in Australia in the future where work and family are equally at home.

I also wish to thank my family for their patient support through this project, particularly my father and mother Andrew and Nereda Lynn and my brothers Tim and David, who have always supported me in my academic studies and have also helped me in more ways than can be mentioned here. Having grown up in a ‘legal’ household where we discussed cases and trials and where I sat in on court cases in my school holidays, only they truly know what it is like to get entangled with the law and its strange tangents and the long-suffering sacrifices involved. I owe a special thanks of gratitude to them both.

I wish to also thank Ms Linda Browning from Curtin University for her thesis copy-editing and formatting services. Any remaining errors remain my responsibility.

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## LIST OF DEFINED TERMS

<b>FLEXIBLE WORKING ARRANGEMENTS</b>	Work arrangements that allow employees to combine work and family responsibility
<b>FREEDOM OF CONTRACT</b>	The freedom of two individuals to determine voluntary legal obligations without external interference
<b>MATERNITY LEAVE</b>	Paid or unpaid time taken by a woman off work after childbirth
<b>NEOLIBERALISM</b>	A system of economic and political thought characterised by an emphasis on personal responsibility and freedom of the market
<b>NORDIC NATIONS</b>	The countries of Denmark, Norway, Iceland, Sweden and Finland
<b>PARENTAL LEAVE</b>	Paid or unpaid time taking by a person off work to engage in raising or caring for children
<b>WORK CHOICES</b>	Labour law legislation introduced in 2005 by the Howard government under the <i>Work Choices Act 2005</i> to abolish the <i>Industrial Relations Act 1996</i>

## LIST OF ABBREVIATED TERMS

<b>ABS</b>	AUSTRALIAN BUREAU OF STATISTICS
<b>ACAC</b>	AUSTRALIAN CONCILIATION AND ARBITRATION COMMISSION
<b>ACTU</b>	AUSTRALIAN COUNCIL OF TRADE UNIONS
<b>AHRC</b>	AUSTRALIAN HUMAN RIGHTS COMMISSION
<b>AIG</b>	AUSTRALIAN INDUSTRY GROUP
<b>AIRC</b>	AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
<b>AWA'S</b>	AUSTRALIAN WORKPLACE AGREEMENTS
<b>CCI</b>	CHAMBER OF COMMERCE AND INDUSTRY
<b>CEDAW</b>	CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
<b>DAPP</b>	DAD AND PARTNER PAY
<b>EC</b>	EUROPEAN COMMUNITY
<b>EHROC</b>	EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
<b>EU</b>	EUROPEAN UNION
<b>FWA</b>	FAIR WORK ACT 2009
<b>GDP</b>	GROSS DOMESTIC PRODUCT
<b>HDI</b>	HUMAN DEVELOPMENT INDEX
<b>ILO</b>	INTERNATIONAL LABOUR ORGANISATION
<b>IRC</b>	INDUSTRIAL RELATIONS COMMISSION
<b>NES</b>	NATIONAL EMPLOYMENT STANDARDS
<b>NSW</b>	NEW SOUTH WALES
<b>OECD</b>	ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
<b>PC</b>	PRODUCTIVITY COMMISSION
<b>PPL</b>	PAID PARENTAL LEAVE
<b>PPLA</b>	PAID PARENTAL LEAVE ACT 2010

<b>SSIA</b>	SWEDISH SOCIAL INSURANCE AGENCY
<b>TFEU</b>	TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION
<b>TFR</b>	TOTAL FERTILITY RATE
<b>UK</b>	UNITED KINGDOM
<b>UN</b>	UNITED NATIONS
<b>US</b>	UNITED STATES
<b>WWII</b>	WORLD WAR II

## ABSTRACT

In 2010, the Australian federal government introduced a national scheme of taxpayer-funded paid parental leave. This legislation was introduced only after much political debate and came after more than 100 years of reform to Australian industrial law to make employment laws work better for employees with families. These reforms occurred on the back of a long history of relatively slow female legal emancipation in Australia and the concept of employment rights for women having children is a relatively new legal concept. Australian employment law has traditionally been conceptualised in terms of the paradigm of ‘the male breadwinner,’ supported in turn with the legal concept of ‘freedom of contract.’

Based on Australia’s historical heritage of inherited common law from England, ‘freedom of contract’ incorporated notions of ‘master and servant’ mixed with ‘laissez-faire’ into employment law which biased employment relations law strongly in favour of the employer over the employee, who was employed at the employer’s will and could be dismissed at any time for any reason. ‘Laissez-faire’ embodied the doctrine the government should intervene only in a very minimal way in the operation of private contractual relations, including those of employment, excepting those necessary to prevent fraud, theft, violence and social anarchy. The ‘male breadwinner’ concept is derived from the ancient Western social custom that men are economically responsible for the maintenance of their households, decision-making in society and in creating and maintaining the political, social and economic order of society, while women’s primary roles are to help procreate and nurture children, support the smooth running of a domestic household, and care for those in their family and in the wider society while remaining mostly hidden and silent from the public realms of law and politics.

Australian employment law reflected these cultural assumptions until at least the 1960s when the sexual revolution, the rise of feminist activism, historical events earlier in the 20<sup>th</sup> century and other factors led to women becoming more

economically independent from men and also acquiring a greater say on issues in the public sphere. Having acquired the right to vote earlier in the 20<sup>th</sup> century and later acquiring more freedoms during and after the World Wars, women played an expanding role in public life that could not be changed. To reflect these changes women increasingly demanded greater legal, social and economic recognition for their participation in Australian society, especially in their workplaces.

Within the traditional framework of Australian employment law, as time has passed, women demanded more gender equality in the workplace. These demands included employment rights such as equal pay for equal work, equality of opportunity in hiring and promotions, protections from being dismissed from employment due to gender, and rights such as paid maternity leave, protection unfair from dismissal and discrimination based on pregnancy or family responsibility, affordable childcare, and paid parental leave. This created tensions in the Australian employment law system which due to a strong conservative tradition, continued to embody principles of freedom of contract and the male breadwinner ideal well into the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. These tensions could not be easily reconciled with the complex demands placed on workers in the late 20<sup>th</sup>/early 21<sup>st</sup> centuries, the continuing reinforcement of ‘freedom of contract’ and ‘male breadwinner’ models of social responsibility and the growing importance of gender equality in Australian workplaces. The legal challenge this presents to the employment lawyer then is how to achieve gender equality in the workplace through traditional mechanisms of employment law or whether government intervention in the labour market is required to the achievement of gender equality in the workplace. Since this issue is quite broad, this thesis will attempt to narrow down this question by a conducting a close and detailed investigation into one particular contemporary issue in Australian employment law: paid parental leave.

The purpose of this thesis is to investigate the tensions between the ‘classical’ model of employment relations law based on ‘freedom of contract’ and ‘male breadwinner’ social roles and will investigate the historical development of these concepts in the Australian context. The historical investigation will examine if



these classical ideas and their updated versions are effective means of achieving gender equality in the Australian workplace including consideration of paid parental leave as a potential employment right for workers. Secondly, this thesis will investigate the 2010 *Paid Parental Leave Act* and relevant provisions as well as cases that have considered maternity and parental leave.

This thesis will then examine international legal frameworks for parental leave with particular attention to selected OECD European nations. European countries and their legal and policy frameworks will be considered in more detail as European countries have led the world in introducing paid and unpaid schemes of parental leave and also finding effective ways of funding such schemes. Attention will also be made to the fact that most European countries have government-funded paid parental leave systems like the 2010 Australian *Paid Parental Leave Act*. Particular attention will be given in this thesis to the parental leave framework of Sweden. Sweden is considered a world leader in being a smaller country adept in balancing a dynamic economy competing in a global marketplace with a generous social system, including fundamental gender equality across society and also providing paid parental leave and affordable childcare systems which are regarded as being among the best in the OECD.

This thesis arrives at a number of conclusions regarding the regulation of paid parental leave in the framework of Australian labour relations law. It also gives a number of recommendations for future policy and legal reform and suggestions for future research. Therefore, this research aims to make a contribution to the development of paid parental leave policy in employment law.

# CHAPTER 1 INTRODUCTION AND STATEMENT OF THE RESEARCH PROBLEM

## 1.1 Introduction

In 2010 after more than 30 years of research, lobbying and political debate Australia became the second last country in the OECD to introduce a national regulatory framework for paid parental leave.<sup>1</sup> At the time, the introduction of paid parental leave was deeply controversial although in principle the introduction of a national regulatory framework for paid parental leave had bipartisan support and mainly followed the recommendations of the 2009 Productivity Commission Inquiry into the issue.<sup>2</sup> Before 2010, Australia did not have a national regulatory system of paid parental leave as such but instead a ‘patchwork’ set of arrangements for working parents covered by different sets of instruments such as industry awards and other agreements.<sup>3</sup> This patchwork system of arrangements was seen to be inadequate, particularly given Australia was lagging well behind other OECD nations in this regard and required urgent reform to update its industrial relations system to make it more competitive in the global economy and to bring it into line with OECD and International Labour Law Standards.<sup>4</sup>

A major problem the new regulatory system of paid parental leave introduced in 2010 was supposed to address was the systemic and ongoing problems of gender

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<sup>1</sup>Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour* 184, 184-185.

<sup>2</sup>Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour* 184, 192-194. See also Australian Government Productivity Commission, ‘Paid Parental Leave: Support for Parents of Newborn Children,’ (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), XXXIX-XLV.

<sup>3</sup>By 2010, Australia was the only OECD country along with the United States to not have a national regulatory framework for paid parental leave. See Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour* 184, 185-186; Marian Baird and John Murray, ‘Collective Bargaining for Paid Parental Leave in Australia 2005-2010: A Complex Context Effect’ (2014) 25(1) *Economic and Labour Relations Review* 47, 50-51.

<sup>4</sup>Lucie Newsome, ‘Female Leadership and Welfare State Reform: The Development of Australia’s First National Paid Parental Leave Scheme’ (2017) 52(4) *Australian Journal of Political Science* 537, 541-545.

inequality in the workplace and discriminatory employment practices aimed at women because of gender, pregnancy status and family responsibility.<sup>5</sup> In the past two decades, investigations by the Australian Human Rights Commission showed workplace gender inequality was a serious problem in Australia.<sup>6</sup> Australia's new paid parental leave scheme was introduced with the hope that Australia's scheme, like paid parental leave schemes in other OECD countries, might help to address workplace gender inequality.<sup>7</sup> Reviews and commentary analysing the *Paid Parental Leave Act 2010* suggested the paid parental leave schemes of European countries, particularly the Scandinavian countries (Iceland, Sweden, Norway, Finland and Denmark) might be useful for Australian policymakers to consider as the Scandinavian nations were considered to be world leaders in having effective systems of paid parental leave.<sup>8</sup>

The purpose of this thesis is to critically analyse the policy aims and the legislative framework of Australian *Paid Parental Leave Act 2010* and to see whether this legislation has been effective in achieving its goals within the framework of Australian Industrial Relations law. This thesis will argue that the *Paid Parental Leave Act 2010* has not achieved its stated policy aims and needs further reform to achieve the goals of workplace gender equality and having a properly funded and administered system of paid parental leave that does not have unfavourable outcomes for women.

## **1.2 Statement of the Problem**

A major question of contemporary debate in Australian employment law discourse is whether employees should have the employment right of paid parental leave.<sup>9</sup> In 2010 the Rudd Labour government, following the

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<sup>5</sup>Barbara Pocock, Sara Charlesworth, Janine Chapman, 'Work-Family and Work-Life Pressures in Australia: Advancing Gender Equality in "Good Times?" (2013) 33(9-10) *International Journal of Social Policy* 594, 599-600.

<sup>6</sup> See Chapter 2 of this thesis for further details.

<sup>7</sup>John von Doussa, 'It's About Time: Key Findings from the Women, Work and Family Project' (2007) 76(1) *Family Matters* 48, 48-49. See also Chapter 2 of this thesis.

<sup>8</sup>Nabatina Datta Gupta, Nina Smith and Matte Verner, 'The Impact of Nordic Countries' Family Friendly Policies on Employment, Wages and Children' (2008) 6(1) *Review of Economics of the Household* 65, 66-72.

<sup>9</sup>Marian Baird, 'Orientations to Paid Maternity Leave: Understanding the Australian Debate' (2004) 46(3) *Journal of Industrial Relations* 259, 259-261.

recommendations of a 2009 Productivity Commission inquiry into the matter<sup>10</sup> introduced a government funded statutory paid parental leave scheme<sup>11</sup> for eligible employees that provided paid parental leave as a workplace right under the *Fair Work Act*.<sup>12</sup> Following on in 2012, the Abbott Coalition led by Tony Abbott announced a new parental leave policy in 2012,<sup>13</sup> which was intended to replace and improve upon the legislated scheme with a more generous and comprehensive paid parental leave entitlement funded by a tax on individual businesses.<sup>14</sup> However, the Coalition abandoned this proposed plan in 2015 following an election defeat in Queensland<sup>15</sup> and consequently important issues regarding the policies and legislation regarding parental leave in Australia remain unresolved.<sup>16</sup>

The research conducted in this thesis will aim to shed light on the issues by identifying and investigating the problems in the Australia context that a paid parental leave scheme is supposed to address, the legal and policy frameworks developed around a parental leave scheme in Australia and the legislation made in the Australian context.<sup>17</sup> This thesis will also investigate whether the current Australian *Paid Parental Leave Act* is structured best as a workplace right or welfare entitlement for those attached to the paid workforce, particularly for working women and reference will also be made to the question of whether eligible employees should be given parental leave by (a) incorporating the

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<sup>10</sup>Australian Government Productivity Commission, 'Paid Parental Leave: Support for Parents of Newborn Children,' (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), XXXIX-XLV.

<sup>11</sup>*Paid Parental Leave Act 2010* (Cth).

<sup>12</sup> *Ibid.*

<sup>13</sup>Parliament of Australia, *The Coalition's Policy for Paid Parental Leave*, (August 2013), Parliament of Australia, <[http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload\\_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22)>

<sup>14</sup>*Ibid.*

<sup>15</sup>James Glenday and Susan McDonald, *Tony Abbott to Dump Parental Leave Policy amid Leadership Speculation*, (2<sup>nd</sup> February 2015), ABC News Online, <<http://www.abc.net.au/news/2015-02-02/tony-abbott-to-outline-policies-at-press-club-address/6061116>>.

<sup>16</sup>Antony Forsyth, 'Industrial Legislation in Australia in 2015' (2016) 58(3) *Journal of Industrial Relations* 372, 376-378.

<sup>17</sup>Anna Chapman, 'The New National Scheme of Parental Leave Payment' (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70. See also Belinda Smith, 'Work and Family: A Gender Issue and More for Labour Lawyers' (2007) 20(1) *Australian Journal of Labour Law* 92, 92-103.

relevant rights into employer/employee contracts through direct enterprise bargaining between employers and staff, or (b) incorporating the appropriate entitlements into industrial awards through collective bargaining between employers and employee unions, or (c) by a publicly funded and government legislated scheme of paid parental leave.<sup>18</sup> This thesis will examine options (a), (b) and (c) by discussing the Australian system of paid parental leave<sup>19</sup> and also discuss the paid parental leave frameworks of selected OECD European countries with particular focus on the parental leave schemes of Germany, France, the UK, Central and Southern Europe, and the Scandinavian countries of Iceland, Denmark, Sweden, Norway, and Finland.<sup>20</sup>

### **1.3 Background Discussion and Scope of the Research**

An issue for present research in Australia is whether the operation of free market principles in the employment relations law context should connect to the provision of paid parental leave to eligible employees and whether the state should legislate to intervene in workplace relations law to provide employees with a substantive and actionable workplace right to parental leave.<sup>21</sup> The prospect of government intervention into the field of Australian industrial relations law has not been welcomed by some commentators since it involves sensitive questions touching on policy issues and also conflicts with the general government policy of labour market deregulation adopted since the early 1980s.<sup>22</sup> Some commentators have argued that ultimately a government run scheme of parental leave is just another costly form of ‘middle-class welfare’<sup>23</sup>

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<sup>18</sup>Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70.

<sup>19</sup> These countries are considered on the basis that these Nordic countries are considered world leaders in developing effective paid parental leave policies and that the Australian government looked to these nations in developing its own paid parental leave system. See Australian Government Productivity Commission, ‘Paid Parental Leave: Support for Parents of Newborn Children,’ (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), 1.1, 4.5, 5.31, 5.34-5.35, E-2 and E-3.

<sup>20</sup>See Chapters 3, 4 and 5 of this thesis.

<sup>21</sup>Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70.

<sup>22</sup>John Burgess and Glenda Strachan, ‘Will Deregulating the Labour Market in Australia Improve the Employment Conditions of Women?’ (2001) 7(2) *Feminist Economics* 53, 53-76.

<sup>23</sup>Chris Berg, *Lavish Parental Leave Has Nothing To Do with Need*, (14 May 2013), ABC News Online, <<http://www.abc.net.au/news/2013-05-14/berg-a-scandinavian-leave-scheme-for-a-liberal->

that will not provide any substantial benefits to society or the economy in the long term.<sup>24</sup>

Since the end of the 1970s successive Australian governments (and English-speaking OECD countries generally) have followed a political, social and economic framework called 'neoliberalism'.<sup>25</sup> Neoliberalism itself is a complex and contested concept<sup>26</sup> but is characterised as being associated with a bias towards free markets, economic liberalisation, deregulation of markets and cuts to government-funded programs<sup>27</sup> in order to increase the role of the private sector in the economy. In neoliberal economic analysis, a capitalist free market economy is the most efficient way to distribute scarce economic resources into productive hands to maximise social and the economic goods across all of society.<sup>28</sup>

Associated with neoliberal economic idea of free markets is an emphasis on individuals being responsible for their own welfare, particularly by bearing responsibility for their own decisions to maximise or minimise self-interest.<sup>29</sup> In neoliberal theory, the overall result of all individuals maximising their self-interest is also the maximisation of the good as a whole, primarily translated practically into economic prosperity to the highest degree possible in a free society.<sup>30</sup> The role of government in neoliberal philosophy is not to grant favours and gifts to legal persons for some general purpose but rather to facilitate individual freedom and responsibility by removing anything that unnecessarily

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[country/46880261226647906369&ei=AKTBVM7NPI\\_X8gWq8IKIBA&usg=AFQjCNGYC2DmfJDAZB7OqhRGSBixkCMhZg](https://doi.org/10.1080/1226647906369&ei=AKTBVM7NPI_X8gWq8IKIBA&usg=AFQjCNGYC2DmfJDAZB7OqhRGSBixkCMhZg).

<sup>24</sup>Ibid.

<sup>25</sup>Taitu Heron, 'Globalization, Neoliberalism and the Exercise of Human Agency' (2008), 20(1) *International Journal of Politics, Culture and Society* 85, 85-101.

<sup>26</sup>Belinda Smith, 'Work and Family: A Gender Issue and More for Labour Lawyers' (2007) 20 *Australian Journal of Labour Law* 92, 92-103.

<sup>27</sup>Ben Spies-Butcher, 'Marketisation and the Dual-Welfare State: Neoliberalism and Inequality in Australia' (2014) 25(2) *Economic and Labour Relations Review* 185, 187-197; Mathew D J Ryan, 'Austerity for Some: Tony Abbott's Economic Legacy' (2016) 35(2) *Social Alternatives* 6, 8-12.

<sup>28</sup>Alfredo Saad-Filho and Deborah Johnston, *Neoliberalism: A Critical Reader* (Pluto Press, 2005) 1-9.

<sup>29</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002) 1-2.

<sup>30</sup>Ibid 22-36.

hinders the individual's free exercise of their own self-interest.<sup>31</sup> Consequently, the government's responsibility and scope in society must to be strictly limited; according to neoliberal economist Milton Friedman the task of government in a free society is primarily to 'preserve law and order, to enforce contracts, and to foster competitive markets.'<sup>32</sup>

Neoliberal philosophy is not favourable to direct government intervention in society or social relationships.<sup>33</sup> Milton Friedman argues the role of government when making laws is to act like an umpire in a sports game: to recognise the basic social rules, to change the rules when needed, mediate different interpretations of the rules, and enforce them when necessary.<sup>34</sup> The task of the state according to neoliberal theory is therefore not to redistribute income from the wealthy to the poor or to legislate to regulate business conditions and social relationships beyond what is necessary to prevent fraud, theft and criminal activity, but rather to foster individual responsibility and freedom through the operation of the free market.<sup>35</sup> Individuals are inviolable against governmental interference when making personal decisions concerning their self-interest and any action by a government to coerce individuals to act against their own self-interest is never justified.<sup>36</sup> This is regardless whether the outcomes of personal decisions are positive or negative for the individual or society involved, with the exception of laws needed to protect basic freedoms required for people to be free actors in a free society (rights such as liberty to life, property and to engage in free transactions with other legal persons).<sup>37</sup>

Consequently, according to neoliberalism the alleviation of social and gender-based inequalities in society has to be left to individuals promoting their self-interest by making self-interested decisions that also benefit the wider community, such as private philanthropy or by negotiating better terms in their

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<sup>31</sup>Ibid 2.

<sup>32</sup>Ibid 22.

<sup>33</sup>Ibid 24-5.

<sup>34</sup>Ibid 25.

<sup>35</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002) 212.

<sup>36</sup>Robert Nozick, *Anarchy, State, Utopia* (Basic Books, 1974) 88-119, 149-231, 232-275.

<sup>37</sup>Ibid 169-170.

contractual relations with other parties, rather than government intervention that attempts to resolve failures in individual decision-making through ‘social engineering.’<sup>38</sup> Consequently the government should only act to the extent it assists the operation of the free market, which is the most effective way to eliminate poverty and inequality in a free society by allocating finite resources to the most efficient ends.<sup>39</sup>

Neoliberal economic and political theory has received criticism from some sources,<sup>40</sup> especially since the 2008 global financial crisis, which seemed to be caused by the widespread failure of neoliberal economic and political policy.<sup>41</sup> A detailed discussion of arguments for and against neoliberalism is beyond the scope of the present thesis;<sup>42</sup> however, some salient brief points about arguments against neoliberalism for the purposes of employment relations law can be made: neoliberal policy has been accused of producing negative social outcomes that include (a) fostering high levels of income inequality between individuals and nations, (b) undermining social and personal well-being, (c) impoverishing the poor while enriching the wealthy, (d) giving immense powers to private corporations at the expense of democratic actors, (e) encouraging personal and corporate greed and environmental destruction, and (f) worsening outcomes for of gender inequality.<sup>43</sup>

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<sup>38</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> anniversary ed, 2002) 212.

<sup>39</sup>Ibid 191-192.

<sup>40</sup>Henk Overbeek and Bastiaan van Apeldoorn, *Neoliberalism in Crisis* (Palgrave MacMillan, 2014) Ch 1 and Ch 2; Damien Cahill, ‘Beyond Neoliberalism? Crisis and Prospects for Progressive Alternatives’ (2011) 33(4) *New Political Science* 479-492, 480-492; Yolanda van Gellecum, Janeen Baxter and Mark Western, ‘Neoliberalism, Gender Inequality and the Australian Labour Market’ (2008) 44(1) *Journal of Sociology* 45, 45-60.

<sup>41</sup>Philip Mirowski, *Never Let a Serious Crisis Go to Waste: How Neoliberalism Survived The Financial Meltdown* (Verso Press, 2013) 1-27; Thomas Piketty, *Capital in the 21<sup>st</sup> Century* (Harvard University Press, 2014) 1-35, 199-270, 336-376; Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Alfred A Knopf, 2007) 1-40.

<sup>42</sup> See Thomas Piketty, *Capital in the 21<sup>st</sup> Century* (Harvard University Press, 2014) above, 41 for a discussion of structural defects in neoliberal economic theories.

<sup>43</sup>Alfredo Saad-Filho, and Deborah Johnston, *Neoliberalism: A Critical Reader* (2005), (Pluto Press, 2009), 1-7 and Thomas Piketty, *Capital in the 21<sup>st</sup> Century* (Harvard University Press, 2014), 1-35 and 41, above. This relates to employment relations law in the sense employment relations law is not simply about ‘black letter’ law but also very much also about social issues as well. See Marilyn Pittard and Richard Naughton, *Australian Labour Law: Text, cases and commentary* (Lexisnexis Butterworths, 5<sup>th</sup> ed, 2015).



While it is beyond the scope of this thesis to engage in a full-scale discussion of the merits of neoliberal policy,<sup>44</sup> what is of more interest to this thesis is the influence of neo-liberal policies Australia employment law and the related issue of gender equality. Neoliberal policies such as deregulated capital and labour markets, tariff reductions, the abolition of standardised awards and decentralisation of labour arbitration, wage determination and employment conditions in favour of individualised employment agreement making has profoundly impacted Australian labour relations law and policy since the early 1980s.<sup>45</sup> These changes include the adoption of enterprise bargaining in Australian employment law, the decline of unions, removal of industrial tribunals to determine employment standards, a return to the classical common law of contract model for employment obligations and a marked rise in casualization and irregular forms of ‘work.’<sup>46</sup> These changes have posed deep challenges for people in the workforce as well as for researchers, policymakers and legislators.<sup>47</sup>

With the neoliberal framework in view, government intervention in the Australian labour market since the 1980s begin to make more sense.<sup>48</sup> Both labour and liberal governments in Australia introduced neoliberal policy reforms into the Australian workplace with an increased emphasis on employees and employers engaging in direct bargaining to decide legal obligations, as opposed

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<sup>44</sup>Kean Birch and Vlad Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (Zed Books, 2013) 20-268; Ravi K Roy, Arthur Denzau and Thomas D Willett, *Neoliberalism: National and Regional Experiments with Global Ideas* (Taylor and Francis, 2006) 1-114.

<sup>45</sup>Mark Bray and Andrew Stewart, ‘What is Distinctive About the Fair Work Regime?’ (2013) 26(1) *Australian Journal of Labour Law* 20, 20-49; Rae Cooper, and Bruce Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22(3) *Australian Journal of Labour Law* 284, 284-305; Joanne Conaghan, ‘Labour Law and the New Economy Discourse’ (2003) 16(1) *Australian Journal of Labour Law* 9, 9-27.

<sup>46</sup>Alfredo Saad-Filho and Deborah Johnston, *Neoliberalism: A Critical Reader* (Pluto Press, 2009), 1-7; Joanne Conaghan, ‘Labour Law and the New Economy Discourse’ (2003) 16(1) *Australian Journal of Labour Law* 9-27, 1-19; Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment*, (Thomson Reuters, 7<sup>th</sup> ed, 2011) 1-11; Breen Creighton, and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 663-716; Joellen Riley, ‘A Fair-Deal for the Entrepreneurial Worker? Self-employment and Independent Contracting Post-Work Choices’ (2006) 19(3) *Australian Journal of Labour Law*, 246, 246-262; Joellen Riley, ‘Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16(1) *Australian Journal of Labour Law* 28, 28-48.

<sup>47</sup>Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 663-716.

<sup>48</sup>*Ibid* 663-716.

to having unions or government industrial arbitration do the same.<sup>49</sup> This policy approach accelerated with the relative decline in union activity in Australia in the period from the 1990s to the 2000s,<sup>50</sup> with changes in Australian workplace laws tending to favour employer rights over employee rights,<sup>51</sup> and also the trend of increasing numbers of Australian workers being shifted towards more ‘non-traditional’ forms of employment. These developments and their relevant details are discussed in further detail the relevant literature.<sup>52</sup>

Relating this back to the issue of parental leave as a workplace right, studies conducted of the coverage of parental leave (paid or unpaid) in employment agreements reached by enterprise bargaining across different industries shows parental leave coverage is not uniform, especially in the private sector.<sup>53</sup> This is particularly the case with employees covered by Australian Workplace Agreements (AWAs), which were a key aspect of the 2005-2006 ‘Work Choices’ legislation of the Howard coalition government that was designed to replace collectively-bargained awards with individually negotiated contracts based on the common law contract of employment.<sup>54</sup> These matters are discussed further in Chapters 2 and 3 of this thesis.

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<sup>49</sup>Harry Glasbeek, ‘Industrial Relations Reforms: Implications for Corporate Scholars and Activists’ (2010) 24(2) *Australian Journal of Corporate Law* 110, 110-147; Aaron Rathmell, ‘Collective Bargaining After Work Choices: Will Good Faith Take Us Forward With Fairness?’ (2008), 21(2) *Australian Journal of Labour Law* 164, 164-199; David Chin, ‘Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism’ (1997) 10(3) *Australian Journal of Labour Law* 257, 257-279.

<sup>50</sup>Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011), ch 1.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid* 13-19. The literature on this issue is vast. For a compendious summary see also Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70 and Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour Law Reform’ (2006) 19(2) *Australian Journal of Labour Law* 105, 105-126.

<sup>53</sup>Marian Baird and John Murray, ‘An Analysis of Collective Bargaining for Paid Parental Leave – Sector and Context Effects’, Paper presented at the 16th World Congress of the International Labour and Employment Relations Association 2012, Philadelphia, United States, 5th July 2012, 1-10. See also Len Perry, ‘Labour Market Reforms and Lockouts in New Zealand’ (2006) 32(4) *Australian Bulletin of Labour* 401, 401-420, for the analysis of labour market deregulation on worker entitlements.

<sup>54</sup>Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011), ch 1; Marian Baird, and John Murray, ‘An Analysis of Collective Bargaining for Paid Parental Leave - Sector and Context Effects’, Paper presented at the 16th World Congress of the International Labour and Employment Relations Association 2012, Philadelphia, United States, 5th July 2012), 1-10.

In light of the prior discussions in this chapter in sections (1.1-1.3), a major argument in this thesis is that the neoliberal model in itself fosters workplace gender inequality and unlawful discrimination against employees with family responsibilities, and hence this detrimental outcome has to be offset by government intervention in the labour market through suitably designed parental leave legislation making paid parental leave an employee right allied with suitable anti-discrimination legislation.<sup>55</sup> The current Australian parental leave framework will be investigated in this dissertation in this light and references will be made to the parental leave frameworks of selected OECD European countries with Sweden as an exemplary model will be made to suggest future reforms to Australian employment laws including paid parental leave legislation.<sup>56</sup>

A number of countries, particularly in Europe, model their political systems around a 'social democratic' model including the Nordic countries of Scandinavian Europe.<sup>57</sup> The Nordic countries have followed what social researchers classify as a 'mixed' social model of capitalist economies with the operation of free markets, free trade and high levels of integration into the global economy combined with relatively high rates of taxation and social welfare spending.<sup>58</sup> In the context of this thesis, the Scandinavian countries, with Sweden as an exemplary model, will be analysed in more detail because of their long history of framing and applying schemes of paid parental leave as an

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<sup>55</sup>Judy Fudge, 'Precarious Employment in Australia and Canada: The Road to Labour Law Reform' (2006) 19(2) *Australian Journal of Labour Law* 105, 105-126; Joellen Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *Australian Journal of Labour Law* 28, 28-49; Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 33-57; Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012), 1-37.

<sup>56</sup>See Chapters 5 and 6 of this thesis and also Eric S Einhorn and John Logue, 'Can Welfare States be Sustained in a Global Economy?' (2010) 125(1) *Political Science Quarterly* 1, 1-30; Alison Earle, Zitha Mokomane and Jody Heymann, 'International Perspectives on Work-Family Policies: Lessons from the World's Most Competitive Economies' (2011) 21(2) *Work and Family* 191, 192-203; Nadine Zacharias, 'Work-life Balance: 'Good Weather Policies or Agenda for Social Change?' A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-42.

<sup>57</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Denmark, Finland and Norway* (Monash University Publishing, 2014), 1-17. The Scandinavian nations are Denmark, Iceland, Finland, Norway and Sweden.

<sup>58</sup>*Ibid* 1-25.

employment right in their society and workplaces.<sup>59</sup> After an analysis of the Scandinavian nations and selected OECD European countries with Sweden as an exemplary model in Chapters 4 and 5, potential positive lessons Australia can apply to its system will be discussed in Chapter 6 of this thesis.

#### **1.4 Research Questions**

In light of the discussion of the research problem identified above, this thesis is directed towards addressing the following research questions:

1. What is the policy and regulatory framework situating paid parental leave in Australian employment law context?
2. What are the prevailing and competing economic, philosophical and political theories that underpin paid and unpaid parental leave schemes in Australian employment law?
3. What is the previous history of regulatory frameworks for maternity leave and parental leave entitlements what legal issues does this raise in an Australian employment law context?
4. How is paid parental leave regulated and administered in selected European jurisdictions and how might this inform the development of Australia's *Paid Parental Leave Act* in the near future?
5. How has paid parental leave been regulated in Sweden and how might this inform the future development of Australia's current parental leave framework?
6. How could Australia develop its parental leave scheme in the future based on lessons learned from Nordic models of parental leave laws?

#### **1.5 Research Aims**

In order to address the research questions, this research:

1. Provides an overview of economic and social policy frameworks to situate parental leave in the employment law context.

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<sup>59</sup>Ibid 1-25.

2. Analyses the historical development of maternity and paid parental leave in Australia.
3. Critically examines the development of the present legislative regulatory scheme of paid parental leave in Australia with a focus on selected legal issues including workplace gender equality, discrimination against working parents and employment protections.
4. Critically analyses the regulatory frameworks and funding mechanisms of parental leave in selected OECD European jurisdictions with a special focus on the Swedish regulatory regime.
5. Discusses the current regulatory framework for paid parental leave in Australia and how the regularly frameworks for paid parental leave law and Australian anti-discrimination laws regarding employees with family responsibilities in Australia can be further developed with reference to the Swedish regulatory model for paid parental leave and anti-discrimination laws in relation to paid parental leave.

## **1.6 Research Framework**

The topic of this thesis is located in the field of employment law and is guided by the general principles of employment law. The thesis topic will refer to both public and private law, as both of these sources of law are relevant to how paid parental leave fits within the Australian employment law framework.<sup>60</sup> These include the private law of contract, the common law of master and servant, and federal and state regulations designed to intervene and shape the nature of workplace relations according to certain government policy and economic goals.<sup>61</sup> Employment law has also evolved since the 19<sup>th</sup> century as a large and independent area of law within Australia and other English-speaking countries because of its fundamental importance to regulating one of the most socially and

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<sup>60</sup>Anna Chapman, 'The New National Scheme of Parental Leave Payment' (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70; Kathy Tannous and Meg Smith, 'Access to Full-time Employment: Does Gender Matter?' (2013) 16(2) *Australian Journal of Labour Economics* 237, 239-255; Marian Baird and John Murray, 'Collective Bargaining for Paid Parental Leave in Australia 2005-2010: A Complex Context Effect' (2014) 25(1) *Economic and Labour Relations Review* 47, 50-51.

<sup>61</sup>Marian Baird, 'Women, Work and Industrial Relations' (2011) 53(1) *Journal of Industrial Relations* 337-352; Marian Baird, 'The State, Work and Family in Australia' (2011) 22(18) *International Journal of Human Resource Management*, 3742, 3742-3754.

economically important sets of relationships in society: that between employer and employee.<sup>62</sup>

Concerning private law principles, this thesis will consider the nature of the law of contract as applicable to employment relations law. The discussion will mostly focus on the classical theory of contract law and updated versions applied to workplace agreements through government intervention in the workplace to regulate the nature and terms of employment agreements. This discussion will also consider the economic principles underlying the development of the law of contract in the employment law context, particularly those relating to the regulation of employer/employee relations in a capitalist society and the influence of neoliberal economic theories on the development of the law of employment relations in Australia from the 1970s to the present.<sup>63</sup> The impact of neoliberal economic principles on the regulation of employment agreements will be highlighted in this thesis,<sup>64</sup> as well as the impact of neoliberal principles on workplace relations laws involving female workers.<sup>65</sup>

This thesis will also discuss social policy frameworks applicable to the employment law context, particularly in the form of government intervention to

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<sup>62</sup>Michael Quinlan and Peter Sheldon, 'The Enforcement of Minimum Employment Standards In an Era of Neoliberal Globalisation' (2011) 22(2) *Economic and Labour Relations Review* 5, 12-20; Ron McCallum, 'Australian Labour Law and the Rudd Vision' (2008) 18(2) *Economic and Labour Relations Review* 23, 24-29; Gordon Anderson and Michael Quinlan, 'The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007' (2008) 95(1) *Labour History* 111, 111-129; Mark Westcott, Marian Baird and Rae Cooper, 'Re-Working Work: Dependency and Choice in the Employment Relationship' (2006) 17(1) *Labour and Industry* 5, 6-16.

<sup>63</sup>Simon Fry and Bernard Mees, 'Two Discursive Frameworks Concerning Ideology in Australian Industrial Relations' (2017) 28(4) *Economic and Labour Relations Review* 483, 484-496; Joe Collins and Drew Cottle, 'Labor NeoLiberals or Pragmatic Neo-Laborists? The Hawke and Keating Labor Governments in Office, 1883-1996' (2010) 98(1) *Labour History* 25, 25-37; Kerrie Saville, Bruce Hearn-Mackinnon and Julian Vieceli, 'Did Work Choices Deliver? Evidence from Survey Data' (2009) 20(2) *Labour and Industry* 207, 209-222; Christopher Lloyd, 'Australian Capitalism since 1992: A New Regime of Accumulation?' (2008) 61(1) *Journal of Political Economy* 30, 32-52.

<sup>64</sup>Mark Western et al, 'Neoliberalism, Inequality and Politics: The Changing Face of Australia' (2007) 42(3) *Australian Journal of Social Issues* 401, 401-418.

<sup>65</sup>Yolanda van Gellecum, Janeen Baxter, Mark Western, 'Neoliberalism, Gender Inequality and the Australian Labour Market' (2008) 44(1) *Journal of Sociology* 45, 45-63; Tim Battin, 'Labouring under Neoliberalism: The Australian Government's Ideological Constraint, 2007-2013' (2017) 28(1) *Economic and Labour Relations Review* 146, 146-163; Janis Bailey, Fiona MacDonald and Gillian Whitehouse, 'No Leg to Stand On: The Moral Economy of the Australian Industrial Relations Changes' (2011) 33(3) *Economic and Industrial Democracy* 441, 441-461.

prevent discrimination in the workplace on the basis of gender, pregnancy status and family responsibility. As governments at both the state and federal level have intervened using anti-discrimination laws to prevent employers from discriminating against existing or potential employees on the basis of gender, pregnancy status and family responsibility, an important part of the discussion of this thesis will involve a consideration of these laws. Further, this thesis will need to consider the historical development of the current Australian parental leave regulatory framework, how this was framework was conceived and legislated, and analyse subsequent developments in the framework to improve its efficiency and cost-effectiveness.<sup>66</sup> This will require consideration and review of the research methodology framework in the thesis.

### **1.7 Research Methodology**

This research focuses on the nature of paid parental leave in Australia and how Australia's regulatory framework for paid parental leave should be further developed in Australia. This research is literature based,<sup>67</sup> and will have a detailed and systematic analysis of primary and secondary legal sources including legislation, case law, policy analysis documents, and other sources.<sup>68</sup> The scope of this research will encompass consideration of regulatory frameworks relating to parental leave in other legal jurisdictions, namely selected European OECD countries, including a special focus on Sweden as an exemplary model, and how these nations regulate and fund their paid parental leave schemes. This research specifically examines the regulatory system and funding arrangement for each selected European OECD country to see how maternity leave and paid parental leave entitlements are administered and funded in these nations with reference to their unique economic, social and historical circumstances, with particular attention given to the regulatory regime of parental leave in Sweden. The aim of including these regulatory frameworks for paid parental leave is to acquire deeper insights into how paid parental leave can be efficiently introduced and regulated in such a manner as to produce optimal

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<sup>66</sup>See Chapter 3 of this thesis.

<sup>67</sup>Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010), 5-35.

<sup>68</sup>Ibid 51-75.

outcomes for employers and employees and also to the wider society as a whole. The consideration of these frameworks is also aimed at discerning what lessons can be learned from the European context (with particular reference to Sweden) and used to improve and further develop Australia's parental leave framework and assist Australian policy-makers deal with problems such as discrimination against women and working parents on the basis of gender, pregnancy and family responsibility.<sup>69</sup>

### **1.7.1 The Use of Internet-Based Materials**

In addition to the use of primary and secondary legal materials and peer-reviewed articles, this thesis has made extensive use of internet-based materials. The researcher has drawn on additional material beyond primary and secondary legal materials and peer-reviewed articles particularly as employment law is not just simply another area of 'black letter law' but a field of law that has profound connections to wider and very complex social, economic and political forces which have deep implications for any society and also how its social structures are formed and regulated.<sup>70</sup> The introduction of workplace regime change in Australia has always been an intensively contested issue in the wider media, public discussion and also political life and the introduction of paid parental leave and subsequent attempts to change the scheme have been no different.<sup>71</sup> Given the nature of the complex social, economic and political factors, the author has also made use of materials available on the Internet from different sources including newspaper articles, opinion sections in online publications and policy position statements of interest groups and political parties relating to paid parental leave.<sup>72</sup> The author however has taken care to use these resources in a

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<sup>69</sup>Ibid 459-483.

<sup>70</sup>Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010), 35-37, 71-77. The research methodology used in this thesis may be summarised as doctrinal in nature in the sense described in Hutchinson at 37 as 'selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation'.

<sup>71</sup>Barbara Pocock, Sarah Charlesworth and Janine Chapman, 'Work-family and Work-life Pressures in Australia: Advancing Gender Equality in Good Times?' (2013) 33(9/10) *International Journal of Sociology and Social Policy* 594, 596-600.

<sup>72</sup>Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010), 80-95 and the researcher has also used the Boolean methodology of electronic searches as described by Hutchinson, 90-91.



critical fashion and to give appropriate weight to the sources considered in terms of relevance, date and credibility.<sup>73</sup>

### **1.7.2 The Use of Foreign Legal Materials in English Translation**

Because the nature of the research taken in this thesis requires careful discussion of the legal systems of a number of non-English speaking countries, there have been some limitations in terms of access to materials not written in English. This has particularly been the case with non-English speaking European countries,<sup>74</sup> where primary legal materials (legislation and case law) are only available to the reader in the official language of the nation.<sup>75</sup> Where possible, the author has relied on materials available in reliable and official English translation and this has been referenced in the relevant footnotes.<sup>76</sup>

### **1.8 Thesis Structure**

Chapter 1 of the thesis presents a brief statement of the problem of workplace gender inequality in Australia identified by the research of bodies such as the AHRC and how paid parental leave was introduced in Australia through the legislation of the *Paid Parental Leave Act 2010*, with a brief background discussion on how this act was designed to remedy workplace gender equality and also achieve a more equal balance of parental leave time sharing between male and female working parents. Chapter 1 also sets out the rationale for the research, research questions to be considered and the aims for this research to address the current Australian regulatory framework for paid parental leave and potential future developments.

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<sup>73</sup>Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3<sup>rd</sup> ed, 2010), 40-43, 459-460.

<sup>74</sup>Where possible, reference to authoritative and reliable English translations of foreign legal materials will be provided. When this is not possible, it will be noted in the appropriate footnotes for each section of the thesis.

<sup>75</sup>This is mostly the case with European non-English speaking countries considered in Chapters 4 and 5 of this thesis.

<sup>76</sup>Where possible, the author has used primary materials published on official government websites or international organisations such as the International Labour Organisation where available in English translation. Links to these resources will be provided in the footnotes when appropriate.

Chapter 2 of the thesis will consider the economic and social policy frameworks behind the introduction of paid parental leave in Australia. It provides a detailed discussion of background issues to paid parental leave including detailed research into the problem of gender inequality in the workplace by academic research, human rights and advocacy organisations and government inquiries and how these have impacted the development of Australian policymaking on the issue. Further, this chapter provides an overview of the arguments raised for and against the introduction of a government-funded and administered system of paid parental leave in the Australian context and how paid parental leave should be defined in Australian law.

Chapter 3 examines the legal status and regulation of maternity and parental leave in Australia and the legal issues it has given rise to in Australian industrial relations law. The legal issues around maternity and parental leave discussed in this chapter include discussions around the legal nature of maternity and paid parental leave in Australian industrial arbitration cases and later in the legislation of a government-funded and administered system of paid parental leave in Australia, including the 2010 *Paid Parental Leave Act*. This chapter will highlight how the introduction of paid parental leave has raised particular issues and how these issues affect business, employers and employees, women and the Australian government and recent policy developments in this area.

Chapter 4 examines the paid parental leave systems of selected European OECD countries, particularly focused on jurisdictions in Western Continental Europe. This discussion includes an analysis of international legal standards of labour law relating to paid parental leave and how these have been incorporated into leave systems in these jurisdictions. These jurisdictions are selected for discussion in Chapter 4 because of their introduction and administration of paid parental leave schemes in recent times contemporaneous with Australia<sup>77</sup> and whether these parental leave laws are effective in protecting employees with family responsibilities from workplace gender inequality and discrimination on the basis of family responsibility and meeting the need for employees in certain

classes to be protected from employment discrimination on the basis of parental responsibility, as discussed in Chapters 2 and 3 of the thesis. Chapter 4 will also consider what positive lessons can be learned by Australia from the systems of these nations.

Chapter 5 discusses the paid parental leave system of one Nordic OECD country, Sweden. The focus of this chapter will be a detailed discussion of the Swedish regulatory framework around paid parental leave and a consideration as to how successful the Swedish leave framework has actually been in achieving its goal of gender equality and non-discrimination against employees with family responsibilities. This chapter will also contain a detailed analysis of the historical development of Sweden's parental leave framework from the early 20<sup>th</sup> century to the 21<sup>st</sup> century and particular legal and administrative challenges it has faced. Sweden is chosen for detailed analysis because its paid parental leave regulatory framework has been seen to be a highly successful example of how such a scheme should be structured to address the problems mentioned in Chapters 2 and 3 of this thesis around gender-based discrimination and discrimination based on pregnancy and parental responsibility. The Swedish regulatory framework will be discussed in relation to Australia's present system of paid parental leave and anti-discrimination laws and what lessons positive lessons Australia can learn or adopt from the Swedish regulatory framework for parental leave will be briefly discussed.

Chapter 6 provides a summary of key thesis findings and will make recommendations to amend the *Paid Parental Leave Act 2010* to better address workplace gender inequality and achieve a fairer balance of work and family responsibility in Australia, particularly by equalising parental leave sharing between men and women. Chapter 6 will also discuss what Australia can do in the areas of research and government policy to address these problems better in the future.

## **1.9 Conclusion**

The introduction of a government administered and regulated paid parental leave regulatory framework in 2010 in Australia was and continues to remain

controversial.<sup>78</sup> There is still considerable debate among stakeholders as to whether Australia's current regulatory framework around parental leave is adequate to achieve its goals, including assisting working parents balance family responsibility with employment obligations and protecting working parents (particularly women) from discrimination on the basis of gender, pregnancy and parental responsibility in the workplace.<sup>79</sup> The Australian paid parental leave framework appears to have attractive features including making paid parental leave available for the first time as a general entitlement for parents in continuous employment, high-levels of take up by parents (including women) and specific legislative goals in the current *Paid Parental Leave Act* related to gender equality and workplace discrimination.<sup>80</sup>

However, the regulatory system of paid parental leave in Australia raises a number of legal issues and challenges. Paid parental leave in principle has come under strong challenge and resistance, particularly from some employers and figures in Australian politics who oppose giving employees further rights or increasing welfare spending and government regulation of workplace relations which should be left more to the prudential judgments of business managers.<sup>81</sup> The present system of paid parental leave has also been criticised as having several major flaws, including not furthering gender equality enough and not doing enough to protecting working parents from workplace discrimination.<sup>82</sup> Therefore, as will be argued in Chapter 6 of the thesis, the current Australian regulatory system of paid parental leave needs further reform through carefully

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<sup>78</sup>Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198; Marian Baird and Sue Williamson, 'Women, Work and Industrial Relations 2010' (2011) 53(3) *Journal of Industrial Relations* 337, 337-352.

<sup>79</sup>Claire Mariskind, 'Good Mothers and Responsible citizens: Analysis of Public Support for the Extension of Paid Parental Leave' (2017) 61(1) *Women's Studies International Forum* 14, 14-19; Irina Hondralis, 'Does Maternity Leave Pay Off? Evidence from a Recent Reform in Australia' (2017) 24(1) *International Studies in Gender, State and Society*, 29, 29-54; Sarah Kaine, 'Women, Work and Industrial Relations in Australia in 2016' 59(3) *Journal of Industrial Relations* 271, 274-277.

<sup>80</sup>See above, 78.

<sup>81</sup>Sarah Kaine, 'Women, Work and Industrial Relations in Australia in 2016' (2017) 59(3) *Journal of Industrial Relations* 271, 274-277; Sarah Kaine, 'Women, Work and Industrial Relations in Australia in 2015' (2016) 58(3) *Journal of Industrial Relations* 324, 326-331.

<sup>82</sup>Marian Baird and Margaret O'Brien, 'Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes' (2015) 18(2) *Community, Work and Family* 198, 200-214.

considered laws and policies that will help create fairer workplaces for women and protect working parents from employer misconduct. By learning from countries with more experience in developing and administering regulatory systems of paid parental leave, such as the Nordic nations and Sweden, a better-designed paid parental leave and anti-discrimination legal and policy framework set in place in Australian employment relations law and policy can help to minimise the risks of employers misusing their superior power in the employment relationship by discriminating against vulnerable working employees and embrace the need for reform to bring about more gender equal and diverse workplaces.

In light of the research problem stated in 1.3, this chapter has set out the research questions and aims to address the question of how Australia should design its regulatory scheme of paid parental leave to achieve optimal outcomes and how Australia might further develop its scheme in the future to better achieve its aims. It further addressed the statement of the problem and background to the problem to consider the legal challenges paid parental leave faces and the implications for employers, employees and government. Chapter 2 of this thesis will provide overview of economic and social policy issues concerning paid parental leave in Australia and arguments about how a regulatory system of paid parental leave should be designed and implemented in Australia with reference to HREOC/AHRC and Productivity Commission Inquiries.<sup>83</sup>

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<sup>83</sup>See Chapter 2 of this thesis.

## **CHAPTER 2 POLICY FRAMEWORKS AROUND PARENTAL LEAVE IN AUSTRALIA**

### **2.1 Introduction**

Chapter 2 of this thesis sets out the framework for discussing the problem of gender inequality in the Australian workplace context with references to investigations into the background factors related to the underlying issues involving gender inequality in Australia and the related issue of gender-based discrimination in Australia. Firstly, in Chapter 2 of this thesis the problem of gender inequality will be examined within the context of the Australian workplace and also the underlying forces that act as incentives for employers to choose to discriminate against employees with family responsibilities will be examined. Where appropriate economic, social, and policy framework backgrounds will be produced in more detail to contextualise the analysis being made in this chapter of the Australian context with reference to relevant Australian and overseas research, focused primarily on nations within the OECD. The first stage of this analysis will be a brief review of relevant academic literature including peer-reviewed journal articles and also other reputable sources as outlined in Chapter 1, sections 1.6 and 1.7. The second stage of analysis will be conducted by reviewing relevant academic literature and reports prepared in Australia by reputable government consultative bodies on gender equality and paid parental leave frameworks such as the Australian Human Rights Commission and the Productivity Commission.

In this chapter, special reference will be made to Australian and international policy and legal research into the issue of gender discrimination with particular focus on reports prepared into workplace discrimination by the Human Rights and Equal Opportunity Commission and later the Australian Human Rights Commission. The AHRC is a consultative body tasked by a government mandate to conduct policy research with recommendations for legislative reform

in human rights law, including issues relating to gender equality.<sup>1</sup> The AHRC has conducted a number of inquiries specifically designed to research the issue of workplace gender discrimination using the most contemporary and effective methods of social research and policy analysis tools.<sup>2</sup> Therefore after academic literature on workplace gender inequality and its driving factors is discussed in Chapter 2 to understand the impacts gender inequality has on workplace relations law, relevant HREOC and AHRC reports and their recommendations for the design of an Australian paid parental leave regulatory framework will therefore be discussed in Chapter 2 of this thesis. A selection of the more recent and relevant HREOC/AHRC reports will be outlined and elaborated upon for reasons of brevity and more thorough discussions of relevant sections will be referenced in the footnotes.

The third phase of analysis in this chapter is the 2009 Final Report prepared by the Productivity Commission into paid parental leave.<sup>3</sup> This document is of critical importance as the Rudd/Gillard Labour government of the time specially tasked the Productivity Commission to research and prepare a comprehensive review of the issue of paid parental leave in Australia as well as preparing a detailed submission for the government on the best scheme design for Australia.<sup>4</sup> This document is fundamental to the development and design of the later legislated *Paid Parental Leave Act*, which forms the current basis of Australia's parental leave regulatory framework. The analysis of this document therefore gives context to the issue of gender inequality and what paid parental leave should look like in the Australian context.<sup>5</sup> This discussion will be then linked to the discussion in Chapter 3 in the thesis of the *Paid Parental Leave Act 2010* and the analysis and discussion that will take place in Chapters 4 and 5 which brings the paid parental leave frameworks of international jurisdictions to bear

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<sup>1</sup>See for example and Dominique Allen, 'Supporting Working Parents: Findings from the AHRC's National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in the Workplace' (2014) 27(3) *Australian Journal of Labour Law* 281, 281-292.

<sup>2</sup>See following discussion in sections 2.7 and 2.8 of this Chapter.

<sup>3</sup>See sections 2.9 and 2.10 of this Chapter.

<sup>4</sup>See section 2.10 of this Chapter.

<sup>5</sup>Anna Chapman, 'The New National Scheme of Parental Leave Payment' (2011) 24(1) *Australian Journal of Labour Law* 60, 60-65.

when considering the present design of Australia's regulatory paid parental leave framework.<sup>6</sup>

## **2.2 Economic Policy Frameworks: The Costs of Gender Inequality in the Workplace**

Statistical information from the Australian Bureau of Statistics shows Australian women constitute an integral part of the Australian workforce.<sup>7</sup> According to ABS statistics for 2009-2010, approximately 65% of adult women participated in the Australian workforce at this time.<sup>8</sup> ABS statistics also show female participation in the Australian workforce has been increasing steadily over time and women are increasingly employed in skilled occupations including health, science, engineering, law, medicine, and higher education.<sup>9</sup> Australian men continue to be engaged primarily in mining, construction, manufacturing and industrial sectors, though men are also well-represented across a wide range of service industries.<sup>10</sup> Australian women are now also graduating from universities in undergraduate, postgraduate and professional degrees at a higher rate than men (particularly in skilled service-based industries including education, medicine, science, engineering, health and law), a trend that is occurring worldwide and in the OECD.<sup>11</sup>

It has been noted by researchers<sup>12</sup> that women now constitute a critical part of the Australian workforce regarding the numbers of women working, the economic value of their work and concerning the qualities, skill and experience they bring to the Australian economy.<sup>13</sup> However, statistical information and

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<sup>6</sup>See Section 2.11.

<sup>7</sup>Australian Bureau of Statistics *Gender Indicators Australia 2012*, (7<sup>th</sup> February 2012), ABS Website  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/4125.0~Jan+2012~Main+Features~Labour+force~1110>>

<sup>8</sup>Ibid.

<sup>9</sup> Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>Economist, *Degrees of Equality*, (13<sup>th</sup> September 2013), The Economist Website  
<<http://www.economist.com/blogs/dailychart/2011/09/female-graduation-rates>>

<sup>12</sup>Marian Baird, 'The State, Work and Family in Australia' (2011) 22(18) *International Journal of Human Resource Management* 3742, 3742-3754; Marian Baird, 'Parental Leave in Australia: The Role of the Industrial Relations System' (2005) 23(1) *Law in Context* 45, 45-64.

<sup>13</sup>Workplace Gender Equality Agency, *Untapped Opportunity: The Role of Women in Unlocking Australia's Productivity Potential*, (July 2013), Australian Government WGEA website,



social research also show women tend to be disadvantaged in economic and social terms relative to their male colleagues in various ways.<sup>14</sup>

Studies conducted by researchers<sup>15</sup> have consistently shown Australian women are paid less than male colleagues for the same job and retire with lower levels of superannuation savings than their male counterparts.<sup>16</sup> Women are more frequently working in part-time, casual or insecure jobs with lower rates of pay and long-term job security than men, have lower workforce participation rates when compared to men, and women are far more likely than men to face workplace discrimination, particularly in recruitment, promotion and retention practices at workplaces.<sup>17</sup> The overall research indicates the general result of unfair workplace practices on women is a substantial level of economic inequality between Australian men and women in the workforce with considerable detrimental economic costs to Australian society.<sup>18</sup>

Therefore, one of the central economic questions involved in the paid parental leave debate is the problem of pervasive gender inequality between men and women in the workplace, particularly the disparities of income levels (take-home pay) as well as superannuation earnings and what policies can be made to deal

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<<https://www.wgea.gov.au/sites/default/files/EY-%202013%20-%20Untapped-opportunity-The-role-of-women-in-unlocking-Australias-productivity-potential.pdf>>

<sup>14</sup>Baird, Marian, Rae Cooper, Damian Oliver, 'Down and Out with Work Choices: The Impact of Work Choices on the Work and Lives of Women in Low Paid Employment' (A Report to the Office of Industrial Relations, University of Sydney Faculty of Economics and Business, June 2007).

<sup>15</sup>Barbara Pocock and Alexander Michael, 'The Price of Feminised Jobs: New Evidence on the Gender Pay Gap in Australia' (1999) 10(2) *Labour and Industry* 75, 75-99; Damian Grimshaw, Gillian Whitehouse, Di Zetlin, 'Changing Pay Systems, Occupational Concentration and the Gender Pay Gap: Evidence from Australia and the UK' (2001) 32(3) *Industrial Relations Journal* 209, 209-229; Therese Jefferson and Alison Preston, 'Australia's other Two-speed Economy: Gender, Employment and Earnings in the Slow Lane' (2010) 36(3) *Australian Bulletin of Labour* 327, 327-334.

<sup>16</sup>Ian Caddy, 'Remuneration and Gender in Australia: Background and Analysis' (2013) 19(2) *International Employment Relations Review* 38, 38-59; Philip Taylor, Catherine Earl and Christopher McLoughlin, 'Contractual Arrangements and Retirement Intentions of Women in Australia' (2016) 19(3) *Australian Journal of Labour Economics* 175, 175-195; David Johnston and Wang-Sheng Lee, 'Climbing the Job Ladder: New Evidence of Gender Inequality' (2012) 51(1) *Industrial Relations* 129, 129-151.

<sup>17</sup>Workplace Gender Equality Agency, *Gender Workplace Statistics at a Glance*, (July 2013), Australian Government WGEA website, <[https://www.wgea.gov.au/sites/default/files/2013-07-25%20-%20Stats%20at%20a%20Glance\\_FINAL.pdf](https://www.wgea.gov.au/sites/default/files/2013-07-25%20-%20Stats%20at%20a%20Glance_FINAL.pdf)>

<sup>18</sup>Sara Charlesworth, 'Striking the Balance or Tipping the Scales: The HREOC Women, Men, Work and Family Discussion Paper' (2005) 19 *Australian Journal of Labour Law* 313, 313-324.

with it.<sup>19</sup> While the full extent of gender inequality in Australian society is a persistent and significant problem beyond the scope of this thesis,<sup>20</sup> particular aspects of gender inequality and discrimination against women or people with family responsibilities in the workplace manifest themselves in ways that are dysfunctional and detrimental, such as significant gaps between the take-home wages, hourly pay rates, and superannuation earnings of women and men. Also related to this are subtle forms of discrimination against female and other employees on the basis of pregnancy, maternity and family responsibility including dismissal from employment, forced redundancies, demotions, workplace bullying and harassment, and lack of opportunities for promotions to senior positions and career development which have destructive outcomes on the economic, social and personal well-being of workers subjected to these kinds of behaviours by employers.<sup>21</sup>

Despite significant changes to Australian labour relations law and sex discrimination law in the last 30 years designed to enact fundamental employment rights to protect working parents (especially women) from unlawful workplace practices, research shows that Australian women and workers with family responsibilities still feel under pressure to conform to relatively

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<sup>19</sup>Belinda Smith, 'Work and Family: A Gender Issue and More for More Labour Lawyers' (2007) 20 *Journal of Australian Labour Law* 92, 92 – 104; Sara Charlesworth., 'Striking the Balance or Tipping the Scales: The HREOC Women, Men, and Family Working Paper' (2005) 18 *Australian Journal of Labour Law* 313, 313-324; Christopher Ruhm, 'Parental Leave and Child Health' (2000) 19(6) *Journal of Health Economics* 931, 931-960.

<sup>20</sup>Belinda Smith, 'From Wardley to Purvis: How far has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* 3, 3-24; Yolanda Van Gellecem, et al, 'Neoliberalism, Gender Inequality and the Australian Labour Market' (2008) 44(1) *Journal of Sociology* 45, 45-63; Tanya Carney, 'The Employment Disadvantage of Mothers: Evidence for Systematic Discrimination' (2009) 51(1) *Journal of Labour Relations* 113, 113-30.

<sup>21</sup>Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Report,' (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 1-26; Tanya Carney, 'The Employment Disadvantage of Mothers: Evidence for Systematic Discrimination' (2009) 51(1) *Journal of Labour Relations* 113, 113-30; Lawson Savery and A C Gledhill, 'Sexual Harassment of Women In Industry and Commerce' (1988) 17(6) *Personnel Review*; 34, 34-37; Louise Fitzgerald, 'Sexual Harassment: Violence Against Women in the Workplace' (1993) 48(10) *American Psychologist* 1070, 1070-1075.

conservative and patriarchal social ideals in the workplace.<sup>22</sup> These pressures involve economic forces involving the concept of the 'ideal' employee who puts the employer's interest first before all else,<sup>23</sup> along with the traditional social expectations that women will undertake the bulk of unpaid caring responsibilities in the domestic sphere.<sup>24</sup>

Research has shown that compared to OECD average,<sup>25</sup> Australian women still face remarkably high levels of sexism in the workplace, often manifesting itself in extreme forms of bullying and sexual harassment and also in less obvious ways.<sup>26</sup> Research also shows gender inequality is not merely an Australian problem but is global in nature and extent.<sup>27</sup> For example, an 2012 OECD report<sup>28</sup> examining the global economic and social consequences of gender inequality,<sup>29</sup> a comparative economic analysis indicated gender bias relating to

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<sup>22</sup>William E Snizek and Cecily C Neil, 'Job Characteristics, Gender Stereotypes and Perceived Gender Discrimination in the Workplace' (1992) 13(3) *Organization Studies* 403, 403-427; Norman T Feather and Robert J Boeckmann, 'Beliefs about Gender Discrimination in the Workplace in the Context of Affirmative Action: Effects of Gender and Ambivalent Attitudes in an Australian Sample' (2007) 57(1) *Sex Roles* 31, 31-42; Janeen Baxter, 'Barriers to Equality: Men's and Women's Attitudes to Workplace Entitlements in Australia' (2000) 36(1) *Journal of Sociology* 12, 12-29.

<sup>23</sup>Annelies E.M. Van Vienen and Tienke M. Willemsen 'The Employment Interview: The Role of Sex Stereotypes in the Evaluation of Male and Female Job Applicants in the Netherlands' (1992) 22(6) *Journal of Applied Social Psychology* 471, 471-491; Janeen Baxter and Belinda Howett, 'Negotiating Domestic Labour: Women's Earnings and Housework Time in Australia' (2016) 19(1) *Feminist Economics* 29, 29-53; Janeen Baxter, 'To Marry or Not to Marry: Marital Status and the Household Division of Labour' (2005) 26(3) *Journal of Family Issues* 300, 300-321.

<sup>24</sup>Peter Walters, and Gillian Whitehouse, (2014), 'Mother's Perceptions of Support in the Workplace – A Sense of Entitlement or Resignation?' (2014) 51(3) *Journal of Sociology* 769, 769-782.

<sup>25</sup>Joshua Chang et al, 'Gender Gaps in Australian Workplaces: Are Policy Responses Working?' (2014) 33(8) *Equality, Diversity and Inclusion: An International Journal*, 764, 764-775; Sara Charlesworth, Paula McDonald, Cerise Somali, 'Naming and Claiming Workplace Sexual Harassment in Australia' (2011) 46(2) *Social Issues* 141, 141-161.

<sup>26</sup>Robert Broeckman, and Norman Feather, 'Gender, Discrimination Beliefs, Group-Based Guilt and Responses to Affirmative Action for Australian Women' (2007) 31(3) *Psychology of Women Quarterly* 290, 290-304; Glenda Strachan et al., 'Equal Employment Opportunity Legislation and Policies: the Australian Experience' (2007) 26(6) *Equal Opportunities International* 525, 525-540.

<sup>27</sup>Shawn F. Dorius, and Glenn Firebough, 'Trends in Global Gender Inequality' (2010) 88(5) *Social Forces* 1941, 1941-1968; Christine Bose, 'Patterns of Global Gender Inequalities and Regional Gender Regimes' (2015) 29(6) *Gender and Society* 767, 767-791; Mary-Beth Mills, 'Gender and Inequality in the Global Labour Force' (2003) 321(1) *Annual Review of Anthropology* 41, 41-62.

<sup>28</sup>OECD, (2012), *Closing the Gender Gap: Act Now*, (2012) <[http://www.keepeek.com/Digital-Asset-Management/oced/social-issues-migration-health/close-the-gender-gap-now\\_9789264179370-en#page1](http://www.keepeek.com/Digital-Asset-Management/oced/social-issues-migration-health/close-the-gender-gap-now_9789264179370-en#page1)>, 1-3.

<sup>29</sup>Ibid 1-3.

work and employment is a massive global problem, with significant adverse consequences for the GDP of both the world economy and also for national economies, which would be boosted greatly if real workplace gender equality were a reality.<sup>30</sup> One modelling scenario examined in the report showed what would happen to the OECD nations studied if gender gaps in labour force participation between men and women were reduced by 50%, 75% and 100%.<sup>31</sup>

The economic modelling in the 2012 OECD report cited showed:<sup>32</sup>

- a) Australia's economy would gain a 5.3% increase in GDP by 2030 if the gender gap narrowed by 50%;
- b) Australia's GDP growth would be 7.9% with a gap reduction of 75% and 10.6% if the reduction were 100%;
- c) Overall the GDP of the OECD nations would increase by between 9% and 12% with reductions in gender inequality by 75% to 100% respectively; and
- d) Even relatively equal nations such as the Nordic countries would achieve considerable increases in their GDP if reductions in inequality occurred.

A particular issue of concern raised by an OECD study on gender pay gaps worldwide is that women work in part-time employment in large numbers, often in insecure and underpaying jobs.<sup>33</sup> The OECD 2012 study shows that women who work part-time face a significant gap in earnings compared to men,<sup>34</sup> which corroborating Australian research<sup>35</sup> has shown is related to differential social responsibilities men and women have in reproductive roles related to childbirth

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<sup>30</sup>Ibid 28-30.

<sup>31</sup>Ibid 58.

<sup>32</sup>Ibid 58.

<sup>33</sup>OECD, (2012), *Closing the Gender Gap: Act Now*, (2012) <[http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/close-the-gender-gap-now\\_9789264179370-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/close-the-gender-gap-now_9789264179370-en#page1)>, 160.

<sup>34</sup> Ibid 166. The gap is estimated at 16% averaged across the entire OECD.

<sup>35</sup> Barbara Pocock and Michael Alexander, 'The Price of Feminised Jobs: New Evidence on the Gender Pay Gap in Australia' (1999) 10(2) *Labour and Industry* 75, 75-100; Ian Watson, 'Decomposing the Gender Pay Gap in the Australian Managerial Labour Market' (2010) 13(1) *Australian Journal of Labour Economics* 49, 49-79; Patricia Todd and Joan Eveline, 'The Gender Pay Gap in Western Australia: Gross Inequity, Women Counting for Nothing?' (2007) 18(2) *Labour and Industry* 105, 105-120.

and child-rearing.<sup>36</sup> This gender bias leads to a significant ‘caring’ penalty gap in wages and lifetime earnings for women which can be made worse by part-time employment arrangements women arrange post-partum.<sup>37</sup> Research also shows that part-time female workers with children can be worse off in terms of work and family outcomes and economic well-being, even if they work the same hours as men, have the same qualifications, and also have the added burden of being expected to caring for disabled family members or elderly relatives and parents in addition to children.<sup>38</sup> Research into the lives of working women in Australia have shown similar outcomes, especially for women employed in insecure forms of work based on casual, temporary or fixed-term contracts or self-employment.<sup>39</sup> Social research data collected in Australia also indicated women with family responsibilities were concentrated in parts of the Australian labour market involving less-skilled forms of work, with poor conditions, higher levels of discrimination, and reduced employment security after the introduction of ‘Work Choices’ legislation in the late 1990s.<sup>40</sup>

### **2.3 Structures of Workplace Gender Inequality in Australia**

The gender inequalities between men and women in the Australian labour market have several root structural causes.<sup>41</sup> Firstly, evidence from research<sup>42</sup> indicates

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<sup>36</sup>OECD, (2012), *Closing the Gender Gap: Act Now*, (2012) <[http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/close-the-gender-gap-now\\_9789264179370-en#page1](http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/close-the-gender-gap-now_9789264179370-en#page1),> 166-67. See also references in 35, above.

<sup>37</sup>Ibid 167.

<sup>38</sup>Ibid 167-8.

<sup>39</sup>Janis Bailey et al, ‘No Leg to Stand On: The Moral Economy of Australian Industrial Relations Changes’ (2011) 33(3) *Economic and Industrial Democracy* 441, 441-461; Whitehouse, Gillian et al, ‘Women and Work Choices: Impacts on the Low Pay Sector’ (Centre for Work/Life Report, Hawke Institute, University of South Australia, August 2007), 1-32.

<sup>40</sup>Ibid 1-32.

<sup>41</sup>Janeen Baxter, and Yolanda Van Gellecum, ‘Neoliberalism, Gender Inequality and the Australian Labour Market’ (2008) 44(1) *Journal of Sociology* 45, 45-63; Raewyn Connell, ‘A Really Good Husband: Work-life Balance, Gender Equity and Social Change’ (2005) 40(3) *Australian Journal of Social Issues* 363, 363-385; Marcel van Egmond et al, ‘A Stalled Revolution: Gender Role Attitudes in Australia 1986-2005’ (2010) 27(3) *Journal of Population Research* 147, 147-68.

<sup>42</sup>Bradom Ellem, ‘The Making of Industrial Relations Policy: Where are We Now and How Did We Get Here?’ (2010) 21(1) *Labour and Industry* 353, 353-368; Michael Quinlan and Peter Sheldon, ‘The Enforcement of Minimum Labour Standards in an Era of Neoliberal Globalisation: An Overview’ (2011) 22(2) *Economic and Labour Relations Review* 5, 5-32; Amanda Keddie, ‘Neoliberalism and The New Configurations of Global Space: Possibilities, Tensions and Problematics for Gender Justice’ (2010) 19(2) *Journal of Gender Studies* 139, 139-152.

that neoliberal inspired reforms to workplace laws and in the Australian labour market have not been good for women.<sup>43</sup> Employment academics note that despite increasing levels of female workplace participation, women who work have carried the heaviest burdens from rapid changes in workplace relations laws arising from relentless pursuit by governments and businesses of neoliberal economic policies.<sup>44</sup> These relate to economic pressures forcing women to work in more insecure forms of employment (often casual or part-time in nature) with reduced job security, unpredictable shifts, fewer entitlements and minimal coverage of workplace rights under the industrial law.<sup>45</sup> Studies also show women working in insecure forms of work also often face persistent gender-related burdens regarding care obligations and lost income and opportunities if they choose to have children or take on caring responsibilities.<sup>46</sup>

These pressures due to neoliberal reform programs<sup>47</sup> in the workplace are well supported by evidence gained from research into Australian women's participation in the workforce.<sup>48</sup> Firstly, a range of studies indicates there is a substantial gap in full-time average weekly earnings that exists between women and men in Australia.<sup>49</sup> For example, research by the ABS in 2014 indicated the wage gap between working men and women in Australia is 17% and has varied

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<sup>43</sup>William Creighton and Andrew Stewart, (2010), *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 14.

<sup>44</sup>Marian Baird, Rae Cooper, Bradon Ellem, 'Low Paid Women: The Impact of Regulatory Change in Australia' (2009) 40(5) *Industrial Relations Journal* 393, 393-407; Barbara Pocock and Helen Smith-Masterman, 'Work Choices and Women Workers' (2009) 56(1) *Journal of Australian Political Economy* 126, 126-144; Barbara Pocock et al, 'The Impact of Work Choices on Women in Low Paid Employment in Australia: A Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations* 475, 475-488.

<sup>45</sup>Barbara Pocock et al, 'The Impact of Work Choices on Women in Low Paid Employment in Australia: A Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations* 475, 477-487.

<sup>46</sup>*Ibid* 477-487.

<sup>47</sup>Rachel S Turner, *Neoliberal Ideology: History, Concepts and Policies*, (Edinburgh University Press, 2008); Mehmet Z Duman, 'The Victory of Neo-liberal Globalization' (2011) 8(1) *International Journal of Human Sciences* 666, 666-700; Paul O'Connell, 'On Reconciling Irreconcilables: Neoliberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483, 483-509; Raewyn Connell, 'A Really Good Husband: Work/life Balance, Gender Equity and Social Change' (2005) 40(3) *Australian Journal of Social Issues* 369, 369-383.

<sup>48</sup>Klee Adams and Christopher Geller, 'Work and Family: Seeking Solutions' (2007) 20 *Australian Journal of Labour Law* 312, 312-328.

<sup>49</sup>Barbara Pocock and Michael Alexander, 'The Price of Feminised Jobs: New Evidence on The Gender Pay Gap in Australia' (1999) 10(2) *Labour and Industry* 75, 75-100; Hiau Kee, 'Glass Ceiling or Sticky Floor – Exploring the Gender Pay Gap in Australia' (2006) 82(1) *Economic Record* 408, 408-427.

between 15% and 18% over several decades<sup>50</sup> and on average, women working full-time earn \$12 730.30 per week while men who were working full-time earn \$1532.80 per week, a \$262.50 difference.<sup>51</sup> Also in some states, such as Western Australia<sup>52</sup>, the gender gap is much higher, as much as 25% of average weekly earnings or greater in some cases.<sup>53</sup> The ABS statistics also showed that in the past two decades, the gap between average weekly male earnings and female earnings had increased.<sup>54</sup>

Secondly, there is abundant evidence from Australian and international research<sup>55</sup> suggesting that there is a substantial and tangible adverse effect on the long-term financial well-being of working women who choose to take time off from work to have or care for children called the ‘motherhood penalty.’<sup>56</sup> Social research suggests this ‘motherhood penalty’ is caused by several factors.<sup>57</sup> These include perceptions of some employers and managers that pregnant women or women with children are less capable in their jobs due to a perceived conflict between their caring and work duties.<sup>58</sup> Also differences in caregiving responsibilities between male and female parents and differing social

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<sup>50</sup>Workplace Gender Equality Agency, ‘Gender Pay Gap Statistics’, (March 2014), <[https://www.wgea.gov.au/sites/default/files/Gender\\_Pay\\_Gap\\_factsheet.pdf](https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_factsheet.pdf)>, 2.

<sup>51</sup> Ibid 2.

<sup>52</sup> Ibid 2.

<sup>53</sup>Workplace Gender Equality Agency, ‘Gender Pay Gap Statistics’, (March 2014), <[https://www.wgea.gov.au/sites/default/files/Gender\\_Pay\\_Gap\\_factsheet.pdf](https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_factsheet.pdf)>, 3.

<sup>54</sup>Ibid 2.

<sup>55</sup>Tanya Livermore, Joan Rodgers, Peter Siminski, ‘The Effect of Motherhood on Wages and Wage Growth: Evidence from Australia’ (2011) 87(1) *Economic Record* 80, 80-91; Shelley Correll and Stephen Bernard, ‘Normative Discrimination and the Motherhood Penalty’ (2010) 24(5) *Gender and Society* 616, 616-646; Tamar Kricheli-Katz, ‘Choice, Discrimination and the Motherhood Penalty’ (2012) 46(3) *Law and Society Review* 557, 557-587.

<sup>56</sup>Jane Waldfogel, ‘Understanding the Family Gap in Pay for Women with Children’ (1998) 12(1) *Journal of Economic Perspectives* 135, 135-56; Michelle Budig and Paula England, ‘The Wage Penalty for Motherhood’ (2001) 66 *American Sociological Review* 204, 205-225; Shelley Correll, and Stephen Bernard, et al. ‘Getting a Job – Is There a Motherhood Penalty?’ (2007) 112 *American Journal of Sociology* 1297, 1297-1339.

<sup>57</sup>Shelley Correll and Stephen Bernard, ‘Normative Discrimination and the Motherhood Penalty’ (2010) 24(5) *Gender and Society* 616, 616-646; Hilary Lips and Katie Lawson, ‘Work Values, Gender and Expectations About Work commitment and Pay: Laying the Groundwork for the Motherhood Penalty?’ (2009) 61(9-10) *Sex Roles* 667, 667-676; Margaret Gough, ‘Birth Spacing, Human Capital and the Motherhood Penalty at Midlife in the United States’ (2017) 37(13) *Demographic Research* 363, 363-416.

<sup>58</sup>Beatriz Aranda and Peter Glick, ‘Signalling Devotion to Work Undermines the Motherhood Penalty’ (2014) 17(1) *Group Processes and Intergroup Relations* 91, 91-99; Shelley Correll, et al. ‘Getting a Job – Is there a Motherhood Penalty?’ (2007) 112 *American Journal of Sociology* 1297, 1297-1339.

expectations of fathers and mothers in their respective roles as workers and parents also appear to be a factor.<sup>59</sup> These perceptions of women with family responsibilities in the workplace by some employers can lead to harmful forms of discrimination against women by those responsible for recruitment, promotional opportunities, and setting salaries for female workers.<sup>60</sup> As American social researchers Shelley Correll and Stephen Bernard explain in their article:<sup>61</sup>

Motherhood affects perceptions of competence and commitment because contradictory schemes govern conceptions of ‘family devotion’ and ‘work devotion’ (Blair-Loy 2003, p. 5). Contemporary cultural beliefs about the mother role include a normative expectation that mothers will and should engage in ‘intensive’ mothering that prioritises meeting the needs of dependent children above all other activities. The cultural norm that mothers should always be on call for their children coexists in tension with another widely held normative belief in our society that the ‘ideal worker’ be unencumbered by competing demands and be “always there” for his or her employer.<sup>62</sup>

This norm is further explained by Correll and Bernard as follows:

According to this ‘ideal worker’ belief, the best worker is the ‘committed’ worker who demonstrates intensive effort on the job through actions that appear to sacrifice all other concerns for the job. These examples include a willingness to drop everything at a moment’s notice for a new work demand, to devote enormous hours to ‘face-time’ at work, and to work late nights or weekends. While it has often been observed that ‘face-time’ and extended hours are not necessarily associated with actual worker performance or productivity in the contemporary organisation of work, they function as a cultural sign of the effort component of performance capacity. Normative conceptions of the ‘ideal worker’ and the ‘good mother’ create a cultural tension between the enactment of the motherhood role and the adoption of the committed worker role.<sup>63</sup>

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<sup>59</sup>Shelley Correll and Stephen Bernard, et al. ‘Getting a Job – Is There a Motherhood Penalty?’ (2007) 112 *American Journal of Sociology* 1297-1339; Ray Broomhill and Rhonda Sharp, ‘The Changing Male Breadwinner Role in Australia: A New Gender Order?’ (2005) 16(1) *Labour and Industry* 103, 103-127.

<sup>60</sup>Shelley Correll, and Stephen Bernard et al. ‘Getting a Job – Is There a Motherhood Penalty?’ (2007) 112 *American Journal of Sociology* 1297, 1297-1300.

<sup>61</sup> Ibid 1300.

<sup>62</sup>Shelley Correll, and Stephen Bernard et al. ‘Getting a Job – Is There a Motherhood Penalty?’ (2007) 112 *American Journal of Sociology* 1297, 1297-1300.

<sup>63</sup>Ibid 1306.



Research from Australian studies similarly shows the ‘motherhood penalty’ problem exists in Australian workplaces,<sup>64</sup> with similar findings for other English-speaking countries such as the UK, US, New Zealand and Canada.<sup>65</sup> Also, social research suggests the ‘motherhood penalty’ plays a substantial causative role in gender pay gaps between men and women.<sup>66</sup> These findings are supported corroborated by social research elsewhere.<sup>67</sup> Research from studies<sup>68</sup> has also shown the gap in earnings between male and female workers can range from 5%-10%, depending on the country where the gap exists, with a greater loss of income occurring in English-speaking nations such as Australia, the UK and the US.<sup>69</sup> Research conducted in Australia shows a real effect<sup>70</sup> with

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<sup>64</sup>Lynne Cooke, ‘Gendered Parenthood Penalties and Premiums Across the Earnings Distribution in Australia, the United Kingdom, and the United States’ (2014) 30(3) *European Sociology Review* 360, 360-372; Maureen Baker, ‘Motherhood, Employment and the Child Penalty’ (2010) 33(3) *Women’s Studies International Forum* 215, 215-224; Gillian Whitehouse, ‘Parenthood and Pay in Australia and the UK: Evidence from Workplace Surveys’ (2005) 38(4) *Journal of Sociology* 381, 381-397.

<sup>65</sup>Lynne Cooke, ‘Gendered Parenthood Penalties and Premiums Across the Earnings Distribution in Australia, the United Kingdom, and the United States’ (2014) 30(3) *European Sociology Review* 360, 360-372.

<sup>66</sup>Hilary Lips and Katie Lawson, ‘Work Values, Gender, and Expectations About Work Commitment and Pay: Laying the Groundwork for the ‘Motherhood Penalty’? (2009) *Sex Roles* 61(9-10) 667, 667-76; Markus Gangl and Andrea Ziefle, ‘Motherhood, Labour Force Behaviour, and Women’s Careers: An Empirical Assessment of the Wage Penalty for Motherhood in Britain, Germany, and the United States’ (2009) 46(2) *Demography* 341, 341-369; Michael Bittman, ‘Parenthood Without Penalty: Time Use and Public Policy in Australia and Finland’ (1999) 5(3) *Feminist Economics* 27, 27-42.

<sup>67</sup>Deborah Anderson, et al., ‘The Motherhood Wage Penalty – Which Mothers Pay It and Why’ (2002) 92 *The American Economic Review* 354, 354-358; Michelle Budwig et al., ‘The Motherhood Penalty in Cross-country Perspective: The Importance of Work/Family Policies and Cultural Attitudes’ (2010) 19(2) *Social Politics* 163, 163-93.

<sup>68</sup>Michael Kuhhirt and Volker Ludwig, ‘Domestic Work and the Wage Penalty for Motherhood in West Germany’ (2012) 74(1) *Journal of Marriage and Family* 186, 186-200; Alexandra Killewald and Jonathan Bearak, ‘Is the Motherhood Penalty Larger for Low-pay Women? A Comment on Quintile Regression’ (2014) 79(2) *American Sociological Review* 350, 350-357; Tanya Livermore, Joan Rodgers, Peter Siminski, ‘The Effect of Motherhood on Wages and Wage Growth: Evidence from Australia’ (2011) 87(1) *Economic Record* 80, 80-91.

<sup>69</sup>Jose Molina and Victor Montuenga, ‘The Motherhood Wage Penalty in Spain’ (2009) 30(2) *Journal of Family and Economic Issues* 237, 237-251. See also Maria Gutiérrez-Domènech, ‘Employment Penalty After Motherhood in Spain’ (London School of Economics Centre for Economic Performance Research Papers, Centre for Economic Performance, London School of Economics and Political Science, London, UK, (July 2002), [http://eprints.lse.ac.uk/20068/1/Employment\\_Penalty\\_After\\_Motherhood\\_In\\_Spain.pdf](http://eprints.lse.ac.uk/20068/1/Employment_Penalty_After_Motherhood_In_Spain.pdf)), 1-33.

<sup>70</sup>Shoba Arun, et al., ‘The Effect of Career Breaks on the Working Lives of Women’ (2004) 10(1) *Feminist Economics* 65, 65-84.

Australian women with children earning 5-9% less than women without children.<sup>71</sup>

## 2.4 Economic Factors Driving Gender Inequality in Australia

To understand the factors behind gender inequality and their connection to neoliberal economic policy reform, it is helpful to develop a contextual and historical analysis of the development of neoliberal economic policy in Australia and its influence on Australian Labour relations law.<sup>72</sup> From the 1970s through to 2000-2017, successive Australian governments at the state and federal level (and in OECD countries globally) followed a broad economic policy framework analysts label ‘neoliberalism.’<sup>73</sup> Before neoliberal policy is discussed in more detail this section, it should be noted that ‘neoliberalism’ is a broad concept that can encompass different meanings across a wide range of different fields of discourse that makes a precise definition of it for the purposes of legal analysis in the field of employment relations law problematic.<sup>74</sup> However for the purposes of employment law, it can be noted that in jurisprudential theory it is argued neo-liberalism is a stream of contemporary political thought noted to have developed from the political philosophy and jurisprudence of Anglo-American and European intellectuals such as John Locke, David Hume, Adam Smith, David Ricardo, John Stuart Mill, Jeremy Bentham, Friedrich Hayek, Karl Popper and Milton Friedman.<sup>75</sup> Neoliberalist political theory and jurisprudence has also incorporated formulations of justice and desert derived from Utilitarian political philosophy, which focused on maximising the overall welfare of society

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<sup>71</sup>Tanya Livermore, Joan Rodgers, Peter Siminski, ‘The Effect of Motherhood on Wages and Wage Growth: Evidence from Australia’ (2011) 87 *Economic Record* 81, 81-90.

<sup>72</sup>Peter Fairbrother et al., ‘The Ascendancy of Neoliberalism in Australia’ (1997) 21(3) *Capital and Class* 1, 1-12; Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011) ch 1-2; Paul Kelly, *The End of Certainty: Power, Politics and Business in Australia* (Allen and Unwin, 1994) 19-660; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), ch 1-2.

<sup>73</sup>Taitu Heron, ‘Globalisation, Neoliberalism and the Exercise of Human Agency’ (2008) 20(1) *International Journal of Politics, Culture and Society* 85, 85-101.

<sup>74</sup>Wendy Larner, ‘Neo-Liberalism: Policy, Ideology, Governmentality’ (2000) 63 *Studies in Political Economy*, 1, 5-25.

<sup>75</sup>Robert Ekelund and Robert Hebert, *A History of Economic Theory and Method* (McGraw-Hill, 1997), ch 1-2.

by promoting self-responsibility and self-sufficiency by citizens.<sup>76</sup> Modern neoliberal political theory emerged in the current form from the 1920s-1970s from a variety of sources, including the ‘Austrian’ school of economics founded by Austrian economist and jurist Friedrich Hayek,<sup>77</sup> continued by the ‘Chicago School’ of economics led by the influential American economist Milton Friedman,<sup>78</sup> and restated by libertarian political theorists such as Robert Nozick and others.<sup>79</sup> Neoliberalist political theory was widely adopted as policy in Western countries from the 1980s onwards following the dramatic economic crises of the 1970s. These crises came about due to many factors, including a dramatic rise in the cost of energy following the Arab-Israeli conflict of 1973-1974 and a prolonged period of economic and social malaise in the 1970s and early 1980s characterised as ‘stagflation.’<sup>80</sup> Government intervention in national economies at the time seemed incapable of improving the economic situation, which appeared to be made worse by constant industrial action and demands by workers and representative unions for higher wages and better work conditions, which neoliberals argued undermined Western economies by hindering business productivity and preventing governments from undertaking reforms to revitalise flagging economies and restore growth and prosperity.<sup>81</sup>

In response to these challenges, a number of governments were elected in Western nations in the late 1970s and early 1980s to enact a broad neoliberal political and economic reform agenda characterised by promises to reduce state intervention and participation in the economy through sales and privatisation of

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<sup>76</sup>Julia Driver, *The History of Utilitarianism*, The Stanford Encyclopedia of Philosophy (Winter 2014 edition), Edward N. Zalta (ed), <<http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>> 1-5.

<sup>77</sup>Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press, 2007), ch 1; Friedrich Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Political Economy* (Routledge, 2013), ch 1.

<sup>78</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002), ch 1-2.

<sup>79</sup>Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) ch 3-10.

<sup>80</sup>An economic term denoting the coexistence of high unemployment and inflation. ‘Stagflation’. In Graham Bannock, Ron Baxter, Evan Davis, *The Penguin Dictionary of Economics* (Penguin, 2003).

<sup>81</sup>Geoffrey Harcourt, ‘The Rise and Hopefully, Fall of Economic Neoliberalism in Theory and Practice’ (2009) 20(1) *Economic and Labour Relations Review* 1, 1-6; Verity Archer, ‘Dole-Bludgers, Taxpayers and the New Right: Constructing Discourses in 1970s Australia’ (2009) 96(1) *Labour History* 177, 177-190; Ashley Lavelle, ‘Social Democrats and Neoliberalism: A Case Study of the Australian Labour Party’ (2005) 53(4) *Political Studies* 753, 753-771.

public assets and utilities to pay off public debts, deregulation and liberalisation of markets and industry, broad-based tax cuts for individuals and enterprises, decreasing government spending and curtailing union activity in workplaces in the belief doing so would lead to higher levels of economic growth, lower unemployment, reduced inflation, higher GDP, and improved living standards.<sup>82</sup> A key aspect of neoliberal reform was making individuals responsible for their welfare, particularly by making decisions to maximise their self-interest and ‘paying their way’ through life.<sup>83</sup> In neoliberal political theory, it is argued the collective result of individuals maximising their self-interest is also the maximisation of the public good as a whole, primarily translated practically into economic prosperity.<sup>84</sup>

Neoliberal political theory proposes the duty of government is not to grant favours and gifts to people of a particular class for some purpose, but rather to facilitate individual freedom and responsibility by removing anything that unnecessarily hinders the individual’s free exercise of their self-interest.<sup>85</sup> The government’s responsibility in society according to neoliberal political theory is strictly limited; its task in society is primarily to ‘preserve law and order, to enforce contracts, and to foster competitive markets.’<sup>86</sup> The role of government is not to ‘pay’ for the mistakes or choices the individual makes; the individual must ‘pay’ from their resources.<sup>87</sup>

Therefore, neoliberal reform is not favourable to direct government intervention in society.<sup>88</sup> In neoliberal political theory, government intervention in the market or society is mostly harmful in nature.<sup>89</sup> Neo-liberal political theory proposes

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<sup>82</sup>Alfredo Saad-Filho, and Deborah Johnston, *Neoliberalism – A Critical Reader* (Pluto Press, 2005) 1-9. See also Wendy Lerner, ‘Neo-Liberalism: Policy, Ideology, Governmentality’ (2000) 63(1) *Studies in Political Economy*, 1, 1-21; Andrew Gamble, ‘Neoliberalism’ (2001) 25(3) *Capital and Class* 127, 127-134; Daniel Perkins et al., ‘Beyond Neoliberalism: The Social Investment State?’ (2005) 38(1) *Just Policy Journal* 34, 34-31; Grant Duncan, ‘After Neo-Liberalism, What Could be Worse?’ (2014) 29(1) *New Zealand Sociology* 15, 15-39.

<sup>83</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002), 1-2.

<sup>84</sup>Ibid 22-36.

<sup>85</sup>Ibid 2.

<sup>86</sup>Ibid 2.

<sup>87</sup>Ibid 3-4.

<sup>88</sup>Ibid 24-5.

<sup>89</sup>Ibid 3-4.

the role of government is like an umpire in a sports game: to recognise the basic social rules, to change the rules when needed, mediate different interpretations of the rules, and enforce them when necessary.<sup>90</sup> According to neoliberal thinkers, it is also not a task of the state to redistribute wealth from the richer classes in society to the poorer classes through income taxation or spending on social welfare programs or to legislate to regulate business conditions. Rather the state functions to foster individual responsibility and freedom through promoting the operation of free markets and free market forces to allocate finite resources most efficiently.<sup>91</sup>

Consequently in neoliberal political thought, the alleviation of inequalities in social and economic relationships is left to the individual to decide what is fair or not fair. It is up to the wealthy to promote their self-interest to benefit the wider community by voluntary means of redistributing wealth such as through philanthropy, private charity or setting up special trusts for charitable purposes.<sup>92</sup> Those wanting better terms in their contractual relations with other parties to make them more 'equal' need to negotiate better terms through freedom of contract rather than the government intervening through 'social engineering.'<sup>93</sup> It follows in neoliberal thought that the government should only act to the extent it facilitates the operation of free market forces which is the most efficient way to reduce poverty and inequality in a free democratic society.<sup>94</sup>

Neoliberal political and economic theory has come under extensive criticism since the 2008 global financial crisis,<sup>95</sup> which seemed caused by the widespread failure of the neoliberal framework that dominated government policy-making in Australia and other countries since the 1980s.<sup>96</sup> Critics of neoliberal political

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<sup>90</sup>Ibid 25.

<sup>91</sup>Ibid 212.

<sup>92</sup>Examples of this would include the work of entities such as the Bill Gates foundation and similar institutions.

<sup>93</sup>Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002), 212.

<sup>94</sup>Ibid 191-2.

<sup>95</sup>See Philip Mirowski, *Never Let A Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso Press, 2013), 1-89.

<sup>96</sup>Philip Mirowski, *Never Let A Serious Crisis Go to Waste: How Neoliberalism Survived the Financial Meltdown* (Verso Press, 2013), 1-89; Thomas Piketty, *Capital in the 21<sup>st</sup> Century*

and economic theory suggest neoliberal-inspired government policies have had a severe social cost in forms such as rapidly rising wealth inequality, increasing poverty and marginalising particular groups in society from the economic benefits of neoliberal reforms.<sup>97</sup> For some critics of neoliberalism, nothing less than capitalism itself is to blame.<sup>98</sup>

## 2.5 The Impact of Neoliberal Policies in Australian Labour Law

The triumph of neoliberal policy ideas in the Western world and the rise of a globalised economy based on ‘free-trade’ and ‘free-market principles’ is linked to significant changes to the structure of the Australian economy from the 1980s to the 2000s.<sup>99</sup> These broad changes to the Australian economy were also mirrored in Australian labour relations law and policy<sup>100</sup> since the 1980s,<sup>101</sup> particularly with the introduction of amended industrial legislation by the Coalition government of John Howard in the period from 1996-2006 that made

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(Harvard University Press, 2014), 296-300; Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Picador, 2007), ch 1-14.

<sup>97</sup>Alfredo Saad-Filho, and Deborah Johnston, *Neoliberalism: A Critical Reader*, (Pluto Press, 2005), 1-7 and Thomas Piketty, *Capital in the 21<sup>st</sup> Century* (Harvard University Press, 2014). 1-73, 237-430.

<sup>98</sup>See Richard Westra and Dennis Badeen, *The Future of Capitalism After the Financial Crisis: The Varieties of Capitalism in An Age of Austerity* (Routledge, 2015), 1-156, 149-228.

<sup>99</sup>Paul Kelly, (1994), *The End of Certainty: Power, Politics and Business in Australia* (Allen and Unwin, 1994), 1-200. It should be noted the transformation of Australia’s economy and society in this period due to neoliberalism and other forces is highly complex and a detailed discussion is beyond the scope of this thesis. For a discussion of the historical origins of neo-liberalism in the tradition of Bentham and legal positivism the reader is referred to Michael D A Freedman, *Lloyd’s Introduction to Jurisprudence* (Sweet and Maxwell, 2014, Ninth Ed), 195-217.

<sup>100</sup>Joanne Conaghan, ‘Labour Law and the New Economy Discourse’ (2003) 16 *Australian Journal of Labour Law* 9, 9-19; Margaret Thornton, ‘Corrosive Leadership: A Corollary of the Corporatised Academy?’ (2004) 17 *Australian Journal of Labour Law* 161, 161-185; Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour Law Reform’ (2006) 19 *Australian Journal of Labour Law* 105, 105-126; Barbara Pocock et al. (2008), ‘The Impact of Work Choices on Women in Low Paid Employment in Australia: A Qualitative Analysis’ (2008) 50 *Journal of Industrial Relations* 475, 475-488; Rae Cooper, and Brandon Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22 *Australian Journal of Labour Law* 284, 284-305.

<sup>101</sup>Mark Bray and Andrew Stewart, ‘What is Distinctive about the Fair Work Regime?’ (2013) 26 *Australian Journal of Labour Law* 20, 20-49; Rae Cooper and Brandon Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22 *Australian Journal of Labour Law* 284, 284-305; Joanne Conaghan, ‘Labour Law and the New Economy Discourse’ (2003) 16(1) *Australian Journal of Labour Law* 175, 175-209. See also Paul Kelly, *The End of Certainty: Power, Politics and Business in Australia* (Allen and Unwin, 1994) 1-200.

radical changes to the Australian industrial relations system, particularly through the ‘Work Choices’<sup>102</sup> laws introduced in 2005-2006.<sup>103</sup>

The ‘Work Choices’ legislation was characterised by certain features,<sup>104</sup> such as the abolition of a centralised system of wage fixing and award making and the introduction of individualised ‘Australian workplace agreements.’<sup>105</sup> Work Choices also abolished and standardised many standard ‘industry awards’ and removed standard workplace rights such as protection from unfair dismissal in businesses with 100 employees or less.<sup>106</sup> Work Choices also placed substantive restrictions on the abilities of employee unions to organise, inspect workplaces for compliance with work standards and to take industrial action on behalf of union members.<sup>107</sup> There was also renewed emphasis on returning to the

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<sup>102</sup> It should be noted here that the ‘Work Choices’ laws were the fruit of a long period of policy development and complex legislative reform across a range of areas in Australian Industrial Relations law from the 1980’s to the mid 1990’s by both Labor and Coalition governments. A full in-depth discussion of these is beyond the scope of this thesis and hence only the legislation most concerned with the development of paid parental leave will be discussed. The reader can find a brief summary of the history of Australian Industrial Relations laws from at the 1980’s to the Work Choices period in Ron McCallum ‘American and Australian Labor Law and differing approaches to employee choice,’ (2011) 26(2) *ABA Journal of Labor Law* 181, 181-199.

<sup>103</sup> An excellent overview and analysis can be found in Janis Bailey et al., ‘Work Choices, Image Choices and the Marketing of New Industrial Legislation’ (2009) 23(2) *Work Employment and Society* 285, 285-304; Waleed Aly, ‘What’s Right: The Future of Conservatism in Australia’ (2010) 37(1) *The Quarterly*, 1, 1-141; Judith Brett, (2007), ‘Exit Right: The Fall of John Howard’ (2007) 28(1) *The Quarterly*, 1, 1-128.

<sup>104</sup> Richard Mitchell et al., ‘Assessing the Impact of Employment Legislation: The Coalition Government’s Labour Law Program 1996-2007’ (2010) 23 *Australian Journal of Labour Law* 274, 274-301; Richard Mitchell et al., (2010), ‘The Evolution of Australian Labour Law: Measuring the Change’, 23 *Australian Journal of Labour Law* 61, 61-93; Rosemary Owens, ‘Working Precariously: The Safety Net Under Work Choices’ (2006) 19 *Australian Journal of Labour Law* 161, 161-182; Marilyn Pittard, ‘Back to The Future: Unjust Termination Under the Work Choices Legislation’ (2006) 19 *Australian Journal of Labour Law* 225, 225-241.

<sup>105</sup> Kristin van Barneveld, ‘Australian Workplace Agreements under Work Choices’ (2006) 16(2) *Economic and Labour Relations Review* 165, 165-91; Peter Waring and John Burgess, ‘Work Choices: The Privileging of Individualism in Australian Industrial Relations’ (2006) 14(1) *International Journal of Employment Studies* 61, 61-80.

<sup>106</sup> See Marilyn Pittard, ‘Back to the Future: Unjust Termination under the Work Choices Legislation’ (2006) 19 *Australian Journal of Labour Law* 225, 225-241, and Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour Law Reform’ (2006) 19 *Australian Journal of Labour Law* 105, 105-126.

<sup>107</sup> Antony Forsyth and Carolyn Sutherland, ‘Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining’ (2006) 19(2) *Australian Journal of Labour Law* 183, 183-197.

common law of contract as the legal source for the mutual obligations in the employer/employee relationship.<sup>108</sup>

Work Choices laws also focused on reintroducing classical ‘freedom of contract’ principles based on the direct bargaining between the employer and employee to determine their mutual rights and obligations and other contract law.<sup>109</sup> This change in Australian industrial relations law coincided with the decline in union membership in Australia that had been occurring since the 1980s and the rise of ‘enterprise bargaining’ and ‘enterprise agreements’ to replace standardised industry awards and centralised wage fixing by an Arbitration Commission.<sup>110</sup> The deregulation of the Australian labour market from the 1980s onwards was followed by rising levels of insecure employment, casual work and underemployment in the Australian workplace, which increased after the 1990-1991 economic recession, leading to reduced workplace rights and poorer working conditions for workers that unions have been mostly unable to slow down or stop.<sup>111</sup> The move back towards the common law employment of contract, particularly for ‘casual’ employees in insecure jobs led to the loss of many basic entitlements and conditions previously protected by prior industrial

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<sup>108</sup>Alfredo Saad-Filho and Deborah Johnston, *Neoliberalism: A Critical Reader* (Pluto Press, 2005), 1-7; Joanne Congahan, ‘Labour Law and the New Economy Discourse’ (2003) 16 *Australian Journal of Labour Law* 9, 9-19; Carolyn Sappideen and James Joseph Macken *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011) ch 1; Breen Creighton and Andrew Stewart, (2010), *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 663-716; Joellen Riley, ‘A Fair-Deal for the Entrepreneurial Worker? Self-employment and Independent Contracting Post-Work Choices’ (2007) 19 *Australian Journal of Labour Law* 246, 246-262; Joellen Riley, ‘Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16 *Australian Journal of Labour Law* 28, 28-50.

<sup>109</sup>Harry Glasbeek. ‘Industrial Relations Reforms: Implications for Corporate Scholars and Activists’ (2010) 24 *Australian Journal of Corporate Law* 110, 110-147; Aaron Rathmell, ‘Collective Bargaining After Work Choices: Will Good Faith Take Us Forward with Fairness?’ (2008) 21 *Australian Journal of Labour Law* 164, 164-199; David Chin, (1997), ‘Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism’ 10 *Australian Journal of Labour Law* 257, 257-279.

<sup>110</sup>Rae Cooper and Bruce Ellem, ‘The Neoliberal State, Trade Unions and Collective Bargaining in Australia’ (2008) 46(3) *British Journal of Industrial Relations* 532, 532-554.

<sup>111</sup>Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70. See also Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour Law Reform’ (2006) 19 *Australian Journal of Labour Law* 105, 105-120; Anna Chapman, ‘Unfair Dismissal and Work Choices: From Safety Net to Legal Privilege’ (2006) 16(2) *Labour Relations Review* 237, 237-264; Deborah Brennan, ‘Australia: The Difficult Birth of Paid Maternity Leave,’ in Sheila Kamerman and Peter Moss (eds) *The Politics of Parental Leave Policies* (Policy Press, 2009), 18-20.



legislation.<sup>112</sup> Studies of the coverage of parental leave entitlement terms<sup>113</sup> in employment agreements reached through enterprise bargaining across different industries showed that even under the reformed ‘Fair Work’<sup>114</sup> laws, parental leave coverage was very uneven, especially in the private sector.<sup>115</sup> This is particularly the case with employees covered by Australian Workplace Agreements (AWAs) which were a key platform of the 2005-2006 ‘Work Choices’ legislation.<sup>116</sup>

To better understand the reason why freedom of contract underpins gender inequality, it is helpful to review some basic principles of contract law in Australia.<sup>117</sup> The common law of contract in Australia is underpinned by the capitalist economic system.<sup>118</sup> Capitalism is a highly complex mode of economic and social organisation<sup>119</sup> but includes the ‘free market’ principle and common law principles of ‘freedom of contract,’ where employers (also usually owners of capital and the means of production) have to ‘purchase’ labour in order to

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<sup>112</sup>Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24(1) *Australian Journal of Labour Law* 60, 60-70. See also Judy Fudge, ‘Precarious Employment in Australia and Canada: The Road to Labour Law Reform’ (2006) 19 *Australian Journal of Labour Law* 105, 105-120.

<sup>113</sup>Belinda Smith, ‘What Kind of Equality Can We Expect from the Fair Work Act?’ (2011) 35(2) *Melbourne University Law Review* 545, 545-577; Jennifer Waterhouse and Linda Colley, ‘The Work-Life Balance Provisions of the Fair Work Act: A Compromise of Stakeholder Preference’ (2010) 36(2) *Australian Bulletin of Labour* 154, 154-177.

<sup>114</sup>Introduced in 2007 and 2010 by the Rudd and Gillard labour governments respectively. For further discussion, see sections 2.9 and 2.10 below and also Chapter 3 of this thesis.

<sup>115</sup> Marian Baird and John Murray, ‘An Analysis of Collective Bargaining for Paid Parental Leave – Sector and Context Effects’, Paper presented at the 16th World Congress of the International Labour and Employment Relations Association 2012, Philadelphia, United States, 5th July 2012, 1-10. See also Len Perry, ‘Labour Market Reforms and Lockouts in New Zealand’ 32(4) *Australian Bulletin of Labour*, 401, 401-420.

<sup>116</sup>See Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011), Ch 1.

<sup>117</sup>Patricia Easteal, *Women and the Law* (LexisNexis Butterworths, 2010), Ch 1; Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 1-19; Regina Greyca and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002), 87-133, 139-165.

<sup>118</sup>PS Atiyah, *An Introduction to the Law of Contract* (Oxford University Press 2<sup>nd</sup> ed, 1971) 1-22; PS Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford University Press, 1979) 602-627; N Sneddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot: Law of Contract* (LexisNexis Butterworths, 10<sup>th</sup> Australian ed, 2012) 1274-1311.

<sup>119</sup>‘Capitalism’ is a very broad concept discussed across a very substantial body of research literature that goes well beyond the scope of this discussion. For useful introductions to capitalism as a concept, see Paul Bowles, *Capitalism* (Routledge, 2014) 28-146; Victor D Lippit, *Capitalism* (Routledge, 2005), 1-25 and Dennis C Mueller (ed) *The Oxford Handbook of Capitalism* (Oxford University Press, 2012), 1-38, 38-67 for an overview on the evolution and nature of capitalism in the West.

utilise their capital holdings and in doing so, make a profit to accumulate more capital which is then reinvested to increase the productivity and profitability of a business.<sup>120</sup> In the capitalist economy, the person who is an ‘employee’ of the employer usually lacks the capital to live independently and must sell their labour, skills or surplus goods beyond what they produce to survive to achieve the required levels of personal wealth required to live a decent life for themselves and their family.<sup>121</sup>

The nature and extent of the contractual transaction is of long historical provenance in England and Australia<sup>122</sup> and is governed and protected by law in a capitalist system by a range of laws, particularly the common law of contract,<sup>123</sup> which will be discussed in further detail below.<sup>124</sup> The common law of contract and more recent neoliberal economic theory defends the notion that it is acceptable that a substantial inequality of power can and should exist between the owner of the capital and means of production (employer) and the person seeking to earn a living by selling their skills to the business (the employee) under the rubric of ‘freedom of contract’ provided the overall result is to maximise utility and wealth in society as a whole<sup>125</sup> through economic growth and efficient allocation of finite resources to best use through the free

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<sup>120</sup>Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 10-11; Des Moore, ‘Why Labour Market Players Should have the Freedom to Contract’ (2002) 38(2) *Australian Economic Review* 192, 192-200.

<sup>121</sup>Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 10-11. See also Harry Glasbeek, ‘Industrial Relations Reforms: Implications for Corporate Scholars and Activists’ (2010) 24(2) *Australian Journal of Corporate Law* 110, 111-13.

<sup>122</sup> Originating from serfdom and the medieval system of villeinage. See Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 10-11.

<sup>123</sup>Joellen Riley, ‘Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16 *Australian Journal of Labour Law* 1, 1-28; Carolyn Sappideen and James Joseph Macken, *Macken’s Law of Employment*, (Thomson Reuters, 7<sup>th</sup> ed, 2011), ch 2.

<sup>124</sup>See references above n 123 and also Peter Gahan and Andreas Pekarek, ‘The Rise and Rise of Enterprise Bargaining in Australia, 1991-2011’ (2013) 22(3) *Labour and Industry* 195, 195-222; Grant Belchamber, ‘The Future of Enterprise Bargaining’ (2012) 22(3) *Labour and Industry* 307, 307-15; Bill Kelyt, ‘Industrial Relations and Enterprise Bargaining’ (2012) 22(3) *Labour and Industry* 223, 223-227.

<sup>125</sup>Anthony Kronman, ‘Wealth Maximisation as a Normative Principle’ (1980) 9(1) *Journal of Legal Studies* 227, 227-243.

market mechanism.<sup>126</sup> The implications of this for gender inequality are discussed below.

## 2.6 Social Policy Frameworks for Parental Leave

The question of how to grant justice to women's emancipation in the workplace has been a major social problem in Australia for at least a century<sup>127</sup> and maternity and parental leave has been an item of policy debate in this area in Australia long before the first statutory scheme enacted in 2010.<sup>128</sup> Traditionally, paid support to working mothers has had specific policy goals: protecting the marital bond, fostering healthy child development and family life, and encouraging population growth by making it attractive for parents to have more children.<sup>129</sup> These ideals have evolved over time to include broader ideals around gender equality such as equal pay for women and better employment opportunities after having children.<sup>130</sup> There is also evidence from studies that 'family friendly' policies such as paid parental leave help deal with issues such as the 'motherhood' gap and reduce pay inequity between the genders.<sup>131</sup>

However, such goals and entitlements can also reflect conservative or patriarchal social values about women's caring roles in society.<sup>132</sup> In more recent times parental leave entitlements have focused more on balancing the economic benefits of having women in the workforce with the fact women spend more

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<sup>126</sup>Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010), 10-11; David Chin, 'Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism' (1997) 22(10) *Australian Journal of Labour Law* 257, 257-280.

<sup>127</sup>Marjorie O'Neill and Robyn Johns, 'The History of Welfare and Maternity Leave in Australia', (Paper Presented at International Employment Relations Association Conference No 17, Bangkok, July 2009), 172-196.

<sup>128</sup>Graeme Orr and Joo-Cheon Tham, 'Paid Parental Leave: Welfare or Workplace Right?' (2011) 18 *Australian Journal of Administrative Law*, 193, 193-197.

<sup>129</sup>Anca Ghaeues and Ingrid Robeyns, 'Equality Promoting Parental Leave' (2011) 42(2) *Journal of Social Philosophy* 173, 173-191.

<sup>130</sup>Carmen Casto-Garcia and Maria Pazos Moran, 'Parental Leave Policy and Gender Equality in Europe' (2015) *Feminist Economics* 1, 1-23; Anna-Lea Almqvist et al, 'Parental Leave in Sweden: Motives, Experiences and Gender Equality Amongst Parents' (2011) 9(2) *Fathering* 189, 189-206.

<sup>131</sup>Heather Boushey, 'Family Friendly Policies – Helping Mothers Make Ends Meet' (2008) 66(1) *Review of Social Economy* 51, 51-70.

<sup>132</sup>Elissa Brauenstein Nancy Folbre, 'To Honour and Obey: Efficiency, Inequality and Patriarchal Property Rights' (2001) 7(1) *Feminist Economics* 25, 25-44.

time in caring for their children than men.<sup>133</sup> It was not until the 1970s the Australian federal government granted paid maternity leave to women working in the public service for 12 weeks and unpaid leave for up to 40 weeks<sup>134</sup> when the previous policy had required women to resign from work once they married or became pregnant.<sup>135</sup> This maternity/parental leave time was later extended to longer periods in some cases.<sup>136</sup>

Social researchers have argued strongly in favour of paid parental leave on the basis it encourages women's workforce participation.<sup>137</sup> However, such arguments have been countered by those who still hold to more traditional images of family and work.<sup>138</sup> Another sore point for other commentators is a lack of progress of Australia regarding parental leave and workplace rights for parents relative to other OECD nations.<sup>139</sup> Although Australia introduced a paid parental leave framework in 2010 via the *Paid Parental Leave Act*,<sup>140</sup> researchers have argued Australia needs to do much more to help reduce gender inequality in the workforce and society.<sup>141</sup> The next section will discuss the role of the AHRC into gender equity and paid parental leave.

## **2.7 Australian Human Rights Commission Inquiries into Gender-Based Workplace Discrimination and Paid Parental Leave**

The Australian Human Rights Commission has conducted a number of detailed studies into gender inequality as part of its legislative mandate.<sup>142</sup> These studies

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<sup>133</sup> Anca Ghaeues and Ingrid Robeyns, 'Equality Promoting Parental Leave' (2011) 42(2) *Journal of Social Philosophy* 173, 178-179.

<sup>134</sup>Rianne Mahom and Deborah Brennan, 'Federalism and the 'New Politics' of Welfare Development: Childcare and Parental Leave in Australia and Canada' (2013) 43(1) *Publius* 90-108, 102.

<sup>135</sup>Gillian Whitehouse 'Access to Parental Leave in Australia: Evidence from Negotiating the Life Course' (2006) 40(4) *Australian Journal of Social Issues* 489, 489-503.

<sup>136</sup>Ibid 489-503. See also Chapter 3 of this thesis, section 3.2.

<sup>137</sup>Elizabeth Broderick, 'Women in the Workforce' (2012) 45(2) *The Australian Economic Review* 204-210.

<sup>138</sup>Tom Dreyfus, 'Paid Parental Leave and the Ideal Worker: A Step Towards the Worker/Carer in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>139</sup>Ibid 107-119.

<sup>140</sup>*Paid Parental Leave Act 2010* (Cth).

<sup>141</sup>Anna Chapman, 'Employment Alternatives to Carer's Leave: Domesticating Diverse Subjectivities' (2009) 18(2) *Griffith Law Review* 453, 453-474; Sara Charlesworth, and Fiona McDonald, 'Women, Work and Industrial Relations in Australia in 2013' (2014) 56(3) *Journal of Industrial Relations* 381, 381-396.

<sup>142</sup>See following discussion.

contain excellent in-depth information about women, the workplace, parental responsibility and gender-based discrimination and these studies will be discussed with particular reference to paid parental leave. Firstly in 1999, the HREOC (now AHRC)<sup>143</sup> prepared a detailed report following an inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) at preventing workplace discrimination against women in the workplace with pregnancy or family responsibilities.<sup>144</sup> The inquiry had broad terms of reference which included the following matters:<sup>145</sup>

- a) Examine the policies and practices of employers in the recruitment of women who are pregnant or who are about to become pregnant;
- b) Discuss the rights and responsibilities of employers towards pregnant employees;
- c) Examine the adequacy of Federal anti-discrimination laws and policies aimed at preventing workplace discrimination against women who are pregnant or have family obligations; and
- d) Consider potential policy and legislative changes that would be required to remove discriminatory practices against pregnant women in the workplace.

The forward to the HREOC 1999 report, written by the Sex Discrimination Commissioner, Sue Halliday, noted since 1984 it had been a ‘right’ and not a ‘privilege’ for pregnant women to have access to paid employment under Australian workplace and anti-discrimination law.<sup>146</sup> The executive summary of the report noted some concerning findings:<sup>147</sup>

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<sup>143</sup>At the time the Human Rights and Equal Opportunity Commission, but later the Australian Human Rights Commission. The abbreviation ‘AHRC’ will be used from this point forwards to refer to any report prepared by the AHRC in the timeframe being considered. It should also be noted that while the studies that will be discussed are somewhat descriptive and qualitative in nature, the research is valuable in terms of preparing the groundwork that would later be used by policy bodies such as the Productivity Commission in advising the government on parental leave legislation. See section 2.9 below for further discussion.

<sup>144</sup>Australian Human Rights Commission, ‘Pregnant and Productive: It’s a Right, Not a Privilege to Work While Pregnant.’ (Australian Human Rights Commission 1999 Report, Australian Human Rights Commission, 1999).

<sup>145</sup>Ibid vi.

<sup>146</sup>Ibid viii.

<sup>147</sup>Ibid ix-x.

- a) Employer discrimination against pregnant female employees was common and involved many complaints of victimisation and harassment, most of which went unreported;
- b) Female job applicants who were pregnant were often stereotyped as being unable to combine work and family responsibilities and were denied employment or promotional opportunities; and
- c) Discriminatory dismissals of pregnant women were a relatively frequent occurrence.

The report noted<sup>148</sup> that the majority of complaints lodged under the *Sex Discrimination Act* (80%) related to discrimination occurring during employment.<sup>149</sup> A substantial number of these complaints (around 20%) related to pregnancy-related issues in the workplace.<sup>150</sup> The HREOC report also indicated this had continued despite significant changes to workplace structures involving much higher rates of participation in the workforce by women,<sup>151</sup> with the growth in labour participation by women being double the rate of men in a ten-year interval between 1986-1996.<sup>152</sup> Despite this substantial social change, where the report described women as ‘a permanent part of the paid workforce and significant contributors to the Australian economy’,<sup>153</sup> paid work was still structured firmly around ‘masculine’ ideas, particularly that of a male breadwinner with a female housewife or part-time worker/carer who dominated in caring roles.<sup>154</sup>

The report’s findings noted these views strongly informed labour law and policy issues, particularly concerning women and their role in the workplace.<sup>155</sup> The reported indicated Australian males were still expected to be the primary income earners in households, while women who became pregnant while working or who had caring responsibilities were supposed to prioritise their caring roles by

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<sup>148</sup>Ibid.

<sup>149</sup>Ibid 2.

<sup>150</sup>Ibid 2-3.

<sup>151</sup>Ibid 10.

<sup>152</sup>Ibid 10.

<sup>153</sup>Ibid 10.

<sup>154</sup>Ibid 11.

<sup>155</sup>Ibid 12.

resigning from their employment or moving from full to part-time work, a situation that ultimately economically benefited men more than women.<sup>156</sup>

Further research conducted by the HREOC in the 1999 report highlighted the problems caused at a social level by persistent gender inequality and discrimination against women with children.<sup>157</sup> The first was declining demographic fertility rates and the second was the significant negative economic impact on women's lifetime earnings.<sup>158</sup> Concerning fertility rates, family size and demographic data, the report indicated these correlated with increasing difficulties women had in balancing work and family responsibilities:<sup>159</sup>

- a) While the numbers of women working had increased, the numbers of babies born had declined from the 1980s to the 1990s;
- b) The average age of mothers having children had increased by three years from 1985 to 1995;
- c) Australia's 'natural' fertility rate had fallen to well below replacement level by the late 1990s, a situation mirrored in places such as Japan or Southern Europe;
- d) In a submission to the report, an academic commentator argued 'low fertility is a result of the conflict between a liberal economic agenda, and the persistence of social institutions premised upon a male-breadwinner role of the family. It is this combination which is fatal to child rearing;'<sup>160</sup> and
- e) Highly educated women in professional roles tended to have fewer children than less educated women, or than similarly educated male colleagues.

On the economic front, the HREOC's 1999 report findings were sobering, finding that deciding to have a family had a substantive negative impact on a woman's long-term economic well-being.<sup>161</sup> The HREOC 1999 report

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<sup>156</sup>Ibid 12.

<sup>157</sup>Ibid 14-15.

<sup>158</sup>Ibid 14-15.

<sup>159</sup>Ibid 13-15.

<sup>160</sup>Ibid 14.

<sup>161</sup>Ibid 16.

summarised the following findings regarding the impact on lifetime earnings (including superannuation earnings) for women who decided to have a family over those who chose not to have families:<sup>162</sup>

- a) Women who left the workforce to have one child faced an average loss of lifetime earnings of \$336 000;
- b) Female workers (particularly with children) got paid less than their male counterparts; and
- c) Job insecurity or movement into lower paid and less secure forms of work was made worse by the decision to have a family (and conversely people surveyed deterred them from starting families for these reasons).

The HREOC 1999 report also found in its review of the effectiveness of anti-discrimination legislation that pregnancy discrimination and harassment remained major problems in the workplace.<sup>163</sup> Submissions to the inquiry report and previous EOC<sup>164</sup> decisions made it clear many women had been dismissed from their employment, denied opportunities for promotion or turned down by prospective employers when they revealed their pregnancy status to them.<sup>165</sup> The HREOC 1999 report also found problems existed for women in insecure, temporary or casual forms of employment, which often involved reduced conditions at a poorer level of job security as compared with part-time or full-time employees.<sup>166</sup> The HREOC 1999 report also noted the numbers of women in casual jobs was increasing over time since the 1980s, and at a faster rate than male employees in similar industries.<sup>167</sup> Insecure forms of employment for women tended to exacerbate the problems caused by pregnancy discrimination against females, as women on casual contract or temporary roles often had fewer

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<sup>162</sup>Ibid 16.

<sup>163</sup>Ibid chs 4-8.

<sup>164</sup>Equal Opportunity Commission. Now the Australian Human Rights Commission (AHRC). The title 'Australian Human Rights Commission' will be used from this point on to refer to reports prepared by the AHRC.

<sup>165</sup>Australian Human Rights Commission, 'Pregnant and Productive: It's a Right, Not a Privilege to Work While Pregnant.' (Australian Human Rights Commission 1999 Report, Australian Human Rights Commission, 1999), 62-3.

<sup>166</sup>Ibid 146-7.

<sup>167</sup>Ibid 146-7.



workplace rights than those covered by awards and ‘Australian Workplace Agreements’ (AWA’s).<sup>168</sup>

In 2002, the AHRC (formerly HREOC) conducted a follow up report to the HREOC 1999 report titled: ‘A Time to Value: A Proposal for a National Paid Maternity Leave Scheme (2002 Report).’<sup>169</sup> The AHRC 2002 report examined issues working parents faced in trying to balance work and family responsibilities.<sup>170</sup> The report made these recommendations for law reform relating to workplace discrimination against women with parental responsibilities:

- a) A national statutory paid maternity leave scheme as basic employment right should be enacted by the federal government as soon as possible;<sup>171</sup>
- b) The maternity leave period available should be for 14 weeks and paid at the rate of the federal minimum wage;<sup>172</sup>
- c) Mothers who have been in any form of paid work (including casual, part-time and self-employment) for 40 out of the previous 52 weeks should be eligible for paid parental leave and the parental leave payment should not be ‘means tested’;<sup>173</sup>
- d) The parental leave payment should be made fortnightly to the individual parent by the government, or by the employer who is then reimbursed by the government;<sup>174</sup> and
- e) The parental leave payment should be compatible with existing employment awards and government family payments to avoid ‘double-dipping’<sup>175</sup>

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<sup>168</sup>Ibid 146-150.

<sup>169</sup>Australian Human Rights Commission, ‘A Time to Value: A Proposal for a National Paid Maternity Leave Scheme,’ (Australian Human Rights Commission 2002 Report, Australian Human Rights Commission, 2002).

<sup>170</sup>Ibid.

<sup>171</sup>Ibid 17.

<sup>172</sup>Ibid 17.

<sup>173</sup>Ibid 17.

<sup>174</sup>Ibid 18.

<sup>175</sup>Claiming both employer contributions and government payments. Ibid 18.

The AHRC 2002 report estimated a paid maternity leave scheme at the national level would cost the federal government about \$864 million over a period of four years.<sup>176</sup> The AHRC 2002 report argued the benefits that would flow from a paid national maternity leave scheme included:<sup>177</sup>

- a) Helping to ensure the health of mothers and their offspring following birth;
- b) Addressing workplace discrimination that women face due to maternity; and
- c) Assisting women to participate in the workforce and the community on an equal footing with men.

The AHRC 2002 report also argued social research showed that women who are choosing to have children while working suffered a range of negative economic consequences, including<sup>178</sup>

- a) An average net financial cost of raising two children to the age of 20 years of \$450 000;
- b) Losing between \$157 000 and \$239 000 in lifetime earnings;
- c) Retirement incomes reduced to about half those of men because of the time is taken off from paid work to care for children over their lifetimes; and
- d) Increased levels of female poverty and reliance on the aged pension upon retirement when compared to men.

The AHRC 2002 report also found working women faced different forms of workplace discrimination if they chose to have children.<sup>179</sup> These forms of discrimination included demotion, dismissal from the job, lower rates of pay and missed promotional opportunities for years following pregnancy and birth.<sup>180</sup>

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<sup>176</sup>Ibid 251.

<sup>177</sup>Ibid 65.

<sup>178</sup>Ibid 63-71.

<sup>179</sup>Australian Human Rights Commission, 'A Time to Value: A Proposal for a National Paid Maternity Leave Scheme,' (Australian Human Rights Commission 2002 Report, Australian Human Rights Commission, 2002), 89-90.

<sup>180</sup>Ibid 89-90.

The report argued a statutory paid parental leave scheme would help overcome some of these problems and promote gender equality.<sup>181</sup> It also suggested a paid parental leave scheme would have indirect social benefits including reducing economic burdens of an ageing population by making it easier for people of working age to start a family.<sup>182</sup>

In 2005, the AHRC prepared a follow-up working paper to the 1999 and 2002 reports that further examined the issue of paid work and parental leave.<sup>183</sup> The 2005 AHRC working paper indicated despite social changes in the previous four decades that saw women enter the workforce in greater numbers, enjoying relatively higher levels of social and economic freedom, and progressing in the workplace, their roles in domestic and caring roles had changed little.<sup>184</sup>

The 2005 AHRC working paper further indicated that in fact, women in the current era faced increased demands both at work and in ‘non-work’ related caring responsibilities, which were mostly of an unpaid nature.<sup>185</sup> These conflicting demands between work and family obligations had negative impacts on women in several ways, including discrimination in employment and other areas and reduced lifetime income and earnings as previous reports had highlighted.<sup>186</sup>

The 2005 AHRC working paper further developed new arguments recommending the introduction of a government-funded and administered system of paid maternity leave as a workplace right to help parents (especially women) to balance work and family responsibilities as a matter of urgency for policymakers and legislators.<sup>187</sup> Consistent with previous research,<sup>188</sup> the AHRC

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<sup>181</sup>Ibid 99.

<sup>182</sup>Ibid 106.

<sup>183</sup>Australian Human Rights Commission, ‘Striking a Balance: Women, Men, Work and the Family’, (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005).

<sup>184</sup>Ibid 11.

<sup>185</sup>Ibid 11.

<sup>186</sup>Ibid 11-12.

<sup>187</sup>Ibid 14.

<sup>188</sup>See the Australian Human Rights Commission, ‘Pregnant and Productive: It’s a Right, Not a Privilege to Work While Pregnant.’ (Australian Human Rights Commission 1999 Report, Australian Human Rights Commission, 1999) and the Australian Human Rights Commission,

2005 working paper listed several factors that continued to cause problems for working women, particularly those in pregnancy or child-rearing related situations:<sup>189</sup>

- a) Women are entering the workforce in larger numbers and are still expected to do the majority of unpaid work at home and elsewhere;
- b) Employees (including women) are facing higher expectations of productivity and performance from employers, making it difficult to combine work and family responsibilities;
- c) Caring burdens are increasing on women due to rising numbers of elderly and disabled persons living in Australian households; and
- d) Parenting styles have become more intense and demanding in the 21st century, and proper parenting requires complex skills and a greater investment of time and money into parenting from parents than in earlier historical periods.

The 2005 AHRC working paper argued a lack of significant reform and change in this area would lead to continued disadvantages for women, including still carrying the bulk of caring responsibilities and also facing continued discrimination in employment.<sup>190</sup> In the analysis of the underlying social and economic framework prevailing in Australia, the 2005 AHRC working paper noted that despite social changes that led to more women being active in the workforce, Australian workplaces and domestic contexts were still dominated by the ‘male breadwinner’ model. This model is one where men were still expected to earn most of the household income (generally through paid employment) and be the economic mainstay of the family, while women did most of the unpaid work which was mainly of a domestic or caring nature.<sup>191</sup> The 2005 AHRC working paper also indicated that data from a 2000 longitudinal

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‘A Time to Value: A Proposal for a National Paid Maternity Leave Scheme,’ (Australian Human Rights Commission 2002 Report, Australian Human Rights Commission, 2002).

<sup>189</sup> Australian Human Rights Commission, ‘Striking a Balance: Women, Men, Work and the Family’, (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005), 15.

<sup>190</sup>Ibid 17.

<sup>191</sup>Australian Human Rights Commission, ‘Striking a Balance: Women, Men, Work and the Family’, (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005), 25.

study<sup>192</sup> showed around 45% of women had access to some paid maternity or parental leave in their primary employment, and women in full-time work were about 20% more likely than part-time or casual female employees to have maternity leave entitlements.<sup>193</sup> A similar 2003 ABS study<sup>194</sup> found women working in the public sector were also twice as likely to have access to paid maternity leave.<sup>195</sup>

The 2005 AHRC report also conducted a careful study of ABS statistical information indicating trends around women and unpaid work.<sup>196</sup> The information collected showed that while women had increased workforce participation, they continued to do most housework and unpaid caring work.<sup>197</sup> The statistical information collected in the paper showed ‘domestic’ work was still strongly gender segregated, with women performing 70% of all domestic work in Australian households, and with married women spending the most time on ‘women’s work’ and domestic chores.<sup>198</sup> Time study data compiled in the paper also noted that upon becoming parents, women undertook the bulk of unpaid work relating to childcare and related tasks.<sup>199</sup> The time survey data in the paper also showed the time men spent less time on domestic tasks after becoming a parent, and women continued to devote more time to unpaid tasks (cooking, cleaning, and housework) for an extended period after becoming a parent.<sup>200</sup>

The AHRC 2005 working paper noted that despite aspirations from Australians of both sexes that women participate on an equal basis to men in the workforce, this expectation was not matched by reality.<sup>201</sup> Despite progress in several areas, gender identity roles in Australia were still constructed around the ‘male

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<sup>192</sup>Ibid 25.

<sup>193</sup>Ibid 30.

<sup>194</sup>Ibid 30.

<sup>195</sup>Ibid 30.

<sup>196</sup>Ibid 37.

<sup>197</sup>Ibid 37.

<sup>198</sup>Ibid 37-40. This was according to data collected from 1993-1997.

<sup>199</sup>Ibid 40-43.

<sup>200</sup>Australian Human Rights Commission, ‘Striking a Balance: Women, Men, Work and the Family’, (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005), 43.

<sup>201</sup>Ibid 66.

breadwinner' model, with men's roles focused around obtaining and remaining in full-time work that supported the household financially and women's roles structured around 'caring' and 'nurturing' roles rather than paid work.<sup>202</sup> The AHRC 2005 working paper confirmed the inequality inherent in unequal distributions of unpaid caring work and paid work that had dire economic costs for women across their lifetime.<sup>203</sup> The paper used the term 'downward spiral' to describe the cumulative consequences of lifetime gender inequality, noting 'young women start out in the workforce with high expectations of their working lives,'<sup>204</sup> but face a 'slow and often irreversible decline in pay, work status and financial security relative to men as their working and domestic lives unfold in time'.<sup>205</sup> This gender pay gap between men and women and lower retirement savings or superannuation holdings of older women reflected this.<sup>206</sup>

The AHRC 2005 working paper also cited information showing becoming mothers had a heavy impact on the labour force participation rates of women, a significant factor in Australia's long-term plans for economic prosperity.<sup>207</sup> Information cited from other studies (including international social research)<sup>208</sup> indicated that the uneven sharing of caring and housework responsibilities and poor prospects for employment for mothers were often critical factors in meagre workplace participation rates and declining fertility rates in Australia and overseas.<sup>209</sup> The 2005 AHRC paper also conducted research into the incorporation of so-called 'family friendly' provisions into Australian Workplace Agreements, the cornerstone of the 2005-2006 Work Choices laws. AWAs were designed to replace the federal awards system with a more flexible and deregulated model of industrial relations to enhance productivity, flexibility and economic prosperity.<sup>210</sup> The AHRC's 2005 paper indicated that while

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<sup>202</sup>Ibid 66-7.

<sup>203</sup>Ibid 80.

<sup>204</sup>Ibid 81.

<sup>205</sup>Ibid 81.

<sup>206</sup>Ibid 81-2.

<sup>207</sup>Ibid 83.

<sup>208</sup>Ibid 85-86.

<sup>209</sup>Australian Human Rights Commission, 'Striking a Balance: Women, Men, Work and the Family', (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005), 86.

<sup>210</sup>Ibid 102-3.

around 87% to 91% of AWA's or 'registered industrial agreements' contained a "family friendly" or 'flexible time' provision, only around a quarter of these included provisions relating to parental leave, and most AWA's also had terms which gave employers the right to extend the working hours of employees or to trade away other entitlements that might be used to cover time off work for maternity or to care for a child (i.e. sick leave or annual leave time) in return for higher pay or working hours.<sup>211</sup>

Following the 2005 discussion paper, the AHRC released a comprehensive follow-up report titled 'It's About Time: Women, Men, Work and the Family,'<sup>212</sup> that recommended introducing a federally legislated and administered paid parental leave scheme.<sup>213</sup> The AHRC 2007 report recapitulated many of the findings of the AHRC 2005 discussion paper<sup>214</sup> and previous reports,<sup>215</sup> and recommended moving away from the 'male breadwinner' model of earning and caring to a 'shared work – valued care' approach where paid labour and caring responsibilities (including parenting) were shared between the sexes to foster greater equality.<sup>216</sup> The AHRC 2007 report recommended the introduction of a national paid parental leave scheme 'as a matter of priority'<sup>217</sup> for at least a 14-week period, paid at the level of the federal minimum wage as a workplace right, and after the introduction of this right, the government should further introduce a two week period of paid paternity leave for working fathers with an additional period of 38 weeks of paid leave available to either parent.<sup>218</sup>

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<sup>211</sup>Ibid 102-3.

<sup>212</sup>Australian Human Rights Commission, 'It's About Time: Women, Men, Work and the Family,' (Australian Human Rights Commission Final Paper 2007, Australian Human Rights Commission, 2007).

<sup>213</sup>Ibid.

<sup>214</sup>See following review.

<sup>215</sup>Australian Human Rights Commission, 'It's About Time: Women, Men, Work and the Family,' (Australian Human Rights Commission Final Paper 2007, Australian Human Rights Commission, 2007).

<sup>216</sup>Ibid 13.

<sup>217</sup>Ibid 20, Recommendation 13.

<sup>218</sup>Australian Human Rights Commission, 'It's About Time: Women, Men, Work and the Family,' (Australian Human Rights Commission Final Paper 2007, Australian Human Rights Commission, 2007), 20, Recommendation 14. The *Paid Parental Leave Act 2010* (Cth) is virtually identical, except there is a longer maximum leave period of 18 rather than 14 weeks: *Paid Parental Leave Act 2010* (Cth) ch 1 pt 1-1 div 2 s 4.

The AHRC 2007 report concluded that the ‘male breadwinner’ model of work, family and social relationships was simply no longer ‘viable.’<sup>219</sup> and the male breadwinner model needed to be replaced with a dual-earner/carer model of social relationships to better reflect Australian social change.<sup>220</sup> Assessing how this could be achieved, the AHRC 2007 report suggested three methods: (i) public family leave policies, (ii) working time regulations, and (iii) affordable systems of public childcare and education.<sup>221</sup> Accessing standard forms of leave and parental leave would be integral to achieve gender equality outcomes.<sup>222</sup> The report suggested implementing these policies would have multiple beneficial outcomes in a range of areas, including social, economic and personal wellbeing.<sup>223</sup>

Though the AHRC 2007 report contained an extensive range of proposed measures to help Australia move from a ‘male breadwinner’ or ‘ideal worker’ model to a ‘dual earner/carer’ model, paid maternity/parental leave formed a cornerstone recommendation in the report.<sup>224</sup> The report gave several grounds for making a national paid maternity/parental leave scheme an urgent priority.<sup>225</sup> These included the fact that at the time of the report was released Australia (along with the United States) was the only country without any paid parental leave scheme.<sup>226</sup> Also noted in the AHRC 2007 report were clear health benefits for infants and young children<sup>227</sup> and the ability to help parents (especially mothers) retain workforce attachment and fostering wider gender equality.<sup>228</sup>

The AHRC 2007 report cited evidence from submissions in support, including surveys of working fathers who wanted to better balance professional and family

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<sup>219</sup>Ibid 42-3.

<sup>220</sup>Ibid 42-3.

<sup>221</sup>Ibid 43.

<sup>222</sup>See 75, above.

<sup>223</sup>Ibid 43-7.

<sup>224</sup>Ibid 83.

<sup>225</sup>Ibid 83.

<sup>226</sup>Ibid 84.

<sup>227</sup>Australian Human Rights Commission, ‘It’s About Time: Women, Men, Work and the Family,’ (Australian Human Rights Commission Final Paper 2007, Australian Human Rights Commission, 2007), 83. For a detailed explanation of research methodology and data sampling methods used in the study, please see 30-31, sections 1.4-1.5 of the AHRC 2007 Report.

<sup>228</sup>Ibid 83-5.



responsibilities in a fairer manner to their female partners.<sup>229</sup> The AHRC 2007 report suggested ‘paid (parental) leave entitlements are essential for recognising a shared work-value care approach. Paid (parental) leave encourages workers with family/carer responsibilities to remain attached to the workforce, providing financial and job security when care needs are high.’<sup>230</sup> Consistent with the recommendations in the AHRC 2005 report, the 2007 AHRC report advised the introduction of a paid parental leave scheme for at least 14 weeks, with further extensions of time, was crucial to helping working parents achieve a proper life/work balance.<sup>231</sup>

## **2.8 The AHRC 2014 Report into Workplace Discrimination Against Working Parents**

A further study by the AHRC in 2014 titled ‘Supporting Working Parents: Pregnancy and Return to Work’ which supported the findings of the previous AHRC reports but also further discussed the issue of discrimination against working parents.<sup>232</sup> Some of the AHRC 2014 report’s key findings include:

- a) The increased participation of women in the 20<sup>th</sup> century in the Australian labour market increased Australia’s GDP by around 22%;
- b) If 6% more women participated in the work force the national GDP would increase by \$25 billion per annum;
- c) Encouraging women nearing retirement age to remain in the workforce would save the government \$2-8 billion per year on the aged pension and other social security payments;
- d) Retaining talented women would reduce costs, promote work productivity and enhance profitability for the business;
- e) 49% of mothers who took part in the study reported some form of negative consequences to their employment when taking leave;

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<sup>229</sup>Ibid 84.

<sup>230</sup>Ibid 85.

<sup>231</sup>Ibid 82-84.

<sup>232</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report,’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014).

- f) 32% of respondents reported discrimination in some form when requesting parental leave from their employer;
- g) 18% of respondents said they had been dismissed, made redundant or did not get their work contract renewed by their employer following pregnancy and childbirth; and
- h) Pregnant or childbearing women often faced confrontational forms of sexual discrimination, workplace bullying and harassment following pregnancy or childbirth, threats of sackings or wage cuts, deliberate refusals by employers to make suitable changes in the workplace environment to comply with occupational health and safety guidelines despite requests to do so, and deliberate exclusion from employment opportunities by recruitment agents.<sup>233</sup>

The AHRC 2014 report found these forms of adverse discrimination in the workplace had serious ‘knock-on’ effects on women and their partners, including adverse financial, mental health, physical health and other impacts.<sup>234</sup> The AHRC 2014 report found a connection between unjust forms of discrimination in the workplace and gender stereotypes, such as ‘the construction of women as nurturers and caregivers’,<sup>235</sup> that led to a conflict between their role in the workplace as employees, and their role in the family as mothers and carers.<sup>236</sup> The AHRC 2014 report indicated some harmful gender stereotypes in this area had not changed, even with more than 30 years of social change in Australia promoting women’s employment rights in the workplace.<sup>237</sup>

The AHRC 2014 report made these findings of discriminatory practices being conducted against parents including working women who become pregnant on

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<sup>233</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report,’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 64-8.

<sup>234</sup>Ibid 76-81.

<sup>235</sup>Ibid 82.

<sup>236</sup>Ibid 82.

<sup>237</sup>Ibid 82.

the job or women and men who tried to combine work with family responsibilities:<sup>238</sup>

- a) One in two women and one in four fathers surveyed reported experiencing some discrimination related to parenting upon returning to work;<sup>239</sup>
- b) A significant percentage (32%) of women surveyed who experienced discrimination due to parenting obligations decided to resign or look for work elsewhere;<sup>240</sup>
- c) 18% of the mothers surveyed were made redundant, sacked, or had their employment contract cancelled during a pregnancy;<sup>241</sup>
- d) 91% of the mothers who experienced discrimination at work did not make a formal complaint or take legal action;<sup>242</sup> and
- e) Around 32% of mothers surveyed reported suffering discrimination when requesting parental leave, and 35% when returning to work after having a child.<sup>243</sup>

Discrimination against working women who became pregnant or mothers with children took various forms.<sup>244</sup> A large percentage of the mothers surveyed (46-49%) indicated discrimination often manifested itself indirectly in workplace matters relating to pay and conditions, performance assessment and duties, promotional opportunities and health/safety issues.<sup>245</sup> Smaller numbers of female respondents indicated discrimination occurred in more overt forms, such as dismissal from their jobs, being made redundant, or losing their position in so-called business ‘restructures.’<sup>246</sup> The female respondents surveyed for the report indicated the level of employer discrimination relating to pay, conditions and duties increased to 69% when they requested parental leave.<sup>247</sup> Other forms

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<sup>238</sup>Ibid 82.

<sup>239</sup>Ibid 82.

<sup>240</sup>Ibid 8.

<sup>241</sup>Ibid 8.

<sup>242</sup>Ibid 23.

<sup>243</sup>Ibid 26.

<sup>244</sup>Ibid 26.

<sup>245</sup>Ibid 27.

<sup>246</sup>Ibid 27.

<sup>247</sup>Ibid 28.

of discrimination also increased when working mothers requested parental leave.<sup>248</sup>

These problems continued for mothers who chose to return to work following childbirth.<sup>249</sup> A high percentage of mothers (63%) indicated they received negative comments or experienced negative attitudes from managers, supervisors and co-workers when returning to work.<sup>250</sup> Around 50% of the respondents in the study also indicated they suffered discrimination when requesting flexible work arrangements to balance work and care responsibilities and 38% reported difficulties when negotiating pay, terms and conditions upon their return to work.<sup>251</sup> About a quarter of female respondents also indicated they had their employment terminated or were made redundant after completing their parental leave period.<sup>252</sup>

The AHRC 2014 report highlighted the negative discrimination faced by working mothers and parents had substantial adverse effects across a range of indicia for social, economic and personal well-being.<sup>253</sup> About 84% of the mothers who reported discrimination regarding parental status indicated they had suffered from some negative effect on them personally.<sup>254</sup> Around 72% indicated their mental health had been negatively affected by discrimination about their parental status, especially regarding their self-confidence and self-esteem.<sup>255</sup> The respondents in the AHRC 2014 report also indicated they had experienced adverse outcomes in financial losses and insecurity, lost career and job opportunities, and reduced levels of physical and mental health and of the female respondents surveyed who experienced discrimination, 75% took some considered action to respond to the discrimination.<sup>256</sup> Around 32% resigned

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<sup>248</sup>Ibid 28.

<sup>249</sup>Ibid 29.

<sup>250</sup>Ibid 29.

<sup>251</sup>Ibid 29.

<sup>252</sup>Ibid 29.

<sup>253</sup>Ibid 38-40.

<sup>254</sup>Ibid 38.

<sup>255</sup>Ibid 38.

<sup>256</sup>Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Report,' (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 33.

from their job or looked for alternative work, and 22% did not return to the workforce in an employment capacity.<sup>257</sup>

The AHRC 2014 report indicated discrimination against working mothers also disproportionately affected single mothers and women working according to casual employment arrangements.<sup>258</sup> Around 24% of female respondents working in casual positions resigned following discrimination, and 14% were dismissed or made redundant by their employer.<sup>259</sup> Women working on fixed-term contracts or in permanent positions also suffered heavily from discrimination, particularly when asking for parental leave from their employer.<sup>260</sup>

The female respondents to the study indicated discrimination regarding parental status was more prevalent in larger workplaces or male-dominated industries such as mining.<sup>261</sup> Discrimination regarding parental status also occurred in a broad range of economic sectors but was most prevalent in manufacturing, utilities, hospitality, and recreation industries.<sup>262</sup> Regarding occupation type, women working in sales roles reported the highest levels of pregnancy or parental discrimination, though women working in professional and managerial positions also suffered quite elevated levels of discrimination.<sup>263</sup>

The vast majority of workers surveyed in the AHRC 2014 report who took leave were women who took parental or maternity leave to care for their child.<sup>264</sup> While some respondents took up the Commonwealth paid parental leave scheme, around 60% of female respondents used some other form of parental leave such as employer-provided leave.<sup>265</sup> The AHRC 2014 report also

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<sup>257</sup>Ibid 33.

<sup>258</sup>Ibid 38.

<sup>259</sup>Ibid 38.

<sup>260</sup>Ibid 39.

<sup>261</sup>Ibid 41-2.

<sup>262</sup>Ibid 43.

<sup>263</sup>Ibid 39. Managers were among those most heavily affected (44-45%).

<sup>264</sup>Ibid 45.

<sup>265</sup>Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Report,' (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 45.

suggested women who were discriminated against for parenting responsibilities were also not informed of workplace changes promptly.<sup>266</sup>

The AHRC 2014 report also examined the experience of fathers who also faced negative consequences of deciding to become a parent, though to a lesser degree than the female respondents.<sup>267</sup> The male respondents to the AHRC 2014 report indicated these workplace difficulties occurred when they became parents:<sup>268</sup>

- a) Around 49% of fathers received negative comments about their parenting or employment responsibilities;
- b) 47% of fathers experienced discrimination relating to work, pay and conditions;
- c) 38% of fathers indicated difficulty in negotiating flexible work arrangements; and
- d) 16% of fathers were threatened with dismissal, and 10% lost their jobs when becoming parents.<sup>269</sup>

As with the female respondents, male respondents in the AHRC 2014 report indicated discriminatory practices relating to becoming a parent or parental responsibilities had damaging effects on their mental and physical health, as well as their finances and work opportunities.<sup>270</sup> A substantial number of male fathers who faced discrimination decided to resign or look for another job, and very few of them made any formal complaint about the discrimination they faced.<sup>271</sup>

The reasons for discrimination against working parents seem deeply rooted and involved, but the interviews with respondents (mainly female respondents) in the study shed interesting light on the issue.<sup>272</sup> First, pregnant women often received hostile or negative criticism from employers, managers, supervisors or co-

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<sup>266</sup>Ibid 47.

<sup>267</sup>Ibid 49.

<sup>268</sup>Ibid 49.

<sup>269</sup>Ibid 49-50.

<sup>270</sup>Ibid 53.

<sup>271</sup>Ibid 53.

<sup>272</sup>Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Report,' (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 64.

workers on the basis they were perceived to be a liability to the business.<sup>273</sup> In other cases, women were subjected to harsh moral judgments about their decision to have a child, in a sense, it was questioned whether they even made the right choice to continue working while pregnant and instead they should have taken time off to care for their child.<sup>274</sup> In other cases, women were perceived by their employers not to be seriously committed to their jobs, and employers assumed following the birth of children they wanted a minor role with less responsibility, lower pay and a smaller workload.<sup>275</sup> Working mothers were also often assumed by their employers to not be capable of taking on more senior roles in the business after having a family.<sup>276</sup> Female respondents who had children also indicated they faced discrimination while going through the recruitment process for jobs by gender stereotyping.<sup>277</sup> This gender stereotyping included the assumption women were the main caregivers of children and men the primary breadwinner, so women were not likely to be good candidates for a full-time role.<sup>278</sup> In other cases where female respondents asked for parental leave, they were often denied leave because of costs to the business or were pressured to take leave on unfavourable terms by employers for different reasons.<sup>279</sup>

Female respondents to the study also indicated male colleagues (even those with lesser experience and qualifications) were promoted rapidly to their detriment, as male counterparts were perceived by their superiors to be more valuable workers.<sup>280</sup> The reasons for this perception seem to be complex but appeared to be related to employer perceptions that female employees with childcare obligations cannot be as fully committed to their jobs as male colleagues can be.<sup>281</sup> Another element appeared to be the notion an employee had to be available around the clock if needed to be considered for any promotion or

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<sup>273</sup>Ibid 64.

<sup>274</sup>Ibid 64.

<sup>275</sup>Ibid 64.

<sup>276</sup>Ibid 64.

<sup>277</sup>Ibid 66.

<sup>278</sup>Ibid 66.

<sup>279</sup>Ibid 68-9.

<sup>280</sup>Ibid 71.

<sup>281</sup>Ibid 72.

advancement in their workplace.<sup>282</sup> Further submissions to the AHRC 2014 report indicated a trend of employers in some cases breaching basic workplace and anti-discrimination laws by summarily dismissing employees who chose to become parents.<sup>283</sup> Other respondents indicated in their interview responses extreme actions of this kind by their employers often had various and sometimes severe ramifications on their lives through financial loss, relationship breakdowns, stresses due to having to retrain or seek new work, mental health problems, and even miscarriage in some instances.<sup>284</sup>

Even with the introduction of paid parental leave laws in 2010,<sup>285</sup> many respondents interviewed in the AHRC 2014 report found the parental leave schemes of both the government and their employers did not offer sufficient protection from discrimination or compensation for the financial losses and problems caused by discrimination.<sup>286</sup> The respondents surveyed in the report stated this was because the amounts given in paid leave did not sufficiently compensate lost income and future earnings (including superannuation) from adverse employer action, but also other matters such as changing from full-time positions into part-time positions with fewer hours, being moved into casual or fixed-term contracts, sackings and forced redundancy rendered parents ineligible for government payments (including parental leave) that were contingent on their employment status.<sup>287</sup>

The roots of discriminatory work practices listed in the AHRC 2014 report are manifold.<sup>288</sup> As mentioned earlier, gender stereotyping and the ideal of the ‘perfect worker’ seems to play a role<sup>289</sup> and there are also different kinds of discrimination and stigma attached to male and female workers who become

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<sup>282</sup>Ibid 72.

<sup>283</sup>Ibid 72-74.

<sup>284</sup>Ibid 72-4.

<sup>285</sup>Ibid 72-4. See Chapter 3 of this thesis below for a more detailed discussion on this matter.

<sup>286</sup>Ibid 78.

<sup>287</sup>Ibid 78.

<sup>288</sup>Ibid 81-2.

<sup>289</sup>Ibid 82. See also section 2.1. of this Chapter.



parents.<sup>290</sup> However, most stigma and discrimination seems to be directed mainly towards women and mothers (because they are perceived by employers not to be able to reconcile being entirely loyal to the organisation and loyal to honouring their duties as a parent).<sup>291</sup> Also, lack of awareness by both employers and employees of their legal rights and obligations, difficulties in finding affordable childcare, gaps between workplace policy and practice, workplace inflexibility and other factors also played a role.<sup>292</sup> The findings of the AHRC 2014 report suggested workplace discrimination against pregnant women and working parents was ‘pervasive’<sup>293</sup> in the Australian workplace and not simply an isolated problem confined to a few cases involving ‘rogue’ employers with many employees experiencing more than one kind of discrimination at once from more than one employer.<sup>294</sup>

The AHRC 2014 report received submissions from employers on the issue of discrimination against working parents.<sup>295</sup> While many employers were aware of their obligations under the law, evidence from business submissions indicated employers were often under pressure to dismiss pregnant employees and working parents or make them redundant due to cost and other pressures in competitive industry environments.<sup>296</sup> Other factors also weighed in, such as the costs of replacing long-term employees with the new staff (including recruitment, advertising, administrative and training costs), business uncertainty, human resources costs, and management issues.<sup>297</sup> Many managers and business owners surveyed in the report also found requests for ‘flexible work’ unintelligible or meaningless in the face of the complexity of everyday business operations<sup>298</sup> while others could not see the value in these arrangements, particularly in specific businesses or organisations (i.e. law firms, customer

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<sup>290</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report,’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 82.

<sup>291</sup>Ibid 82.

<sup>292</sup>Ibid 82-6.

<sup>293</sup>Ibid 92.

<sup>294</sup>Ibid 92.

<sup>295</sup>Ibid ch 4.

<sup>296</sup>Ibid.

<sup>297</sup>Ibid 100-105.

<sup>298</sup>Ibid 106.

service centres, FIFO operations, mine-sites, etc.) where long working hours, unusual or irregular shifts, high customer and client expectations or the nature of the industry itself limited flexibility in this area.<sup>299</sup>

Manager bias and prejudice were also mentioned as a major problem by some business submissions to the report.<sup>300</sup> Organisational culture also appeared to have a significant impact, with industries being more involved if the culture did not foster a fair workplace for pregnant women and working parents.<sup>301</sup> The AHRC 2014 report found the widespread prevalence of discrimination against working mothers and parents has major costs for the economy, workers and business.<sup>302</sup> The practice of discrimination is inconsistent with Australian workplace relations and anti-discrimination law,<sup>303</sup> and Australia's obligations under international law.<sup>304</sup> The AHRC 2014 report also cited evidence the practice of discrimination conflicts with business and human resources best practice conducted in Australian and in other OECD nations which show gender-equal workplaces have higher levels of productivity, profitability and staff satisfaction than workplaces where only men dominate, particularly in management or on company boards.<sup>305</sup> The AHRC 2014 report also showed discrimination costs the Australian economy in a range of areas, including reducing GDP levels, putting greater pressure on government budgets through items such as reduced superannuation earnings and more demand for the age pension by retired women, and lower workplace productivity.<sup>306</sup> The AHRC 2014 report also cited evidence that discrimination against pregnant women and working parents constitutes a serious waste of human capital, especially among professional women, who are now graduating from universities with higher degrees and entering skilled professions in greater numbers than men.<sup>307</sup>

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<sup>299</sup>Ibid 107-8.

<sup>300</sup>Ibid 108-110.

<sup>301</sup>Ibid 110.

<sup>302</sup>Ibid 15.

<sup>303</sup>Ibid 14-15. For example, the *Sex Discrimination Act 1984* (Cth); *Fair Work Act 2009* (Cth).

<sup>304</sup>Ibid 115.

<sup>305</sup>Ibid 16-17.

<sup>306</sup>Ibid 66.

<sup>307</sup>Ibid 17-18.

The AHRC 2014 report made several recommendations relating to the widespread discrimination against pregnant women and working parents.<sup>308</sup> These covered a range of areas but the initial recommendations came under these general headings:<sup>309</sup>

- a) Strengthening the *Sex Discrimination Act 1984* to reduce the opportunity for employers to discriminate against employees via indirect means;
- b) Amend the *Fair Work Act 2009* to include a right to request flexible working arrangements and unpaid parental leave, and strengthen protections against dismissal or redundancy during leave or pregnancy;
- c) Improve public education relating to Occupational Health and Safety laws;
- d) Reduce legal costs in making complaints against discrimination and enforcing legal rights; and
- e) Protecting employees who make complaints against employers who engage in discriminatory business practices.

The report also made these recommendations relating to parental leave:<sup>310</sup>

- a) Retaining employer administration of the parental leave scheme under the *Paid Parental Leave Act*, so the policy objective of paid parental leave as being a workplace entitlement and not a welfare payment is supported;
- b) Increasing the duration of paid parental leave under the *Paid Parental Leave Act* to 26 weeks, to harmonise Australia's laws with other OECD nations;
- c) Increasing the length of time and payment levels under the Dad and Partner Pay (DAPP) scheme;
- d) Increasing paid parental leave payments from the minimum wage towards full wage replacement levels; and

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<sup>308</sup>See the following discussion.

<sup>309</sup>Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review Report,' (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 118.

<sup>310</sup>Ibid 131. See also Chapter 3 for more details about Australia's PPL laws.

- e) Increasing and improving access to early childcare services.

Over the period from 1999-2014, the HREOC and AHRC reports discussed above showed a troublesome trend of continuing workplace discrimination against parents taking time off from work to engage in family responsibilities. Indeed, the latest of the reports discussed found that discrimination against parents who took time off work to engage in family responsibilities was ‘pervasive’ and occurred across a wide range of workplaces and industries.<sup>311</sup> This long-term trend indicated that ‘self-regulation’ by employers in the place of a robust industrial relations framework that protected worker’s rights was ineffective at protecting parents who took time off work for family responsibility from adverse work discrimination practices.<sup>312</sup>

## **2.9 The 2009 Productivity Commission Final Inquiry Report into Paid Parental Leave**

The other major driver for parental leave reform in Australia was the 2009 Final Inquiry Report into paid parental leave prepared by the Australian Productivity Commission (‘PC 2009 report’)<sup>313</sup> into the viability of introducing a government-funded paid parental leave scheme in Australia.<sup>314</sup> In its stated objectives, the Productivity Commission report listed these aims that a suitable paid parental leave scheme should address these issues:<sup>315</sup>

- a) Identify the economic, productivity and social costs of providing paid parental leave in Australia;
- b) Explore the current extent of current employer provision of paid parental leave in Australia;

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<sup>311</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report,’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 83-83.

<sup>312</sup>Allen, Dominique, ‘Supporting Working Parents: Findings from the AHRC’s National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in The Workplace’ (2014) 27(3) *Australian Journal of Labour Law* 281, 282-291.

<sup>313</sup>Australian Government Productivity Commission, ‘Paid Parental Leave: Support for Parents of Newborn Children,’ (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009). For the policy background to the Productivity Commission’s report, see the prior sections of this Chapter.

<sup>314</sup>*Ibid.*

<sup>315</sup>*Ibid* ‘Terms of Reference,’ IV.

- c) Identify parental leave models that could be developed and applied in an Australian context; and
- d) Assess these models are accounting for factors such as financial costs for business, employment of working parents and mothers, child health, and improving work/family life balance for families.

In its introduction to the 2009 report, the Productivity Commission recommended the Federal Government should develop and adopt a taxpayer-funded paid parental leave scheme with these main features:<sup>316</sup>

- a) Paid postnatal leave for a total of 18 weeks to be shared by eligible parents, with an additional two week period of paid paternity leave;
- b) Provide the full federal minimum wage (\$543.78 per week) for those eligible, subject to taxation;
- c) All those attached to the labour force with a ‘reasonable degree’ should qualify for leave;
- d) A broad range of family types (including single parents and same-sex couples) should be eligible; and
- e) Employers should act as paymasters in the scheme and provide eligible employees with superannuation top-up payments.

The introduction to the Productivity Commission 2009 report noted these social changes drove a need to conduct a detailed inquiry into the matter:<sup>317</sup>

- a) The majority of women who gave birth to children had been previously attached to the labour force and desired to return to paid employment at some point;
- b) Only around 54% of Australian women in the paid workforce had access to paid maternity or parental leave from their employer;
- c) Australia, along with the United States, was the only OECD country lacking a national paid maternity or parental leave scheme;

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<sup>316</sup>Australian Government Productivity Commission, ‘Paid Parental Leave: Support for Parents of Newborn Children,’ (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), XIV.

<sup>317</sup> Ibid 1.1.

- d) The levels of workforce participation by women had increased by more than 20% since the 1970s, and women were now an integral part of the Australian workforce and the national economy;
- e) As a matter of economic necessity, most Australian households where couples with families lived together in a long-term relationship (married or unmarried) required both parents to work to pay off standard household expenses such as mortgages and household bills and save enough money for retirement;
- f) Parental leave coverage was small or negligible for workers in casual, irregular or insecure patterns of work;
- g) Evidence from social research suggested that for maximal health outcomes, newborn babies needed to spend at least six months with their primary caregiver;
- h) The social expectations around the roles of men and women in Australian society had changed in the last few decades, with female equality in all areas of society accepted as a general social norm; and
- i) Paid parental leave would assist working parents (especially women) retain contact with their employers and the workforce during and after the period of parental leave.

The Productivity Commission 2009 report noted the key driver behind the need for reform in this area of law was the inadequate coverage of parental leave entitlements in Australia.<sup>318</sup> Since the 1970s Australia had only developed a relatively limited parental leave coverage, affecting only around 50% of women in the workforce, and even this leave was only on an unpaid basis (for a maximum of 52 weeks).<sup>319</sup> In contrast, the Productivity Commission 2009 report noted most other OECD nations had developed paid maternity or parental leave schemes of between 3-6 months in duration, while the Nordic countries

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<sup>318</sup>Australian Government Productivity Commission, 'Paid Parental Leave: Support for Parents of Newborn Children,' (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), 1.1.

<sup>319</sup>Ibid 1.2.

had introduced schemes that gave paid leave at around 12 months at wage replacement levels.<sup>320</sup>

The Productivity Commission 2009 report noted that despite the lack of the existence of a paid parental leave scheme, other systems in places such as the \$5000 ‘baby bonus’ payment and Family Tax benefits acted as a ‘de-facto’ system of leave that supported parents at around two-thirds of the minimum wage for 14 weeks.<sup>321</sup> However, the Productivity Commission 2009 report argued this way of handling the issue was now inadequate due to social and economic changes that had occurred in Australian society since the 1970s when unpaid leave was introduced as a limited employment entitlement.<sup>322</sup>

In its analysis of the objectives of introducing a paid parental leave scheme, the Productivity Commission 2009 report noted the fact that only 50% of working women had access to paid parental leave from their employer.<sup>323</sup> A government paid scheme would help redress this issue, which many groups in their submissions argued had negative knock-on effects for female employees, their children, and women’s participation in the workforce.<sup>324</sup> The Productivity Commission 2009 report noted it had received many conflicting submissions regarding the issue, with many groups in disagreement over how a parental leave scheme would be designed and funded.<sup>325</sup> The fact Australia already had a ‘de-facto’ system of leave in place through the ‘baby bonus’ payment and Family Tax Benefit arrangements,<sup>326</sup> some argued these were sufficient to dispose of the issue.<sup>327</sup>

The Productivity Commission 2009 report was rather dismissive of arguments suggesting parental leave was purely a form of financial assistance.<sup>328</sup> Similarly,

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<sup>320</sup>Ibid 1.2.

<sup>321</sup>Ibid 1.2.

<sup>322</sup>See above, 261.

<sup>323</sup>Ibid 1.3.

<sup>324</sup>Ibid 1.3. The arguments here included better child health outcomes, improved female attachment to the workforce, redressing gender inequality and making conditions fairer for poorer paid employees.

<sup>325</sup>Ibid 1.3-1.4.

<sup>326</sup>Ibid 1.3. These are Family Tax Benefit A and B.

<sup>327</sup>Ibid 1.3.

<sup>328</sup>Ibid 1.4.

the Productivity Commission suggested there was little evidence indicating paid parental leave would help increase fertility rates.<sup>329</sup> Instead, it suggested paid parental leave could be justified more strongly on these three grounds:<sup>330</sup>

- a) Enhancing maternal and child health;
- b) Facilitating workforce participation by offsetting disincentives to work generated by existing social and welfare arrangements; and
- c) Promoting gender equity and work/life balance.

The Productivity Commission 2009 report noted a number of issues that would need to be addressed in a scheme design.<sup>331</sup> These would include the benefits of giving working parents (particularly mothers) more time with their children than they might otherwise be able to afford and help society as a whole by helping the developmental needs of children.<sup>332</sup> The number of factors that would need to be taken into account in the design of any scheme would be numerous,<sup>333</sup> However, the aim would maximise the benefit to society overall.<sup>334</sup>

The Productivity Commission 2009 report used the three grounds mentioned above<sup>335</sup> as a tabulated matrix to address the objectives and implications for a scheme design. These results are presented in the Table 1.1. below:<sup>336</sup>

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<sup>329</sup>Ibid 1.4.

<sup>330</sup>Ibid 1.4.

<sup>331</sup>Ibid 1.5.

<sup>332</sup>Ibid 1.5.

<sup>333</sup>See 1.5, Tables 1.1. and 1.2.

<sup>334</sup>Ibid 1.5.

<sup>335</sup>See Table 1.1, 'Objectives and Some Implications for Scheme Design' at 1.17 of the Report.

<sup>336</sup>Ibid 1.5. Table 1.1.



**Table 1.1 Objectives and Some Implications for Scheme Design**

<b>Policy Objective</b>	<b>Core Issues</b>	<b>Implications for Design</b>
<b>Maternal and child health</b>	Time needed away from workplace by mother or parent	Income constraints Time Constraints
<b>Gender equality</b>	Greater acceptance of employers of working parents Gender Roles (Male vs Dual Breadwinner, same-sex couples, etc)	Supporting employees with family responsibilities Protecting employees from adverse discrimination due to family responsibility
<b>Workforce participation</b>	Benefits of workplace retention of working parents Costs to business and parents by taking leave period Non-standard work arrangements	Flexible work arrangements Discrimination protections Eligibility for leave
<b>Maternal and child health</b>	Time needed away from workplace by mother or parent	Income constraints Time Constraints
<b>Gender equality</b>	Greater acceptance of employers of working parents Gender Roles (Male vs. Dual Breadwinner, same-sex couples, etc)	Supporting employees with family responsibilities Protecting employees from adverse discrimination due to family responsibility
<b>Workforce participation</b>	Benefits of workplace retention of working parents Costs to business and parents by taking leave period Nonstandard work arrangements	Flexible work arrangements Discrimination protections Eligibility for leave

The Productivity Commission 2009 report also used a further tabulated matrix to help develop other facets of the scheme such as duration, finance, and pay rates.<sup>337</sup> These matrix elements are presented below in Table 1.2:<sup>338</sup>

**Table 1.2: Key Choices to be made in Scheme Design**

<b>Period</b>	<b>Funding</b>	<b>Pay Rate</b>	<b>Eligibility</b>
Use by mothers or fathers	Government	Below minimum wage	Full-time employees
Mandatory or optional periods	HECS style loans	Minimum wage	Part-time employees
12-14 weeks (Singapore, NZ)	Employer contributions	Variable depending on hours worked	Casuals, self-employed
24 weeks or more (Nordic)	Employer/govt	Wage replacement	Broad definition

The Productivity Commission 2009 report noted the need to take several different factors into account in finding an equitable scheme.<sup>339</sup> These included targeting payments in a fair manner towards those most in need,<sup>340</sup> avoiding conflicts with other family payments, ensuring fiscal responsibility and cost effectiveness, and harmonising any scheme of parental leave with related issues such as access to affordable childcare.<sup>341</sup>

The Productivity Commission 2009 report suggested the scheme best suited to Australia would ‘be largely taxpayer funded’<sup>342</sup> and ‘should incorporate two types of leave: (a) 18 weeks paid parental leave for either parent, and (b) two weeks of paid paternity leave for the father or other eligible partner.’<sup>343</sup> The Productivity Commission proposed that both types of leave payment should be at the national minimum wage and parents with access to privately negotiated leave payment arrangements (i.e. as part of their employment contract) should

<sup>337</sup>Ibid 1.5.

<sup>338</sup>Ibid 1.18, Table 1.2., ‘Key Choices to be made in Scheme Design’.

<sup>339</sup>Ibid 1.5.

<sup>340</sup>Ibid 1.5. For example, lower income earners.

<sup>341</sup>Ibid 1.5.

<sup>342</sup>Ibid 2.1.

<sup>343</sup>Ibid 2.1.

still be able to access the government payment if they were eligible.<sup>344</sup> The Productivity Commission justified this recommendation on a range of grounds<sup>345</sup> but the main ones were simplicity and flexibility.<sup>346</sup> The Productivity Commission's model in the 2009 report focused on giving eligible parents up to 18 weeks of paid leave up to one year following the birth of their child.<sup>347</sup> Parents working full-time, as well as part-time, casual and self-employed workers, would be eligible.<sup>348</sup> Parents taking up statutory parental leave would lose the baby bonus payment (\$5000) along with access to Family Tax Benefit B.<sup>349</sup> Payments would be made by the government through taxation. However, employers would pay the entitlement.<sup>350</sup> Appropriate provisions would be made for sharing leave and also eligibility for adoptive parents.<sup>351</sup>

The Productivity Commission justified the payment at the national minimum wage in favour of alternatives (such as wage replacement) on some grounds.<sup>352</sup> The Productivity Commission argued a minimum wage scheme at a flat rate would be easier to implement and would help create incentives for women on low wages to work rather than rely on welfare payments, since parental leave would be more generous.<sup>353</sup> The Productivity Commission argued low-income earners would benefit most from the proposed scheme, though the parental leave payments would be regarded as taxable income and assessed as such.<sup>354</sup>

The Productivity Commission strongly argued the basis of finance for the scheme should be the government through taxation, for several reasons:<sup>355</sup>

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<sup>344</sup>Ibid 2.1.

<sup>345</sup>See 2.2, Box 2.1, and 2.2, Table 2.1.

<sup>346</sup>Ibid 2.1.

<sup>347</sup>Ibid 2.3 Table 2.1.

<sup>348</sup>Ibid Table 2.1.

<sup>349</sup>Ibid Table 2.1. Family Tax Benefit B is a payment of up to \$150.36 per fortnight for a child aged between 0-6 years and \$105.00 per fortnight for children aged 5-15 years for eligible parents earning incomes of \$150 000 or less.

<sup>350</sup>Ibid Table 2.1.

<sup>351</sup>Ibid Table 2.1.

<sup>352</sup>Ibid 2.3.

<sup>353</sup>Ibid 2.3.

<sup>354</sup>Ibid 2.3. Some interesting calculations regarding indexation are discussed in this section.

<sup>355</sup>Ibid 2.4.

- a) Requiring employers to fund parental leave entitlements would put small businesses at risk and act as a disincentive for hiring women of reproductive age;
- b) Spreading the costs through general tax revenue would reduce the risks to women's employment in 'female dominated' industries like retail, child-care and hospitality; and
- c) Income-contingent-style loans along the lines of the 'HECS' type would not be likely to work.

The Productivity Commission argued however in the 2009 report that employers should be required to provide superannuation payments to employees taking parental leave.<sup>356</sup> Despite some potential employer objections about the costs of paying superannuation to employees on paid parental leave, the Productivity Commission's modelling indicated the cost burden on business would be small.<sup>357</sup> The Productivity Commission faced two potential means of paying eligible employees parental leave: using the employer as a 'paymaster' for the payments or prepayment to employers through a government agency such as Centrelink.<sup>358</sup> Regarding eligibility criteria, the Productivity Commission listed some relevant factors, including complexity, cost, accountability, and the risk of fraudulent claims to parental leave entitlements.<sup>359</sup> The Productivity Commission argued that a critical pre-requisite to be eligible for parental leave was 'genuine attachment to the labour market (by the claimant) prior to birth.'<sup>360</sup> This would balance the competing objectives of allowing working parents to take sufficient time off from work to devote to the particular care of their child while avoiding adverse disincentives to return to paid employment following this period.<sup>361</sup> The 'work' test was quite stringent, with the requirement being for an employee to have worked continuously over a 12-month period for a minimum of at least 10 hours a week.<sup>362</sup> The Productivity Commission claimed

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<sup>356</sup>Ibid 2.4.

<sup>357</sup>Ibid 2.4.

<sup>358</sup>Ibid 2.4. Here the report goes into some detail as to payment arrangements.

<sup>359</sup>Ibid 2.5.

<sup>360</sup>Ibid 2.5.

<sup>361</sup>Ibid 2.5.

<sup>362</sup>Ibid 2.5. This requirement was later relaxed for those in non-standard forms of employment.

making parental leave payments available to those with too little attachment to the workplace could create a disincentive to work.<sup>363</sup>

The Productivity Commission recommended paid parental leave also be extended to the self-employed.<sup>364</sup> This reason was justified on several grounds, including accommodating women in professions that required irregular hours of work and those whose work hours were less than the standard eligibility threshold proposed in the scheme.<sup>365</sup> The Productivity Commission also recommended extending parental leave to ‘non-standard’ family units beyond the typical nuclear family, such as adoptive parents and single parents, recognising that in contemporary Australian society there was a range of different family forms.<sup>366</sup> While the Productivity Commission also discussed in some detail those in non-conventional caring and parenting roles, it argued paid parental leave should not be extended too widely as other forms of social or welfare support could cope with those situations.<sup>367</sup> The Productivity Commission’s proposed structure faced some criticism for reinforcing gender inequity by giving the bulk of leave time to women.<sup>368</sup> The Productivity Commission’s response was that (a) these concerns could be addressed through shared leave arrangements made between the parents, or (b) reforms made to the scheme down the track to increase the time available for ‘paternity leave’<sup>369</sup> or encourage more flexible leave-sharing arrangements for parents.<sup>370</sup>

Concerning the duration and timing of paid leave, the Productivity Commission argued that 18 weeks of paid parental leave was the optimal period, to be taken within a year of the birth of the child.<sup>371</sup> The Productivity Commission 2009 report’s recommendation was made on the basis of health research showing

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<sup>363</sup>Ibid 2.5.

<sup>364</sup>Ibid 2.5.

<sup>365</sup>Ibid 2.5.

<sup>366</sup>Ibid 2.5.

<sup>367</sup>Ibid 2.5.

<sup>368</sup>Ibid 2.5.

<sup>369</sup>Ibid 2.5. This proposal has already been implemented in the Scandinavian states and many other countries. See Chapters 4-6.

<sup>370</sup>Ibid 2.5.

<sup>371</sup>Ibid 2.6.

exclusive parental care for the child in this period (the first 12 months after a child's birth) provided the best clinical outcomes for parent and child.<sup>372</sup>

The Productivity Commission was cautious about payments before birth and also allowing parents to claim both a fully-funded (i.e. wage replacement level) employer-paid parental leave pay scheme and the government parental leave scheme at the same time.<sup>373</sup> The Productivity Commission considered whether longer leave periods (i.e. 26 weeks or longer) would provide better outcomes but felt it did not have sufficient evidence to justify such a conclusion.<sup>374</sup> The Productivity Commission also noted concern that excessively long leave periods would act as a disincentive for female workers to re-enter the workforce due to loss of skills and experience due to lost attachment to the labour market.<sup>375</sup> Concerning potential business costs, the Productivity Commission noted potential costs and problems for the administration of a national scheme if paid parental leave were introduced.<sup>376</sup> The Productivity Commission believed the introduction of several measures, mainly through the *Fair Work* legislation, could address these issues:<sup>377</sup>

- a) Ten weeks of notice is required for taking parental leave;
- b) The notice must be in writing and stipulate the start and end date of the proposed leave period;
- c) Employees have a right to extend their leave time beyond that originally proposed, but must give four weeks' notice before doing so; and
- d) Employees on leave can return to work within a sooner period with the consent of their employer.

The Productivity Commission also examined practices conducted in other countries around paid parental leave designed to make it more flexible for employers and employees.<sup>378</sup> Regarding costs, the Productivity Commission

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<sup>372</sup>Ibid 2.6.

<sup>373</sup>Ibid 2.6. This phenomenon is later discussed under the issue of 'double-dipping.'

<sup>374</sup>Ibid 2.6.

<sup>375</sup>Ibid 2.6.

<sup>376</sup>Ibid 2.7.

<sup>377</sup>Ibid 2.7.

<sup>378</sup>Ibid 2.7.-2.8. These included 'Keep in Touch' (KIT) days.

estimated implementing its scheme would cost the government around \$1.3 billion, though the actual net cost would be approximately \$700 million, if savings from reducing baby bonus and Family Tax Benefit B payments were taken into account.<sup>379</sup> The net costs for the Australian economy would be between \$310 million to \$380 million (dependent on factors such as superannuation contributions) and the net cost to employers to be around approximately \$60 million.<sup>380</sup> The Productivity Commission argued against the introduction of a full-wage replacement scheme on the basis of economic and taxpayer cost.<sup>381</sup> The Productivity Commission proposed that its modelling demonstrated a full-wage replacement scheme for 18 weeks would cost the government around \$1.8 billion (factoring in matters such as subsidies for lower-wage workers and reductions in the baby bonus and Family Tax Benefit B) and a wage replacement scheme running for 52 weeks would cost \$7.6 billion.<sup>382</sup> The Productivity Commission argued this would cost each Australian taxpayer around \$500 per year, with bracket creep affecting the middle class and higher income earners would have to be taxed more to fund such a scheme.<sup>383</sup>

## **2.10 The Productivity Commission Inquiry Final Policy Recommendations**

The Productivity Commission 2009 final report strongly suggested that a statutory paid parental leave scheme would be of net benefit to Australian society.<sup>384</sup> The net gains included economic benefits and also positive outcomes with gender equity, work-life balance, and a better recognition of the value of caring and family life in society.<sup>385</sup> The cost of the scheme projected in the report was relatively modest compared to the amounts spent annually by Australia on health, welfare, and family payments in the federal budget.<sup>386</sup> Many of the concerns expressed in submissions by employer and business groups

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<sup>379</sup>Ibid 2.9.

<sup>380</sup>Ibid 2.9.

<sup>381</sup>Ibid 2.9.

<sup>382</sup>Ibid 2.9.

<sup>383</sup>Ibid 2.9.

<sup>384</sup>Australian Government Productivity Commission, 'Paid Parental Leave: Support for Parents of Newborn Children,' (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), Recommendation 2.1, XXXIX.

<sup>385</sup>Ibid Recommendations 2.1-2.13, XXIX-XXVXLIV.

<sup>386</sup>Ibid 'Overview', XXXV.

seemed to be reasonably addressed in the report and its recommendations.<sup>387</sup> The report was generally in favour of introducing a government-administered paid parental leave system in Australia.<sup>388</sup> To support this, the report's key summary made the following general recommendations concerning paid parental leave:<sup>389</sup>

- a) The Australian Government should introduce a regulatory paid parental scheme for eligible working parents;
- b) The leave period should be for a maximum of 18 weeks, shared by eligible primary carers;
- c) Paid parental leave should be available only by an employed parent meeting a suitable 'employment test' (including full-time work, part-time work, casual and self-employed workers);
- d) The employment test was satisfied by continuous employment for 10 out of the previous 13 calendar months and a working period of at least 330 hours of paid employment;
- e) The payment rate should be the federal minimum wage for every week of leave;
- f) Superannuation payments should be included in the leave payments;
- g) An additional two weeks of paid paternity leave should be reserved for the father or same sex-partner of the child;
- h) Paid parental leave should be regarded as taxable income and assessable income for social security payments except for Newstart, parenting payments and the disability support pension; and
- i) The Paid Parental Leave Scheme should be regularly reviewed by the Commonwealth Government to assess its effectiveness in achieving its objectives and assess the impact of the scheme on parental behaviours, existing voluntary parental leave schemes and the welfare of parents and children.

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<sup>387</sup>Ibid 'Overview' XVII-XXV.

<sup>388</sup>Ibid Overview' XVII.

<sup>389</sup>Ibid 'Recommendations 2.1-2.14' XXXIX-XLV.



## 2.11 Conclusion

As indicated in the introduction to Chapter 2 of this thesis, gender inequality has been identified as a problem and paid parental leave has been suggested as one possible way to deal with gender equality.<sup>390</sup> As the previous discussions in this chapter highlighted, while different economic and social drivers of gender inequality in the workplace can be identified, the main driver appears to be differential time allocated for caring and working obligations in the family for children and social expectations about what each parent (male or female) should play in caring and economically supporting their families while also working for an employer.<sup>391</sup> The relevant literature in peer-reviewed journals, reports prepared by the AHRC and the 2009 Productivity Commission report identify a pressing need in Australia for a paid parental leave regulatory framework of some kind to replace the ‘patchwork’ approach of individual workplace agreements or industry awards which provided parental leave of an inconsistent and incoherent nature.<sup>392</sup> The lack of a coherent national paid maternity or parental leave regulatory framework was demonstrated to be a major contributing factor behind gender inequality between men and women in Australia, especially in the matters such as unequal pay, career burnout for working women, lower rates of workplace participation for women with family

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<sup>390</sup>See Sections 2.1 and 2.2 of this Chapter.

<sup>391</sup>Magnus Bygren and Michael Gahler, ‘Family Formation and Men’s and Women’s Attainment of Workplace Authority’ (2012) 90(3) *Social Forces* 795, 795-816; Barbara Pocock and Michael Alexander, ‘The Price of Feminised Jobs: New Evidence on the Gender Pay Gap in Australia’ (1999) 10(2) *Labour and Industry* 75, 75-100; Hiau Joo Kee, ‘Glass Ceiling or Sticky Floor? Exploring the Australian Gender Pay Gap’ (2006) 82(259) *Economic Record* 408, 408-427; Yekaterina Chzen, Karen Mumford, Catia Nicodemo, ‘The Gender Pay Gap in the Australian Private Sector: Is Selection Relevant Across the Earnings Distribution?’ (2013) 89(286) *Economic Record* 367, 367-381.

<sup>392</sup>Gillian Whitehouse and Di Zetlin, ‘Family Friendly Policies: Distribution and Implementation in Australian Workplaces’ (1999) 10(2) *Economic and Labour Relations Review* 221, 221-239; Gillian Whitehouse, ‘Policy and Women’s Workforce Attachment’ (2005) 35(1) *Just Policy* 22, 22-30; Gillian Whitehouse, ‘Access to Parental Leave in Australia: Evidence from Negotiating the Life Course’ (2005) 40(4) *Social Issues* 489, 489-503; Chris Diamond et al., ‘Maternity Leave and Return to Work in Australia’ 33(2) *Australian Bulletin of Labour* 134, 134-157; Gillian Whitehouse et al., ‘Employer Paid Maternity Leave in Australia: A Comparison of Uptake 2005-2010’ 16(3) *Australian Journal of Labour Economics* 311, 311-327; Janis Bailey et al., ‘No Leg to Stand On: The Moral Economy of Australian Industrial Relations Changes’ (2012) 33(3) *Economic and Industrial Democracy* 441, 441- 461.

responsibilities and discriminatory practices in workplaces against employees based on parental and family responsibilities.<sup>393</sup>

The lack of a paid maternity/parental leave regulatory framework in Australia also led to Australia lagging behind other OECD nations in regards to employment conditions and standards for working women and parents.<sup>394</sup> It also singled Australia out for criticism among the OECD group as one of the few economically developed industrial countries within the OECD that had failed to adopt a coherent regulatory framework of paid parental leave.<sup>395</sup> Australia's weaknesses in this area were made worse by market and policy failures that aggravate gender inequality, including a general lack of affordable childcare places, lack of flexible working conditions for employees with parental responsibilities, ongoing discriminatory work practices and stubborn adherence by employers and Australian society to antiquated gender stereotypes.<sup>396</sup> As noted above, these problems will not simply be resolved by introducing a scheme of paid parental leave.<sup>397</sup> Such a scheme also needs to be designed carefully and well thought out and also amenable to further change and development as

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<sup>393</sup>See earlier references in this Chapter to AHRC Enquiries and Submissions relating to discrimination.

<sup>394</sup>Organisation for Economic Development and Co-operation, *Babies and Bosses: Reconciling Work and Family Life Volume 1: Australia, Denmark and the Netherlands* (2002) <<http://www.oecd-ilibrary.org.ezproxy.library.uwa.edu.au/docserver/download/8102111e.pdf?expires=1518007438&id=id&accname=ocid177534&checksum=363449DAE467FF84F2129A369E0F4072>> 127-141, 177-199; Marian Baird, 'Parental Leave in Australia: The Role of the Industrial Relations System' (2005) 23(1) *Law in Context* 45, 45-64; Marian Baird and A S Witlin, 'Rethinking Work and Family Policy: The Making and Taking of Parental Leave in Australia' (2005) 17(5) *International Review of Psychiatry* 385, 385-400.

<sup>395</sup>Gillian Whitehouse, 'Access to Parental Leave in Australia: Evidence from Negotiating the Life Course' (2005) 40(4) *Social Issues* 489, 489-503; Nadine Zacharias, 'Work-Life Balance: A Cross-Country Analysis of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47; Marian Baird and Adam Litwin, 'Rethinking Work and Family Policy: The Making and Taking of Parental Leave in Australia' (2005) 17(5) *International Review of Psychiatry* 385, 385-400; Christine Malatzky, 'Don't Shut Up: Australia's First Parental Leave Scheme and Beyond: Assisting Women and Men Negotiate Two Worlds of Work' (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>396</sup>Ray Broomhill and Rhonda Sharp, 'The Changing Male Breadwinner Model in Australia: A New Gender Order?' (2005) 16(1) *Labour and Industry* 103, 103-127; Wendy Boyd, 'Maternal Employment and Childcare in Australia: Achievements and Barriers to Satisfying Employment' (2012) 38(3) *Australian Bulletin of Labour* 199, 199-213; Melanie Nolan, 'The High Tide of a Labour Market System: The Australasian Male Breadwinner Model' (2003) 13(3) *Labour and Industry* 73, 73-92.

<sup>397</sup>See earlier discussions in the sources mentioned in FN 394 and FN 395 and see also Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198.

research is done to identify flaws in the system and further insights emerge about the legal implications of the Australian system and suggestions are made for change.<sup>398</sup>

The discussion in Chapter 2 of this thesis supports the argument that the problems with gender inequality are tied at least in part with poor parental leave coverage, particularly in Australia and other English speaking countries that have adopted aggressive neoliberal inspired market-based solutions to work-life balance issues.<sup>399</sup> The review of research in Chapter 2 indicates that a scheme of government-legislated and administered paid parental leave framed in terms of gender equality, rather than focusing on leaving paid parental leave to be provided on a private basis by employers and companies to their employees, provides a better way for reducing gender inequality in the workforce and reducing discrimination against working parents Chapter 3 of this thesis will consider the structure and nature of the 2010 *Paid Parental Leave Act* introduced to address this question and examine how it has impacted on the lives of working Australians and how effectively it is working.<sup>400</sup>

However, gender inequality between men and women remains a persistent problem in Australia, particularly in the paid workforce, despite over a century of activism on the part of women and men to attempt to make the balance of work and family responsibilities fairer.<sup>401</sup> This issue is compounded by

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<sup>398</sup>Alison Earle, Zitha Mokomane, Jody Heymann, 'International Perspectives on Work-Family Policies: Lessons from the World's Most Competitive Economies' (2011) 21(2) *Future of Children* 191, 191-200; Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198; Marian Baird, Sue Williamson, Alexandra Heron, 'Women, Work and Policy Settings in Australia in 2011' (2012) 54(3) *Journal of Industrial Relations* 326, 326-343.

<sup>399</sup>Gosta Esping-Anderson, 'The Three Political Economies of the Welfare State' (1990) 26(1) *Canadian Review of Sociology and Anthropology* 11, 11-36; Nadine Zacharias, 'Work-Life Balance: Good Weather Policies or Agendas for Social Change', A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' 12(2) (2006) *International Employment Relations Review* 32, 32-4.

<sup>400</sup>Nadine Zacharias, 'Work-Life Balance: Good Weather Policies or Agendas for Social Change: A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47; Shalene Werth, 'Survival of the Male Breadwinner' (2011) 37(1) *Hecate* 145, 145-156; Gillian Whitehouse and Peter Walters, 'A Limit to Reflexivity: The Challenge for Working Women of Negotiating Sharing of Household Labour' (2012) 33(8) *Family Issues* 1117, 1117-1139.

<sup>401</sup>Janeen Baxter and Yolana van Gellecum, 'Neoliberalism, Gender Inequality and the Labour Market' (2008) 44(1) *Journal of Sociology* 45, 45- 63; Siobhan Austen and Gerry Redmond, 'Male Earnings Inequality: Women's Earnings and Family Income Inequality in Australia 1982-

economic and social forces discussed earlier in Chapter 2 of this thesis that act in the Australian economy and also in Australian workplaces and social life that marginalise working parents, particularly women because of their perceived lesser value in a market-oriented economic system.<sup>402</sup> This suggests more work needs to be done on the framework of parental leave arrangements in Australia to redress the forces that create perverse incentives for discrimination against women and working parents and correct the pay and employment opportunity gaps between men and women in the spheres of employment and family/intimate relationships. This matter will be taken up in more detail in Chapter 3 of this thesis where the history of Australia's arbitration decisions involving family wages is considered.<sup>403</sup>

The research conducted by the AHRC and the Productivity Commission in a 30-year time period underscored the urgent need in Australia for a paid parental leave scheme that was mandated as a basic employment right. While firstly the focus of these inquiries was into the changes which moved Australian women from the home into the workplace to work alongside men, further research showed the need to not just take measures in the workplace that depended on the freedom of contract between employers and employees, but also to help eliminate discrimination in the workplace against women and those with family

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2007' (2013) 47(1) *Journal of Economic Issues* 33, 33-61; Alison Preston and Therese Jefferson, 'Trends in Australia's Gender/Wage Ratio' (2007) 18(2) *Labour and Industry* 69, 69-84.

<sup>402</sup>Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and the Family' (2004) 46(4) *Journal of Industrial Relations* 400, 400-412; Gillian Whitehouse, 'Parenthood and Pay in Australia and the UK: Evidence from Workplace Surveys', (2002) 38(4) *Journal of Sociology* 381, 381-397; Gillian Whitehouse and Di Zettin, 'Family Friendly Policies: Distribution and Implementation in Australian Workplaces' (1999) 10(2) *Economic and Labour Relations Review* 221, 221-223; Janice Bailey et al., 'No Leg to Stand On: The Moral Economy of Australian Industrial Relations Changes' (2012) 33(3) *Economic and Industrial Democracy* 441, 441-461.

<sup>403</sup>Gillian Whitehouse and Peter Walters, 'A Limit to Reflexivity: The Challenge for Working Women of Negotiating Sharing of Household Labour' (2012) 33(8) *Family Issues* 1117, 1117-1139; Marian Baird et al., 'Returning Too Soon: Australian Mother's Satisfaction With Maternity Leave Duration' (2008) 46(3) *Asia Pacific Journal of Human Resources* 288, 288-302; Therese Jefferson and Alison Preston, 'Australia's other Gender Wage Gap: Baby Boomers and Compulsory Superannuation' (2005) 11(2) *Feminist Economics* 79, 79-102; Kristy Eastough and Paul Miller, 'The Gender Wage Gap in Australia: The Path of Future Convergence' (2002) 78(241) *Economic Record* 161, 161-174; Kristy Eastough and Paul Miller, 'The Gender Wage Gap in Paid and Self-paid employment in Australia' (2004) 43(3) *Australian Economic Papers* 257, 257-276; Joshua Chang et al., 'Gender Gaps in Australian Workplaces: Are Policy Responses Working?' (2014) 33(8) *Equality, Diversity and Inclusion Journal* 764, 764-775.

responsibility.<sup>404</sup> Chapter 3 of this thesis will further discuss the policies and legislation that have been formulated in Australia to address these issues since the introduction of the *Paid Parental Leave Act 2010* in Australia, followed by the discussion of the parental leave systems of selected European OECD countries in Chapter 4 of this thesis and a discussion of the Swedish paid parental leave policy and legislative system in relation to Australia's parental leave system in Chapter 5 of this thesis, followed by a discussion in Chapter 6 of this thesis of key research findings and recommendations for policy and legislative reform and further research in the area of parental leave policy and legislation in Australia.

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<sup>404</sup>John Burgess and Glenda Strachan, 'Winding Back the Clock: Equal Employment Opportunity in Australia into the 21<sup>st</sup> Century' 21(12) *Management Research News* 10; Barbara Pocock, Sara Charlesworth, Janine Chapman, 'Work and Life pressures in Australia: Advancing Gender Equality in Good Times?' 33(9/10) *International Journal of Social Policy* 594, 594-612.

## CHAPTER 3 HISTORY AND DEVELOPMENT OF PARENTAL LEAVE IN AUSTRALIA

### 3.1. Introduction

Chapter 3 will give an overview of the development of paid parental leave in the context of Australian employment relations law from the 1900s to the early part of the 21<sup>st</sup> century with reference to the decisions of Arbitration and Conciliation tribunals and government legislation on paid parental leave.<sup>1</sup> Reference is made in this chapter to the development of employee rights relating to maternity and parental leave and equal pay standards in Arbitration and Industrial Tribunal decisions up to the time of the introduction of the *Paid Parental Leave Act* in 2010. The chapter will then review the legislative history behind the introduction of the *Paid Parental Leave Act 2010* with reference to political policies formulated by the 2009 Productivity Commission Final Report into paid parental leave as discussed previously in Chapter 2 of this thesis. Following this discussion, there will be a more detailed discussion of the regulatory framework as set out in the *Paid Parental Leave Act 2010* including funding, administration, eligibility and legal implications for Australian employment law. Following this discussion, the remainder of Chapter 3 will examine proposed amendments and suggestions for policy change to the Paid Parental Leave regulatory framework from 2010-2017 with particular reference to recent legislative amendments and a brief review of current political party policies on the issue.

As discussed in the Chapter 2 of this thesis, a number of studies have shown that gender discrimination against working women is a persistent problem in Australia.<sup>2</sup> Chapter 3 of this thesis will explain and discuss how the slow development of case precedents for maternity and parental leave rights in Industrial Tribunal decisions from the *Harvester* case and following arbitration decisions up to the introduction of the *Paid Parental Leave Act* in 2010 influenced the development of the parental leave standards in the *Paid Parental*

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<sup>1</sup>Gillian Whitehouse, 'Access to Parental Leave: Evidence From Negotiating the Life Course' (2005) 40(4) *Australian Journal of Social Issues* 489, 489-503.

<sup>2</sup>See above, Chapter 2.

*Leave Act 2010*. Following this analysis of relevant cases, Chapter 3 of this thesis will outline in brief the legislative history of the *Paid Parental Leave Act* and outline key elements of the Act related to Parental Leave rights. After the basic structure of the *Paid Parental Leave Act 2010* has been discussed, the chapter will discuss the legal and social impact of the legislation on gender equality in Australian workplaces with particular attention paid to data on the costs of the leave system and the rate of take-up by eligible claimants. Following this discussion, the remainder of the chapter shall examine recent legislative amendments made to the *Paid Parental Leave Act* by governments to achieve policy goals including the introduction of measures to limit eligibility and accessibility of the scheme and some brief remarks about potential future changes in the *Fair Work Act* and *Paid Parental Leave Act*.<sup>3</sup>

Chapter 4 of this thesis will provide a more detailed and in-depth discussion of the parental leave systems of selected OECD European nations followed by a discussion in Chapter 5 of this thesis of Sweden's parental leave policy and legislative framework as an exemplary model in relation to Australia's parental leave model and Chapter 6 of this thesis will discuss key research findings and recommendations relating to potential reforms to Australia's paid parental leave policy and legislative framework with suggestions for further research in this area.

### **3.2. The *Harvester* Case and the Social Wage**

In the history of Australian industrial relations, women have tended to take a second place to men.<sup>4</sup> Based on the traditional social and gender role models imported into Australia from 18<sup>th</sup> and 19<sup>th</sup> century Victorian England, Australian women were expected to do their 'work' primary in the home, particularly by becoming wives and mothers and carers for the elderly, sick or disabled members

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<sup>3</sup>*Fair Work Act 2009* (Cth), *Paid Parental Leave Act 2010* (Cth).

<sup>4</sup>Raelene Frances, Linda Kealey, Joan Sangster, 'Women and Wage Labour in Australia and Canada' (38(2) *Labour* 54, 54-89; Anna Chapman, 'Industrial Law, Working Hours, and Work, Care and Family' (2010) 36(3) *Monash University Law Review* 190, 190-216; Shalene Werth, 'Survival of the Male Breadwinner' (2011) 37(1) *Hecate* 145, 145-156; Anna Chapman, 'Uncovering the Normative Family of Parental Leave: *Harvester*, Law and the Household' (2007) 33(1) *Hecate* 28, 28-42.

of their family.<sup>5</sup> These social patterns mirrored the economic frameworks that underpinned Australian industrial relations law.<sup>6</sup> After Australia became a federation in 1900, industrial disputes were transferred from the state and referred to a central arbitration authority (the Commonwealth Conciliation and Arbitration Court) that had the legislative authority from state and federal parliaments to make determinations concerning the conditions of workers.<sup>7</sup> The conditions and pay of workers were generally determined by collective bargaining between employers and unions,<sup>8</sup> though the common law principles of contract and master-servant relationships also played a very important role in regulating employment law.<sup>9</sup>

In 1907, one of the most important cases in the history of Australian Industrial Relations was decided.<sup>10</sup> Famously known as the ‘*Harvester*’ case,<sup>11</sup> this case illuminated the roles of the different genders regarding work, family and life at the turn of the 20<sup>th</sup> century.<sup>12</sup> In this case, the Commonwealth Court of

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<sup>5</sup>Jayne Lucke et al., ‘Transitions to Informal Caregiving: Out of Paid Employment for Women in Their 50s’ (2008) 67(1) *Social Science and Medicine* 122, 122-127.

<sup>6</sup>John Murphy, ‘Breadwinning: Accounts of Work and Family Life in the 1950s’ (2002) 12(3) *Labour and Industry* 59, 59-75; Marian Baird, ‘Re-conceiving Industrial Relations’ (2003) 14(1) *Labour and Industry* 107, 107-116; Mark Hearn, ‘Securing the Man: Narratives of Gender and Nation in the Verdicts of Henry Bournes Higgins’ (2006) 37(127) *Australian Historical Studies* 1, 1-24.

<sup>7</sup>D.R. Hall, ‘Commonwealth Conciliation and Arbitration Commission: Declining Jurisdiction in Favour of a State’ (1983) 13(1) *University of Queensland Law Journal* 49; Keith Handcock, ‘The Future of Industrial Relations in Australia’ (2008) 18(2) *Economic and Labour Relations Review* 7, 7-14.

<sup>8</sup>Tom Barnes, ‘The Use of Collective Bargaining History in Arbitration’ (2013) 68(4) *Dispute Resolution Journal* 1, 1-11; Peter Berg et al, ‘Collective Bargaining and Public Policy: Pathways to Work-Family Policy Adoption in Australia and the United States’ (2013) 31(5) *European Management Journal* 495, 495-504; Rae Cooper and Bradon Ellem, ‘The Neoliberal State, Trade Unions and Collective Bargaining in Australia’ (2008) 46(3) *British Journal of Industrial Relations* 532, 532-554.

<sup>9</sup>Mary Gardiner, ‘His Master’s Voice? Work Choices and a Return to Master and Servant Concepts’ (2009) 31(1) *Sydney Law Review* 53, 53-81; Miles Goodwin and Glenda Maconachie, ‘Minimum Labour Standards in Australia: Caught in the Crossfire?’ (2011) 22(2) *Economic and Labour Relations Review* 55, 55-80; Ross McCallum, ‘Australian Labour Law after the Work Choices Avalanche: Developing an Employment Law for our Children’ (2007) 49(3) *Journal of Industrial Relations* 436, 436-454.

<sup>10</sup>Anna Chapman, ‘Uncovering the Normative Family of Parental Leave: *Harvester*, Law and the Household’ (2007) 33(1) *Hecate* 28, 28-42; Mark Hearn, ‘Securing the Man: Narratives of Gender and Nation in the Verdicts of Henry Bournes Higgins’ (2006) 37(127) *Australian Historical Studies* 1, 1-24; John Lack and Charles Fahey, ‘The Industrialist, The Trade Unionist and the Judge: The *Harvester* Judgment of 1907 Revisited’ (79(1) *Victorian Historical Journal* 3, 3-18; Adam Jamrozik, ‘From *Harvester* to Deregulation: Wage Earners in the Australian Welfare State’ (1994) 29(2) *Australian Journal of Social Issues* 162, 162-170.

<sup>11</sup>(1907) CAR 1.

<sup>12</sup>See above, 10.



Conciliation and Arbitration (the predecessor to the ACAC and AIRC) had to decide on the question as to what level of wage remuneration was appropriate for an unskilled labourer to live in a 'decent and civilised' manner, and what would be 'fair and reasonable' pay for an employee in the circumstances of the case.<sup>13</sup> Firstly, the president of the court, Higgins J claimed it was the duty of the legislature to deal with social and economic problems, not the court.<sup>14</sup> His Honour remarked: 'It is for the judiciary to apply, and when necessary, interpret the enactments of the legislature.'<sup>15</sup> His Honour proceeded to deal with the issue at hand, which had not been covered previously by legislative enactments.<sup>16</sup>

Higgins J then returned to the matter of the case and noted that in the factual circumstances, remuneration was designed to benefit employees in the industry and be beyond what employees could acquire only by bargaining directly with their employers.<sup>17</sup> Higgins J reasoned that if it was the intention of Parliament to leave employers and employees to bargain their conditions respectively and freely, the terms 'free and reasonable' would not have been used in the relevant legislation, with the pressure 'to earn bread' on the employee's side, and the pressure 'to make profits' working on the employer's side to act as incentives to help the parties reach a suitable contractual relationship.<sup>18</sup>

Higgins J noted that the words 'fair and reasonable' in the context simply had to mean something else.<sup>19</sup> For Higgins J these were the standard appropriate for an average employee, regarded as a human being and living in a civilised community.<sup>20</sup> The standard of the employment agreement (at the minimal level) was to cover the basic cost of living, which was to obtain necessities such as

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<sup>13</sup>Anna Chapman, 'Uncovering the Normative Theory of Parental Leave: Harvester, Law and the Household' (2007) *Hecate* 33(1) 28, 28-42; Adam Jamrozik, 'From Harvester to Deregulation: Wage Earners in the Australian Welfare State' (1994) 29(2) *Australian Journal of Social Issues* 162, 162-170; W.M. Robbins and Ian Harriss, 'A Theatre of Words and Wages: Reading the Script of the Harvester Hearing' (2007) *Labour History* 87, 87-108.

<sup>14</sup>*Ex Parte Harvey v McKay* (1907) 2 CAR 1, 3

<sup>15</sup>*Ex Parte Harvey v McKay* (1907) 2 CAR 1, 3.

<sup>16</sup>*Ibid* 4.

<sup>17</sup>*Ibid* 4.

<sup>18</sup>*Ibid* 4.

<sup>19</sup>*Ibid* 4.

<sup>20</sup>*Ibid* 3-4.

food, water and shelter.<sup>21</sup> In applying the standard, Higgins J referred to the need to ensure the ‘workman’ would be able to acquire the necessities of his existence without having to accept unfairly low wages or being driven into pauperism and starvation.<sup>22</sup> In his analysis and comparison of different industries, the concentration of workers was overwhelmingly male, concerning the terms ‘employee’ and ‘workman’ often being simply synonymous. The decision and reasoning of Higgins J in the case made minimal mention of working women or the evidence of women about working conditions.<sup>23</sup>

The *Harvester* decision was determinative in other cases where the recognition of women’s roles and their importance in the workplace was only slowly acknowledged.<sup>24</sup> In 1916, the Commonwealth Conciliation and Arbitration Court made a number of decisions that gave women working in certain industries a pay rate of at least 54% of those of men.<sup>25</sup> Despite some progress in this area, the great depression of the 1930s and other factors prevented the development of any serious equality between men and women in the Australian workplace.<sup>26</sup>

During and after the Second World War, Australian women gradually began to move from the private environment to the sphere of paid and unpaid

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<sup>21</sup>Ibid 3-4.

<sup>22</sup>Ibid 3-4.

<sup>23</sup>Ibid 4-25; Anna Chapman, ‘Uncovering the Normative Family of Parental Leave: Harvester, the Law and the Household’ (2007) 33(1) *Hecate* 28, 28-42; Charles Fahey and Reg Hamilton, ‘Waltzing Matilda and the Harvester Sunshine Factory: An Early History of The Arbitration Court’ (2012) 103 *Australian Journal of Labour History* 267, 267-8; Paul Smyth, ‘Closing the Gap: The Role of Wage, Welfare and Policy in Promoting Social Inclusion’ 50(4) *Journal of Industrial Relations* 647, 647-663.

<sup>24</sup>W.M. Robbins and Ian Harriss, ‘A Theatre of Words and Wages: Reading the Script of the Harvester Hearing’ (2007) *Labour History* 87, 87-108; Braham Dabscheck, ‘The Typical Mother of the White Race and the Origins of Female Wage Determination’ (1986) 12(1-2) *Hecate* 147, 147-154.

<sup>25</sup>Glenda Strachan, ‘Still Working for the Man: Women’s Employment Experiences in Australia Since 1950’ (2010) 45(1) *Australian Journal of Social Issues* 117, 117-130; Anna Chapman, ‘Industrial Law, Working Hours and Work, Care and the Family’ (2010) 36(3) *Monash University Law Review* 190, 190-216; Laura Bennett, ‘Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907-1921’ (1984) 12 *International Journal of the Sociology of Law* 23, 23-28.

<sup>26</sup>See Sally Kennedy, ‘Useful and Expendable: Women Teachers in Western Australia in the 1920s and 1930s’ (1983) 44(1) *Labour History* 18, 18-26; Michael White, ‘Youth, Employment and Post-Compulsory Education: Crisis Policy Making in Three Depression Decades in Australia: The 1890s, the 1930s and the 1980s’ (1995) 13(1) *Australian and New Zealand Journal of Vocational Education Research* 110, 110-40.

employment.<sup>27</sup> While still constrained by traditional gender roles and expectations,<sup>28</sup> shortages of male labour caused by World War II and other social and economic factors began to encourage women to take on paid work as well as spousal and caring roles.<sup>29</sup> While in the early 20<sup>th</sup> century Australia had legislated fundamental rights to women (including the right to vote in elections and own their own property)<sup>30</sup> and also created and extended a primary system of maternity payment earlier in the century, women were still expected to be mothers first and workers a distant second.<sup>31</sup> Further changes did not come until the 1960s, and 1970s when the Australian Conciliation and Arbitration Commission (later the AIRC) developed principles of ‘equal pay for equal work’ (the equal remuneration principle) in conciliation decisions combined with other important conciliation decisions that for the first time granted Australian women access to unpaid maternity leave for a period of time.<sup>32</sup> The Australian Commonwealth public service also changed previous policy where women were required to abandon their jobs upon marriage<sup>33</sup> and instead could remain working following a fixed period of paid maternity leave.<sup>34</sup>

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<sup>27</sup>Aldrich Finegan et al., ‘Work Relief and Labour Force Participation of Married Women in 1940’ (1994) 54(1) *Journal of Economic History* 64, 64-84; Sebastian Buttle and Alice Schoonbroot, ‘An Accounting for the Shift in Life-cycle Employment Profiles of Women Born between 1940 and 1960’ (2013) 46(3) *Journal of Labour Market Research* 253, 253-271.

<sup>28</sup>Jacqueline Dinan, ‘Australia at War: The Challenges and Opportunities for Women During World War II’ (2016) 51(3) *Agora* 38, 38-44; Taylor Jarowski, ‘You’re in the Army Now: The Impact of World War II on Women’s Education, Work and Family’ (2014) 74(1) *Journal of Economic History* 169, 169-195.

<sup>29</sup>E. Kradval, and R Rindfuss, ‘Changing Relationships Between Education and Fertility: A Study of Men and Women and Men Born Between 1940 and 1960’ (2008) 73(5) *American Sociological Review* 854, 854-873.

<sup>30</sup>Audrey Oldfield, *Women’s Suffrage in Australia: A Gift or a Struggle?* (Cambridge University Press, 1993).

<sup>31</sup>Sharon Crozier, ‘The National and Transnational in British Anti-Suffragist’s Views of Australian Women Voters’ (2013) 10(3) *Australian History* 51, 51-64. See also Jacqueline Dinan, above, 28.

<sup>32</sup>Marian Baird et al., ‘A Pregnant Pause: Paid Maternity Leave in Australia’ (2002) 13(1) *Labour and Industry* 1, 1-19; Marian Baird, ‘Orientations to Paid Maternity Leave: Understanding the Australian Debate’ (2004) 46(3) *Journal of Industrial Relations* 259, 259-274; Marian Baird and Leanne Cutcher, ‘One for the Father, One for the Mother, One for the Country: An Examination of the Construction of Motherhood Through the Prism of Paid Maternity Leave’ (2005) 31(2) *Hecate* 103, 103-113.

<sup>33</sup>Glenda Strachan, ‘Still Working for the Man? Women’s Employment Experiences in Australia Since 1950’ (2010) 45(1) *Journal of Social Issues* 117, 117-130.

<sup>34</sup>Marian Baird, ‘Paid Maternity Leave: The Good, the Bad and the Ugly’ (2003) 29(1) *Australian Bulletin of Labour* 97, 97-109.

The trend of rising Australian female workplace participation continued into the 1980s, despite significant differentials between male and female earnings and the deregulation of the Australian labour market, which opened Australia up to international economic forces and increased pressures on workers of both sexes to accept lower levels of pay and conditions in industries that were not competitive from an economic point of view,<sup>35</sup> and which had previously been ‘protected’ by workplace regulations and tariffs.<sup>36</sup> As Australian women entered the workforce in increasing numbers, demands were made by unions and women’s lobby groups for greater levels of equality between men and women, especially since women were still expected to carry the majority of the unpaid caring and domestic work in the home. Women’s domestic tasks were highly labour intensive and included caring for children, running the household, cooking and cleaning, and caring for elderly, sick or disabled relatives and immediate family members.<sup>37</sup>

Classically, the core controlling legal aspects of the employer/employee relationship in Australia were governed by the legal principles of the common law of contract, rooted primarily in 19<sup>th</sup> century concepts derived from English common law, but modified extensively in the 20<sup>th</sup> and 21<sup>st</sup> centuries by intervention in the form of arbitration decisions made under the former Industrial Arbitration and Conciliation system of industrial relations and also by state and federal government employment legislation.<sup>38</sup> These legal concepts were based on the assumption that socially, the male member(s) of the household were the main financial breadwinners and economic decision-makers and were primarily responsible for the economic well-being of their dependent family members

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<sup>35</sup>Glenda Strachan, ‘Still Working For the Man? Women’s Employment Experiences in Australia since 1950’ (2010) 45(1) *Journal of Social Issues* 117, 117-130; Glenda Strachan and Suzanne Jamieson, ‘Equal Opportunity in Australia in the 1990s’ (1999) 24(3) *New Zealand Journal of Industrial Relations* 319, 319-341.

<sup>36</sup>Barbara Pocock, ‘All Change – Still Gendered: The Australian Labour Market in the 1990s’ (1998) 40(4) *Journal of Industrial Relations* 580, 580-604; Thomas Turner, ‘Industrial Relations Systems, Economic Efficiency and Social Equity in the 1990s’ (2006) 64(1) *Review of Social Economy* 93, 93-118.

<sup>37</sup>*Ibid.*

<sup>38</sup>Michael Kirby, ‘Industrial Conciliation and Arbitration in Australia: A Centenary Reflection’ (2004) 78(12) *Australian Law Journal* 785, 785-787; Bradley Bowden, ‘The Rise and Decline of Australian Unionism: A History of Industrial Labour from the 1820s to 2010’ (2011) 100(1) *Labour History*, 51, 51-82.

(women, children and relatives) while women were responsible for unpaid domestic work and caring duties.<sup>39</sup>

These principles have deep historical roots in a range of legal areas such as English master/servant legislation, the common law of contract, employment agreements reached through collective bargaining, and more recently, extensive government regulation that touches virtually every aspect of the employment relationship.<sup>40</sup> Employment law has also been influenced more remotely through liberal principles of freedom of contract and the relationship between master and servant.<sup>41</sup> The classical doctrines around freedom of contract and the principles of master/servant law that formed the later common law foundation for the law of employment in Australia were developed by English common law courts in the 19<sup>th</sup> century as a body of private law designed to regulate relationships between individuals who at least in theory, were equal before the law and could thus bargain with each other freely on equal terms.<sup>42</sup>

However, employment contracts can be distinguished from other species of commercial contracts on the basis the employee is *not* equal to the employer in the relationship.<sup>43</sup> Instead, the employee ‘accepts a position of subordination to the employer.’<sup>44</sup> Hence the inequalities are inherent in the common law contract of employment as the assumptions of classical contract law theory do not automatically ensure equality between the parties.<sup>45</sup> These assumptions include that parties to a bargain enter that contract freely, the parties both fully

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<sup>39</sup>Ray Broomhill and Rhonda Sharp, ‘The Changing Male Breadwinner Model in Australia: A New Gender Order?’ (2005) 16(1) *Journal of Labour and Industry*, 103, 103-127; Sharlene Werth (2011), ‘Survival of The Male Breadwinner’ 37(1) *Hecate*, 145, 145-156; C Chang, and A Trvaglione, ‘A Demographic Analysis of Breadwinner and Domestic Childcare Roles in Australia’s Employment Structure’ (2012) 22(4) *Labour and Industry* 361, 361-378.

<sup>40</sup>Gillian Whitehouse et al, ‘No Leg to Stand On: The Moral Economy of Australian Industrial Relations’ (2012) 33(3) *Economic and Industrial Democracy*, 441, 441-461.

<sup>41</sup>Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 33, 33-65; Mary Gardiner, ‘His Master’s Choice: Work Choices as a Return to Master and Servant Concepts’ (2009) 31(53) *Sydney Law Review*, 53, 53-81.

<sup>42</sup>Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 33.

<sup>43</sup>Ibid 35. As Riley explains however, this might be except in the case of where the prospective ‘employee’ is someone very ‘savvy’ such as a high-level manager. Even so, a power imbalance arguably remains between the person offering in any contractual relationship (offeror) and the one being offered to (offeree) including in employment relationships. See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 35-45.

<sup>44</sup>Ibid 35.

<sup>45</sup>Ibid 36-7.

understood and knew the extent of their mutual obligations, and both sides entered into a joint arrangement with equal freedom to act or not to act.<sup>46</sup> The other difficulty is the assumption of inferiority and inequality of employee vs. the employer, which originates in English ‘master and servant’ legislation and common law principles developed in the English common law over several centuries.<sup>47</sup> The harshness of the principles of master and servant law, going back to the feudalism of the medieval era and modified somewhat by the evolution of the common law of contract and the development of tort law by common law courts during the 19<sup>th</sup> century to deal with the consequences of the industrial revolution<sup>48</sup> and the 20<sup>th</sup> century, to accommodate social progress and to rectify some of the harsher aspects of inequalities in power between employer and employee derived from master/servant laws.<sup>49</sup> However, legal categories of ‘obedience’ ‘fidelity’ and ‘loyalty’ derived from English master and servant law continue to have an important influence on contemporary Australian employment relations law.<sup>50</sup>

An ancient aspect of the ‘master-servant’ model that has crept into contemporary labour law like a shadow from the medieval past is the concept of ‘managerial prerogative.’<sup>51</sup> The managerial prerogative is the wide latitude given by law to the employer to set the terms and conditions of employment for the employee, vary the terms of employment at will, and to do so without the input of the employee and offering an employment contract on a ‘take it or leave’ basis.<sup>52</sup> Employees are bound by other strict terms implied by courts into standard

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<sup>46</sup>Ibid 36-7. This is reflected in the general strictness of the common law of contracts.

<sup>47</sup>Ibid 41.

<sup>48</sup>Bob Hepple, ‘Negligence: The Search for Coherence’ (1997) 50(1) *Legal Problems* 69, 69-94; Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis, 7<sup>th</sup> ed, 2013) 1-96.

<sup>49</sup>Ibid 43. These include implied terms of ‘fidelity, trust and obedience’ of the employee to the employer that are regarded by Australian courts as being fundamental terms of all employment contracts. See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 21-22 and *Robb v Green* (1895) 2 QB 315.

<sup>50</sup>Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 43. Even today employees owe employers duties of fidelity and obedience in performing their employment contracts.

<sup>51</sup>Ibid 44-45.

<sup>52</sup>See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 44-45. The justification for this is usually for reasons of cost and efficiency in a business enterprise which courts are unwilling to interfere with. See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 44-46.

employment contracts including the ‘no work, no pay’ principle, a duty of fidelity and confidence to the employer, fiduciary duties where applicable and other implied terms courts can interpolate into employment contracts even where not explicitly stated in the contract itself.<sup>53</sup> These common law notions conflict with classical liberal conceptions of personal autonomy and liberty which supposedly underpin the classical freedom of contract doctrine.<sup>54</sup>

The fundamental inequity at the heart of the employer/employee relationship has not gone without recognition at a high judicial level. Lord Wedderburn explained the inequality in the employment relationship in these terms: ‘There is an ancient tension in the (employment law) system. For the common law assumes it is dealing with a contract made between equals, but in reality, save in exceptional circumstances, the individual brings no equality of bargaining power to the labour market and to the transaction central to his life whereby the employer buys his labour power. This *individual* relationship, in its inception, is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as freedom of contract.’<sup>55</sup>

The master/servant paradigm made a strange return in the development of Work Choices laws.<sup>56</sup> For review, the master/servant concept had its basis in medieval concepts of hierarchy, subordination and immutable natural order ordained by God, who could regulate and order the universe as a hierarchy of levels according to his goodness, wisdom and pleasure,<sup>57</sup> and the master/servant relationship evolved in medieval times modelled from feudalism where masters had the natural right to control their servants (fiefs) and deal with them as they

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<sup>53</sup>Ibid 48-49. This is contradictory to the well-established principle of the common law of contract where contractual interpretation is generally held to be strictly a matter of only reading explicit written terms in contracts, rather than ‘implying’ terms which are not stated in a contract, including the famous ‘parole evidence’ rule of contract law. See Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 15-16, 36-37.

<sup>54</sup>Ibid 49.

<sup>55</sup>As cited by Riley, 52 above, at 49.

<sup>56</sup>Mary Gardiner, ‘His Master’s Choice: Work Choices as a Return to Master and Servant Concepts’ (2009) 31(53) *Sydney Law Review*, 53, 53-81.

<sup>57</sup>See St Thomas Aquinas, *Summa Theologica* (Benzinger Brothers, 1947), Part I-II, ‘Natural Law’, Q 94, Arts 1-8.

were so pleased in return for their protection.<sup>58</sup> The Work Choices legislation, introduced by the Coalition government as a lynchpin neoliberal policy for labour market deregulation from 1996-2006, was guided by neoliberal principles of freedom of contract, government deregulation of workplace rights in favour of private contract law and managerial prerogative and encouraging enterprise bargaining in the workplace.<sup>59</sup>

The master/servant laws were very strict in nature and involved severe sanctions for any transgressions by the servant against his master.<sup>60</sup> Master/servant laws also invariably involved concepts of subordination and social hierarchy that evolved from the medieval English legal system.<sup>61</sup> Although legislative changes were later made to Work Choices later on due to public pressure to ameliorate the imbalance of power between employer and employee,<sup>62</sup> these were rolled back in response to employer pressure and demands.<sup>63</sup> Thus the Work Choices laws ended up having a legal severity that in many ways emulated their origin in English master/servant laws.<sup>64</sup>

The Work Choices legislation included new provisions that undermined employee power, particularly the right to move from one employer to another, reduced rights for unions and industrial action, and increased protections for employers against actions such as unfair dismissal.<sup>65</sup> The English master and servant laws, enacted in the 19<sup>th</sup> century in England and also in British colonies, contained substantive elements of these medieval and ancient concepts that echoed in the Work Choices legislation.<sup>66</sup> The Work Choices legislative changes seemed to re-establish some of the ideals behind the master/servant legal concept

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<sup>58</sup>Mary Gardiner, 'His Master's Choice: Work Choices as a Return to Master and Servant Concepts' (2009) 31(53) *Sydney Law Review*, 53-81, 57.

<sup>59</sup>Ibid 57.

<sup>60</sup>Ibid 60-61.

<sup>61</sup>Ibid 62.

<sup>62</sup>Sally Cowan and William Mitchell, 'Taking the Low Road: Minimum Wage Determinations under Work Choices' (2007) 49(5) *Journal of Industrial Relations* 741, 741-756; Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to legal Privilege' (2006) *Economic and Labour Relations Review* 237, 237-264.

<sup>63</sup>Mary Gardiner, 'His Master's Choice: Work Choices as a Return to Master and Servant Concepts' (2009) 31(53) *Sydney Law Review*, 53-81, 64.

<sup>64</sup>Ibid 66.

<sup>65</sup>Ibid 58-59.

<sup>66</sup>Ibid 58.



by changing employment relations law strongly in favour of the employer by expanding managerial prerogative and allowing employers to offer individual employment contracts on unilateral terms rather than requiring awards and collective bargaining and extending the powers of businesses to dismiss workers at will through exemptions to matters such as unfair dismissal.<sup>67</sup> While the Work Choices legislation supposedly contained some minimal standards as a ‘safety net,’<sup>68</sup> the new industrial relations laws seemed designed to curtail employee freedom and autonomy significantly and perhaps even maximally.<sup>69</sup> The neoliberal inspired Work Choices reforms seemed designed to erode workplace rights and indirectly encouraged de-skilling of workers and a ‘race to the bottom’ for employment standards by increasing the rate of casual work with more jobs created in poorly paid, low skilled and low-status sectors while the number of full-time permanent positions decreased.<sup>70</sup> The return of a more modest role for government in industrial relations and the economy based on classical liberal ideals such as ‘freedom of contract’ in the Australian workplace<sup>71</sup> also led to the deterioration of gender equality outcomes in the workplace.<sup>72</sup> Despite some very limited initiatives to offset the impact of Work Choices,<sup>73</sup> the new reforms

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<sup>67</sup>Ibid 71-73. One of these changes was the elimination of unfair dismissal protections for employees in businesses with 100 employees or less, which employed a substantial number of Australians. See Anna Chapman, ‘Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege’ (2006) *Economic and Labour Relations Review* 237, 237-264.

<sup>68</sup>Andrew Stewart, ‘Work Choices in Overview: Big Burn or Slow Lift?’ (2006) 16(2) *Economic and Labour Relations Review* 25, 25-60; Sally Cowling and William Mitchell, ‘Taking the Low Road: Minimum Wage Determination and Work Choices’ (2007) 49(5) *Journal of Industrial Relations* 741, 741-756.

<sup>69</sup>Mary Gardiner, ‘His Master’s Choice: Work Choices as a Return to Master and Servant Concepts’ (2009) 31(53) *Sydney Law Review*, 53-81, 73-4; Sandra Cockfield et al., ‘Assessing the Impact of Employment Regulation on the Low Paid in Victoria’ (2011) 22(2) *Economic and Labour Relations Review* 131, 131-152.

<sup>70</sup>Ibid 76. Kerry Saville et al., ‘Did Work Choices Deliver? Evidence from The Survey Data’ (2009) 20(2) *Labour and Industry* 207, 207-226; Jude Elton and Barbara Pocock, ‘The Effects of Work Choices on Vulnerable South Australian Workers and Their Households’ (2008) 18(3) *Labour and Industry* 93, 93-113.

<sup>71</sup>David Chin, ‘Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism’ (1997) 10 *Australian Journal of Labour Law* 257, 257-279.

<sup>72</sup>Ian Campbell and John Burgess, ‘Casual Employment in Australia and Temporary Employment in Europe: Developing A Cross-national Comparison’ (2001) 15(1) *Work, Employment and Society* 171, 171-184.

<sup>73</sup>Christopher Deeming, ‘The Working Class and Welfare: Francis G. Castles on the Political Development of the Welfare State in Australia and New Zealand Thirty Years On’ 47(6) *Social Policy and Administration* 668, 668-691; Anna Chapman, ‘Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act’ (2009) 32(3) *University of New South Wales Law Journal* 746, 746-771.

arguably set gender equality backwards, particularly for women working in lower skilled and less well-paid occupations.<sup>74</sup>

### 3.3. Key Collective Bargaining Decisions

Before the introduction of paid parental leave legislation in Australia through government legislation, the most important determiner for employee entitlements and employment conditions were decisions made through the system of conciliation and arbitration.<sup>75</sup> The system of collective bargaining through conciliation and arbitration was based on employee and trade unions seeking better working conditions<sup>76</sup> through collective bargaining between employers, companies and staff to set working conditions and entitlements, either by direct negotiation between employers and unions, bringing cases before the relevant tribunal if reasonable negotiations failed, or through strike action.<sup>77</sup> From the 1970s onwards, a number of key decisions were made involving cases related to parental leave entitlements by the Australian Conciliation and Arbitration Commission and Australian Industrial Relations Commission that helped establish a ‘network’ of unpaid parental and maternity leave.<sup>78</sup> While these industrial arbitration decisions achieved some progress on basic parental leave and maternity leave standards, they did not effectively remove deep

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<sup>74</sup>David Peetz, ‘Collateral Damage: Women and the Work Choices Battlefield’ (1997) 33(1) *Hecate*, 61, 61-80; Michael Lyons, and Meg Smith, ‘Work Choices and Pay Equity’ (2007) 33(1) *Hecate*, 112, 112-125; Janeen Baxter and Yolanda van Gellecum, ‘Neoliberalism, Gender Inequality and the Australian Labour Market’ (2008) 44(1) *Journal of Sociology* 45, 45-63;

<sup>75</sup>Marian Baird and John Murray, ‘Collective Bargaining for Paid Parental Leave in Australia 2005-2010: A Complex Context Effect’ (2014) 25(1) *The Economic and Labour Relations Review* 47, 47-62; Anna Chapman, ‘The New National Scheme of Parental Leave’ (2011) 24 *Australian Journal of Labour Law* 60, 60-70.

<sup>76</sup>See John Benson, *Unions at the Workplace* (Oxford University Press, 1991), 1-12 and Chris F. Wright and Russell D. Lansbury, ‘Trade Unions and Economic Reform in Australia, 1983-2013’ (2014) 59(4) *Singapore Economic Review* 1, 1-22. Working conditions prior to the mid-20<sup>th</sup> century were generally very low by contemporary standards. See Glenda Strachan, ‘Still Working for The Man? Women’s Employment Experiences in Australia Since 1950’ (2010) 45(1) *Australian Journal of Social Issues* 117, 117-130; Catherine Bishop, ‘Women on The Move: Gender, Money-making and Mobility in Mid-19<sup>th</sup> Century Australasia’ (2014) 11(2) *History Australia* 38, 38-59.

<sup>77</sup>Catherine Bishop, ‘Women on The Move: Gender, Money-Making and Mobility in Mid-19<sup>th</sup> Century Australasia’ (2014) 11(2) *History Australia* 38, 50-51; Richard Mitchell et al., ‘The Evolution of Labour Law in Australia: Measuring the Change’ (2010) 23(2) *Australian Journal of Labour Law* 61, 61-93; Rosemary Owens, ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2009) 22(3) *Australian Journal of Labour Law* 258, 258-283.

<sup>78</sup>Anna Chapman, ‘The New National Scheme of Parental Leave’ (2011) 24(1) *Australian Journal of Labour Law* 60, 66.

inequities in the system of employment relations involving working women and parental leave.<sup>79</sup>

### 3.3.1 The *Maternity Leave Case*

The first major important industrial arbitration case to contest maternity leave was the *Maternity Leave Case* considered by the Australian Conciliation and Arbitration Commission in 1979.<sup>80</sup> In this case a married claimant sought in a claim having general application to private industry, a period of unpaid maternity leave of between 12-78 weeks for employees who become pregnant, not to be interrupted, and to count as service for all purposes of the employment relationship except for annual leave for which a period of 26 weeks' maternity leave is to count as service.<sup>81</sup>

The Australian Conciliation and Arbitration Commission noted: 'The claim was advanced principally by reference to the changed social and economic role of women in Australia and their significant participation in and contribution to the workforce.'<sup>82</sup> The ACAC noted evidence that the number of working married women in the workforce had increased significantly, from 5% in 1947 to 62.5% in 1973.<sup>83</sup> The ACAC also took note of ILO conventions<sup>84</sup> that discouraged discrimination and the extension of anti-sexual discrimination provisions in standard awards.<sup>85</sup> However, employer groups in their submissions to the ACAC argued the leave application should not be granted, because of increased costs to their operations.<sup>86</sup> The employer groups argued the granting of the entitlement would create unwanted cost burdens in finding and training replacement staff and disruption to the company's business.<sup>87</sup> The ACAC also received expert evidence in the form of medical advice on the optimal period for the mother to

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<sup>79</sup>Anna Chapman, 'Uncovering the Normative Family of Parental Leave: Harvester, Law and the Household' (2007) 33(1) *Hecate* 28, 28-42. The question of a 'fair wage' for a worker with family obligations, and the assumptions underlying those obligations goes back to the time of Australian Federation. See the discussion in the '*Harvester Case*' (1907) 2 CAR 1, 4-5.

<sup>80</sup>(1979) 218 CAR 120.

<sup>81</sup>Ibid 2.

<sup>82</sup>Ibid 3.

<sup>83</sup>Ibid 3.

<sup>84</sup>ILO Conventions will be discussed in more detail in Chapter 4, section 4.3 of this thesis.

<sup>85</sup>Ibid 3-4.

<sup>86</sup>Ibid 4.

<sup>87</sup>*Maternity Leave Case* (1979) 218 CAR 120.

remain with the child following birth that indicated a mother should remain with the child for a period of at least six weeks post-partum.<sup>88</sup>

The ACAC ruled that by ILO standards and best medical advice, an entitlement of 6 weeks compulsory leave and up to 52 weeks of unpaid leave should be granted to women who give birth to children.<sup>89</sup> The ACAC balanced this entitlement with the needs of business by requiring a person claiming such leave to notify their employer in writing not less than four weeks before asking for leave, the approximate time she expected to ask for leave, and the date on which she presumed to take maternity leave.<sup>90</sup> The employer also had the right to require the female employee to commence the leave six weeks before the date of confinement.<sup>91</sup> The ACAC also ruled that the taking of maternity leave would not nullify other awards or lead to negative discrimination against the female employee taking such leave,<sup>92</sup> that she should be entitled to return to her position (within the limits of reasonable business requirements) when her leave has finished, and she shall not be dismissed by reason of her pregnancy.<sup>93</sup> As such, this decision was an important milestone in the issue of maternity leave entitlements for female workers as for the first time it explicitly prohibited discrimination against employees on the basis of pregnancy and maternity and provided the female worker the right to return to the same job as she before taking her leave.<sup>94</sup>

### **3.3.2 The 1969 *Equal Pay Case (No 1)*<sup>95</sup>**

The *Equal Pay Case No 1*,<sup>96</sup> though not concerned directly with paid parental or maternity leave, was one of the first major conciliation decisions made by the ACAC to modernise women's wages and working conditions.<sup>97</sup> In this case,

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<sup>88</sup>Ibid 6-7.

<sup>89</sup>Ibid 7.

<sup>90</sup>Ibid 7.

<sup>91</sup>Ibid 7.

<sup>92</sup>Ibid

<sup>93</sup>Ibid 10-14.

<sup>94</sup>Marian Baird and John Murray, 'Collective Bargaining for Paid Parental Leave in Australia 2005-2010: A Complex Context Effect' (2014) 25(1) *The Economic and Labour Relations Review* 47, 50-51.

<sup>95</sup>(1969) 112 CAR 586.

<sup>96</sup>Ibid.

<sup>97</sup>See the following discussion below.

unions representing both public and private sector employees in different industries brought proceedings before the conciliation commission regarding award rates for workers in various sectors.<sup>98</sup> The primary claim of the unions was to change the award rates of employees in these industries so that gender-based differences between male and female rates was eliminated.<sup>99</sup> The key arguments brought in favour of this claim were structured around a principle known as the ‘equal pay for equal work’ principle adopted by a number of unions and women’s lobby groups<sup>100</sup> to eliminate wage gaps between male and female workers.<sup>101</sup>

### 3.3.3 The *Adoption Leave Case* <sup>102</sup>

In the *Adoption Leave case*, the ACTU sought to vary federal awards of certain employees to include the entitlement of unpaid adoption leave.<sup>103</sup> The ACTU claim before the ACAC proposed that a female employee with twelve months of continuous service to their employer would be entitled to a period of unpaid adoption leave of up to 52 weeks.<sup>104</sup> The ACTU claim also included provisions for entitlement, periods of leave, conflict with other rights, and protection from dismissal while taking adoption leave.<sup>105</sup>

The ACAC decided to grant in favour of the ACTU claim and extended unpaid parental leave to adoptive mothers.<sup>106</sup> The ACAC referred to its previous *Maternity Leave* decision, holding with approval the principle ‘The preservation of job security in the event of maternity might well facilitate career opportunities and encourage career aspirations amongst women who have hitherto regarded termination of employment as an inevitable consequence of motherhood,’<sup>107</sup> arguing ‘For it seems to us that the circumstances which combine to link

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<sup>98</sup>Ibid 1143.

<sup>99</sup>Ibid 1147.

<sup>100</sup>Ibid 1147.

<sup>101</sup>Ibid 1147.

<sup>102</sup>(1985) 298 CAR 321.

<sup>103</sup>Ibid 323-6.

<sup>104</sup>Ibid 325.

<sup>105</sup>Ibid 324-6.

<sup>106</sup>Ibid 330.

<sup>107</sup>Ibid 330.

motherhood with job preservation and consequently continued participation in the work force do not significantly differ according to whether the mother is a natural mother or an adopting mother.’<sup>108</sup> The ACAC held ‘We consider that adoption leave should be accepted in the industrial context,’<sup>109</sup> because in the view of the ACAC, the *Maternity Leave* decision showed that the consideration to encourage women who were mothers to remain employed did not end with biological mothers, but should naturally include adoptive mothers as well.<sup>110</sup>

In justifying their decision, the ACAC cited ABS statistics that showed the number of adoptions relative to live biological births, and single parent families were relatively small.<sup>111</sup> The ACAC acknowledged extending unpaid parental leave to adoptive mothers would cause some cost and disruption to business, but in light of the small numbers of adoptive parents, the entitlement would not cost much overall to the firm or the economy.<sup>112</sup> Therefore there were no compelling economic grounds to refuse to grant the ACTU request.<sup>113</sup> The ACAC also dismissed concerns it was engaged in ‘social activism’<sup>114</sup> as the matter of their concern was industrial rather than social in nature.<sup>115</sup> The ACAC took note of medical evidence of the importance of social and emotional bonding between parents and their children (including adoptive parents) but was reluctant to extend the entitlement to parents of older children, particularly those beyond pre-school age.<sup>116</sup> As a result, the ACAC limited the entitlement to parents of children who were five years old and younger.<sup>117</sup>

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<sup>108</sup>Ibid 330.

<sup>109</sup>Ibid 330.

<sup>110</sup>Ibid 330.

<sup>111</sup>Ibid 331.

<sup>112</sup>*Adoption Leave Case* (1985) 298 CAR 321, 331.

<sup>113</sup>Ibid 331-2.

<sup>114</sup>A common criticism levelled by those who oppose expanding employment entitlements for workers. See for example Robert Vergeer and Alfred Kleinknecht, ‘The Impact of Labour Market Deregulation on Productivity: A Panel Data Analysis of 19 OECD Countries (1960-2004)’ (2010) 33(2) *Journal of Post-Keynesian Economics* 374, 374-408; Mark Wilson, ‘The Negative Effects of Minimum Wage Laws’ (2012) 701(1) *CATO Policy Analysis* 1, 1-16; Richard V. Burkhauser and T Aldrich Finegan, ‘The Economics of Minimum Wage Legislation Revisited’ (1993) 13(1) *CATO Journal* 123, 123-129.

<sup>115</sup>*Adoption Leave Case* (1985) 298 CAR 321, 333.

<sup>116</sup>Ibid 333-5.

<sup>117</sup>Ibid 333.

The ACAC decision included some model provisions for employment awards to include adoptive parental leave.<sup>118</sup> These clauses included eligibility criteria for adoption leave, the period of leave allowed to be taken (up to 52 weeks), and the age limit imposed on an eligible child (up to 5 years).<sup>119</sup> The ACAC decision also contained a comprehensive set of award clauses based on a Retail and Wholesale traders' award designed to be a model for provisions in other awards.<sup>120</sup> These also covered matters such as eligibility, the notice required, periods of leave, compatibility with other forms of leave (such as annual leave), protection from unfair dismissal and right to return to work following the end of leave periods.<sup>121</sup> These model award clauses were important considerations in the following cases on parental leave discussed further below.<sup>122</sup>

### **3.3.4 The *Parental Leave Test Case* (1990)<sup>123</sup>**

In the *Parental Leave Test Case No 1*<sup>124</sup> The Australian Industrial Relations Commission had to consider a claim brought by the ACTU regarding the entitlements of parental leave in the forms of unpaid maternity leave and unpaid paternity leave.<sup>125</sup> At the time the current award system only allowed maternity leave to be taken on an unpaid basis up to 52 weeks, of which six weeks was compulsory.<sup>126</sup> The ACTU submissions sought the following changes to the existing award system to contain these new employment entitlements:<sup>127</sup>

- a) There would be up to 52 weeks of unpaid leave, which would include a 'paternity leave' period of three weeks continuous leave following the birth of a child and the balance of which would be available up until the child's second birthday;
- b) There would still be a period of compulsory maternity leave for six weeks, and up to 52 weeks of unpaid maternity leave which could be

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<sup>118</sup>Ibid 344-349.

<sup>119</sup>Ibid 344.

<sup>120</sup>Ibid 347-9.

<sup>121</sup>*Adoption Leave Case* (1985) 298 CAR 321, 347-9.

<sup>122</sup>See discussion below.

<sup>123</sup>*Parental Test Leave Case* (1990) IR 1.

<sup>124</sup>*Parental Test Leave Case* (1990) IR 1.

<sup>125</sup>Ibid 2-3.

<sup>126</sup>Ibid 2. These standards were based on earlier decisions such as the *Maternity Leave Case*.

<sup>127</sup>Ibid 2-3.

taken between the seventh week after birth and the second birthday of the child; and

- c) Adoption leave would be granted to male employees, with similar provisions for leave as with the birth of a biological child.<sup>128</sup>

The AIRC considered some arguments and submissions from interested parties on the issue.<sup>129</sup> The AIRC first noted social research from the Australian Institute of Family Studies indicating the changing role of women in Australian society.<sup>130</sup> The data from the research indicated the rate of women participating in the workforce after birth (including married women) had dramatically increased in the previous two decades.<sup>131</sup>

The ACTU also submitted that gender care roles were changing, with more Australian men becoming primary caregivers for their children, and more also assisted in the post-natal care of their child.<sup>132</sup> The ACTU further submitted the lack of a scheme of parental leave that appropriately assisted employees was making Australia lag behind international standards, including those of the ILO.<sup>133</sup>

The Commonwealth government, the States and Territories, and the public service indicated in their submissions they already had many suitable arrangements in place and would not necessarily oppose the changes sought after, though with individual reservations.<sup>134</sup> The AIRC also heard some arguments from the CAI (a business lobby group) that opposed the changes sought by the ACTU.<sup>135</sup> The CAI's arguments against the extension of leave included:<sup>136</sup>

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<sup>128</sup>Ibid 2.

<sup>129</sup>See the following discussion.

<sup>130</sup>*Parental Test Leave Case* (1990) IR 1, 3-4.

<sup>131</sup>Ibid 4.

<sup>132</sup>Ibid 4.

<sup>133</sup>Ibid 4-5.

<sup>134</sup>Ibid 4-5.

<sup>135</sup>Ibid 5-6.

<sup>136</sup>Ibid 5-6.



- a) There was no evidence to support the claim paternity leave was necessary for male employees;
- b) The rate of take-up for the entitlement sought would be very small;
- c) The cost to employers and businesses would be unreasonable, particularly because of employees taking protracted periods of leave, the costs of finding and training replacement staff while other employees were on leave, and the disruptions to business operations that would occur because of staff taking leave; and
- d) A better alternative existed in changing the existing award system covering part-time work.

The AIRC in its decision turned to consider Article 3 of the *ILO Convention No 156*, which Australia had ratified and provided that a person would not experience unfair discrimination in balancing their employment and family responsibilities.<sup>137</sup> The AIRC examined changes in Australian legislation regarding maternity leave, including the outcome of the *Maternity Leave Test Case*, which extended unpaid maternity leave as a new entitlement to a range of sectors.<sup>138</sup> The AIRC itself stated: ‘It is now 11 years since maternity leave was introduced as a standard in federal awards and we recognise that substantial changes have occurred in the Australian workforce.’<sup>139</sup> The AIRC also noted data indicating changes such as the fact 45% of female employees with children under the age of five years were in the workforce.<sup>140</sup> The AIRC granted the ACTU claim for paternity leave for period of up to one week on an unpaid basis.<sup>141</sup> The AIRC justified its decision with the remark ‘It is now widely accepted that a father may be called upon to assist his spouse and care for the family at the time of the birth of their child,’<sup>142</sup> and it was appropriate in light of this fact to grant a short period of paternity leave.<sup>143</sup> The AIRC noted however that this paternity leave entitlement had to be balanced against other rights and

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<sup>137</sup>Ibid 7. ILO conventions are discussed further in Chapter 4, Section 3 of this thesis.

<sup>138</sup>Ibid 7-8.

<sup>139</sup>Ibid 8.

<sup>140</sup>Ibid 8.

<sup>141</sup>*Parental Test Leave Case* (1990) IR 1, 9.

<sup>142</sup>Ibid 9.

<sup>143</sup>Ibid 9.

could not be used in addition to other types of leave already granted for the same purpose.<sup>144</sup>

The AIRC also granted that male staff should be entitled to the same 52-week period of unpaid leave as mothers on maternity leave.<sup>145</sup> However, the AIRC ruled this leave could not be taken beyond the first year of the child's life, and both parents were not entitled to take it at the same time.<sup>146</sup> The AIRC found this matter was required by the public interest, particularly concerning the potential costs to business in obtaining and training replacement staff and business disruption, particularly regarding male employees.<sup>147</sup> The AIRC declined to make substantial changes to the structure of maternity leave entitlements, with some changes to the wording of clauses relating to periods of continuous service and evidential requirements to claim the benefit.<sup>148</sup> The AIRC also extended the 52-week period of unpaid parental leave to parents of adopted children.<sup>149</sup> The AIRC also noted the merits of flexible work, particularly part-time employment, but did not examine the issue in depth.<sup>150</sup> The AIRC did hold however that an employee who had worked continuously for 12 months should be entitled to return to their former position, and should not be disadvantaged vis-à-vis their standard entitlements regarding leave.<sup>151</sup>

The AIRC concluded, 'We have decided upon a package of leave and part-time work associated with the birth or adoption of a child which will provide additional choices for families.'<sup>152</sup> Arguing 'The scheme we have provided establishes a flexible range of choices for families and is a further step towards reconciling work and family responsibilities,'<sup>153</sup> the AIRC extended parental entitlements to male employees in the form of unpaid paternity leave and parental leave, recognising their role in caring after birth and also as primary

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<sup>144</sup>Ibid 9.

<sup>145</sup>Ibid 9.

<sup>146</sup>Ibid 9.

<sup>147</sup>*Parental Test Leave Case* (1990) IR 1, 9.

<sup>148</sup>Ibid 10-11.

<sup>149</sup>Ibid 11-12.

<sup>150</sup>Ibid 12-14.

<sup>151</sup>Ibid 13-14.

<sup>152</sup>Ibid 15.

<sup>153</sup>Ibid 15.

caregivers in some cases.<sup>154</sup> The AIRC decided to make changes to the existing award system to reflect its decision in the case.<sup>155</sup> The case represented an important victory for those seeking greater equity in the workplace by increasing access of employees to parental leave.<sup>156</sup>

### **3.3.5 The *Re Vehicle Industry Award* (2001) Test Case<sup>157</sup>**

Another test case that involved parental leave entitlements for casual employees working in the motor industry was brought before the AIRC in 2001.<sup>158</sup> In this case, several applications lodged by various union groups sought to amend parental leave awards, so the parental leave clause applied to eligible casual employees.<sup>159</sup> The essence of the claim by the relevant unions was to vary the existing parental leave test case standard for parental leave and extend it to casual employees as well as full-time and regular employees as casual employment arrangements had become the standard mode of employment for many Australian workers across a range of industries.<sup>160</sup>

The AIRC considered evidence from academic research that indicated a substantial growth in the number of Australians in casual employment arrangements.<sup>161</sup> The AIRC also noted evidence from ABS statistics indicating most of the employment growth in the Australian economy had been casual work, and at least 31.8% of Australian women in the workforce were in casual employment.<sup>162</sup> The AIRC also found that a significant number of casual employees had been in continuous employment for their employers over long

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<sup>154</sup>Ibid 15.

<sup>155</sup>Ibid 15.

<sup>156</sup>Glenda Strachan and Suzanne Jamieson, 'Equal Opportunity in Australia in the 1990s' (1999) 24(3) *New Zealand Journal of Industrial Relations* 319-341.

<sup>157</sup>*Re Vehicle Industry Award* (2001) 107 IR 71.

<sup>158</sup>*Re Vehicle Industry Award* (2001) 107 IR 71.

<sup>159</sup>Ibid 71.

<sup>160</sup>Ibid 71.

<sup>161</sup>Ibid 71. The full bench referred to the article by Ian Campbell, 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' (2000) 45(1) *Journal of Political Economy* 68, 68-98.

<sup>162</sup>Ibid 74. This situation was as at June 1999.

periods of time and had regular hours and ongoing employment stability in many cases.<sup>163</sup>

The AIRC held on the basis of the evidence presented in these submissions that it would be inequitable not to extend parental leave to casual employees while holding that only full-time and regular part-time employees were entitled to parental leave benefits.<sup>164</sup> The AIRC also held that extending the benefit to casual employees would foster the objectives of the *Workplace Relations Act 1996* (Cth) by providing a balance between work and family life,<sup>165</sup> would bring Australia into line with ILO standards regarding casual employees, and the business cost of including parental leave entitlements for casual employees would be minimal.<sup>166</sup>

The AIRC also considered the matter of a new parental leave test standard for casual employees.<sup>167</sup> Despite Commonwealth government submissions to the contrary,<sup>168</sup> the AIRC decided to set a new standard in the test case extending the same parental leave entitlements available to full-time and regular part-time employees in previous test cases to eligible casuals.<sup>169</sup> The new standard included a modified award provision that covered eligible casual employees who had worked continuously for an employer on a systematic and regular basis over a period of at least twelve months.<sup>170</sup> Employers were also prohibited from dismissing a casual employee who had been on parental leave, or whose spouse had become pregnant, and workers on labour hire agreements were also granted

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<sup>163</sup>Ibid 74.

<sup>164</sup>Ibid 74.

<sup>165</sup>See *Workplace Relations Act 1996* (Cth) ss 3(j)-3(k).

<sup>166</sup>Ibid 74-5. ILO Standards will be discussed in Chapter 4 of this thesis. This is most likely because at the time the parental leave in question was unpaid. Casual workers also do not get paid many of the types of leave part-time or full-time workers get as a matter of course. See Wayne Luwchuk, 'Precarious Jobs: Where Are They, and How Do They affect Well-being?' (2017) 28(3) *Economic and Labour Relations Review* 402, 402-419; Ian Campbell and Jenny Chalmers, 'Job Quality and Part-Time Work in The Retail Industry: An Australian Case Study' (2008) 19(3) *International Journal of Human Resource Management* 487, 487-500; Barbara Pocock, John Buchanan, Iain Campbell, 'Meeting the Challenge of Casual Work in Australia: Evidence, Past Treatment and Policy' (2004) 30(1) *Australian Bulletin of Labour* 16, 16-32.

<sup>167</sup>*Re Vehicle Industry Award* (2001) 107 IR 71, 75.

<sup>168</sup>Mainly on the grounds enterprise bargaining would be better. See discussion at 75.

<sup>169</sup>Ibid 75-6.

<sup>170</sup>*Re Vehicle Industry Award* (2001) 107 IR 71, 76.

protection from dismissal.<sup>171</sup> The model award provision for eligible casuals thus included a basic entitlement to 52 weeks of unpaid parental leave (for those who had worked for at least 12 months with the same employer), maternity and special maternity leave, paternity leave and adoption leave.<sup>172</sup> The model award provisions for casuals also included clauses covering the right to return to work and replacement employees.<sup>173</sup> This case was an important milestone in extending parental leave and maternity leave entitlements to a previously exempt and growing part of the Australian workforce.<sup>174</sup>

### **3.3.6 Parental Leave Test Case (2005)**<sup>175</sup>

In 2005, the AIRC considered the issue of parental leave once again in a new test case which was one of the last considered before the restructuring of the AIRC under the new Work Choices laws in 2005-2006.<sup>176</sup> In this case, the ACTU brought five claims to the AIRC seeking to vary some existing awards to achieve a better balance between work and family life.<sup>177</sup> The AIRC received a large number of submissions from interested parties including unions, employer groups, academics, researchers, women's lobby groups and other parties.<sup>178</sup>

The AIRC held an employee should have the right to request a further continuous period of parental leave not exceeding 12 months and return to part-time work until their child reached school age.<sup>179</sup> It further held the employee may similarly request that simultaneous unpaid parental leave be increased to eight weeks, and provided model award provisions to enact this new term.<sup>180</sup>

The case was quite complicated and involved many different points of discussion.<sup>181</sup> The focus of the case was five claims made by the ACTU to vary

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<sup>171</sup>Ibid 76.

<sup>172</sup>Ibid 78-9.

<sup>173</sup>Ibid 79.

<sup>174</sup>Anna Chapman, 'Industrial Law, Working Hours and Care, Work and Family' (2010) 36(3) *Monash University Law Review* 190, 190-216.

<sup>175</sup>*Parental Leave Test Case* (2005) 143 IR 245.

<sup>176</sup>*Parental Leave Test Case* (2005) 143 IR 245.

<sup>177</sup>Ibid 245.

<sup>178</sup>Ibid 245.

<sup>179</sup>Ibid 245.

<sup>180</sup>Ibid 245.

<sup>181</sup>See below.

five awards, which included changes to hours worked, emergency leave, purchased leave, parental leave, and part-time provisions.<sup>182</sup> The ACTU claim for parental leave encompassed a claim that sought to amend a model parental leave clause of general application made in the 1990 test case.<sup>183</sup> The changes proposed by the ACTU sought to: (a) increase the period of unpaid parental leave from 12 months to two years, (b) to impose obligations on employers to communicate to employees who are on parental leave in relation to significant change in the workplace, and (c) increase the period of simultaneous maternity and paternity leave for employees following the birth or adoption of a child to eight weeks.<sup>184</sup> The ACTU claim relating to part-time work also sought to permit an employee to work part-time following a period of parental leave until the child reached school age.<sup>185</sup>

The employer advocacy groups ACCI and AIG made submissions on the issue, along with the State and Territory governments.<sup>186</sup> These mainly concerned allowing for greater flexibility in the workplace, such as allowing for ‘make-up time’ following birth, allowing for casual or part-time employment following birth, requesting flexible hours, and extending leave arrangements.<sup>187</sup> The State and Territory governments seemed more flexible and generous in this regard, though in their submissions they cited cost factors and the capacity to accommodate parental leave requests while not impacting on their ability to deliver services were an important issue for the public sector.<sup>188</sup>

The AIRC gave notice to the context and evidence around work and the family under five matters: (a) labour and family conflict, (b) workforce changes, particularly, labour force participation, part-time and casual employment, (c) enterprise bargaining, (d) demographic change, and (e) the impact of parental

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<sup>182</sup>Ibid 250.

<sup>183</sup>Ibid 251.

<sup>184</sup>Ibid 251.

<sup>185</sup>Ibid 251.

<sup>186</sup>Ibid 251-3.

<sup>187</sup>Ibid 251-3.

<sup>188</sup>Ibid 254.

leave on employers.<sup>189</sup> The AIRC first reviewed the *Workplace Relations Act 1996* (Cth) provisions relevant to the issue of parental leave, including:

- a) Provisions relating to assisting employees balance family and work responsibilities, preventing discrimination and adhering to international labour standards;<sup>190</sup>
- b) Ensuring the main responsibility for determining the matters affecting the relationship between employer and employee rest with these parties at the enterprise level;<sup>191</sup>
- c) Providing the means for wages and conditions to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level upon a foundation of minimum standards;<sup>192</sup>
- d) The objects of the *Workplace Relations Act 1996* (Cth), including the need to prevent discrimination in employment on the basis of family responsibilities, ensuring provisions in employment agreements or awards did not discriminate against an employee because of family responsibilities, pregnancy or marital status; and <sup>193</sup>
- e) Protecting employees from unlawful termination during a period of lawful maternity leave or parental leave.<sup>194</sup>

The AIRC also noted the important submission by the Commonwealth government that the best way to promote balance between work and family life was to maintain minimum fair standards while maximising flexibility at the workplace level by encouraging agreement-making individually at the workplace level, particularly through new employment agreements known as ‘AWAs’ (Australian Workplace Agreements).<sup>195</sup>

The AIRC reviewed the previous arbitration decisions in the area, including the 1990 *Parental Leave Test Case*<sup>196</sup> granting an entitlement of 52 weeks of unpaid

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<sup>189</sup>*Parental Leave Test Case* (2005) 143 IR 245, 255.

<sup>190</sup>*Ibid* 255; *Workplace Relations Act 1996* (Cth) ss 3(j)-3(k).

<sup>191</sup>*Ibid* 255; *Workplace Relations Act 1996* (Cth) s 3(b)

<sup>192</sup>*Ibid* 255; *Workplace Relations Act 1996* (Cth) s 3(d)(1).

<sup>193</sup>*Ibid* 256.

<sup>194</sup>*Ibid* 256.

<sup>195</sup>*Ibid* 255.

<sup>196</sup>*Ibid* 256-7, *Parental Test Leave Case* (1990) IR 1.

parental leave to either parent provided they had worked continuously for their employer for a period of at least 12 months, and the 2001 AIRC decision that extended the standard clause incorporating a parental leave entitlement to casual employees.<sup>197</sup> The AIRC also noted important cases in 1994<sup>198</sup> and 2002<sup>199</sup> that changed provisions in employee awards relating to sick leave, carer's leave and overtime concerning family and caring responsibilities because of evidence considering changes in the workforce, including the increasing numbers of women in the workforce.<sup>200</sup>

The AIRC then moved to consider the conflict between work and family obligations.<sup>201</sup> The AIRC noted evidence that indicated a significant percentage of working parents felt they could not adequately reconcile work and family responsibilities, leading to stress, fatigue, and poor health.<sup>202</sup> The AIRC then reviewed evidence and submissions from a range of sources and made these findings:<sup>203</sup>

- a) Employers often remain inflexible in the face of requests by women with children for changes to hours, working duties and entitlements;<sup>204</sup>
- b) Women bear the bulk of the burdens regarding child-caring and caring for the family;<sup>205</sup>
- c) Mothers adjust their work arrangements more frequently than men to accommodate care responsibilities, housework and childcare;<sup>206</sup>
- d) Family responsibilities can have a negative long-term impact on a women's employment and earnings; and<sup>207</sup>

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<sup>197</sup>Ibid 256-7; *Parental Leave Casual Employees Test Case* (2001) 107 IR 71.

<sup>198</sup>*Family Leave Test Case* (1994) 57 IR 121.

<sup>199</sup>*Working Hours Case* (2002) 114 IR 390.

<sup>200</sup>*Parental Leave Test Case* (2005) 143 IR 245, 257-61.

<sup>201</sup>Ibid 261.

<sup>202</sup>Ibid 261.

<sup>203</sup>These findings are basically identical to those of the AHRC Reports discussed in Chapter 2 and also the Productivity Commission 2009 Final Report discussed in Chapter 2.

<sup>204</sup>*Parental Leave Test Case* (2005) 143 IR 245, 262-3.

<sup>205</sup>Ibid 263.

<sup>206</sup>Ibid 263.

<sup>207</sup>Ibid 263.



- e) Many women take up part-time work to reconcile family and work responsibilities.<sup>208</sup>

The AIRC also noted the changes that took place in the Australian workplace in the preceding 30 years.<sup>209</sup> It noted factors such as economic liberalisation and increased competition, greater participation in the workforce by women (including those with children), the rise of the two-income, dual-earning household, and demographic changes placed new pressures on working families.<sup>210</sup> The AIRC reviewed ABS data that showed Australian women's participation in the workforce had substantially increased, though Australian women remain primary caregivers and participation rates of women with children in the workforce were among the lowest in the OECD.<sup>211</sup> The AIRC also noted evidence that indicated most parents felt that handing child-care over to third parties was inappropriate for children aged less than one year, but this figure fell rapidly as the child grew older.<sup>212</sup> The AIRC concluded producing better work and family balance strategies would help women and the wider economy.<sup>213</sup>

The AIRC also reviewed research concerning the increase in part-time and casual work among female employees.<sup>214</sup> The data reviewed by the AIRC showed two million Australian women worked part-time and 46% of all employed women worked part-time in 2004, increasing from 34% in 1978.<sup>215</sup> Continuing its analysis of flexible work practices, the AIRC considered data submitted by the Federal Government of the broad coverage of 'family leave' or 'family-friendly' provisions supposedly found in Australian Workplace Agreements (AWAs).<sup>216</sup> These provisions included various kinds of leave (including parental leave), job-sharing, home-based work, and subsidised child-

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<sup>208</sup>Ibid 264-5.

<sup>209</sup>Ibid 267.

<sup>210</sup>Ibid 267.

<sup>211</sup>Ibid 270.

<sup>212</sup>Ibid 271.

<sup>213</sup>Ibid 272.

<sup>214</sup>Ibid 272.

<sup>215</sup>Ibid 272-4.

<sup>216</sup>Ibid 274.

care.<sup>217</sup> These examples were cited by the Commonwealth submission as evidence the actual awards and AWAs under the ‘Work Choices’ regime were flexible enough to balance family and work responsibilities, though the ACTU disagreed.<sup>218</sup> The AIRC itself found that enterprise bargaining alone did not necessarily lead to family friendly work practices, as the coverage of ‘family friendly’ provisions did not cover all industries, and the AIRC commented ‘Many employees lack the bargaining power to insist upon agreements that enshrine family friendly policies.’<sup>219</sup>

The AIRC also reviewed demographic data, noting ‘A discussion of these issues provides relevant background.’<sup>220</sup> The AIRC noted Australia’s population was getting older and the rate of population growth had slowed due to fertility declines.<sup>221</sup> These had economic repercussions due to the growing imbalance between the working age and dependent populations.<sup>222</sup> The AIRC held, after reviewing the submitted data, this was mainly because women delayed childbirth to invest more in higher education and full-time work to improve career prospects and earning capacity.<sup>223</sup> The AIRC also noted evidence in other submissions that family payments, appropriate workplace policies, and access to early childhood education and care were essential to reversing this trend.<sup>224</sup>

The AIRC also considered evidence regarding the declining numbers of people in the Australian workforce as the population aged.<sup>225</sup> This problem posed potential issues for governments and employers, due to a shrinking tax base, increased spending on welfare, health and the pension costs, and a smaller pool of quality skilled employees from which to draw taxation.<sup>226</sup> Family structures were also changing, where the structure had changed from one member (usually the father) being the sole income earner in the household and the mother the

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<sup>217</sup>Ibid 274.

<sup>218</sup>Ibid 274-5.

<sup>219</sup>*Parental Leave Test Case* (2005) 143 IR 245, 277.

<sup>220</sup>Ibid 277.

<sup>221</sup>Ibid 277-8.

<sup>222</sup>Ibid 278.

<sup>223</sup>Ibid 278.

<sup>224</sup>Ibid 280.

<sup>225</sup>Ibid 280-1.

<sup>226</sup>Ibid 280-1.

primary carer to household and family structures where both parties shared work and care responsibilities on a more equal basis.<sup>227</sup>

The AIRC also considered submissions from the employer and industry groups.<sup>228</sup> While some employer advocacy groups submitted arguments that ‘family friendly’ policies brought advantages to business,<sup>229</sup> business and employer groups were mostly ambivalent about the ACTU and other submissions.<sup>230</sup> One employer submission<sup>231</sup> for example claimed a unilateral and ‘one-size fits all’ entitlement to parental leave would cost employers too much and undermine the profitability of the business.<sup>232</sup> Other employer groups claimed existing family friendly policies or flexible work practices solved the problem without requiring the changes to awards the ACTU sought.<sup>233</sup>

The AIRC next considered the particular issue of parental leave after its analysis of the data and the submissions by various groups.<sup>234</sup> In this case, the ACTU sought to extend the maximum time for parental leave from 12 months to two years.<sup>235</sup> The ACTU had argued among other things, workplace and demographic changes required amendments to existing entitlements to allow better for working parents to care properly for their children.<sup>236</sup> It also argued changing the entitlement would not damage business through increased costs and reduced competitiveness, would promote gender equity in the workplace, and would bring Australia into line with other OECD countries.<sup>237</sup>

Business groups and the Commonwealth government opposed the ACTU’s parental leave claim.<sup>238</sup> The business groups argued an extension should not be granted because of: (a) increased training and staff replacement costs (especially

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<sup>227</sup>Ibid 282-3.

<sup>228</sup>Ibid 285.

<sup>229</sup>Ibid 286.

<sup>230</sup>Ibid 287.

<sup>231</sup>Ibid 287.

<sup>232</sup>Ibid 287.

<sup>233</sup>Ibid 286-7.

<sup>234</sup>Ibid 295.

<sup>235</sup>Ibid 295.

<sup>236</sup>Ibid 295. This included evidence similar to the Productivity Commission report discussed earlier in Chapter 2 of this thesis.

<sup>237</sup>Ibid 296.

<sup>238</sup>See the following discussion below.

over a 12 month period), (b) covering costs, (c) difficulty in accommodating extended leave periods in fast-changing industries, (d) potential negative discrimination, and (e) reducing Australia's overall economic competitiveness.<sup>239</sup> The Commonwealth government argued such an increase would not be needed, as less than two-thirds of women who had children took leave of fewer than 12 months, and granting such an entitlement would weaken labour force attachment and increase replacement costs.<sup>240</sup>

The AIRC agreed with the negative submissions, holding a balance had to be found between the risk of driving up business costs in an unreasonable manner (through businesses having to replace and retrain staff on leave, re-training costs, and loss of employee skills) and the relatively unknown impact of parental leave on matters like declining fertility.<sup>241</sup> The AIRC noted that as a consequence it had to take commercial realities into account in considering granting an extension of existing parental leave rights.<sup>242</sup>

The second matter for the AIRC to consider was the ACTU's request for parental leave following the birth of a child to increase from one week to eight weeks taken concurrently.<sup>243</sup> The ACTU submitted different arguments to support the claim, including that increased participation rates of women in the workforce meant they had less time to care for children.<sup>244</sup> Business groups opposed this claim, again mainly on the grounds of expense and difficulties, especially for smaller firms.<sup>245</sup> While the AIRC acknowledged the submissions, it held it had already considered them adequately to make a proper decision.<sup>246</sup>

The AIRC also considered where the ACTU proposed an amendment to existing awards contemplating a right to return to part-time work following taking a period of parental leave.<sup>247</sup> The ACTU argued this provision was necessary to

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<sup>239</sup>Ibid 297.

<sup>240</sup>Ibid 297.

<sup>241</sup>Ibid 298.

<sup>242</sup>Ibid 298.

<sup>243</sup>Ibid 298.

<sup>244</sup>Ibid 299.

<sup>245</sup>Ibid 299.

<sup>246</sup>*Parental Leave Test Case* (2005) 143 IR 245, 299.

<sup>247</sup>Ibid 300.

ease the transition from full-time parenting to return to work.<sup>248</sup> The ACTU argued that casual work was too insecure and the ‘market failure’ to provide adequate employment protections to casual workers required this provision to be enacted.<sup>249</sup> Business and industry groups opposed this claim, arguing practical problems would occur in business management if employees were granted an unqualified right to return to work, regardless of practical and cost consequences to the employer.<sup>250</sup> Business groups also submitted employers were not able in all circumstances to give a guarantee of part-time work upon return from leave, so the claim was just unreasonable.<sup>251</sup> The Commonwealth made claims of a similar nature, arguing such an amendment would increase costs for business and the matter could be resolved through enterprise bargaining between employer and employee.<sup>252</sup>

The AIRC found in favour of business and the Commonwealth, finding it unreasonable for a general right to part-time paid work for employees who return after taking parental leave.<sup>253</sup> This was due to the ‘Costs and constraints on business,’<sup>254</sup> and in any case ‘Many businesses, particularly small to medium sized enterprises, would be unable to provide part-time work and it would be unjust to require them to do so.’<sup>255</sup> However, the AIRC did find that return to part-time work by parents should be encouraged, given the evidence for a preference for part-time work by new parents, and the evidence of potential gains for the economy and the demographic balance.<sup>256</sup> However, these considerations had to be consistent with business needs and economic realities.<sup>257</sup>

The AIRC also considered some submissions from industry and business groups concerning flexible work practices.<sup>258</sup> These included measures such as ‘flexible hours at an ordinary time’ that permitted employers and employees to bargain

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<sup>248</sup>*Parental Leave Test Case* (2005) 143 IR 245, 300.

<sup>249</sup>*Ibid* 300-301.

<sup>250</sup>*Ibid* 301.

<sup>251</sup>*Ibid* 302.

<sup>252</sup>*Ibid* 302.

<sup>253</sup>*Ibid* 302.

<sup>254</sup>*Ibid* 302.

<sup>255</sup>*Ibid* 302.

<sup>256</sup>*Ibid* 302.

<sup>257</sup>*Ibid* 303.

<sup>258</sup>*Ibid* 303.

and alter working conditions upon request for work and family purposes.<sup>259</sup> The AIRC engaged in a relatively lengthy discussion of a number of these proposed measures but declined to change the structure of awards to accommodate them, mainly on the basis that the business groups did not submit enough evidence to persuade the AIRC of their efficacy.<sup>260</sup>

The AIRC considered the Commonwealth's submissions regarding the importance of family life and its submissions on the issue of parental leave sought by the ACTU.<sup>261</sup> The Commonwealth rejected the ACTU claims, arguing inter alia:

- a) The ACTU claims bypassed the existing award system;
- b) The matters raised by the ACTU could be dealt with via individual workplace agreements reached through enterprise bargaining;
- c) Increase red tape and costs for business;
- d) The proposed changes would hinder employment and economic growth; and
- e) The claims ignored the needs of different industries and small business to accommodate the claims.<sup>262</sup>

The States and Territories were more flexible, permitting extensions of leave requested by the ACTU, but accommodated to the needs of business and availability by request.<sup>263</sup> The model proposed by the States and Territories included an option to refuse to grant leave on reasonable grounds, such as conflict with the employer's legitimate business needs.<sup>264</sup> The states also insisted the matter was handled through the existing award framework and dispute resolution processes.<sup>265</sup>

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<sup>259</sup>Ibid 303.

<sup>260</sup>Ibid see 303-322, passim.

<sup>261</sup>Ibid 322.

<sup>262</sup>Ibid 323.

<sup>263</sup>Ibid 324.

<sup>264</sup>Ibid 324.

<sup>265</sup>Ibid 324-5.

The AIRC concluded by noting it had received many submissions on the case, and though there were differences, the parties agreed that ‘award provisions should encourage a working environment in which employees are able to discharge their family responsibilities adequately.’<sup>266</sup> The AIRC noted the differences between the ACTU submissions and those of the employers.<sup>267</sup> Whereas the ACTU sought to balance family and work responsibilities through more generous minimum award entitlements, employer groups argued the right balance could be found through enterprise bargaining between employers and their employees, with employers having the unqualified discretion to grant or refuse employee requests for parental leave.<sup>268</sup>

The AIRC also noted that the Commonwealth also actively promoted enterprise bargaining to resolve the issue rather than government regulation of the labour market, while the States and Territories adopted an intermediate position, advocating employees should have the right to request parental leave which an employer should not unreasonably refuse to grant.<sup>269</sup> After considering the evidence, the AIRC argued it had come to three critical conclusions.<sup>270</sup> The first was the AIRC ‘Should take a positive step by way of award provision to assist employees to reconcile work and family responsibilities.’<sup>271</sup> The AIRC’s rationale for this was that while most employers would be sensitive to the family responsibilities of their employees, ‘There are some employers who are unlikely to accommodate the needs of adopting a flexible approach to working hours, leave and other arrangements.’<sup>272</sup> In light of this, the AIRC held it was appropriate to include award provisions to cover this contingency.<sup>273</sup>

The second conclusion of the AIRC was that ‘It is important that our decision should be a cautious one and that we should not attempt to deal with all the situations in which employees may seek additional flexibility.’<sup>274</sup> The AIRC

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<sup>266</sup>*Parental Leave Test Case* (2005) 143 IR 245, 330.

<sup>267</sup>*Ibid* 330.

<sup>268</sup>*Ibid* 331.

<sup>269</sup>*Ibid* 331.

<sup>270</sup>*Ibid* 331.

<sup>271</sup>*Ibid* 331.

<sup>272</sup>*Ibid* 331.

<sup>273</sup>*Ibid* 331.

<sup>274</sup>*Ibid* 331-2.

held it would be unfair to employers to introduce substantial changes to the award structures across a wide range of sectors without further consultation of the relevant stakeholders and a trial of such provisions.<sup>275</sup> The AIRC decided that it should only confine change to the area of parental leave.<sup>276</sup> It also mainly confined the changes to the award to unpaid parental leave provisions, with some other changes.<sup>277</sup>

The third conclusion reached by the AIRC concerned the manner in which ‘employment flexibility’ should be introduced in the workplace.<sup>278</sup> The AIRC did not accept fully either the submissions by the ACTU or employer groups, as the ACTU claims would constitute a new employee entitlement the AIRC was not prepared to grant, and an unconditional right to additional parental leave benefits (beyond the existing scheme) would potentially increase costs, reduce workplace efficiency and create workplace conflict.<sup>279</sup> In light of these considerations, the AIRC decided to grant an employee the right to request changes to work conditions and that an employer may not unreasonably deny the request, modelled on the proposal of the states and territories and ss 80F and 80G of the *Employment Rights Act 1996* (UK).<sup>280</sup>

The AIRC noted that the introduction of a right to seek additional leave related to the birth or adoption of a child built on the parental leave entitlements introduced in the 1990 test case.<sup>281</sup> The AIRC found the current standards reflected well with those in places such as Europe, noting the introduction of flexible employment policies to assisting working women to have families if they wished to do so.<sup>282</sup> The AIRC noted the policies in question included paid and unpaid maternity leave, parental leave, extended unpaid parental leave and the provision of part-time work where appropriate.<sup>283</sup> The AIRC recognised many factors worked to influence employment rates of women with children.

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<sup>275</sup>Ibid 332.

<sup>276</sup>Ibid 332.

<sup>277</sup>Ibid 332.

<sup>278</sup>Ibid 332.

<sup>279</sup>Ibid 332.

<sup>280</sup>*Parental Leave Test Case* (2005) 143 IR 245, 332.

<sup>281</sup>Ibid 333.

<sup>282</sup>Ibid 333.

<sup>283</sup>Ibid 333.



The AIRC argued employment policies could have a major factor, and the changes it made to awards was a measured response to the issue.<sup>284</sup> The AIRC was however prepared to review the changes in light of submissions and bargaining after it had operated.<sup>285</sup>

Cost issues were also raised by the parties to the case, particularly the Commonwealth along with employer and industry groups.<sup>286</sup> The estimates of varying entitlements to parental leave varied quite considerably in the submissions, from \$22 million to \$187 million per annum.<sup>287</sup> The AIRC held these estimates were likely to be excessive, and the safeguards in the parental leave award variation (such as the employer's right to refuse the request if it was unreasonable) was enough to protect against excessive costs, as was the provision for later review of the decision at a later date.<sup>288</sup>

The AIRC also found in favour of the ACTU's request for providing a worker seeking parental leave to discuss with their employer any significant effect of an organisational change on the status or responsibility level of the position of the employee before commencing parental leave.<sup>289</sup> The AIRC concluded it was an element of parental leave that the employee has the right to return to work at the end of the leave period, subject to time limits, notice, and to an appropriate job.<sup>290</sup> The AIRC hence found it was only fair and reasonable to ensure the employee would be consulted while on leave if any changes to their position were occurring during the leave period.<sup>291</sup>

The AIRC summarised the main points of its decision as follows:<sup>292</sup>

The employee has a right to request his or her employer to:

- a) Increase simultaneous unpaid parental leave to eight weeks,
- b) Extend concurrent unpaid parental leave from 52 to 104 weeks,

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<sup>284</sup>Ibid 333.

<sup>285</sup>Ibid 333.

<sup>286</sup>Ibid 334.

<sup>287</sup>Ibid 334.

<sup>288</sup>Ibid 335.

<sup>289</sup>Ibid 336.

<sup>290</sup>Ibid 336.

<sup>291</sup>Ibid 336.

<sup>292</sup>Ibid 337.

- c) Permit an employee to return from parental leave to work on a part-time basis until the child reaches school age; and
- d) The request may only be refused by an employer on reasonable grounds.

These principles were included in model award provisions drafted by the AIRC and appended to the decision in the form of appendices and attachments.<sup>293</sup> The principles developed by the AIRC in the *Parental Leave Test Case* were applied in some subsequent decisions.<sup>294</sup> In the *Tasmanian Trades and Labour Council Case*<sup>295</sup> an application to vary various private sector awards by the Tasmanian Trades and Labour Council in line with the national parental leave decision was successful.<sup>296</sup> The Tasmanian Industrial Relations Commission ordered that all private sector awards in Tasmania to be amended to reflect the model provisions of the AIRC decision regarding the right of an employee to request parental leave.<sup>297</sup>

A similar decision was made by the NSW Industrial Relations Commission in the *Family Provisions Case*.<sup>298</sup> In this case, the NSW Industrial Relations Commission extended the leave provisions made in the Parental Leave case to applicable state awards.<sup>299</sup> The NSW Industrial Relations Commission considered some submissions, including from Unions NSW, business lobby groups and the NSW state and local governments.<sup>300</sup> Unions NSW submitted the decision of the parental leave case should be adopted due to the policy issues involved and the lack of relevant parental leave clauses in NSW awards.<sup>301</sup> Business groups accepted the decision and argued the principles of the decision should be upheld, though changes to NSW awards should recognise local conditions.<sup>302</sup> The other parties to the case also supported the decision.<sup>303</sup>

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<sup>293</sup>*Parental Leave Test Case* (2005) 143 IR 245, 338-351.

<sup>294</sup>See the following discussion.

<sup>295</sup>*Re Tasmanian Trades and Labour Council* (2006) 151 IR 23.

<sup>296</sup>*Ibid* 23-5.

<sup>297</sup>*Ibid* 24-5.

<sup>298</sup>(2006) 152 IR 367.

<sup>299</sup>*Ibid* 368.

<sup>300</sup>*Ibid* 373-376.

<sup>301</sup>*Ibid* 373-4.

<sup>302</sup>*Ibid* 375-6.

<sup>303</sup>*Ibid* 376-8.

The NSW Industrial Relations Commission decided to adopt the principles and the modified award clauses drafted in the test case.<sup>304</sup> The NSW Industrial Relations Commission noted, ‘The decision by the AIRC continues the trend in recent years for industrial parties to achieve through the award system, a better balance between work and family responsibilities through specific provisions in awards.’<sup>305</sup> The NSW Industrial Relations Commission noted the changes reflected a shift in social attitudes and community expectations towards a better balance between family responsibilities and working life, and these public interest considerations should be taken into account in their decisions.<sup>306</sup> Both of these cases were interesting in that they were the most substantial intervention in Australian labour law on the issue of paid parental leave before paid parental leave was legislated into Commonwealth Industrial Laws following the 2009 Productivity Commission final report.<sup>307</sup> However, these developments were largely eclipsed by the impact of the 2005 Work Choices laws, which largely stripped the AIRC of its powers to make determinations regarding employment conditions and awards,<sup>308</sup> which were mostly transferred to the ‘Fair Pay Commission’ or the jurisdiction of the Federal Court and later the AIRC was abolished and replaced with the ‘Fair Work Commission’ with the election of the Rudd Labour Government in 2007 and the legislation of the *Fair Work Act 2009* (Cth) and allied legislation that comprehensively reformed Australia’s industrial relations system.<sup>309</sup>

### 3.3.7 Concluding Remarks

As the cases considered above indicate, standards regarding paid maternity leave (and later paid and unpaid parental leave) gradually became part of the accepted

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<sup>304</sup>Ibid 379.

<sup>305</sup>Ibid 379.

<sup>306</sup>Ibid 379.

<sup>307</sup>See Chapter 2 of this thesis.

<sup>308</sup>Save for award modernisation in line with the Work Choices laws, hearing unfair dismissal cases and limited dispute resolution in employment matters.

<sup>309</sup>For a discussion behind these developments see Anthony Forsyth, ‘Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission’ (2006) 32(1) *Australian Bulletin of Labour* 27, 27-44; Des Moore, ‘Better than the Australian Industrial Relations Commission’ (1999) 15(4) *Policy* 11, 11-18; Geoffrey Guidice, ‘The Evolution of an Institution: The Transition from the Australian Industrial Relations Commission to the Fair Work Australia 1’ (2011) 53(5) *Journal of Industrial Relations* 556, 556-562.

framework of Australian Labour Law. While these standards were not necessarily incorporated into government legislation, they became an important source of law and set of principles for consideration for the AIRC in arbitration decisions where State and Commonwealth laws, industrial awards or employment agreements did not specifically address unpaid or paid maternity and parental leave.<sup>310</sup> These parental leave standards would also prove to be important in the Productivity Commission's considerations on what type of parental leave legislation would be suitable for Australia.<sup>311</sup> However, they also indicated the problems with the existing parental leave framework in Australia, which before the introduction of the *Paid Parental Leave Act 2010* (Cth) was patchy, inconsistent, and in many cases not available to parents who needed it.<sup>312</sup> The introduction of the *Paid Parental Leave Act* was designed in part to deal with the lack of availability of paid parental leave to working parents in Australia.<sup>313</sup>

### **3.4 Parental Leave in Australian Workplace Law**

In 2010, following the final 2009 Report of the Productivity Commission into paid parental leave,<sup>314</sup> the Rudd Labour government introduced a bill into federal parliament containing the recommendations of the Productivity Commission parental leave report<sup>315</sup> in the form of the *Paid Parental Leave Act 2010* (Cth). The second reading speech by the Minister of Families and Housing, Jenny Macklin M.P., along with the explanatory memoranda to the original bill, gives some insight into the Labour government policy behind the introduction of the new law.<sup>316</sup>

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<sup>310</sup>See Marian Baird, 'Parental Leave in Australia: The Role of the Industrial Relations System' (2005) 23(1) *Law in Context* 45, 45-64.

<sup>311</sup>See Australian Government Productivity Commission, 'Paid Parental Leave: Support for Parents of Newborn Children,' (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009), 3.2-3.3.

<sup>312</sup>See Marian Baird 310, above and also Marian Baird, 'The State, Work and Family in Australia' (2011) 22(18) *International Journal of Human Resource Management* 3742, 3750-3752.

<sup>313</sup>See discussion below.

<sup>314</sup>See Chapter 2.

<sup>315</sup>See Chapter 2 of this thesis and related discussion.

<sup>316</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2010, 3204, Ms Jenny Macklin MP.

In the second reading speech, Ms Macklin<sup>317</sup> claimed the parental leave bill was a major win for working families who had waited decades for a paid parental leave scheme.<sup>318</sup> The Minister gave several reasons for legislating in this area including:<sup>319</sup>

- a) The scheme would bring Australia into line with other OECD countries with PPL schemes;
- b) Paid parental leave would give primary carers (particularly mothers) financial security while undertaking caring responsibilities;
- c) The scheme supported women's participation and return to the workforce after the birth of a child;
- d) The scheme included casual, self-employed, part-time and seasonal workers, bringing Australia into line with other OECD countries; and
- e) The scheme would benefit business by helping retain skilled female staff in the workforce.

The Minister explained that the government had estimated about 148 000 people would be eligible for paid parental leave under the proposed scheme.<sup>320</sup> The main eligibility criteria in the proposed bill was that eligible full-time working mothers or primary carers could claim up to 18 weeks of paid leave at the federal minimum wage, for children born or adopted after the 1<sup>st</sup> of January 2011.<sup>321</sup> Women or primary carers in other forms of work such as part-time, casual or who were self-employed were eligible to claim paid parental leave if they had worked 10 out of 13 months before the birth or adoption of their child or if they had worked for a total of 330 hours (for at least one day a week) in the 10-month period before the birth or adoption of their child.<sup>322</sup>

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<sup>317</sup>At the time, the Labour Minister for Employment.

<sup>318</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2010, 3204, Ms Jenny Macklin MP.

<sup>319</sup>*Ibid.*

<sup>320</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2010, 3204, Ms Jenny Macklin MP. However, there was no absolute entitlement to either paid or unpaid parental leave and Ms Macklin noted strict criteria had to be met before a person could become eligible in the proposed scheme.

<sup>321</sup>*Ibid.*

<sup>322</sup>*Ibid.*

The Minister highlighted the eligibility threshold for paid parental leave was an annual household income of \$150 000 per year, though claimants to the paid parental leave scheme would not be eligible for the ‘Baby Bonus’<sup>323</sup> or for Family Tax Payment Benefit Part B.<sup>324</sup> The Minister claimed econometric studies indicated the new scheme would leave most working families around \$2000 better off, and would particularly benefit women working in casual positions with fewer entitlements.<sup>325</sup> The Minister claimed the impact of paid parental leave would be minimal on business. The grounds given included:<sup>326</sup>

- a) The scheme was fully funded by government and required no new taxes to be placed on business;
- b) The scheme was targeted at long-term employees rather than short-term ones to minimise disruption;
- c) Only about 9% of businesses would be involved in the *Paid Parental Leave Act* to give parental leave pay in any one calendar year, and of that only 3% would be small businesses; and
- d) The assessment process for eligibility for parental leave pay was done by the Family Assistance Office, not the employer, hence addressing the business concern that any scheme of paid parental leave would increase business overheads.

The parliamentary debate around the introduction of the bill showed some of the competing issues considered by Labour, the Coalition, the Greens and other parties considered in the legislation. Ms Ley, a female Coalition party MP, noted the economic problems Australia faced with a below-replacement population growth rate and a rapidly ageing population.<sup>327</sup> Ms Ley noted the need to boost

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<sup>323</sup>Ibid. The ‘Baby Bonus’ payment, an initiative of the previous Howard government, was abolished in 2013 by the Gillard Labour government. See ABC Online, *Baby Bonus to be Abolished in Swan’s Deficit Budget*, (14 May 2013), ABC Online, <<http://www.abc.net.au/news/specials/budget-2013/2013-05-14/baby-bonus-to-be-abolished-in-swans-deficit-budget/4689144>>.

<sup>324</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 2010, 3204, Ms Jenny Macklin MP.

<sup>325</sup>Ibid.

<sup>326</sup>Ibid.

<sup>327</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4420, Ms Sussan Ley MP.

population growth by ensuring women were not penalised economically by choosing to have the type of family they wanted.<sup>328</sup> She argued the Coalition's parental leave scheme would be more effective.<sup>329</sup>

Dr Sharman Stone, another female Coalition MP, also made some comments about the scheme. While being critical of aspects of the legislation, she noted change was necessary to better balance the caring responsibilities women face as a result of social expectations and the need to work.<sup>330</sup> As with Ms Ley, she recommended changes to bring Australian government and economic policy more into line with OECD countries such as Norway, Sweden and Iceland based on wage replacement rather than the minimum wage.<sup>331</sup> Tony Abbot (then the leader of the Coalition in opposition and later the Prime Minister)<sup>332</sup> also stated his support of paid parental leave, arguing it was sound social and economic policy, but he backed the Coalition's own paid parental leave scheme policy, not that of Labour.<sup>333</sup>

The explanatory memorandum outlined the timeframe for the introduction of the bill, the requirements of eligibility, and other matters.<sup>334</sup> The new *Act* was designed to take effect for eligible employees from the 1<sup>st</sup> of January 2011.<sup>335</sup> The explanatory memorandum stated the new legislation enacted paid parental leave for a period of 18 weeks at the national minimum wage for eligible women and primary caregivers in a way designed to be compatible with other existing

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<sup>328</sup>Ibid.

<sup>329</sup>Ibid.

<sup>330</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4380, Dr Sharman Stone MP.

<sup>331</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4380, Dr Sharman Stone MP. The example of the Nordic nations cited by Dr Stone was also mentioned in Chapter 1 of the thesis and was also important to the Coalition in developing their 2013 election policy on paid parental leave. See discussion below.

<sup>332</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4390, Mr Tony Abbott MP. Tony Abbott was later deposed by Malcolm Turnbull in a leadership spill following an election loss in Queensland. See sections 3.7 and 3.8 of this Chapter.

<sup>333</sup>Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2010, 4390, Mr Tony Abbott MP.

<sup>334</sup>Comlaw, *Paid Parental Leave Bill 2010 Explanatory Memorandum*, (1<sup>st</sup> January 2018), Parliament of Australia,

<[<sup>335</sup> Ibid. Outline section.](http://www.comlaw.gov.au/Details/C2010B00085/Explanatory%20Memorandum/Text.></a></p></div><div data-bbox=)

NES entitlements and government payments.<sup>336</sup> The memorandum listed these criteria for eligibility under the new legislation:

- a) The primary carer must have been engaged in work for a period of at least 10 of the prior 13 months before the birth or adoption of their child, and;
- b) The primary care must have undertaken at least 330 hours of paid work (at least one day per week) in the 10-month period;
- c) The claimant must be an Australian citizen or resident from the date of birth of the child; and
- d) The claimant is not earning more than \$150 000 per annum.

The explanatory memorandum stated the eligible claimant would be paid the federal minimum wage of \$543.78 per week for a maximum period of 18 weeks.<sup>337</sup> The parental leave pay money would be paid by the employer like salary and wages and would be considered as taxable income.<sup>338</sup> The employer would only have to pay long-term employees (of 12 months service or more) and in other cases the Family Assistance Office would pay the entitlement.<sup>339</sup> The funds would be from the government but offset by payment reductions in the baby bonus, Family Tax Benefit B and tax offsets in people receiving parental leave pay.<sup>340</sup>

The explanatory memorandum also included a 'Regulation Impact Statement' looking at the outcomes of the Productivity Commission report and estimated

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<sup>336</sup>Comlaw, *Paid Parental Leave Bill 2010 Explanatory Memorandum*, (1<sup>st</sup> January 2018), Parliament of Australia,

<<http://www.comlaw.gov.au/Details/C2010B00085/Explanatory%20Memorandum/Text>>, 'Background' section.

<sup>337</sup>Ibid 'Background: Eligibility and Rate of Pay.' At the time of writing this rate is \$694.90 for a 38 hour week. See Fair Work Ombudsman, 'Minimum Wages Factsheet,' (1<sup>st</sup> January 2018), <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>>.

<sup>338</sup>Comlaw, *Paid Parental Leave Bill 2010 Explanatory Memorandum*, (1<sup>st</sup> January 2018), Parliament of Australia,

<<http://www.comlaw.gov.au/Details/C2010B00085/Explanatory%20Memorandum/Text>>.

<sup>339</sup>Ibid.

<sup>340</sup>Ibid.



impacts of the legislation.<sup>341</sup> The ‘regulation impact statement’ included some interesting information garnered from the report and other sources:<sup>342</sup>

- a) In 2007, 285 000 women gave birth, of which 175 000 wished to return to work as soon as possible;
- b) Return to work by mothers after childbirth in a non-optimal timeframe can cause health problems for both the mother and child;
- c) Women can lose between \$157 000 - \$239 000 in lifetime earnings for the birth of one child, in addition to the usual costs of raising a child; and
- d) Australian women’s labour participation after childbirth was at 75% As compared to the OECD average of 80%.

The statement also contained a number of estimates concerning eligibility and costs to business.<sup>343</sup> The statement included four different kinds of potential costs to business arising from the PPL scheme:<sup>344</sup>

- a) Educational and advice costs related to compliance issues;
- b) Purchase costs, i.e. new accounting software;
- c) Administration and record-keeping costs; and
- d) Temporary hire and staff replacement costs.

The statement included a set of cost estimates for businesses (small, medium and large) for implementing the PPL scheme.<sup>345</sup> The statement estimated the costs would total \$59.1 million for small businesses, and \$137.7 million for larger businesses, with a total cost of \$196 million for the first year.<sup>346</sup> This would reduce to about \$107 million for each following year.<sup>347</sup>

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<sup>341</sup>Comlaw, *Paid Parental Leave Bill 2010 Explanatory Memorandum*, (1<sup>st</sup> January 2018), Parliament of Australia, <<http://www.comlaw.gov.au/Details/C2010B00085/Explanatory%20Memorandum/Text>.> ‘Paid Parental Leave Scheme: Regulatory Impact Statement.’

<sup>342</sup>See s 2.

<sup>343</sup>See s 5.2.

<sup>344</sup>Ibid ss 5.2, 6.1.

<sup>345</sup>Ibid s 6.1.

<sup>346</sup>Ibid s 6.1.

<sup>347</sup>Ibid s 6.1.

The statement contained in the explanatory memorandum contained the following tables of cost estimates for implementing the policy which provide a helpful summary of overall estimated costs to Australian businesses:<sup>348</sup>

**Table 3.1: First Year**

Itemised costs	Costs by business size (\$)		
	Small(a)	Larger	Total
Self-education costs (b)	\$9,580,666	\$5,431,660	\$15,012,326
Professional advice	\$13,629,600	\$6,308,775	\$19,938,375
IT purchases	\$4,543,200	\$67,293,600	\$71,836,800
Processing applications - mothers	\$2,962,096	\$9,717,894	\$12,679,991
Processing applications - partners	\$1,002,419	\$3,288,801	\$4,291,219
Paymaster function	\$473,188	\$1,552,424	\$2,025,612
Additional replacement employee costs due to longer average period of PPL taken (10 weeks)	\$26,869,288	\$44,075,696	\$70,944,985
<b>Total costs</b>	<b>\$59,060,457</b>	<b>\$137,668,850</b>	<b>\$196,729,307</b>

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<sup>348</sup>Ibid s 6.1.

**Table 3.2: Second Year**

Itemised costs	Costs by business size (\$)		
	Small(a)	Larger	Total
Self-education costs	\$0	\$0	\$0
Professional advice	\$9,767,880	\$3,154,388	\$12,922,268
IT purchases	\$3,255,960	\$841,170	\$4,097,130
Processing applications - mothers	\$2,962,096	\$9,717,894	\$12,679,991
Processing applications - partners	\$1,002,419	\$3,288,801	\$4,291,219
Paymaster function	\$473,188	\$1,552,424	\$2,025,612
Additional replacement employee costs due to longer average period of PPL taken (10 weeks)	\$26,869,288	\$44,075,696	\$70,944,985
<b>Total costs</b>	<b>\$44,330,831</b>	<b>\$62,630,373</b>	<b>\$106,961,204</b>

### **3.5 Australian Parental Leave Legislation: The *Paid Parental Leave Act 2010* (Cth).**

The *Paid Parental Leave Act 2010* (Cth) was passed into law in April 2010 to reflect these policy recommendations.<sup>349</sup> The Guide to the *Act*<sup>350</sup> states the purpose of the *Act* is to provide payment of parental leave to a person in the first year following the birth or adoption of a child. The guide explains paid parental leave is payable to an eligible person for a maximum period of 18 weeks.<sup>351</sup> It is payable for either the full 18 week or a lesser period, depending on which applies.<sup>352</sup>

The Guide to the *Act* explains paid parental leave is payable in instalments either by the government or an employer for each weekday at the rate of the national

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<sup>349</sup>*Paid Parental Leave Act 2010* (Cth).

<sup>350</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 div 2 s 4.

<sup>351</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 pt 1-1 div 2 s 4.

<sup>352</sup>*Ibid.*

minimum wage.<sup>353</sup> The *Act* defines an eligible person for paid parental leave to satisfy these criteria:<sup>354</sup>

- a) They must satisfy the work test, the income test, and the Australian residency test;
- b) They must be the child's primary carer:
- c) They have not returned to paid work; and
- d) They are not entitled to the baby bonus.

The *Act* divides the types of possible claims into three kinds; a primary claim, a secondary claim, and a tertiary claim (in rare cases).<sup>355</sup> To qualify for a primary claim, the person must satisfy the criteria laid out in section 4 of the *Act*.<sup>356</sup> To qualify for a secondary claim, the same criteria must be satisfied for a primary claim applicable from the day the secondary claimant becomes the child's primary carer.<sup>357</sup> Only the child's birth mother or the adoptive parent of the child can make a primary claim<sup>358</sup> and only the partner of the primary claimant who is the parent of the child (unless exceptional circumstances apply) can make a secondary claim.<sup>359</sup>

A number of tests must be objectively satisfied before a claimant is eligible for paid parental leave.<sup>360</sup> The first test is the 'work test.'<sup>361</sup> To satisfy this test, the person must have performed enough paid work or taken enough paid leave.<sup>362</sup> The work test requires that a primary claimant has completed at least 330 hours of paid work (defined as being at least one hour of paid work per day) in a period of 392 days immediately before the day of the birth of the child, or the day the

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<sup>353</sup>*Ibid.*

<sup>354</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 pt 1-1 div 2 s 4. See also *Paid Parental Leave Rules 2010* (Cth) for the details of these conditions.

<sup>355</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 pt 1-1 div 2 s 4.

<sup>356</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-2 div 5 s 26(1).

<sup>357</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-2 div 5 s 26(2).

<sup>358</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-4 div 2 s 54(1).

<sup>359</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-4 div 2 s 54(2).

<sup>360</sup>*Paid Parental Leave Act 2010* (Cth) ss 4 and 30. This is termed parental leave pay under the Act and DAPP Pay was added in later amendments. See *Paid Parental Leave Act 2010* (Cth) ch 3A pts 3A-1 – 3A-5 ss 115AA-115EM.

<sup>361</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 1 s 30.

<sup>362</sup>*Ibid.*

child is expected to be born.<sup>363</sup> The secondary claimant becomes eligible for 392 days before the day the secondary claimant becomes the child's primary carer.<sup>364</sup>

The 'income test' is relatively straightforward and satisfied when a claimant's annual taxable income does not exceed the paid parental leave limit of \$150 000 per year.<sup>365</sup> The 'residency test' is satisfied if on the day the person is an Australian resident or holds a special category visa while residing in Australia.<sup>366</sup> The *Act* defines the 'primary carer' of the child to be where the child is in the person's care in the reference period, and the person meets the child's physical needs more than anyone else in the reference period.<sup>367</sup> For the purposes of the *Act*, a person is taken to have returned to work if they perform more than one hour of paid work for a permissible purpose, a permissible purpose being if the person is a member of the armed forces or law enforcement, or for the purpose of keeping in touch with their employment.<sup>368</sup>

Parental leave is payable in instalments by either the government or the person's employer.<sup>369</sup> The instalments are payable at the rate of the federal minimum wage from which appropriate adjustments or deductions may be made.<sup>370</sup> The *Act* also provides the circumstances in which an employer must make paid parental leave payments to an employee.<sup>371</sup> Employers are required by the *Act* to keep appropriate records of parental leave payments made to employees.<sup>372</sup> The *Act* also gives the government the power to require an employer to pay the employee paid parental leave if an appropriate determination is made and subject to the employer satisfying certain criteria.<sup>373</sup>

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<sup>363</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 3 s 33(1).

<sup>364</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 3 s 33(3).

<sup>365</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 4(A) s 41.

<sup>366</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 5 s 45.

<sup>367</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 6 s 47.

<sup>368</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 7 ss 49-50.

<sup>369</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-1 div 2 s 63.

<sup>370</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-1 div 2 s 65.

<sup>371</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-2 div 2 s 72.

<sup>372</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-2 div 4 ss 80-81.

<sup>373</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-5 div 2 s 101.

The *Act* also makes provision for ‘Dad and Partner Pay’ (DAPP) which was introduced in 2013 for up to two weeks.<sup>374</sup> A claimant for DAPP must be the biological father of the child, the partner of the child’s mother, or the child’s adoptive father.<sup>375</sup> To claim DAPP, the claimant has to meet the work, income and Australian residency tests, and must also be caring for their child and not be working.<sup>376</sup> These tests are the same as the one applying to a primary claimant except for the ‘caring for child’ and ‘not working criteria’ that each have their own rules in the *Act*.<sup>377</sup>

The rate of parental payment under the *Paid Parental Leave Act* is the federal minimum wage.<sup>378</sup> The DAPP pay rate is also set at the federal minimum wage and is only payable for a maximum time of two weeks.<sup>379</sup>

### 3.6 Parental Leave Standards under the *Fair Work Act 2009* <sup>380</sup>

The standards developed in case law before the *Act*<sup>381</sup> were adapted and applied to some state and federal laws covering entitlements, including the *Fair Work Act 2009* (Cth).<sup>382</sup> The *Fair Work Act* in particular introduced a comprehensive statutory framework of minimum employment standards, some of which particularly relate to maternity and parental leave.<sup>383</sup>

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<sup>374</sup>*Paid Parental Leave Act 2010* (Cth) ch 3A pt 3A-1 div 1 s 115AA.

<sup>375</sup>*Paid Parental Leave Act 2010* (Cth) ch 3A pt 3A-4 div 2 s 115DD.

<sup>376</sup>*Paid Parental Leave Act 2010* (Cth) ch 3A pt 3A-3 div 1 s 115CA.

<sup>377</sup>See *Paid Parental Leave Act 2010* (Cth) Rules 2010.

<sup>378</sup>This is \$695 maximum per week before tax for a maximum period of 18 weeks. The maximum payable per eligible parent would be \$12 510. The maximum DAPP pay would be \$1390. The maximum total for both parents under the *Paid Parental Leave Act* would be \$13 900. For comparison, a partnered person on Newstart would be paid \$485.50 each per fortnight and would be paid a maximum of \$17,478 for 18 weeks. Those on the parenting payment would be paid \$486.50 per fortnight and would be paid \$8757 for 18 weeks. The government only pays up to \$215 per week for those eligible for childcare support to a maximum of \$10 000 per child. Department of Human Services, *Eligibility for Parental Leave Pay*, (1<sup>st</sup> January 2018), Department of Human Services of Human Services, <<https://www.humanservices.gov.au/individuals/enablers/eligibility-parental-leave-pay>> ‘Parental Leave Pay.’ For related calculations for Sweden’s parental leave system, see sections 5.3 and 5.4 of this thesis. This information is current as at 15<sup>th</sup> of January 2018.

<sup>379</sup>*Paid Parental Leave Act 2010* (Cth) ch 3A pt 3A-5 div 2 s 115EC.

<sup>380</sup>The ‘National Employment Standards’ as set out in the *Fair Work Act 2009* (Cth) ch 2 ss 62-131.

<sup>381</sup>See sections 3.1-3.3 of this Chapter.

<sup>382</sup>See *Fair Work Act 2009* (Cth) ch 2 pt 2-2 div 5 ss 67-85.

<sup>383</sup>*Fair Work Act 2009* (Cth) ch 2 pt 2-2 div 5 ss 67-85.

Around the same time as the Fair Work legislation replaced the former 2006 Work Choices legislation regarding employment standards and entitlements, the Department of Employment released a discussion paper explaining the rationale for the changes.<sup>384</sup> The National Employment Standards (NES) were designed to ‘provide an enforceable safety net’<sup>385</sup> to protect worker entitlements such as wages and minimum working conditions.<sup>386</sup> The NES included these matters:<sup>387</sup>

- a) Maximum weekly hours of work;
- b) Requests for flexible working arrangements;
- c) Parental leave;
- d) Annual leave;
- e) Personal, carer and compassionate leave;
- f) Community and long service leave; and
- g) Notice of termination and redundancy pay.

The NES standards were designed to harmonise and streamline the award system of entitlements developed by the AIRC in previous decisions, rather than replace them.<sup>388</sup>

The NES standards covering parental leave reflected government policy concerns, including the desire of parents to be with their child during the first two years of the child’s life, and maintaining strong links between parents and the workforce to ensure social and economic health.<sup>389</sup> The draft NES standards included an entitlement for either parent to take up to 12 months of unpaid parental leave in relation to the birth or adoption of a child.<sup>390</sup> Both parents were

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<sup>384</sup>Australian Government Department of Education, Employment and Workplace Relations (‘Discussion Paper: National Employment Standards Exposure Draft,’ Department of Education, Employment and Workplace Relations, 27 February 2008), 1-90.

<sup>385</sup>Ibid 10.

<sup>386</sup>Ibid 10.

<sup>387</sup>Ibid 10.

<sup>388</sup>Australian Government Department of Education, Employment and Workplace Relations (‘Discussion Paper: National Employment Standards Exposure Draft,’ Department of Education, Employment and Workplace Relations, 27 February 2008), 12.

<sup>389</sup>Ibid 23.

<sup>390</sup>Ibid 23.

not entitled to take the leave simultaneously, though one could take the entitlement after the other parent had used their benefit.<sup>391</sup>

The draft standards also included the option to request an additional twelve months of unpaid parental leave, which could be refused by the employer on 'reasonable business grounds.'<sup>392</sup> The standards also included a right of an employee on paid or unpaid parental leave to return to the same position they held before taking leave, or to a similar situation if, during the duration period of the leave, the position had been removed.<sup>393</sup> In the case of pregnant women, they would have the right to return to the hours and position they had before the pregnancy if they had to reduce their hours or move to a different position.<sup>394</sup>

Under the NES, full-time and part-time workers were entitled to take the 12-month period of unpaid parental leave, provided they had completed at least 12 months of continuous service for the same employer.<sup>395</sup> In the case of casual employees, they could also claim the unpaid parental leave entitlement provided they had worked for the same employer for 12 months on a regular and systematic basis.<sup>396</sup> To claim the benefit, an employee had to give their employer at least ten weeks' notice of their intention to claim parental leave prior to taking leave and provide documentary evidence to support their claim, such as a medical certificate, upon their employer's request.<sup>397</sup>

The NES standards provided that a female employee may take parental leave from six weeks before the birth of her child, while a male employee could take leave from the date of birth of their child.<sup>398</sup> In the case of adoption leave, the leave must start from the date of placement.<sup>399</sup> The NES also provided that an

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<sup>391</sup>Ibid 23.

<sup>392</sup>Australian Government Department of Education, Employment and Workplace Relations ('Discussion Paper: National Employment Standards Exposure Draft,' Department of Education, Employment and Workplace Relations, 27 February 2008),' 23.

<sup>393</sup>Ibid 23.

<sup>394</sup>Ibid 23.

<sup>395</sup>Ibid 24.

<sup>396</sup>Ibid 24.

<sup>397</sup>Ibid 24.

<sup>398</sup>Ibid 24.

<sup>399</sup>Ibid 24.



employee may take other forms of leave<sup>400</sup> during the same period, provided they harmonised with the other entitlements and did not undermine the worker's right to take unpaid leave.<sup>401</sup>

The NES also included some special entitlements related to unpaid parental leave.<sup>402</sup> The first, 'special maternity leave,' entitled a female employee who was unfit to work due to a pregnancy-related illness or premature termination of pregnancy to special maternity leave.<sup>403</sup> The claim had to be supported by appropriate evidence showing unfitness to work.<sup>404</sup> The second 'special entitlement' included a right to transfer to a safe job.<sup>405</sup> In this case, a female employee eligible for unpaid parental leave would be entitled to transfer to a 'safe job' if she was fit for work, but her pregnancy or related conditions prevented her from working in her current position.<sup>406</sup> The entitlement also contained certain matters relating to pay rates and the right to request paid leave if transfer to a 'safe job' was not possible.<sup>407</sup> The NES also contained standards relating to pre-adoption leave, such as leave for employees to attend events such as interviews before the adoption of a child.<sup>408</sup>

The NES also included a new entitlement for an employee to be consulted by their employer where the employee is on leave, and the employer made a decision likely to affect the employee's pre-leave pay or position.<sup>409</sup> This entitlement was included to give the employee a chance to be made 'Aware of any change to their position and given an opportunity to discuss the effect of the

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<sup>400</sup>Ibid 24.

<sup>401</sup>Ibid 25.

<sup>402</sup>Ibid 27.

<sup>403</sup>Ibid 27.

<sup>404</sup>Ibid 27.

<sup>405</sup>Australian Government Department of Education, Employment and Workplace Relations ('Discussion Paper: National Employment Standards Exposure Draft,' Department of Education, Employment and Workplace Relations, 27 February 2008), 28.

<sup>406</sup>Ibid 28.

<sup>407</sup>Ibid 28

<sup>408</sup>Ibid 28.

<sup>409</sup>Ibid 29.

employer's decision.<sup>410</sup> These standards, which reflected much of the previous case law, were implemented into law with the passing of the *Fair Work Act*.<sup>411</sup>

The effect of the introduction of the *Paid Parental Leave Act* and the Fair Work standards has been ambiguous at best.<sup>412</sup> Research<sup>413</sup> has indicated despite the legislation of Fair Work Standards and the *Paid Parental Leave Act*, men and women deciding to have children and take leave still face considerable levels of discrimination, harassment and negative outcomes when trying to balance work and family commitments.<sup>414</sup> For example, some employers are also reluctant to provide employees with parental leave, due to expected costs, complex regulation and difficulties in replacing and training replacement staff.<sup>415</sup> Unfortunately, the evidence also indicated those seeking to return to work after taking leave no longer had a job due to 'restructuring' that took place in their absence.<sup>416</sup> Attempts to enforce parental leave rights in the courts have not been successful, leaving a cloud over whether the measures implemented by the federal government are effective.<sup>417</sup> These matters will be discussed in further detail in the following sections of this chapter which examines the take up rates of parental leave and subsequent adjustments made to parental leave law and policy after the introduction of the *Paid Parental Leave Act*.

### **3.6 Take-up of parental leave under the 2010 *Paid Parental Leave Act***

Social research indicated that by 1 January 2012, 126 000 new or expectant parents had applied for paid parental leave under the *Paid Parental Leave Act*.<sup>418</sup> The number of applications for paid parental leave soon increased to over 150 000<sup>419</sup> with 99% of claims being for the full 18-week payment.<sup>420</sup> Research also

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<sup>410</sup>Ibid 29.

<sup>411</sup>See *Fair Work Act 2009* (Cth) ch 2 pt 2-2 div 5 ss 67-85.

<sup>412</sup>Domonique Allen, 'Supporting working parents: Findings from the AHRC's National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in the Workplace' (2014) 27 *Australian Journal of Labour Law* 281, 281-292.

<sup>413</sup>Ibid 281-291.

<sup>414</sup>Ibid 281-291.

<sup>415</sup>Ibid 284-5.

<sup>416</sup>Ibid 285-7.

<sup>417</sup>Ibid 285-9.

<sup>418</sup>Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour*, 184, 184-198.

<sup>419</sup>Ibid 187.

<sup>420</sup>Ibid 187.

indicated that half of the women receiving payments under the scheme after January 2012 were earning less than \$43 000 per year, suggesting women not covered by employer leave schemes were receiving payments under the government paid parental leave scheme.<sup>421</sup>

Evidence from social research also indicated the rate of take-up of paid parental leave by men (especially under DAPP) was very low.<sup>422</sup> The research indicated Australian fathers usually took other forms of employment-related leave (such as annual leave and long-service leave) to be with their newborn children and partners, if they took any kind of leave at all.<sup>423</sup> The average duration of leave taken by fathers was quite brief (2.6 weeks) and compared very unfavourably with the leave time taken by fathers in other OECD countries, particularly in Europe.<sup>424</sup>

The research undertaken into the take-up of paid parental leave raised issues about the effectiveness of the scheme.<sup>425</sup> The fact the majority of take-up of the scheme was made by Australian women rather than men raised the question about whether the scheme promoted gender equity in pay and caring roles, or simply reproduced and promoted those inequalities.<sup>426</sup> The relatively low take-up rate by working fathers and the low level of parental leave entitlement for male parents reinforced these criticisms.<sup>427</sup>

Another major problem revealed by the research was a significant number of people (mainly women) surveyed by social researchers did not qualify for paid parental leave despite being in employment.<sup>428</sup> This issue was due to the stringency of the 'employment test', which required 12 months of continuous service with the same employer, a criterion many people in low paid, short-term

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<sup>421</sup>Ibid 187.

<sup>422</sup>Ibid 187-88.

<sup>423</sup>Ibid 187-88.

<sup>424</sup>Ibid 188.

<sup>425</sup>Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour*, 184, 189.

<sup>426</sup>Ibid 189.

<sup>427</sup>Ibid 189-90.

<sup>428</sup>Ibid 191-3.

or insecure employment could not satisfy.<sup>429</sup> The evidence suggested instead women in secure, permanent jobs or who were members of unions predominately took up paid leave, while those in less secure environments tended to miss out on paid parental leave.<sup>430</sup>

This issue led to some submissions made claiming that the eligibility criteria should be eased under the scheme to allow greater flexibility and access to parents working in casual or insecure employment environments, such as competitive businesses, low-paid industries and industries under stress from globalisation and neoliberal economic forces such as cost-cutting, layoffs and ‘economic rationalisation’ (such as higher education, personal services and retail industries).<sup>431</sup> It was proposed among other things among some submissions examined by social researchers that the time of paid leave is extended to 26 weeks, and eligibility should extend to those with fractured employment histories, insecure employment or the unemployed registered as looking for work in a 12-month period.<sup>432</sup>

The take-up of parental leave the scheme was also hampered by the lack of harmony between NES standards and superannuation cover.<sup>433</sup> While parental leave is covered by the NES under the *Fair Work Act*,<sup>434</sup> the leave is not paid, and also superannuation benefits are not replaced either under the NES or the PPL scheme.<sup>435</sup> The Coalition and Greens scheme designs made up for some of these weaknesses, though not without a substantial number of criticisms and ongoing difficulties.<sup>436</sup>

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<sup>429</sup>Ibid 191-2.

<sup>430</sup>Ibid 191-3.

<sup>431</sup>Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour*, 184, 192-3.

<sup>432</sup>Ibid 192-3.

<sup>433</sup>Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: First Birthday Policy Review’ (2012) 38(3) *Australian Bulletin of Labour*, 184, 194-5.

<sup>434</sup>*Fair Work Act 2009* ss 61(2)(c), 70, 80.

<sup>435</sup>Ibid s 70. Unpaid leave is available for 12 months. See *Fair Work Act 2009* (Cth) ch 2 ss 61-131.

<sup>436</sup>See later discussion of Coalition and Green Parental Leave schemes in this thesis.

### 3.7 The Abbott Government 2013 Election Policy on Paid Parental Leave

While welcomed in some quarters, the new statutory scheme introduced by the Rudd/Gillard government was not received without criticism.<sup>437</sup> Some troubling questions emerged about the scheme and its adequacy.<sup>438</sup> One concern was the administration of the leave entitlement by businesses, which was raised in submissions<sup>439</sup> and later became part of the Coalition's attempts to make 'business-friendly' amendments to the parental leave legislation.<sup>440</sup>

The new parental leave scheme was also criticised for being another kind of 'social welfare entitlement' being dressed up as an employment right.<sup>441</sup> The social welfare aspects included minimum payment across the board funded by the government that was available to workers rather than employees.<sup>442</sup> This perception added to the idea of parental leave becoming another form of 'Undue middle-class welfare in Australia.'<sup>443</sup> A further difficulty with the scheme was the perception it entrenched and reinforced inequitable gendered caring roles based on women's perceived duties to work and family in Western society.<sup>444</sup>

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<sup>437</sup>Peter Sheldon and Louise Thornthwaite, 'Employer and Employer Association Matters in Australia in 2014' (2015) 57(3) *Journal of Industrial Relations* 383, 383-400; David Baker, 'Maternity Leave and Reduced Future Earning Capacity' (2011) 89(1) *Family Matters* 82, 82-89; Samone McKerdy and Caroline Knell, 'Deliberative Democracy or Democratic Dilemma? The Curious Case of Australia's Statutory Parental Leave Policy' (2015) 99(2) *Children, Community and Families* 5, 5-22.

<sup>438</sup>Anna Chapman, 'The New National Scheme of Parental Leave Payment' (2011) 24 *Australian Journal of Labour Law* 60, 60-70. See also Anna Chapman, 'Is the Right to Request Flexibility Under the FWA Enforceable?' (2013) 26(1) *Australian Journal of Labour Law* 118, 118-122 for discussion regarding parental leave entitlements under the *Fair Work Act*.

<sup>439</sup>Workplace Express, *Bill Should Spell Out That Existing Paid Parental Entitlements Continue*, says ACTU, (1<sup>st</sup> January 2017), Workplace Express <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=42551](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=42551)>

<sup>440</sup>Workplace Express, *Opposition Bill Fails to Overturn PPL Paymaster Arrangement*, (1<sup>st</sup> January 2017), Workplace Express, <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&stream=1&selkey=43902&hlc=2&hlw=paid+parental+leave+2010&s\\_keyword=paid+parental+leave+2010&s\\_searchfrom\\_date=631112400&s\\_searchto\\_date=1409293635&s\\_pagesize=20&s\\_word\\_match=2&s\\_articles=1&stream=1](http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=43902&hlc=2&hlw=paid+parental+leave+2010&s_keyword=paid+parental+leave+2010&s_searchfrom_date=631112400&s_searchto_date=1409293635&s_pagesize=20&s_word_match=2&s_articles=1&stream=1)>

<sup>441</sup>Graham Orr and Joo-Cheong Tham, 'Paid Parental Leave: Welfare or Workplace Right?' (2011) 18 *Australian Journal of Administrative Law*, 193, 193-197. See also Barbara Pocock, 'Holding Up Half the Sky? Women at Work in the 21<sup>st</sup> Century' (2016) 27(2) *Economic and Labour Relations Review* 147, 147-163; Barbara Pocock, Sara Charlesworth, Janine Chapman, 'Work-Family and Work-life Pressures in Australia: Advancing Gender Equality in Good Times?' (2013) 33(9/10) *International Journal of Sociology and Social Policy* 594, 594-612.

<sup>442</sup>Graham Orr and Joo-Cheong Tham, 'Paid Parental Leave: Welfare or Workplace Right?' (2011) 18 *Australian Journal of Administrative Law*, 193.

<sup>443</sup>Ibid 193.

<sup>444</sup>Ibid 193.

The failure to extend the scheme to traditional homemakers, the unemployed and young people (such as single mothers) was also criticised as being unfair.<sup>445</sup>

The paid parental leave regulatory scheme made under labour also left many unresolved legal and policy questions.<sup>446</sup> These included the fact the *Act* seemed to still be based strongly on a neoliberal economic framework<sup>447</sup> that leaves in place certain gender-based assumptions about the structure of work, the economy and the normative ideals of men and women in the family which no longer reflects a more diverse Australian society with many different social, economic, family and living arrangements besides the traditional ‘nuclear family.’<sup>448</sup> Indeed, the scheme seems only a piecemeal ‘patch’ covering over a much deeper range of social, economic and legal inequalities and problems faced by Australian women.<sup>449</sup>

As such, while acknowledged as a step in the right direction, the *Paid Parental Leave Act* was argued to only be a ‘first step’ in the right track,<sup>450</sup> but needed to be further reformed to further reduce inequality and also to form part of a broader and more organically integrated set of policy and legislative frameworks that included high quality affordable child care, more flexible social roles for men and women, gender and pay equity for men and women for the same work, the right to request flexible work, and also protection from arbitrary dismissal, discrimination and poor working conditions to create a more gender-equitable workplace and Australian society.<sup>451</sup>

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<sup>445</sup>Graham Orr and Joo-Cheong Tham, ‘Paid Parental Leave: Welfare or Workplace Right?’ (2011) 18 *Australian Journal of Administrative Law*, 193, 194.

<sup>446</sup>Graham Orr and Joo-Cheong Tham, ‘Paid Parental Leave: Welfare or Workplace right?’ (2011) 18 *Australian Journal of Administrative Law*, 193, 194; Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24 *Australian Journal of Labour Law* 60, 60-70.

<sup>447</sup>Lionel Orchard (ed), *Australian Public Policy: Progressive Ideas in the Neoliberal Ascendancy* (Policy Press, 2014), 63-81; Samone McKerdy and Caroline Knell, ‘Deliberative Democracy or Democratic Dilemma? The Curious Case of Australia’s Statutory Parental Leave Policy’ (2015) 99(2) *Children, Community and Families* 5, 5-22.

<sup>448</sup>Anna Chapman, ‘The New National Scheme of Parental Leave Payment’ (2011) 24 *Australian Journal of Labour Law* 60, 63-64.

<sup>449</sup>*Ibid* 63-5.

<sup>450</sup>*Ibid* 63-5.

<sup>451</sup>*Ibid* 63-5.

The Coalition government led by Tony Abbott went into the 2013 election with the election promise of a ‘signature policy’<sup>452</sup> of a new alternative paid parental leave scheme<sup>453</sup> as part of its package of comprehensive economic reforms and also to address some of the concerns raised above.<sup>454</sup> The pre-election policy document,<sup>455</sup> published online in August 2013 by the Coalition<sup>456</sup> promised working mothers of newborn children six months of paid leave at replacement wages capped at \$150 000 per annum.<sup>457</sup> Eligible mothers would have a total of 26 weeks of paid parental leave at their actual wage level, or the federal minimum wage (depending on which was greater) with superannuation.<sup>458</sup> The policy document justified this change in paid parental leave on the basis that Australia compared poorly with other OECD countries by failing to pay parental leave at the replacement wage level.<sup>459</sup> The policy document argued due to a less generous paid parental leave scheme the productivity gains made by increased participation of women in the workforce could be at risk, so the paid parental leave was a ‘workforce entitlement, not a welfare payment.’<sup>460</sup> The document made the claim based on ABS statistics that women who earned the average full-time salary of \$65 000 per annum would be \$21 000 better off under the Coalition scheme because they would receive their full wage for 26 weeks (\$32 500) as opposed to the minimum wage they would receive under the *Paid Parental Leave Act 2010* (Cth) (\$11 200).<sup>461</sup> The policy document also claimed that women earning the average full-time salary and who had two children between the ages of 26 and 29 would on average be \$50 000 better off upon

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<sup>452</sup>Workplace Express, *Election 2013, IR Policies Compared*, (1<sup>st</sup> January 2017), Workplace Express, <[https://secure.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&stream=15-5&selkey=51240&hlc=2&hlw=>](https://secure.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=15-5&selkey=51240&hlc=2&hlw=>)>

<sup>453</sup>Parliament of Australia, *The Coalition’s Policy for Paid Parental Leave*, (August 2013), Parliament of Australia,

<[<sup>454</sup>Ibid 19.](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22>”, 19.</a></p></div><div data-bbox=)

<sup>455</sup>Ibid.

<sup>456</sup>Ibid.

<sup>457</sup>Parliament of Australia, *The Coalition’s Policy for Paid Parental Leave*, (August 2013), Parliament of Australia,

<[<sup>458</sup>Ibid 2.](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22>”, 2.</a></p></div><div data-bbox=)

<sup>459</sup>Ibid 2. OECD nations used in the report included Sweden, Norway and Denmark.

<sup>460</sup>Ibid 2.

<sup>461</sup>Ibid 2.

reaching their retirement as the Coalition's proposed replacement scheme included superannuation payments.<sup>462</sup>

The reasons given in the Coalition's policy document for supporting paid parental leave were very similar to those in the Productivity Commission report listed previously in Chapter 2 of this thesis.<sup>463</sup> The Coalition policy paper justified the inclusion of superannuation in the scheme on the basis that women who choose to have children should not be disadvantaged in their retirement savings.<sup>464</sup> Fathers were also to be granted two weeks of paternal leave, paid at the rate of their salary of the minimum wage (depending on what is greater) or the full scheme if he is nominated the primary caregiver.<sup>465</sup> The eligibility criteria in the proposed changes for paid parental leave given by the Coalition were essentially the same as those of Labour's scheme:<sup>466</sup>

- a) The claimant must have worked in continuous employment for at least 10 of the 13 months before the birth or adoption of their child; and
- b) The claimant must have worked for at least 330 hours in the ten month period (a day a week or more) with no more than an 8 week gap between two consecutive working days.

Unlike Labour's scheme however, under the Coalition's plan parental leave payments would be paid directly to the employee by the government through the Family Assistance Office, rather than to the employer who would then pay the employee the entitlement.<sup>467</sup> The Coalition's policy was projected in the coalition paper to cost the federal budget \$6.1 billion over a period of three years commencing from July 2015,<sup>468</sup> to be funded by a special 1.5% tax levy on companies with taxable incomes of \$5 million or more per annum.<sup>469</sup> The policy

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<sup>462</sup>Ibid 2. The maximum salary cap for eligibility was \$150 000 per annum.

<sup>463</sup>Ibid 4.

<sup>464</sup>Ibid 4.

<sup>465</sup>Ibid 5.

<sup>466</sup>Ibid 6.

<sup>467</sup>Parliament of Australia, *The Coalition's Policy for Paid Parental Leave*, (August 2013), Parliament of Australia, [http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload\\_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22](http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/2674145/upload_binary/2674145.pdf;fileType=application%2Fpdf#search=%22library/partypol/2674145%22), 6

<sup>468</sup>Ibid 9.

<sup>469</sup>Ibid 6-7.



position paper claimed this levy would only affect only 3000 out of 750 000 Australian companies and the cost of this impost would be offset by anticipated productivity gains and a small cut in the company tax rate.<sup>470</sup>

### **3.8 Criticism, Review and Abandonment of the 2013 Abbott Parental Leave Policy**

The Coalition's policy was widely criticised and sometimes even ridiculed in the media, academia and by the Labour opposition<sup>471</sup> and was also unpopular in more conservative segments of the Coalition itself.<sup>472</sup> For example, in a public speech, former Labour Minister Jenny Macklin, who had been intimately involved in the construction of the Rudd Paid Parental Leave legislation, criticised the Coalition's policy for being too costly, inequitable and unworkable in the current Australian economic and social environment.<sup>473</sup>

The most controversial element of the scheme was the substantial cost to the federal budget, which was projected to amount to a gross figure of nearly \$10 billion over four years.<sup>474</sup> As the scheme was designed to be funded through tax receipts on corporations, this funding plan was criticised as by some commentators as being economically unrealistic, given the shrinking government income from corporate taxes and the small overall economic benefits from such a massive investment.<sup>475</sup> Other Coalition plans to grant tax

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<sup>470</sup>Ibid 6-7.

<sup>471</sup>Workplace Express, *The Nuts and Bolts of the Coalition's Paid Parental Leave Policy*, Workplace Express Online, (1<sup>st</sup> January 2018), <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&stream=2&selkey=51181](http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=51181)>

<sup>472</sup>Adam Creighton, 'Coalition Must Scrap Its Paid Parental Leave Plan,' *The Australian* (Canberra, ACT) 26 April 2013, 24; Liz Taylor, 'Liberal MP Sharman Stone Attacks Parental Leave Policy,' *The Guardian* (online), 20 May 2015 <<https://www.theguardian.com/australia-news/2015/may/21/liberal-mp-sharman-stone-attacks-coalitions-paid-parental-leave-policy>>

<sup>473</sup>Workplace Express, *Government Says Opposition Parental Pay Model not Suited to Australia*, (1<sup>st</sup> January 2017), Workplace Express, <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=50948](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=50948)>

<sup>474</sup>Workplace Express, *Coalition's Levy on Corporations to Initially Raise more than Cost of PPL Scheme*, (1<sup>st</sup> January 2017), Workplace Express, <[http://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=51227](http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=51227)>

<sup>475</sup>Greg Jericho, *Tony Abbott's Parental Leave Policy: High Cost, Low Benefit*, (2 July 2013), Guardian Online, <<http://www.theguardian.com/business/grogonomics/2013/jul/02/abbott-paid-parental-leave-cost>>

cuts and concessions to companies and businesses also detracted from the scheme in the views of some commentators.<sup>476</sup>

The Coalition's proposed scheme was not also uniformly welcomed by businesses analysts for obvious reasons.<sup>477</sup> Some suggested the benefits under the scheme did not justify the cost.<sup>478</sup> The Productivity Commission also rejected the scheme, arguing instead the same goals could be achieved more efficiently through reform of the family payments system and more funding for affordable childcare for working parents.<sup>479</sup>

The Coalition's proposed scheme also came under fire from the government's own specialist 'Commission of Audit,'<sup>480</sup> which had been tasked with finding savings in the 2014 federal budget soon after the Abbott government was elected on a supposed mandate to avert a so called 'debt and deficit' disaster.<sup>481</sup> Firstly, the Commission of Audit's projections showed the scheme would cost the Federal government at least \$5 billion to consolidated revenue in the first year of operation alone, and more in coming years, placing great strain on the federal

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<sup>476</sup>Ibid.

<sup>477</sup>Greg Jericho, *Abbott's Parental Leave Scheme Will do Little to Bring Women to the Workforce*, (10 March 2014), Guardian Online, <<http://www.theguardian.com/business/grogonomics/2014/mar/10/abbotts-paid-parental-leave-will-do-little-to-bring-women-to-the-workforce>>

<sup>478</sup>Sabra Lane, *Coalition's Paid Parental Leave Policy to be Funded in Part through New Levy on Big Business*, (August 21, 2013), ABC World Today, <<http://www.abc.net.au/worldtoday/content/2013/s3830357.htm>>

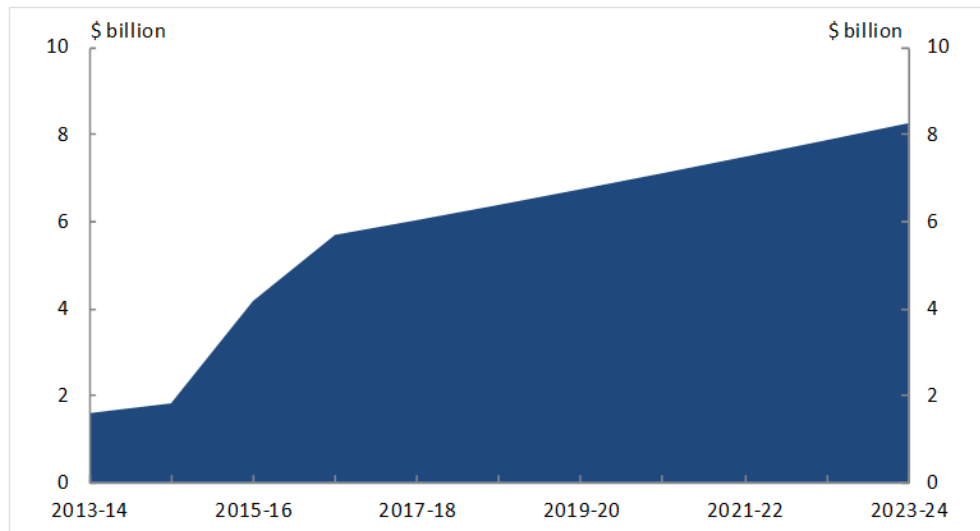
<sup>479</sup>Daniel Hurst, *Productivity Commission Sceptical of Value of Abbott's Parental Leave Scheme*, (22 July 2014), Guardian Online, <<https://www.theguardian.com/world/2014/jul/21/productivity-commission-sceptical-of-value-of-abbotts-parental-leave-scheme>>

<sup>480</sup>The 'Commission of Audit' was tasked by the Abbott government soon after taking power in 2014 to find savings in the federal budget to reduce government deficit and debt levels. See Chris Uhlmann, 'Commission of Audit: From Crazy to Brave to Politically Suicidal, No Easy Options for Federal Government,' ABC News Online, (1 May 2014), <http://www.abc.net.au/news/2014-05-01/hold-chris-uhlmann-on-commission-of-audit/5423602>

<sup>481</sup>Workplace Express, *Razor Gang Backs Lower Parental Leave Cap, Longer Super Preservation*, (1<sup>st</sup> January, 2017), Workplace Express, <[http://www.workplaceexpress.com.au/n106\\_news\\_selected.php?act=2&stream=15-5-001&selkey=52266&hlc=2&hlw=>](http://www.workplaceexpress.com.au/n106_news_selected.php?act=2&stream=15-5-001&selkey=52266&hlc=2&hlw=>)>

budget.<sup>482</sup> The Commission of Audit prepared a table of future costs of the Coalition's proposed scheme as given in the figure below<sup>483</sup>:

**Figure 1: Projected Government Spending on Paid Parental Leave under the Coalition Policy According to Commission of Audit<sup>484</sup>**



The Commission of Audit's report stated the scheme needed to be amended to reflect the realities of the budget situation better, target government spending more efficiently, and achieve the outcomes desired from implementing the plan.<sup>485</sup> The Commission of Audit recommended reducing the eligibility threshold for parental leave pay from a salary of \$150 000 per year to \$57 460

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<sup>482</sup>National Commission of Audit, (2014) The Report of the National Commission of Audit. Volume 1, Appendix 1 (February 2014), 'Paid Parental Leave and Childcare,' <http://www.ncoa.gov.au/report/appendix-vol-1/9-6-paid-parental-leave-and-child-care.html>, 9.6.

<sup>483</sup>Ibid 9.6.

<sup>484</sup>National Commission of Audit, (2014) The Report of the National Commission of Audit. Volume 1, Appendix 1 (February 2014), 'Paid Parental Leave and Childcare,' <http://www.ncoa.gov.au/report/appendix-vol-1/9-6-paid-parental-leave-and-child-care.html>, 9.6.

<sup>485</sup>National Commission of Audit, (2014) The Report of the National Commission of Audit. Volume 1, Appendix 1 (February 2014), 'Paid Parental Leave and Childcare,' <http://www.ncoa.gov.au/report/appendix-vol-1/9-6-paid-parental-leave-and-child-care.html>, 9.6.

per year indexed annually to movements in average weekly earnings, to reduce the costs to the government of the scheme and ensure wage replacement under the scheme did not lead to inequitable outcomes.<sup>486</sup> The Commission of Audit also recommended that the savings made under the suggested reforms by diverted instead to expand eligibility for childcare assistance.<sup>487</sup>

The growing political and economic unpopularity froze the Coalition policy in place for a time, at least until the budget issues could be resolved.<sup>488</sup> As it happened, the 2014 federal budget turned out to be a complete political disaster for Tony Abbott and the Coalition on a scale not seen since the defeat of John Howard following Work Choices.<sup>489</sup> Following a catastrophic election defeat in Queensland, Tony Abbott formally abandoned the Coalition's paid parental leave policy.<sup>490</sup>

Following the abandonment of the Tony Abbott proposal and the deposing of Abbott as Prime Minister, the reformed Coalition party led by Malcolm Turnbull did not make parental leave policy a major platform issue as it went into a double-dissolution election in 2016.<sup>491</sup> Following re-election, the Turnbull Coalition government made some minor changes to the *Paid Parental Leave Act* in order to narrow the eligibility criteria and help move towards a policy goal of returning the Federal Budget to surplus.<sup>492</sup> At the time of writing however, the Coalition has not made major substantive changes to the *Paid Parental Leave*

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<sup>486</sup>Ibid 9.6.

<sup>487</sup>Ibid 9.6.

<sup>488</sup>See following discussion.

<sup>489</sup>Daniel Hurst, *Productivity Commission Sceptical of Value of Abbott's Parental Leave Scheme*, (22 July 2014), Guardian Online, <<https://www.theguardian.com/world/2014/jul/21/productivity-commission-sceptical-of-value-of-abbotts-parental-leave-scheme>> See also Daniel Hurst, 'Tony Abbott Vows to Learn the Lessons of Stunning Queensland Election Rout,' The Guardian Online, (1 Feb 2015), <<https://www.theguardian.com/australia-news/2015/feb/01/tony-abbott-vows-to-learn-the-lessons-of-stunning-queensland-electoral-rout>>

<sup>490</sup>Tony Abbott was deposed soon afterwards in a leadership spill and replaced by Malcolm Turnbull as Prime Minister. See Chris Uhlmann, 'Analysis: What Led to the Demise of Tony Abbott?' ABC News Online, 15 September 2015, <<http://www.abc.net.au/news/2015-09-15/analysis-what-led-to-the-demise-of-tony-abbott/6777070>>

<sup>491</sup>Elizabeth Hill, 'the Best Mother's Day Gift? Paid Parental Leave,' (8 May 2016) ABC News Online <<http://www.abc.net.au/news/2016-05-08/the-best-mothers-day-gift-paid-parental-leave/7389564>>

<sup>492</sup>These developments are further discussed in 3.17 below.

Act regarding parental leave beyond leaving the current framework in place as it is with some suggested savings measures blocked by a hostile senate.<sup>493</sup>

### **3.9 Labour, the Greens and other Political Party Policies on Parental Leave**

As at 2017, the Australian Labour Party has not put forward a specific detailed policy on paid parental leave or proposals to radically change the existing Paid Parental Leave Scheme.<sup>494</sup> The ALP only promises, if re-elected in the future, to reverse the minor cuts the Turnbull government made to the paid parental leave scheme to reduce government spending.<sup>495</sup> The policy page for Labour prepared for the 2016 election states ‘If Labor is elected on 2 July, we will immediately end the Liberals’ war on working mums. We will protect their paid parental leave entitlements and their living standards.’<sup>496</sup>

The Australian Greens gave the issue some more consideration and released a policy document outlining their proposal for parental leave in 2014.<sup>497</sup> While not constituting as important a part of the Australian political landscape as Labour or the Coalition, the Greens form an important minority party with a significant number of members in both the legislative assemblies and senates at both the state and federal level and often hold the balance of power in the senate.<sup>498</sup> The Greens’ parental leave policy is similar to the policy outlined in the 2013 Coalition policy position paper.<sup>499</sup> The Greens’ scheme can be summarised as follows:

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<sup>493</sup>See Jane Norman, *Federal Budget 2017: Changes to Parental Leave Scheme off the Table*, (12 May 2017), ABC News Online, <<http://www.abc.net.au/news/story-streams/federal-budget-2017/2017-05-12/federal-budget-2017-no-changes-to-paid-parental-leave-scheme/8522196>>

<sup>494</sup>See Australian Labour Party, *Labour’s Plan to Protect Paid Parental Leave*, (1<sup>st</sup> January 2018), Australian Labour Party, <<http://www.alp.org.au/protectpaidparentalleave>>

<sup>495</sup>Ibid.

<sup>496</sup>Ibid.

<sup>497</sup>Australian Greens Party, *Balancing Work and Family: Better Paid Parental Leave*, (1<sup>st</sup> January 2018), Greens Australia, <[https://greensmps.org.au/sites/default/files/better\\_paid\\_parental\\_leave.pdf](https://greensmps.org.au/sites/default/files/better_paid_parental_leave.pdf)>

<sup>498</sup>The official website lists 11 elected Federal MPs and Senators and 14 state MPs and Senators: The Greens, *Your Representatives*, (28 March 2018), <[http://greens.org.au/mps?field\\_position\\_tid=159&field\\_state\\_tid=All&=Apply](http://greens.org.au/mps?field_position_tid=159&field_state_tid=All&=Apply)>

<sup>499</sup> See the following discussion below.

- a) The Greens' plan provides up to 6 months of paid leave for the primary carer, capped at \$100 000 p.a. (\$50 000 for the first six months) on the basis parental leave is a workplace entitlement, not a welfare payment;<sup>500</sup>
- b) Two weeks of paid leave are granted to the eligible secondary carer, capped at the same amount; and<sup>501</sup>
- c) The scheme would be funded by a 1.5% tax on companies whose gross earnings are \$5 million or above.<sup>502</sup>

The Greens 2014 policy paper claims such a scheme is necessary to remediate some social problems, including women having lower superannuation balances and payouts upon retirement due to caring responsibilities.<sup>503</sup> The document also claims the scheme brings Australia into line with advanced OECD countries and is fairer and more cost-effective than the Coalition's plan,<sup>504</sup> and better than Labor's scheme, which does not pay enough to the right people in need.<sup>505</sup> The policy also claims to be part of a wider framework designed to produce a fairer workplace with better working conditions for all, including families and parents.<sup>506</sup> The Greens policy seems to be the one in Australia that aligns most closely with the European and Nordic models of paid parental leave.<sup>507</sup>

By 2017, the Greens policy does not seem to have changed much in substance or style.<sup>508</sup> The basics of the scheme are still wage-replacement parental leave payments for six months at 100% of the main caregiver's pre-leave earnings, capped at \$100 000 per annum.<sup>509</sup> Non-primary carers are also entitled to two additional weeks of leave at 100% of their regular wage, also capped at \$100

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<sup>500</sup>Australian Greens Party, *Balancing Work and Family: Better Paid Parental Leave*, (1<sup>st</sup> January 2018), Greens Australia,

<[https://greensmps.org.au/sites/default/files/better\\_paid\\_parental\\_leave.pdf](https://greensmps.org.au/sites/default/files/better_paid_parental_leave.pdf)> 1.

<sup>501</sup> Australian Greens Party, *Balancing Work and Family: Better Paid Parental Leave*, (1<sup>st</sup> January 2018), Greens Australia,

<[https://greensmps.org.au/sites/default/files/better\\_paid\\_parental\\_leave.pdf](https://greensmps.org.au/sites/default/files/better_paid_parental_leave.pdf)> 1.

<sup>502</sup>Ibid 1.

<sup>503</sup>Ibid 2.

<sup>504</sup>Ibid 2-3.

<sup>505</sup>Ibid 2-3.

<sup>506</sup>Ibid 2-3.

<sup>507</sup>Australian Greens Party, *Balancing Work and Family: Better Paid Parental Leave*, (1<sup>st</sup> January 2018), Greens Australia,

<[https://greensmps.org.au/sites/default/files/better\\_paid\\_parental\\_leave.pdf](https://greensmps.org.au/sites/default/files/better_paid_parental_leave.pdf)> 1-3.

<sup>508</sup> Ibid

<sup>509</sup> Ibid.

000 per annum and is specifically aimed at dads.<sup>510</sup> The Greens proposed scheme is still to be funded by a 1.5% levy on businesses earning more than \$5 000 000 per annum and is explicitly stated to be a workplace right, not a welfare payment.<sup>511</sup> The Greens have also opposed attempts by the current Liberal Turnbull government to cut back paid parental leave.<sup>512</sup>

Though the Greens do not hold the balance of power in the Australian Senate, the dynamics of Australian politics mean their votes on key family-related legislation will remain important.<sup>513</sup> Therefore the Greens' policies are likely to influence their vote on any legislation relating to parental leave or childcare put forward by the party that controls the House of Representatives in federal Parliament.<sup>514</sup> The importance of other minor parties on the right wing of Australian politics, such as Pauline Hanson's 'One Nation' party and other small politically conservative parties cannot be discounted either in the future. At the time of writing however, no minority party in Parliament with significant voting power besides the Greens appears to have proposed a major parental leave policy or amendments to the current scheme.<sup>515</sup>

### 3.10 New Policy Initiatives 2015-2017

As noted in 3.16 of this chapter, the Coalition government attempted to outdo Labour and the other parties by offering a replacement-wage paid parental leave scheme in both the 2010 and 2013 elections.<sup>516</sup> However under considerable

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<sup>510</sup>Ibid.

<sup>511</sup>Ibid.

<sup>512</sup>Australian Greens Party, *Malcolm Turnbull, Don't Cut Paid Parental Leave*, (28 March 2018), Australian Greens, <<https://greens.org.au/paid-parental-leave>>

<sup>513</sup>At the time of writing the upper house of the Senate has six Greens senators. See Parliament of Australia, *Senators and Members*, (28 March, 2018) <[http://www.aph.gov.au/Senators\\_and\\_Members/Parliamentarian\\_Search\\_Results?page=7&q=&sen=1&par=-1&gen=0&ps=12&st=1](http://www.aph.gov.au/Senators_and_Members/Parliamentarian_Search_Results?page=7&q=&sen=1&par=-1&gen=0&ps=12&st=1)>

<sup>514</sup>However the Greens have reduced numbers after the 2016 election and other parties such as One Nation and the Nick Xenophon team are likely to have a stronger influence than in the past.

<sup>515</sup>This may change in the future if smaller parties such as One Nation, Family First, The Australian Conservatives, or the Socialist Alliance become more important as a political force at the national level. The basic position of the minority right-wing parties however, seems to be to oppose the current scheme or advocate removing it altogether. See Isidewith, *The Quick Guide to Australia's Political Parties' Stances on Paid Parental Leave* (28 March, 2018) <<https://australia.isidewith.com/political-parties/issues/social/parental-leave.>>

<sup>516</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 487.

political pressure (including a crushing election defeat in for the Liberal/National coalition in Queensland state elections) in 2015 and facing internal political pressure after a series of political blunders, Tony Abbott abandoned the replacement-wage scheme that he and the Coalition had taken to the election and in theory, had a mandate to legislate.<sup>517</sup> Soon after abandoning the proposed bill to amend the *Paid Parental Leave Act*,<sup>518</sup> the reformed Coalition government under the new PM Malcom Turnbull moved to conduct an ‘about face’<sup>519</sup> to curtail entitlements drawn from both the government and other sources, stigmatised as ‘double-dipping’ by some Coalition MPs.<sup>520</sup> Moves to cut back parental leave were immediately criticised.<sup>521</sup>

For example, modelling conducted in October 2016 by Marian Baird and Andrea Constantin showed<sup>522</sup> that the proposed Coalition cuts to parental leave would have a substantive detrimental effect on working women and also working families with children.<sup>523</sup> The cuts to paid parental leave were essentially designed to make it harder for parents to access both employer paid schemes of leave and the government system of paid parental leave.<sup>524</sup> Such cuts were projected to save approximately \$1 billion from the federal budget over a period of four years.<sup>525</sup>

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<sup>517</sup>Ibid 487.

<sup>518</sup>Deemed the ‘*Paid Parental Leave Bill 2015*.’

<sup>519</sup>Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016).

<sup>520</sup>Ibid 487-489. One attempt to curtail alleged anti-double dipping was known as the ‘Fairer Paid Parental Leave Bill 2015’ which narrowed eligibility criteria and payments.

<sup>521</sup>For example see Helen Hodgson, *Paid Parental Leave Plan Ignores Economics of Well-Functioning Families*, (October 25, 2016), The Conversation, <<https://theconversation.com/paid-parental-leave-plan-ignores-economics-of-well-functioning-families-67549>> and Belinda Hewitt et al, *Removal of Double-Dipping from Parental Leave may impact Mother’s Health*, (October 27, 2016), The Conversation, <<https://theconversation.com/removal-of-double-dipping-from-parental-leave-may-impact-mothers-health-67541>>.

<sup>522</sup>Marian Baird and Andrea Constantin, ‘Analysis of the Impact of the Government’s MYEFO Cuts to Paid Parental Leave’, (Women and Work Research Group Papers, University of Sydney Business School, October 2016), 1-5.

<sup>523</sup>See following discussion below.

<sup>524</sup>Marian Baird and Andrea Constantin, ‘Analysis of the Impact of the Government’s MYEFO Cuts to Paid Parental Leave’, (Women and Work Research Group Papers, University of Sydney Business School, October 2016), 1-5.

<sup>525</sup>See Luke Buckmaster, (2016), ‘Parental Leave Pay’, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/BudgetReview201516/ParentalLeave](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/ParentalLeave)



Baird and Constantin suggested their modelling indicated around 50% of the claimants for government-funded paid parental leave (of which 99% were women) would be affected by the proposed cuts since they also claimed employer-funded paid parental leave.<sup>526</sup> Their modelling suggested around 160 000 families and 79 000 women would be adversely affected by the proposed cuts.<sup>527</sup> Baird and Constantin's analysis also showed those working in lower-paid jobs or industries such as nursing, teaching, retail or healthcare would be burdened the most by the proposed changes, with the financial losses being considerable.<sup>528</sup>

Baird and Constantin argued any cuts and major changes to the current Australian parental leave regulatory system including those proposed by the Coalition government would reduce the ability of women to return to the workforce, make financial situations more difficult, and increase the burden on Australia's childcare system.<sup>529</sup> Instead of cuts to the scheme, Baird and Constantin recommended increasing the period of leave-time to a minimum of 26 weeks, with abundant evidence from both Australia and overseas (particularly Europe)<sup>530</sup> indicated that paid parental leave was a highly efficient means to improve gender equality, positive health outcomes for children, improving women's workforce participation and return to work and making the distribution of work and care responsibilities between men and women fairer.<sup>531</sup>

At the time of writing, further attempts by the Turnbull Coalition government to wind-back the paid parental leave scheme had made no progress in the Senate and no further proposals for reform were on the table for the foreseeable future.<sup>532</sup>

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<sup>526</sup>Marian Baird and Andrea Constantin, 'Analysis of the Impact of the Government's MYEFO Cuts to Paid Parental Leave', (Women and Work Research Group Papers, University of Sydney Business School, October 2016), 1-5.

<sup>527</sup>Ibid 2-3.

<sup>528</sup>Ibid 2-3.

<sup>529</sup>Marian Baird and Andrea Constantin, 'Analysis of the Impact of the Government's MYEFO Cuts to Paid Parental Leave' (Women and Work Research Group Papers, University of Sydney Business School, October 2016), 3.

<sup>530</sup>Ibid 3-5.

<sup>531</sup>Ibid 3-5.

<sup>532</sup>Jane Norman, *Federal Budget 2017: Changes to Paid Parental Leave off the Table*, (12 May 2017), ABC News Online, <<http://www.abc.net.au/news/story-streams/federal-budget-2017/2017-05-12/federal-budget-2017-no-changes-to-paid-parental-leave-scheme/8522196>>

### 3.11 Conclusion

Despite the introduction of a legislative paid parental scheme in harmony with the inquiries reviewed in Chapter 2 of this thesis and the case decisions and legislation discussed in this chapter, research suggests much remains to be done to improve Australia's scheme of paid parental leave.<sup>533</sup> As noted by Stewart, it could be surmised there are two focal problems with parental leave under Australia's present system of industrial relations: (a) under the *Fair Work Act*, parents may take unpaid parental leave which is unpaid for a period of up to 12 months under existing general industrial law entitlements<sup>534</sup> (a situation which has not changed much since the 1979 *Maternity Leave Case*<sup>535</sup>), leaving families or employees 'to use accrued leave entitlements to help tide them over'<sup>536</sup> during periods of parental leave and (b) a further difficulty is the *Fair Work Act* and related NES standards relating to parental leave, safe-return to work and non-discrimination (along with other Commonwealth and State laws prohibiting discrimination) appear to be somewhat ineffective because of a lack of remedies available to specifically deal with cases of discrimination specifically on the grounds of taking parental leave or family responsibility.<sup>537</sup> Indeed, several important cases where claims of discrimination seemed to have solid grounds ultimately failed in the courts, setting a high bar for claimants trying to enforce *Fair Work* protections in this area.<sup>538</sup>

A further difficulty is the *Paid Parental Leave Act* itself arguably does not provide a workplace right to parental leave per se that is actionable in a court or a tribunal (unlike unfair dismissal or other legislative workplace rights) but is instead 'Is in effect a social security payment that is spread for up to 18 weeks,

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<sup>533</sup>See Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) 486-490 and following discussion.

<sup>534</sup>*Ibid* 481-483.

<sup>535</sup>*Ibid* 481-486.

<sup>536</sup>*Ibid* 486.

<sup>537</sup>See Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 483-4 for a detailed analysis.

<sup>538</sup>*Ibid* 484. Some cases include *Stanley v Service to Youth Council Inc* (2014) FCR 317; *Heraud v Roy Morgan Research Pty Ltd* (2016) FCCA 185. But see also *Allied Express Transport Pty Ltd v Owens* (2011) 210 IR 7. Andrew Stewart et al, *Creighton and Stewart's Labour Law*, (Federation Press, 6<sup>th</sup> ed, 2016), 483-485 provides a more comprehensive case law review.

as long as the carer does not return to work in this period.<sup>539</sup> This creates its own set of problems, including difficulties in harmonising the payment and determining who is eligible in an environment where governments, facing constrained budgets, are tempted to make populist targets of government spending programs perceived to be welfare-oriented in nature.<sup>540</sup> An additional problem noted by Baird and Constantin in a research paper is the majority of take-up of government and employer-paid parental leave is done by Australian women, and it is the women who take the time off work to do the caring and also domestic housework.<sup>541</sup> This arguably only reinforces the problems with gender inequality, pay gaps and discrimination noted in the discussion in Chapter 2 of this thesis and the slow progress of Australia in this area reviewed in this Chapter.<sup>542</sup>

It can be argued that Australia's regulatory scheme of paid parental leave introduced in 2010 is an important first step but needs further development.<sup>543</sup> Chapter 2 of this thesis identified the central issue of gender inequality in the Australian workplace (which correlated with research into workplace cultures in other OECD countries) and that paid parental leave is one possible way to solve the problem, but there is a gap in research at the present time concerning what parental leave design would work best, given that a formal regulatory scheme of paid parental leave in Australia is quite a new legal development.<sup>544</sup> Chapter 2

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<sup>539</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 488.

<sup>540</sup>*Ibid* 489.

<sup>541</sup>Marian Baird and Andrea Constantin, 'Analysis of the Impact of the Government's MYEFO Cuts to Paid Parental Leave' (Women and Work Research Group Papers, University of Sydney Business School, October 2016) 3-5.

<sup>542</sup>*Ibid* 3-5.

<sup>543</sup>See Olivier Thevenon and Angela Luci, 'Reconciling Work, Family and Child Outcomes: What Implications for Family Support Policies?' (2012) 31(6) *Population Research and Policy Review* 855, 855-882; Huerta, Maria et al, 'Early Maternal Employment and Child Development in OECD Countries' (OECD Social, Employment and Migration Working Papers No 118, OECD Publishing, September 2011), 13-32; Christine Malatzky, 'Don't Shut Up: Australia's First Paid Parental Leave Scheme and Beyond: Assisting Women and Men Negotiate Two Worlds of Work' (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>544</sup>Natalie Skinner and Barbara Pocock, 'Work, Life, Flexibility and Workplace Culture in Australia: Results from the 2008 Australian Work and Life Index (AWALI) Survey' (2010) 36(2) *Australian Bulletin of Labour* 133, 133-151; Nadine Zaharias, 'Work-Life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47; Wendy Boyd, 'Maternal Employment and Childcare in Australia: Achievements and Barriers to Satisfying Employment' (2012) 38(3) *Australian Bulletin of Labour* 199, 199-213;

of this thesis examined the economic and social policy frameworks underlying regulatory systems of paid parental leave and suggested scheme designs for the Australian context. Chapter 3 of this thesis considered the evolution of workplace rights for working parents in Australian industrial law in a historical context and then examined the introduction of Australia's own regulatory system of paid parental leave in 2010. Chapter 2 and Chapter 3 of this thesis aimed at developing and understanding the Australian context of paid parental leave and Chapter 4 and Chapter 5 of this thesis will aim to fill the gap in contemporary research about how Australia's current regulatory scheme of paid parental leave may be developed with reference to international legal standards.

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Nick Parr and Ross Guest, 'The Contribution of Increases in Family Benefits to Australia's Early 21st Century Fertility Increase: An Empirical Analysis' (2011) 25(1) *Demographic Research* 215, 215-245.

## CHAPTER 4 PAID PARENTAL LEAVE IN OTHER OECD COUNTRIES

### 4.1 Introduction

Chapters 2 and 3 of this thesis examined the problems faced by Australian workers attempting to reconcile work and family responsibilities. It was argued in Chapter 2 of this thesis that gender inequality and discrimination is still a major problem in Australia. The attempts to deal with gender inequality and discrimination through the introduction of a paid parental leave system were also discussed previously in Chapters 2 and 3. However, the examination of the attempt to deal with these problems through a combination of Industrial Arbitration Tribunal decisions giving employees the right to maternity and parental leave, the neoliberal reforms of the 1990s-2000s including the introduction of Work Choices legislation in 2006, and the introduction of the *Paid Parental Leave Act 2010* (Cth) and *Fair Work Act 2009* (Cth) indicated Australia's industrial relations system needed reforms to stamp out gender inequality and gender-based discrimination and discrimination against employees on the grounds of family responsibility.<sup>1</sup>

As Chapter 2 and Chapter 3 of this thesis have demonstrated, one problem is Australia is a relative newcomer to the 'club' of OECD nations that have introduced paid parental leave regulatory systems.<sup>2</sup> A significant reason for this is until quite recently Australia's domestic law making, at least in the field of employment law, was influenced primarily by domestic rather than international factors.<sup>3</sup> Nevertheless, Australia's present regulatory system of paid parental leave and the legal issues it raises are relatively new for Australia and Australia has little in its own history to guide it in how to properly develop and frame a

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<sup>1</sup>See Chapter 3 of this thesis.

<sup>2</sup>See Chapter 3 and Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review*, 32, 32-47.

<sup>3</sup>Ken Phillips, 'The International Labour Organisation Finally Faces Reality' (2006) 58(3) *Institute of Public Affairs Review* 26, 26-29; Chris White, 'Work Choices: Removing the Choice to Strike' (2005) 56(1) *Journal of Australian Political Economy* 66-80; Deidre O'Connor, 'The Effect of Australian International Obligations on the Development of our System of Industrial Relations' (1995) 1(1) *Newcastle Law Review* 1, 1-11.

regulatory system of paid parental leave.<sup>4</sup> The unsatisfactory design of Australia's scheme has been discussed elsewhere in this thesis.<sup>5</sup> The discussion of the differing policy proposals for a parental leave scheme from political parties in Chapter 3 of this thesis also indicates there are still many different proposals for how Australia's parental leave system should be designed.<sup>6</sup> There is also the related issue that even the basic design of Australia's parental leave framework is contested by different political parties who have different policies on the issue which diverge from each other at a fundamental level in terms of goals and also at the specific proposals made for legislative scheme design.<sup>7</sup> This means Australia's leave system is likely to undergo significant changes in structure and aims over time, potentially undermining legal predictability, stability and coherence if these changes are not informed by sound policy and well-developed legislation.<sup>8</sup>

As Chapter 1 of this thesis indicated, it is necessary to undertake an international perspective to help fill the gap of knowledge in this area that requires research.<sup>9</sup> To help guide this research, Chapter 4 of this thesis will undertake a review of the International Labour Law Standards that are relevant to Australian labour law and how these influence the development of Australia's regulatory system of paid parental leave.<sup>10</sup> To keep the discussion within reasonable limits, this

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<sup>4</sup>Barbara Pocock, Sara Charlesworth, Janine Chapman, 'Work-family and Work-life Pressures in Australia: Advancing Gender Equality in Good Times?' (2013) 33(9-10) *International Journal of Sociology and Social Policy* 594, 594-612; Natalie Skinner and Barbara Pocock, 'Paid Annual Leave in Australia: Who Gets It, Who Takes It and Implications for Work-life Interference' (2013) 55(5) *Journal of Industrial Relations* 681, 681-698.

<sup>5</sup>See Chapter 3 of this thesis.

<sup>6</sup>See Chapter 3, particularly section 3.7.

<sup>7</sup>See Chapter 3, section 3.8

<sup>8</sup>The problematic nature of neoliberal reforms such as Work Choices offers a good example of this. See Yolanda van Gellecum, Janeen Baxter, Mark Western, 'Neoliberalism, Gender Inequality and The Australian Labour Market' (2008) 44(1) *Journal of Sociology* 45, 45-63; Angela Barnes and Alison Preston, 'Is Australia Really a World Leader in Closing the Gender Gap?' (2010) 16(4) *Feminist Economics* 81, 81-103; Marian Baird, Rae Cooper, Damian Oliver, 'Down and Out with Work Choices: The Impact of Work Choices on the Work and Lives of Women in Low Paid Employment,' (June 2007) A Report to the Office of Industrial Relations, 1-59.

<sup>9</sup>Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32(1) *Melbourne University Law Review* 1065, 1065-1095; Terry Hutchinson, *Research and Writing in Law* (LawBook Company, 3<sup>rd</sup> ed, 2010), Pt 1, Ch 1, Pt 2, Ch 14.

<sup>10</sup>Deidre O'Connor, 'The Effect of Australian International Obligations on the Development of our system of Industrial Relations' (1995) 1(1) *Newcastle Law Review* 1, 1-11; Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial*

chapter of the thesis will a) firstly discuss these standards as developed in applicable international labour law and b) secondly, discuss these standards with reference to Australia and c) thirdly, discuss selected OECD European nations that have regulatory systems of paid parental leave. Chapter 4 of this thesis will include a detailed analysis of the different regulatory approaches of paid parental leave in selected OECD nations of Continental Europe, examining how different legal jurisdictions in Europe have dealt with gender inequality in the workplace using parental leave policies and frameworks and will include a discussion of the parental leave frameworks in place in the nations of Scandinavia. This will help foreground the way for the discussion in Chapter 5, which will discuss Australia and Sweden's regulatory models of paid parental leave and their relative strengths and weaknesses and this discussion will be followed with an analysis of Sweden's parental leave framework as an exemplary model for Australia in Chapter 5.

#### **4.2 International Labour Law Standards and the Australian Paid Parental Leave Framework**

Australian labour regulation was mostly a matter of domestic concern until the early 1990s.<sup>11</sup> In more recent times, international labour law standards, particularly as formulated by the International Labour Organisation,<sup>12</sup> form the primary (though not the only) source of international labour law standards applicable to Australian labour law.<sup>13</sup> Australian labour law is also influenced by anti-discrimination legislation enacted to implement international human rights instruments Australia has signed.<sup>14</sup> The ILO has been in existence for

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*Employment Relations Review* 32, 32-47; Breen Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia' (1998) 22(2) *Melbourne University Law Review* 239, 239-280.

<sup>11</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 78.

<sup>12</sup>Not the International Labour Office. See Creighton and Stewart, above, 11.

<sup>13</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 78.

<sup>14</sup>*Ibid* 78-79. For a more detailed discussion see Gerry Rodgers, Lee Swepston, Eddy Lee, *International Labour Organisation and the Quest for Social Justice, 1919-2009* (International Labour Office, 2009), 157-62. These include the *Racial Discrimination Act 1975* (Cth). Australia has ratified a number of international human rights instruments. See discussion in Stewart and Creighton, above 11, 78-79. A fully detailed analysis of all human rights instruments Australia has ratified is beyond the scope of this thesis but see Peter Bailey and

almost a century having origins as an institution of the United Nations and in the former League of Nations.<sup>15</sup> The ILO (International Labour Organisation) is a body tasked by the UN to monitor the implementation of international standards recognised by the UN in the sphere of employment relations.<sup>16</sup> The ILO is constituted of three main organs: (a) The International Labour Conference; (b) The Governing Body and (c) The International Labour Office.<sup>17</sup> As a working body, the Conference can be seen as analogous to the ‘legislature’ of the ILO, the Governing body as the ‘executive’ and the International Labour Office as the ‘public service.’<sup>18</sup>

The ILO has a basic guiding constitutional framework.<sup>19</sup> The ILO’s Constitution sets out a number of basic matters of concern for international labour law regulation:<sup>20</sup>

- a) Labour is not regarded merely as an item of commerce;
- b) There is a right of association for employees;
- c) The employed are to be paid a wage adequate to maintain a reasonable standard of life according to their time and country;
- d) A working week should be set at a maximum of eight hours a day and forty-eight hours a week;
- e) Men and women should receive equal remuneration for work of equal value;
- f) The standard set by law should have due regard to the equitable treatment of all workers; and

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Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2016) 23-46, 95-115.

<sup>15</sup>Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 79.

<sup>16</sup>See *United Nations Declaration of Human Rights 1948* GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/Res/217A (III) (10 December 1948), Arts 23 and 24 and Stewart, 78-80. Ratified and binding treaties will be discussed below.

<sup>17</sup>Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 79. See also Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 30-31. See also Owens et al, *The Law of Work*, 30-34 for a detailed discussion of the development of the ILO constitution and related principles.

<sup>18</sup>Andrew Stewart et al, *Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 79-80.

<sup>19</sup>Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 30-32.

<sup>20</sup>*Ibid* 30-32.



- g) Each state should make provision for a system of inspection in which women should take part in order to ensure the enforcement of the laws and protections of the employed.

In addition to these basic international labour law standards as set out in the ILO Constitution, the ILO has adopted an amendment known as the Declaration of Philadelphia.<sup>21</sup> The Declaration included a number of principles relating to equal educational and vocational opportunities, a fair minimum wage, the provision of childcare services and maternity services, adequate housing and nutrition and access to appropriate social welfare.<sup>22</sup> These general standards of international labour law and basic employment conditions that are codified in a set of 188 Conventions and 200 Recommendations known as the International Labour Code.<sup>23</sup> The Code and associated Recommendations set out detailed standards relating to international standards on work, including working hours, rates of payment, protection for vulnerable classes of workers (i.e. young workers and female workers), freedom of association, equality and outlawing slavery and child labour.<sup>24</sup>

Australia has ratified 58 of the 188 Conventions in the ILO Code.<sup>25</sup> The process of ratification does not automatically create domestic legal obligations in Australia for constitutional reasons.<sup>26</sup> However, courts will construe in the case of ambiguity, Commonwealth statutes in favour of obligations under

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<sup>21</sup>ILO 1944 *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (Declaration of Philadelphia). See also Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 31-33 for a more detailed discussion of the Declaration and following developments.

<sup>22</sup>Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 31.

<sup>23</sup>Ibid 33. The ILO Conventions and Recommendations are extensive and cover a very wide range of different matters of employment law. For a discussion of those relating to maternity leave, see Jill Murray, 'The International Regulation of Maternity: Still Waiting for Reconciliation of Work and Family Life' (2001) 17(1) *International Journal of Comparative Labour Law and Industrial Relations* 25, 25-30. For the complex legal machinery involved in developing, drafting and implementing ILO conventions, see Owens et al, *The Law of Work*, 33-34.

<sup>24</sup>Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 34-35.

<sup>25</sup>Ibid 36. See also Andrew Stewart et al, *Creighton and Stewart's Labour Law*, (Federation Press, 6<sup>th</sup> ed, 2016), 89-94 for a detailed discussion of the ratification processes required to incorporate the ILO Standards into Australian law and a discussion of the reasons why Australia has not ratified all ILO Code Conventions and Recommendations.

<sup>26</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 91.

international treaties and also that the ratification of an international treaty constitutes a positive statement by the executive government to the world and the Australian people the executive government and its agencies will act in accordance with the Convention in question.<sup>27</sup> Support for the legal principle that Australian Commonwealth laws should be construed and interpreted in a manner consistent with Australia's obligations under ratified international treaties also can be found in other sources.<sup>28</sup>

However even given the fact Australia has ratified a number of ILO Labour Conventions,<sup>29</sup> Australia has still reserved a considerable degree of discretion and autonomy by choosing not to ratify a substantial number ILO Code Conventions and denouncing other ILO Conventions it had previously ratified for various reasons.<sup>30</sup> These reasons include the fact that many ILO Conventions do not cover areas Australia may have an interest in legislating on domestically and that many of the Conventions are of a 'minimalist' or 'promotional' rather than a 'prescriptive' character.<sup>31</sup> While Australia has not always complied with ILO Convention standards whether ratified or not, the ILO Code and Convention

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<sup>27</sup>Ibid 91 and see also *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 per Mason CJ and Dean J.

<sup>28</sup> Andrew Stewart et al, *Creighton and Stewart's Labour Law* (The Federation Press, 6<sup>th</sup> ed, 2016), 92. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 and s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth). See also the arbitration cases in Chapter 3, which discuss ILO Standards.

<sup>29</sup>For a list of ILO Conventions and Protocols Australia has ratified and their present status see ILO, *Ratifications for Australia*, (28 March 2018) Normlex <[http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102544](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544)>. The relevant conventions discussed here include *ILO Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (opened for signature 29 June 1951) 1975 ATS 45 (entered into force 23<sup>rd</sup> May 1953), *ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (opened for signature 25 June 1958) [1974] ATS 12 (entered into force 15 June 1974) and *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991). At the time of writing, Australia has not ratified any of the ILO Code Conventions and Protocols related specifically to Maternity and Parental Leave. The *ILO Convention on Workers and Family Responsibilities* which has been ratified by Australia will be discussed further below.

<sup>30</sup>See Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 36-7 and Breen Creighton, 'The ILO and the Protection of Human Rights in Australia' (1998) 22 *Monash University Law Review* 239, 254-261.

<sup>31</sup>Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 96.

standards remain an important influence on the development and drafting of Australian labour laws.<sup>32</sup>

For example, new legislative proposals relating to employment legislation in Australia are assessed with reference to relevant ILO Convention standards whether ratified by Australia or not.<sup>33</sup> The form and content of Australian legislation can be influenced by ILO Code standards, which have not been ratified, as the 2010 paid parental leave regulatory framework was influenced by The ILO Maternity Leave Convention 2000 (No 183).<sup>34</sup> Industrial tribunals and courts also use ILO Code standards as reference points and aids to interpretation when making decisions regarding employment law.<sup>35</sup> However, while the ILO has an important role internationally, it is being challenged by a number of forces including those discussed in detail in Chapter 2 (neoliberalism, globalisation and deregulation of labour markets)<sup>36</sup> and also global trade liberalisation have caused strains to the Code framework for Australia and other countries.<sup>37</sup>

#### **4.2.1 The ILO Code and Australian Parental Leave Standards in an International Context**

As discussed earlier in this chapter, the ILO Code has helped in the drafting and structuring of a number of international instruments designed to protect basic employment conditions including the area of maternity leave, parental leave and anti-discrimination that form the international legal framework for employment standards that create a reference point for labour relations law in OECD nations.<sup>38</sup> This section of Chapter 4 will discuss two major ILO Conventions

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<sup>32</sup>Andrew Stewart et al, *Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 95-96. See also 28, above.

<sup>33</sup>Ibid 97.

<sup>34</sup>Ibid 97. This ILO Convention will be discussed in more detail below.

<sup>35</sup>Ibid 97.

<sup>36</sup>Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 38-51 and Chapter 2 of this thesis.

<sup>37</sup>Ibid 54-61. See also discussions in Owens et al at above 36, 64-89 for a comprehensive analysis of these and related matters including work casualization, unemployment, underemployment and other matters.

<sup>38</sup>Australia has ratified 58 treaties and one protocol in the ILO Code. They do remain a source of guidance in domestic law and policy making. See Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 78-96. See also earlier discussion in section 4.2. of this Chapter. At the time of writing Australia has ratified the *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991) but not the *ILO Maternity Protection Convention* (No 183) 2000

that have been a strong influence on Australian and foreign parental leave legislation: The C156 Workers with Family Responsibilities Convention 1981 (No 156) and the C183 Maternity Protection Convention 2000 (No 183).<sup>39</sup> The Workers with Family Responsibilities Convention 1981 (No 183) sets out the following articles relating to employment protections for working parents:<sup>40</sup>

- 1) Each member state shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without discrimination and to the extent possible, without conflict between their employment and family responsibilities;<sup>41</sup>
- 2) With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken (a) to enable workers with family responsibilities to exercise their right to free choice of employment and (b) to take account of their needs in terms of employment and in social security;<sup>42</sup>
- 3) All measures compatible with national conditions and possibilities shall further be taken to (a) take account of the needs of workers with family responsibilities in community planning and (b) to develop or promote

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(opened for signature 15 June 2000) (not yet in force). Australia has also ratified the *ILO Convention (No 111) concerning Discrimination in Respect of Employment and Occupation* (opened for signature 25 June 1958) [1974] ATS 12 (entered into force 15 June 1974) that forbids discrimination on the basis of sex, religion, race, political opinion, national extraction or social origin and requires equality of opportunity to be implemented in the workplace; see Arts 1(1) – 1(3) of the *Convention*.

<sup>39</sup>*ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991), *ILO Maternity Protection Convention, 2000* (No 183). Australia has ratified the *Workers with Family Responsibilities Convention 1981* (No 156) but not the *ILO Maternity Protection Convention (No 183) 2000* (opened for signature 15 June 2000) (not yet in force). Nevertheless, both of these conventions have played an important role in the formulation of Australia's parental leave standards, as will be seen below.

<sup>40</sup>*ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991) See also the Preamble to the *Convention* for a detailed list of matters the *Convention* addresses with reference to other ILO *Conventions* and UN Human Rights *Conventions*.

<sup>41</sup>*ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991), Art 3.1.

<sup>42</sup>*Ibid* Art 4(a) and Art 4(b).

community services, public or private, such as child care and family services and facilities;<sup>43</sup>

- 4) All measures compatible with national conditions and possibilities, including measures in the field of vocational guidance and training, shall be taken to enable workers with family responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after an absence due to those responsibilities;<sup>44</sup>
- 5) Family responsibilities shall not as such constitute a valid reason for termination of employment;<sup>45</sup> and
- 6) The provisions of this Convention may be applied by laws and regulations, collective agreements, work rules, arbitration awards, court decisions or a combination of these methods or in any other manner consistent with national practice as may be appropriate, account being taken of national conditions.<sup>46</sup>

The remainder of the Convention contains articles relating to the machinery of implementation of the Convention and other rights such as freedom of association.<sup>47</sup> The Convention also has Recommendation 165 attached<sup>48</sup> giving specific recommendations pertaining to protections from discrimination and parental leave.<sup>49</sup>

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<sup>43</sup>Ibid Art 5(a) and Art 5(b).

<sup>44</sup>Ibid Art 7.

<sup>45</sup>Ibid Art 8.

<sup>46</sup>Ibid Art 9.

<sup>47</sup>See *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991), Arts 10(1) and 10(2) – Art 18. Art 11 covers worker's rights to freedom of association by participating in organisations.

<sup>48</sup>*ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991), *Recommendation R165 – Recommendation Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*. Cited hereafter as '*Recommendation R165*' unless otherwise indicated.

<sup>49</sup>See above, 40, and The Preamble of the *Recommendation R165* for general guiding principles and Arts (1) – (4) of the *Recommendation* for a list of useful terms. See Arts (6) – (23) for useful discussions relating to gender equality, conditions of employment, and parental leave standards.

The ILO 2000 Maternity Protection Convention (No 183)<sup>50</sup> notes in its preamble section the need to ‘revise the Maternity Protection Convention (Revised), 1952, and the Maternity Protection Recommendation, 1952, in order to further promote equality of all women in the workforce and the health and safety of the mother and child, and in order to recognize the diversity in economic and social development of Members, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice,’<sup>51</sup> and ‘taking into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society,’<sup>52</sup> the ILO 2000 Maternity Convention outlines a number of standards that should apply for women workers.<sup>53</sup> The Maternity Protection Convention (except for Convention provisions relating to administrative and legal matters pertaining to the ILO law making process<sup>54</sup>) sets out five sections with articles under these headings: a) Health Protection, b) Maternity Leave, c) Leave in Case of Illness or Complications, d) benefits, e) employment protection and non-discrimination and f) breastfeeding mothers.<sup>55</sup>

Section d)<sup>56</sup> of the ILO Maternity Protection Convention under ‘Benefit’s has these key articles on the payment rate of parental/maternity leave:<sup>57</sup>

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<sup>50</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force).

<sup>51</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force), Preamble, Paragraph (3). The two previous Maternity Conventions were not ratified by Australia or Sweden, the primary countries of study in this thesis. See ILO, ‘*Ratifications of C-183 By Country*,’ (28 March 2018), Normlex, <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312328](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328)>

<sup>52</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force), Preamble, Paragraph (5).

<sup>53</sup>*Ibid.*

<sup>54</sup>These are laid out in the section titled ‘Final Provisions’ of the *ILO Maternity Protection Convention* (No 183) under Arts (13) – (20). Art 21 states that both the English and French versions of the text are equal in authority.

<sup>55</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force), Arts 3-10.

<sup>56</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force), Section C, Article 5 is ‘Leave in Illness or Complications’ and deals with additional periods of leave in case of complications or illness during pregnancy or maternity.

<sup>57</sup>*ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force), Arts 1-8(a) and 8(b).

- 1) Cash benefits shall be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on leave referred to in Articles 4 or 5.
- 2) Cash benefits shall be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.
- 3) Where, under national law or practice, cash benefits paid with respect to leave referred to in Article 4 are based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.
- 4) Where, under national law or practice, other methods are used to determine the cash benefits paid with respect to leave referred to in Article 4, the amount of such benefits shall be comparable to the amount resulting on average from the application of the preceding paragraph.
- 5) Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies and
- 6) Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.

These ILO standards mirror and expand upon similar provisions in the two earlier ILO Conventions relating to maternity leave.<sup>58</sup> Recommendation 191 attached to the ILO Maternity Protection Convention 2000<sup>59</sup> also advises that

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<sup>58</sup>See *ILO Convention (No 3) concerning the Employment of Women before and after Childbirth* (opened for signature 29 November 1919) UNTS 38 (entered into force 13 June 1921), Arts 3-4; *ILO Convention (No 103) Concerning Maternity Protection* (opened for signature 28 June 1952) (entered into force 28 June 1952), Arts 3 - 4, 6. These Conventions have not been ratified by either Sweden or Australia.

<sup>59</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191).

these measures should be implemented in the employment legislation of nations to protect women's maternity rights in the workplace<sup>60</sup>:

- a) The leave period following the birth of the child should extend to 18 weeks;
- b) The cash benefits available to a woman during the term of leave should be increased to her full previous earnings while working; and
- c) A person shall be entitled to return to the same position with the same benefits at the end of the maternity leave period, and protected from unlawful discrimination.

More specifically, Recommendation 191 has seven sections that are grouped under the following headings: a) Maternity Leave, b) Benefits, c) Financing of Benefits, d) Employment Protection and Non-discrimination, e) Health Protection, f) Breastfeeding Mothers and g) Related types of leave.<sup>61</sup> Section a) recommends the period of maternity leave available under Article 4 of the Maternity Protection Convention 2000 should be at least 18 weeks and provision should be made for an extension of maternity leave times in the case of multiple births.<sup>62</sup> Section b) on the rate of benefit payment provides: 'Where practicable, and after consultation with the representative organizations of employers and workers, the cash benefits to which a woman is entitled during leave referred to in Articles 4 and 5 of the Convention should be raised to the full amount of the woman's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.'<sup>63</sup> Section c) on financing provides any contributions under social insurance to finance maternity benefits should be made without discrimination based on sex.<sup>64</sup> Section d) on employment protections provides 'A woman should be entitled to return to her former

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<sup>60</sup>Ibid Arts 1-10.

<sup>61</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191). Arts 1-10. As ILO Recommendations carry a prescriptive (ideal) rather than a prospective (actual agreed legal obligations assumed by ratifying states) the descriptions here will be of a summary nature. See Gerry Rodgers, Lee Swepston, Eddy Lee, *International Labour Organisation and the Quest for Social Justice, 1919-2009* (International Labour Office, 2009), 57-62 and Breen Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia' (1998) 22(2) *Melbourne University Law Review* 239, 239-280.

<sup>62</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191), Arts 1(1) and 1(2).

<sup>63</sup>Ibid Art 2.

<sup>64</sup>Ibid Art 4.



position or an equivalent position paid at the same rate at the end of her leave referred to in Article 5 of the Convention. The period of leave referred to in Articles 4 and 5 of the Convention should be considered as a period of service for the determination of her rights.’<sup>65</sup> Section e) deals mainly with matters pertaining to occupational health and safety of working mothers<sup>66</sup> while section f) deals with matters relating to breastfeeding.<sup>67</sup> Where national law and practice provide for adoption, adoptive parents should have access to the system of protection offered by the Convention, especially regarding leave, benefits and employment protection.<sup>68</sup> In the case of Australia, the ILO Workers with Family Responsibilities Convention 1981 and the Maternity Protection Convention 2000 and associated Recommendations have had an increasingly important influence on the formulation of Australian leave policy and laws.<sup>69</sup>

This section will briefly examine the influence these two Conventions<sup>70</sup> have had on the development of Australian parental leave law, namely the ILO Parents with Families Convention 1989 and the Maternity Protection Convention 2000.<sup>71</sup> The Workers with Family Responsibilities Convention 1989 was ratified by Australia in March 1990 and entered into force in 31 March 1991.<sup>72</sup> The

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<sup>65</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191), Art 5.

<sup>66</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191), Arts 6(1) – 6(6). These include matters such as safe workplaces, safe work practices, risk minimisation and the right to attend medical examinations.

<sup>67</sup>*Recommendation R191 Maternity Protection Convention* (2000) (No 191), Arts 7-9. These include allocation of appropriate breaks and suitable workplace facilities for breastfeeding mothers.

<sup>68</sup>*Ibid* Art 10(5).

<sup>69</sup>Andrew Stewart et al, *Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 79-97; Marilyn Pittard and Richard Naughton, *Australian Labour and Employment Law* (LexisNexis Butterworths, 1<sup>st</sup> ed, 2015), 35-46 and 925-945.

<sup>70</sup>*ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991); *ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force).

<sup>71</sup>Breen Creighton, ‘The ILO and the Protection of Fundamental Human Rights in Australia’ (1998) 22(2) *Melbourne University Law Review* 239, 239-280; Gillian Whitehouse, ‘Access to Parental Leave in Australia: Evidence from Negotiating the Life Course’ (2005) 40(4) *Australian Journal of Social Issues* 489, 489-503.

<sup>72</sup>ILO, ‘*Ratifications of C156 – Workers with Family Responsibilities Convention, 1981 (No 156)*, (28 March, 2018), Normlex, <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312301](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312301)>. See also Sara Charlesworth and Alison Elder, ‘Convention No 156 on Workers with Family Responsibilities and Recommendation No 165’, (Paper in International Labour Office Working Paper 2/2012, ‘Good Practices and Challenges on the Maternity Protection

Maternity Protection Convention 2000 has not at the time of writing been ratified by Australia and has not entered into force, and no legislation has been made to directly enact the Convention stipulations or Recommendations into Australian domestic law.<sup>73</sup> The ratification of the ILO Convention for Workers with Family Responsibilities in Australia coincided with social and economic changes that led to increasing demand for women to enter the workforce and also other trends such as increasing deregulation, greater numbers of part-time workers and increased workforce engagement of mothers with dependent children.<sup>74</sup> Also through the 1980s and 1990s, more Australian women entered predominately part-time work that was casual in nature with little job security and no leave or parental leave entitlements (paid or unpaid).<sup>75</sup> Intensive lobbying in the 1980s by various women's groups and unions<sup>76</sup> placed pressure on contemporary federal governments to ratify the Workers with Family Responsibilities Convention and introduce parental leave.<sup>77</sup>

At the same time, Australia had already made some legislative progress along these lines with the introduction of maternity leave in the *Australian Public*

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Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study,' International Labour Office, January 2012).

<sup>73</sup>ILO, 'Ratifications of C183 – Maternity Protection Convention 2000 (No 183) (28 March 2018),

Normlex,

[http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312328.>](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328.>) See also Adrienne Cruz, International Labour Office Working Paper 2/2012, 'Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study, International Labour Office, January 2012), 79 – 102.

<sup>74</sup>Ibid 80-86. See also H Carmody, 'Workers with Family Responsibilities, Sharing the Load' (Papers from the 1990 National Women's Consultative Council conference on Workers with Family Responsibilities, Office for the Status of Women, Canberra, 1990), 47 and A Hayes et al, 'Families Then and Now: 1980-2010' (Facts Sheet, Australian Institute of Family Studies Melbourne, October 2010).

<sup>75</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, 'Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study' (International Labour Office, January 2012), 80-81. See also 'Australia Country Paper' in *Labour Standards for Women in Australia: Statements Made by the Social Partners to the ILO Asia/Pacific Regional Symposium on Equality for Woman Workers* Department of Industrial Relations, Canberra, 1991, 48 and A Sinclair and F Marriott, 'Women in Management – Advantage through Adversity' (1990) 28(2) *Asia Pacific Journal of Human Resources* 14, 14-25.

<sup>76</sup>Ibid 80-82. Examples include the Women's Electoral Lobby and the Australian Council of Trade Unions.

<sup>77</sup>Ibid 82. See also Eve Landau, 'The Influence of ILO Standards on Australian Labour Law and Practice' (1987) 126(6) *International Labour Review* 669, 684-687 and Australian Government Publishing Service, 'National Agenda for Women: Implementation Report' (Institute Report, Office for the Status of Women, Department of the Prime Minister and Cabinet, 1991), 13.

*Service Maternity Leave (Australian Government Employees Act) 1973*.<sup>78</sup> Along with proposals for legislative reform, Industrial Tribunal decisions in the 1970s and 80s<sup>79</sup> gradually introduced and extended maternity and parental leave entitlements for Australian workers.<sup>80</sup> Further legislative changes in Australia followed the adoption of UN Human Rights Treaties relating to eliminating discrimination based on gender.<sup>81</sup> In the 1980s and 1990s feminist activism also helped to expand employment rights and protections for women to be more consistent with international anti-discrimination and employment standards, though against some resistance from employers and right-wing and conservative politicians.<sup>82</sup> Statistical research also showed a major barrier for women working full-time or re-entering the workforce after having children was family responsibility.<sup>83</sup>

With the adoption of the ILO Workers with Family Responsibilities Convention 1981, research and policy lobbying was conducted by the federal government and women's groups about how to best change culture and legislation to mirror the standards of the Convention.<sup>84</sup> Changes in the nature of the Australian labour

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<sup>78</sup>Ibid 83. See also Chapter 3 of this thesis.

<sup>79</sup>See Chapter 3 of this thesis for a review of these cases.

<sup>80</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, 'Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study, International Labour Office, January 2012), 83. These included the *Maternity Leave Test Case* (1979) 218 CAR 121 that introduced 12 months of unpaid maternity leave for all women workers on the birth of their child with a guarantee of return to their job; the *Adoption Leave Test Case* (1985) 298 CAR 321 whereby adoption leave was introduced and the *Parental Leave Test Case* (1990) 36 IR 1 where provisions for unpaid parental and other types of family leave were extended to both male and female workers.

<sup>81</sup>For an extensive discussion see above, 86, 89-90 and M Thornton, and T Luker, 'The Sex Discrimination Act and Its Rocky Rite of Passage' in M Thornton, (ed.) *Sex Discrimination in Uncertain Times* (ANUE Press, 2010) 25-45. The main piece of Australian anti-discrimination was the *Sex Discrimination Act 1984* (Cth) which was legislated after Australia ratified the UN *Convention on the Elimination of all forms of Discrimination against Women* (opened for signature 17 July 1980), 1983 ATS 9 (entered into force 27 August 1983).

<sup>82</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, 'Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study' (International Labour Office, January 2012), 85.

<sup>83</sup>Ibid 86. See also I Wolcott, *The World of Work and Family Life: A Balancing Act* (National Women's Consultative Council Conference on Workers with Family Responsibilities, Office for the Status of Women Canberra, 1990).

<sup>84</sup>For a detailed discussion see Adrienne Cruz, International Labour Office Working Paper 2/2012, 'Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156): A Comparative Study' International Labour Office, January 2012), 87-89 and Sawyer, Marian, 'The Commonwealth Sex

market from the 1980s and 1990s led to more women with family responsibilities entering the Australian labour market with a shift away from the ‘male breadwinner’ model where the woman worker’s income was at most only a supplement to the primary household income that came from the male head.<sup>85</sup> Australia’s industrial laws were soon changed by lobbyists to reflect the ILO Workers with Family Responsibilities Convention and allied International Human Rights Laws such as the Convention for the Elimination of All Forms of Discrimination against Women.<sup>86</sup> Major changes were later legislated<sup>87</sup> into Australian employment law, including amending legislation such as the *Workplace Relations Act 1996* (Cth), that required the AIRC must take into account Workers with Family Responsibilities 1989 Convention No 156 in a way that furthered the Act’s aims on dealing with family responsibilities<sup>88</sup> and also the relevant provisions under the *Fair Work Act 2009* (Cth) ‘Minimum Employment Standards’<sup>89</sup> relating to employment protections for workers with family responsibilities and a right to request flexible work arrangements.<sup>90</sup>

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Discrimination Act: Aspirations and Apprehensions’, (Paper Presented at the 20th Anniversary of the Sex Discrimination Act Conference, The Darlington Centre, University of Sydney, 3<sup>rd</sup> August 2004), 15.

<sup>85</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, ‘Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156)’ 89 and see also J Daley, *Game Changes: Economic Reform Priorities for Australia* (2012) Grattan Institute, <[http://grattan.edu.au/static/files/assets/3e1bdca4/Game\\_Changes\\_Revised.pdf](http://grattan.edu.au/static/files/assets/3e1bdca4/Game_Changes_Revised.pdf)>, 39-42.

<sup>86</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, ‘Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156)’ 89. The *Industrial Relations Act 1991* (Cth) was the first law to be amended requiring the Australian Industrial Relations Commission to consider the Convention in its deliberations. See Gillian Whitehouse, ‘Access to Parental Leave in Australia: Evidence from Negotiating the Life Course’ (2005) 40(4) *Australian Journal of Social Issues* 489, 489-503.

<sup>87</sup>Also see *Sex Discrimination Act 1984* (Cth).

<sup>88</sup>Ibid 90 and also see also Australian Human Rights Commission, ‘Striking a Balance: Women, Men, Work and the Family’ (Australian Human Rights Commission Discussion Paper 2005, Australian Human Rights Commission, 2005), 89-90.

<sup>89</sup>*Fair Work Act 2009* (Cth) ch 2 pt 2-2 ss 59-131. .

<sup>90</sup>Ibid. The *Fair Work Act 2009* (Cth) also prohibits dismissal of employees on the basis of parental responsibility. See also Sara Charlesworth and Ian Campbell, ‘Right to Request Regulation: Two New Australian Models’ (2008) 21(2) *Australian Journal of Labour Law* 1, 1-14. There is no right however to appeal a rejection of a request for leave under the *Fair Work Act*. See *Fair Work Act 2009* (Cth) ch 2 pt 2-2 s 74.

A number of Industrial Arbitration decisions also showed the influence of the Workers with Family Responsibilities Convention.<sup>91</sup> These decisions included the ‘*Family Leave/Personal Carer’s Leave*’ decisions<sup>92</sup> which provided employees with the right to take a maximum period of five days of family leave per year to attend to family responsibilities and also granted provisions for make arrangements to attend to family responsibilities in lieu of other forms of leave such as annual leave entitlements and paid overtime.<sup>93</sup> The *Casual Employees Parental Leave* test case<sup>94</sup> allowed casual employees who had worked for 12 months or longer to claim up to 12 months of unpaid parental leave, and the ‘*Reasonable Hours*’ decision<sup>95</sup> that permitted employees to refuse requests for overtime that is unreasonable if family responsibility is involved, and the ‘*Family Provisions*’ decision<sup>96</sup> permitted employees on parental leave to request an extra 12 months of unpaid parental leave and to request a return to part-time leave until the child reached school age.<sup>97</sup>

Australia also amended its anti-discrimination laws to take into account of the ILO Convention No 156 and related UN instruments on human rights Australia ratified.<sup>98</sup> At the time of writing however, Australia has not ratified the ILO Maternity Protection Convention 2000 or the attached Recommendation 191.<sup>99</sup>

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<sup>91</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, ‘Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156)’ 90-91.

<sup>92</sup>(1996) 66 IR 138 and (1996) 66 IR 176.

<sup>93</sup>For a full discussion see above, 101, 90-91.

<sup>94</sup>*Re Vehicle Industry Award* (2001) 107 IR 1.

<sup>95</sup>*Reasonable Hours Case* (2002) 114 IR 390.

<sup>96</sup>*Family Provisions Case* (2005) 143 IR 245.

<sup>97</sup>*Ibid.* However, the impact of this decision was limited by the introduction of the ‘Work Choices’ legislation that removed the powers of the AIRC to vary awards according to their decisions. See Jill Murray, ‘The AIRC’s Test Case on Work and Family Provisions: the End of Dynamic Regulatory Change at the Federal level?’ (2005) 3(1) *Australian Journal of Labour Law* 325, 325-343 for a more detailed discussion of this case and Work Choices.

<sup>98</sup>Adrienne Cruz, International Labour Office Working Paper 2/2012, ‘Good Practices and Challenges on the Maternity Protection Convention 2000 (No 183) and the Workers with Family Responsibilities Convention 1981 (No 156)’ 92. See also Sara Charlesworth, ‘Law’s Response to The Reconciliation of Work and Care: The Australian Case’ in James, C.G. and Busby, N. (eds), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, Cheltenham, 2011) and see also the *Sex Discrimination Act 1984* (Cth) ss 4(A), 4(B), (6), (7), (7AA), (7A) and ss (30) – (47) for exemptions.

<sup>99</sup>However, the Convention and Recommendations have been influential in government policy and legislation. See Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016), 96-97 and Rosemary Owens et al, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 381-382.

The 2009 Productivity Commission Report<sup>100</sup> listed several International Conventions as having a direct bearing on its research into the proper design of a universal legislative regulatory parental leave scheme in Australia.<sup>101</sup> The Productivity Commission Report noted that most of these treaties were non-binding but the CEDAW and the ILO Convention 183 were relevant.<sup>102</sup> While Australia had not formally ratified ILO Convention 183, it had ‘Voted in favour of adoption of Convention 183,’<sup>103</sup> which advice from the HREOC suggested (along with the obligations under the CDEAW) Australia should take all measures to eliminate discrimination against women in the field of employment, a component of which was a period of paid maternity/parental leave.<sup>104</sup> Drawing on the implications of the ILO Maternity Protection Convention 2000 and the Maternity Protection 191, the Productivity Commission stated the ILO Maternity Protection Convention ‘Sets out the right to health protection by calling for measures that ensure the pregnant (or nursing) women do not perform work prejudicial to that of her health or that of her child,’<sup>105</sup> and the Maternity Protection Recommendation that ‘Provides for adaptations to the pregnant women’s working conditions in order to reduce the particular workplace risks associated with the health and safety of the pregnant woman and her child.’<sup>106</sup> The Productivity Commission report also cited that in many submissions reference was made to ILO Recommendation 191 in that a period of 14 weeks of paid leave was required in order to protect a woman’s health during pregnancy and to support the establishment of breastfeeding.<sup>107</sup>

Similarly, the 2014 Australian Human Rights Commission Report<sup>108</sup> discussed earlier in Chapter 2 of this thesis noted ‘Australia has an obligation to implement

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<sup>100</sup>See the Productivity Commission Report (2009), ‘Paid Parental Leave: Support for Parents with Newborn Children’, Productivity Commission Inquiry Report No 47, 28<sup>th</sup> February 2009, 1.4, Box 1, for a list of relevant ILO and UN Conventions.

<sup>101</sup>Ibid 1.4.

<sup>102</sup>Ibid 1.4.

<sup>103</sup>Ibid 1.4.

<sup>104</sup>Ibid 1.4.

<sup>105</sup>Ibid 4.6.

<sup>106</sup>Ibid 4.6.

<sup>107</sup>Ibid 4.10.

<sup>108</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014).

international human rights standards, as set out in the Conventions it has ratified.<sup>109</sup> The AHRC in the 2014 report indicated Australia could not simply leave it for private market forces or operators to voluntarily comply with these standards but ‘These obligations extend to the regulation of the actions of non-state actors, including private entities.’<sup>110</sup> The AHRC 2014 report noted that a failure to implement the standards in the relevant ILO and UN Conventions Australia had ratified or supported, particularly in allowing discrimination to occur in relation to pregnancy and return to work after parental leave, could potentially result breaches of fundamental human rights.<sup>111</sup>

The Human Rights Commission also indicated international ILO and UN Conventions Australia had ratified created obligations for ‘Australia to take appropriate measures in relation to women in the field of employment, across a range of areas relating to pregnancy and parental leave,’<sup>112</sup> and upon return to work to prohibit dismissal from employment on the grounds of taking maternity or parental leave and also to introduce paid maternity and parental leave where it had not been previously accessible or available.<sup>113</sup> To better reflect these standards, the AHRC 2014 Report recommended Australia should ratify the ILO Maternity Protection Convention 2000 and related ILO Conventions and better implement the ILO standards of ratified ILO conventions relating to parental leave and maternity leave to better protect Australian women from discrimination and to improve the existing Australian paid parental leave framework.<sup>114</sup>

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<sup>109</sup>Ibid 115.

<sup>110</sup>Ibid 115. This goes against the trend of Australian labour law reform under past liberal governments to give more autonomy to private entities such as corporations and business in hiring and firing decisions and regulation of the employer/employee relationship. See Chapters 2 and 3 of this thesis for a more detailed discussion of this issue, particularly around the ‘Work Choices’ laws.

<sup>111</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 115.

<sup>112</sup>Ibid 115.

<sup>113</sup>Ibid 115-6.

<sup>114</sup>Ibid 115-116 and see also Appendices C and G.

## 4.2.2 Concluding Remarks

The discussions above demonstrate that international labour law standards, particularly those in the ILO Labour Code and in the ILO Conventions relating to Workers with Family Responsibilities 1981 and the Maternity Convention 2000, have had an important influence on the development of Australian legislation and employment standards in the areas of anti-discrimination legislation, maternity leave, and unpaid and paid parental leave.<sup>115</sup> ILO Labour Law standards and UN Conventions relating to anti-discrimination have also played an important role in the policy-making around these areas, and especially in the AHRC reports examined in more detail in Chapter 2, in the AIRC decisions examined in Chapter 3, and also in the Paid Parental Leave and Fair Work Acts.<sup>116</sup> A further discussion of the influence of international labour law standards in the EU context will be undertaken in Chapter 5, where the influence of international and European Union law on Sweden's parental leave scheme will be discussed in more detail.

## 4.3 Parental Leave Frameworks in the Scandinavian States (Iceland, Sweden, Norway, Finland, Denmark)

The Scandinavian countries of Northern Europe have been praised<sup>117</sup> for their apparent ability to combine economic prosperity, a progressive society, and a generous welfare state into a harmonious whole as part of their political and social compact.<sup>118</sup> The Scandinavian or 'Nordic' model of the welfare state<sup>119</sup> arose from some factors, including industrialisation, urbanisation, the development of a working class, and appearance of categories of poor and

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<sup>115</sup>Gillian Whitehouse, 'Access to Parental Leave in Australia: Evidence from Negotiating the Life Course' (2005) 40(4) *Australian Journal of Social Issues* 489, 489-503; Jenny Earle, 'The International Labour Organisation and Maternity Rights: Evaluating the Potential for Progress' (1999) 10(2) *Economic and Labour Relations Review* 203, 203-218; Marian Baird, Deborah Brennan, Leanne Cutcher, 'A Pregnant Pause: Paid Maternity Leave in Australia' (2002) 13(1) *Labour and Industry*, 1, 1-19.

<sup>116</sup> See Chapter 3 of this thesis.

<sup>117</sup>Sweden will be chosen as a particular example in Chapter 5 of this thesis for more detailed discussion. For reasons why, see Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47.

<sup>118</sup>Mikko Kautto, 'The Nordic Countries' in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 586, 586-600.

<sup>119</sup>Classified as 'social democratic' according to the typology of Gosta Esping-Anderson in Gosta Esping Anderson, *Three Worlds of Welfare Capitalism* (Polity Press, 1990), 2-38.



marginalised people from the industrial revolution, and demands for democratic political change.<sup>120</sup> The state and local municipalities took over poor relief and welfare from the church after the Reformation period, funding social support schemes primarily through taxation.<sup>121</sup>

Scandinavian countries were historically progressive concerning the emancipation of women and gender equality.<sup>122</sup> They were among the first to give women a right to vote, provide paid maternity leave, to give publicly funded childcare and welfare support to women including single mothers and also to legislate a right to no-fault divorce.<sup>123</sup> Scandinavian women also have access to parental leave and childcare schemes for children and elders as well as social insurance and services that are generous by OECD standards.<sup>124</sup> The Scandinavian countries have commended for being among the first to develop ‘dual-earner’ rather than male breadwinner societies, in contrast to other countries where the male breadwinner female continues to prevail and female labour participation rates are considerably lower when compared to those of men.<sup>125</sup>

The Nordic welfare states have been singled out as examples for the progressive and advanced nature of their parental leave schemes.<sup>126</sup> In particular, Nordic welfare states have been seen as exemplary instances of countries where the ability to balance work and family responsibilities is encouraged while

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<sup>120</sup>Mikko Kautto, ‘The Nordic Countries’ in Francis G Castles et al, (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 588.

<sup>121</sup>Ibid 588.

<sup>122</sup>Mikko Kautto, ‘The Nordic Countries’ in Francis G Castles et al, (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 589.

<sup>123</sup>Ibid 589.

<sup>124</sup>Ibid 592.

<sup>125</sup>Ibid 592.

<sup>126</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire to?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006). See also Mikko Kautto, ‘The Nordic Countries’ in (Francis G Castles et al, (eds) *The Oxford Handbook of the Welfare State* (2010), 586-600. The IZA resource will be cited a number of times over the following pages as it has an excellent in-depth discussion of parental leave in the Nordic countries and is one of the few English-language publications available to cover the issue in the required depth.

maintaining replacement level fertility rates.<sup>127</sup> Such features also include equal pay rates for men and women, growing rates of wealth transfer through appropriate welfare schemes to those most in need, and balancing taxation levels with high levels of personal income.<sup>128</sup>

Women in Scandinavian countries were among the first to be able to combine work and parental responsibilities through maternity leave schemes, government subsidized low-cost childcare and well-funded paid parental leave schemes.<sup>129</sup> Also fathers in Scandinavian countries such as Sweden, Denmark, Finland, Norway and Iceland can access parental leave entitlements such as paid paternity leave following the birth or adoption of a child.<sup>130</sup> The Nordic model of social welfare and paid parental leave is however not without criticism.<sup>131</sup> The Nordic model of social welfare (including parental leave and state-funded child care) has been criticised for a number of flaws, including a ‘boomerang’ effect on the participation of women in the labour market, a stagnation of women’s pay and conditions relative to men, high costs to government budgets, and excessive personal taxation rates that act as a disincentive to business.<sup>132</sup>

Compared to other OECD and European nations, the Scandinavian countries have extended periods of maternity leave and generous coverage of childcare including publically funded childcare places.<sup>133</sup> The Scandinavian countries have also had parental and maternity leave for an extended period.<sup>134</sup> For

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<sup>127</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 5.

<sup>128</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 5.

<sup>129</sup>Ibid 5-6.

<sup>130</sup>Linda Haas and Tine Rostgaard, ‘Father’s Rights to Paid Parental Leave in the Nordic Countries: Consequences for The Gendered Division of Leave’ (2011) 14(2) *Community, Work and Family* 177, 177-195.

<sup>131</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 6. See also Mikko Kautto, 126, above.

<sup>132</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 6.

<sup>133</sup>Ibid 7.

<sup>134</sup>Ibid 9.

example, Sweden introduced unpaid maternity leave for one month in 1901, extending this to a three-month period of paid maternity leave in 1955.<sup>135</sup> Sweden introduced paternity leave in 1980, starting from a baseline period of two weeks<sup>136</sup> and increasing ultimately to 15 months period, which could be taken by either parent subject to certain conditions.<sup>137</sup>

Norway introduced paid maternity leave in 1956.<sup>138</sup> This entitled the mother to a period of 12 weeks (3 months) of paid maternity leave.<sup>139</sup> In 1977, the period of parental leave in Norway was extended to 18 weeks and then to 52 weeks by 2005.<sup>140</sup> Paternity leave was also introduced and since 1993 Norwegian fathers could have four weeks of parental leave.<sup>141</sup> Finland introduced paid maternity leave in 1964, for nine weeks.<sup>142</sup> The period in Finland was extended to 12 weeks in 1972 and 29 weeks in 1974, and by 1981 has been extended to 43 weeks.<sup>143</sup> Finnish fathers became entitled to paternity leave in 1978 and became enabled to share the parental leave period with the mother progressively in the 1980s and 1990s.<sup>144</sup> By 2005, the parental leave period in Finland was 54 weeks including 20 weeks of maternity leave for the mother, 32 weeks of parental leave and a minimum paternity leave period of 2 weeks.<sup>145</sup> Denmark introduced a universal scheme of paid parental leave in 1967 for 14 weeks.<sup>146</sup> In 1984, further changes were introduced in Denmark that allowed parents to take an additional ten weeks of leave, and a two-week period of paternity leave introduced at the same time.<sup>147</sup> In 1992-1994, Denmark introduced a childcare scheme that allowed one parent to take up to 52 weeks of leave per child aged 9 and

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<sup>135</sup>Ibid 9.

<sup>136</sup>A point of comparison is Australia introduced the same in 2013, 33 years after Sweden.

<sup>137</sup>Ibid 9.

<sup>138</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 9.

<sup>139</sup>Ibid 9.

<sup>140</sup>Ibid 9.

<sup>141</sup>Ibid 9.

<sup>142</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 10.

<sup>143</sup>Ibid 10.

<sup>144</sup>Ibid 10.

<sup>145</sup>Ibid 10.

<sup>146</sup>Ibid 10.

<sup>147</sup>Ibid 10.

younger.<sup>148</sup> The Danish childcare scheme was abolished in 2002 and replaced with a longer period of paid maternity leave, which was extended in Denmark from a period of 10 weeks to 32 weeks.<sup>149</sup> Iceland introduced a 3-month period of maternity leave in 1980, with fathers being able to take up one out of the three months.<sup>150</sup> The leave period in Iceland was increased to 6 months by 1990 and replaced in 2000 with a scheme that gave three months of maternity leave for the mothers, an additional three month period for either parent and a three-month period of paternity leave for the father.<sup>151</sup>

Take up rates of parental leave in all Scandinavian countries is relatively high by OECD standards,<sup>152</sup> as are the compensation levels.<sup>153</sup> For example, Sweden, Iceland and Norway have a wage replacement rate of payment up to 80% of the pre-leave parental wage,<sup>154</sup> while Finland has a substitution rate of 70% of average earnings.<sup>155</sup> The wage replacement level in Denmark is around 66% on average, though 100% for lower wage levels.<sup>156</sup> In the public sector in Denmark, wage compensation is set at 100%, and the majority of private industry employees had access to fully paid maternity leave by 2004.<sup>157</sup>

Studies have shown the compensation and flexibility of leave schemes are necessary for the Scandinavian region.<sup>158</sup> The economic incentives for women to take leave are more substantial than for men,<sup>159</sup> as the leave compensation tends to be greater in the public service (where about half of the female workforce in Scandinavian countries is employed) while the majority of men

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<sup>148</sup>Ibid 10.

<sup>149</sup>Ibid 10.

<sup>150</sup>Ibid 11.

<sup>151</sup>Ibid 11.

<sup>152</sup>Ibid 11.

<sup>153</sup>Ibid 11.

<sup>154</sup>Sweden's rate is discussed and compared to that of Australia in more depth in Chapter 5 of this thesis.

<sup>155</sup>Ibid 11.

<sup>156</sup>Ibid 11.

<sup>157</sup>Ibid 11-12.

<sup>158</sup>Ibid 12.

<sup>159</sup>As Chapter 5 on Sweden will show, women still take up the majority of parental leave time that is available.

work in the private sector, and earn higher wages but receive less compensation (around 66%) during periods of leave.<sup>160</sup>

The Scandinavian states also invest heavily in childcare, especially care for pre-school aged children.<sup>161</sup> Childcare is generally publically funded, where this includes either state funded childcare centres or state-paid child minders who care for children at home while the parents are working.<sup>162</sup> For example, Denmark provides the most public coverage of childcare, with around 50% of children aged between 0-2 years being in state-funded childcare.<sup>163</sup> Iceland also has high rates of childcare coverage, while Finland has the lowest rate of childcare coverage, due to longer leave periods being available.<sup>164</sup> Scandinavian children start school about 1-2 years later than in English speaking countries, so child-care arrangements need to last longer.<sup>165</sup> Evidence suggests that the childcare available in the Nordic nations is of high quality and low cost, mainly because of extensive public subsidies.<sup>166</sup>

Nordic countries were among the first to introduce a sophisticated suite of policies (mainly from the state) designed to deal with the entry of women into the workforce.<sup>167</sup> In Finland for example, the large numbers of Finnish men serving in WWII led to a labour shortage which was compensated for by women entering the work force in large numbers.<sup>168</sup> By the 1960s-1970s women entered the workforce in all Nordic nations in large numbers, and by the 2000s most young women were working full time, including around 50% of mothers.<sup>169</sup> The evidence from the Scandinavian countries suggests women benefited substantially from maternal and parental leave schemes, allowing Scandinavian

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<sup>160</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 12.

<sup>161</sup>Ibid 13.

<sup>162</sup>Ibid 13.

<sup>163</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 13.

<sup>164</sup>Ibid 13.

<sup>165</sup>Ibid 14.

<sup>166</sup>Ibid 14.

<sup>167</sup>Ibid 15.

<sup>168</sup>Ibid 15.

<sup>169</sup>Ibid 15.

women to retain an active relation to their employer and remain involved in the labour market.<sup>170</sup> The evidence on childcare is also good, with high coverage and availability of state-funded childcare places in Scandinavian states leading to increased returns from the mother's labour supply and positive effects on female participation rates<sup>171</sup> and other studies of return to work rates of women in Norway, Sweden and Finland in the 1970s and 80s indicated that a right to paid maternity leave with job protection assisted women's return to paid employment.<sup>172</sup> Evidence also indicated that the rate of fathers taking up parental leave in Scandinavian countries was much lower than that of women, being below 50%.<sup>173</sup> Although there is some evidence that in Nordic countries more fathers are taking up leave, women still take up the majority of leave and do the majority of caring for children and household tasks.<sup>174</sup>

The effect of the parental leave schemes and childcare on gender equality has been somewhat mixed in the Nordic countries.<sup>175</sup> While Scandinavian nations have had low levels of gender inequality and gender wage gaps relative to the OECD average,<sup>176</sup> issues such as growing public sector employment, high tax rates and significant take-up of leave and childcare caused issues for women's employment and labour force participation levels.<sup>177</sup> A concerning trend involves the relative stagnation of female wages and an increasing gender pay gap in Scandinavian nations, even falling behind countries with high inequality and inadequate social security such as the United States.<sup>178</sup> The evidence from research<sup>179</sup> also indicated that in Scandinavian countries, women in the private sector who had taken parental leave for one year had a vast and negative gap between those who did not take leave.<sup>180</sup> Further, Scandinavian women working in the public sector who had taken leave showed no negative gap when compared

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<sup>170</sup>Ibid 16.

<sup>171</sup>Ibid 16.

<sup>172</sup>Ibid 17.

<sup>173</sup>Ibid 18.

<sup>174</sup>Ibid 18.

<sup>175</sup>Ibid 19-20.

<sup>176</sup>Ibid 19-20.

<sup>177</sup>Ibid 19-20.

<sup>178</sup>Ibid 20-21.

<sup>179</sup>Ibid 20-21.

<sup>180</sup>Ibid 24

with women who had not taken leave.<sup>181</sup> This evidence reflected the activity of groups such as public sector unions, who bargained for better conditions for female employees, while the private sector was less flexible in this respect.<sup>182</sup> This difference has been described as a ‘welfare-based glass ceiling.’<sup>183</sup> Despite having progressive social policies, the Scandinavian workforce is among the most gender-segmented in the OECD.<sup>184</sup> In this way, a new gender-biased society has arisen where the male remains the primary breadwinner by working in better-paid jobs in the private sector, while Scandinavian women take lower-paying jobs in the public sector.<sup>185</sup> The gap between private and public sector earnings in Scandinavian nations has also accelerated in the past three decades.<sup>186</sup> Publically provided and funded childcare in the Scandinavian countries is also not exempt from criticism<sup>187</sup> on grounds such as requiring high taxation rates and public spending to support and also being inefficient or discriminatory.<sup>188</sup> There is some evidence publically funded childcare is inflexible in some Nordic nations and drives up costs to households in indirect ways.<sup>189</sup>

Research does suggest however<sup>190</sup> that in the Scandinavian countries, family-friendly policies have helped Scandinavian nations maintain a relatively high fertility rate while also maintaining relatively high levels of economic prosperity.<sup>191</sup> Studies of the operation of parental leave in the Scandinavian

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<sup>181</sup>Ibid 24.

<sup>182</sup>Ibid 24

<sup>183</sup>Ibid 24-5.

<sup>184</sup>Ibid 24-5.

<sup>185</sup>Ibid 25.

<sup>186</sup>Ibid 25.

<sup>187</sup>Ibid 26.

<sup>188</sup>Ibid 26-28.

<sup>189</sup>Ibid 27-8.

<sup>190</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 25-28; Anne Lise Ellingsaeter, ‘Leave Policy in the Nordic States: A Recipe for High Employment/High Fertility?’ (2006) 12(1) *Community Work and Family* 1, 1-19; Nabatina Gupta, Nina Smith, Verner Mette, ‘The Impact of Nordic Countries’ Family Friendly Policies on Employment, Wages and Children’ (2008) 6(1) *Review of Economics and the Household*, 65, 65-89.

<sup>191</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, ‘Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?’ (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 28-9.

nations is real evidence to indicate paid parental leave (especially paid parental or maternity leave), and state-funded childcare have a direct impact on reducing the economic cost of children and hence making having larger families an attractive option to potential parents.<sup>192</sup> The study of childcare policies indicated the Nordic model of providing childcare to children aged 0-3 years had a positive impact on improving outcomes for children (health, welfare, etc.) and reducing child poverty.<sup>193</sup> This positive impact is especially evident if the child-care is of high quality and is affordable and available.<sup>194</sup> Such childcare policies also appear to help needy families in making caring easier and lifting children out of poverty.<sup>195</sup>

The Nordic welfare state economic model of social democracy<sup>196</sup> and family/leave policies are not without criticism.<sup>197</sup> The biggest concern raised by critics is the cost of the Scandinavian system, particularly due to the cost pressure it places on public budgets and the high levels of marginal income taxation required to support a generous welfare state, which many regard as unaffordable.<sup>198</sup> For example, Scandinavian countries spend around 4-5 times more money on parental leave and childcare funding than English-speaking OECD nations such as the UK and the US.<sup>199</sup> The Scandinavian countries also have relatively high levels of income taxation (including high marginal tax rates) and high levels of public spending compared the OECD average, with Sweden having about 51% and Denmark 49% of its GDP taxed and redistributed in social spending.<sup>200</sup> Parental leave and childcare also have not entirely removed the inequitable male breadwinner model in the Scandinavian nations, which

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<sup>192</sup>Ibid 28-9.

<sup>193</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 32-33.

<sup>194</sup>Ibid 32-33.

<sup>195</sup>Ibid 33.

<sup>196</sup>Ibid 33.

<sup>197</sup>See the following discussion.

<sup>198</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 33.

<sup>199</sup>Ibid 34.

<sup>200</sup>Ibid 36.



generous welfare payments for mothers appear to promote.<sup>201</sup> Questions have also been raised about the long-term economic sustainability of the Nordic model in general.<sup>202</sup> It has been argued, for example, by economists<sup>203</sup> that the high levels of taxation required to fund the Nordic welfare state are ultimately unsustainable and the high levels of government spending, the significant role of the public sector in the economy and the inefficient allocation of productive capital from business investment to welfare spending has caused a large number of economic and social ills in Scandinavian states, such as lower per capita levels of GDP, reduced economic competitiveness, inefficient allocation of resources, lower disposable income for families, social delinquency, and the encouragement of illegal immigration, high rates of unemployment, underemployment and welfare dependency among a significant proportion of the populations of Scandinavian states.<sup>204</sup>

Critics of the Nordic social-democratic model and the welfare state have also argued the money spent on social welfare ‘Creates a culture of dependency and misallocates resources.’<sup>205</sup> This claim would seem to be supported by comparisons of long-term economic growth trends which demonstrated, on the whole, the US economy grew faster over the last three decades than the Nordic countries<sup>206</sup> in addition to the fact the United States and English-speaking nations with neoliberal policies seem to have faster economic growth and are on average wealthier than European countries.<sup>207</sup> The Nordic social model also has problems regarding personal wealth levels, adjusted for levels of taxation,

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<sup>201</sup>Ibid 36.

<sup>202</sup>Daniel J Mitchell, ‘Can the United States Learn from the Nordic Model?’ (Working Paper, CATO Policy Analysis No 603, CATO Institute, 5<sup>th</sup> November, 2007), 1-20.

<sup>203</sup>Sherwin Rosen, ‘Public Employment and the Welfare State in Sweden’ (1996) 34(2) *Journal of Economic Literature* 729, 729-740; Wolfgang Merkel, ‘Social Justice and the Three Worlds of Welfare Capitalism’ (2002) 43(1) *European Journal of Sociology* 59, 59-91; Daniel J Mitchell, ‘Can the United States Learn from the Nordic Model?’ (Working Paper, CATO Policy Analysis No 603, CATO Institute, 5<sup>th</sup> November, 2007), 1-20.

<sup>204</sup>Ibid 1.

<sup>205</sup>Ibid 3. See Isabella Mares (2010), ‘Macroeconomic Outcomes’, in Francis G Castles et al (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010) 539.

<sup>206</sup>Daniel J Mitchell, ‘Can the United States Learn from the Nordic Model?’ (Working Paper, CATO Policy Analysis No 603, CATO Institute, 5<sup>th</sup> November, 2007), 3.

<sup>207</sup>Monica Prasad, *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, and the United States* (University of Chicago Press, 2006), 1-45, 235-280; Daniel J Mitchell, ‘Can the United States Learn from the Nordic Model?’ (Working Paper, CATO Policy Analysis No 603, CATO Institute, 5<sup>th</sup> November, 2007), 7-10.

inflation of the cost of living measures, which show Scandinavian nations tended to have lower levels of prosperity, disposable income and assets, and higher levels of unemployment when compared to other OECD nations.<sup>208</sup> Neoliberal critics of the Nordic social democratic model also argued Scandinavian nations with smaller government sectors and less public spending had faster economic growth and larger reductions in poverty levels than in Scandinavian countries where government spending was the primary means to reduce inequality.<sup>209</sup> Neoliberal economists have also argued the Nordic social model undermines the entrepreneurial creativity needed to generate new businesses by discouraging investment, personal risk-taking and productivity gains<sup>210</sup> and a generous welfare state can be like a ‘drain’ that destroys long-term economic prosperity by sucking productive capital away from productive areas into unproductive ones.<sup>211</sup>

Despite these weaknesses, the achievements in gender equality, increased workplace fairness, and progress towards a dual-earner household and economic prosperity in the Scandinavian countries (especially through policies of well-funded parental leave and childcare schemes) is worth considering.<sup>212</sup> It is therefore worth spending some time looking more closely at the economic systems of these nations and how they have developed enough to sustain liberal social regimes involving leave schemes and social welfare systems while maintaining economic prosperity.<sup>213</sup> The Scandinavian states, like other Western nations, faced profound economic crises in the decades of instability from the 1973 oil crisis to the global financial crisis of the 2000s and beyond.<sup>214</sup> While English-speaking nations in response to these issues abandoned generous welfare systems in favour of the neoliberal agenda of economic liberalisation

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<sup>208</sup>Ibid 7-8.

<sup>209</sup>Ibid 10.

<sup>210</sup>Ibid 12-13.

<sup>211</sup>Ibid 12-20. See also Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 40<sup>th</sup> Anniversary ed, 2002), Preface and Ch 2.

<sup>212</sup>See Katherina Spiess and Katherina Wöhrlich, ‘The Parental Leave Benefit Reform Model in Germany: Costs and Outcomes of Moving to a Nordic Model’ (2008) 27(5) *Population Research and Policy Review*, 575, 575-91.

<sup>213</sup>Peer H Kristensen and Kari Lilja, *Nordic Capitalisms and Globalisation: New Forms of Economic Organisation and Welfare Institutions* (Oxford University Press, 2011), 1-47.

<sup>214</sup>Peer H Kristensen and Kari Lilja, *Nordic Capitalisms and Globalisation: New Forms of Economic Organisation and Welfare Institutions* (Oxford University Press, 2011), 1-47.

and free-markets in the 1980s to the global financial crisis of the 2000s,<sup>215</sup> Scandinavian countries seemed to be a paradox in being able to remain economically dynamic while retaining high rates of taxation, generous welfare provisions, elevated levels of female participation in the workforce, robust parental leave schemes and large governments.<sup>216</sup>

The Scandinavian nations undertook complex economic and social reforms in the 1990s and 2000s that enabled them to better compete in the global marketplace while retaining high living standards and the massive welfare state.<sup>217</sup> These reforms included measures to re-skill workers and reduce unemployment levels, reducing eligibility for unemployment benefits, stricter management of government spending, and higher levels of workplace participation by women.<sup>218</sup> Comparing Scandinavian countries positively with the adverse effects of globalised capitalism in the US and other nations (such as inequality, lost job security, and reduced standards of living for many classes)<sup>219</sup> the authors cited the Scandinavian economic and social model as having the positive qualities:<sup>220</sup>

- a) By offering citizens of both sexes equal educational opportunities, they are better equipped to respond to rapid economic and social change;
- b) By sharing economic and job risks with citizens, the states help citizens become more flexible economically and move from one situation to another without catastrophic results; and
- c) By providing social services that make it possible to live a non-routinised life, it becomes possible for families to enter the dynamic global economy.

The generous welfare states in Scandinavian countries thus allow Scandinavian nations to come out very high in measures of social equity (minimum income

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<sup>215</sup>Ibid 1-47.

<sup>216</sup>Ibid 1-47.

<sup>217</sup>Ibid 1-47.

<sup>218</sup>Peer H Kristensen and Kari Lilja, *Nordic Capitalisms and Globalisation: New Forms of Economic Organisation and Welfare Institutions* (Oxford University Press, 2011), 1-47.

<sup>219</sup>Ibid 1-47, 184-218, 220-258.

<sup>220</sup>Ibid 1-47, 220-258. .

inequality, assistance for the disabled and unemployed, single parents and other marginalised groups), economic performance and human development metrics.<sup>221</sup> Fertility rates also remain relatively high while correlated to higher levels of female employment and workforce participation.<sup>222</sup>

#### **4.3.1 Concluding Remarks**

Combined with measures such as proper workforce retraining, education and measures to reduce unemployment and social disruption, the generous measures aimed to include parents in the workforce help assist the Scandinavian nations to achieve positive social outcomes and economic prosperity.<sup>223</sup> While the economic challenges facing the welfare state are complex, the Nordic welfare state model of combining productive business with a generous and fair system of social protection involving state-funded parental leave and childcare remains potentially one for other countries emulate.<sup>224</sup> The Nordic social model will be discussed further in Chapter 5 of this thesis where Sweden's system of parental leave regulation and employment law system is discussed in greater detail.

#### **4.4 Parental Leave in Continental European Nations (France, Germany, the Netherlands, Luxembourg and Eastern Europe)**

Like the Scandinavian nations, France and Germany have had relatively generous state welfare systems since the Second World War.<sup>225</sup> These originated as a response to the destructive effects on society of the Industrial Revolution and related social, economic and political upheavals and the welfare systems of France and Germany were designed to protect citizens from social risks, first by extending social insurance schemes to protect against matters such as

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<sup>221</sup>Ibid.

<sup>222</sup>Ibid.

<sup>223</sup>Ibid 220-258.

<sup>224</sup>Though the Nordic model faces formidable challenges going into the 21<sup>st</sup> century - see Chapter 5 of this thesis.

<sup>225</sup>Bruno Palier (2010), 'Continental Western Europe', in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 600-615. This system is currently in crisis due to the GFC and a relative decline in the French and German economies. See Economist, *The World's Biggest Problem: The Eurozone*, (23 October, 2014), Economist, <<http://www.economist.com/news/leaders/21627620-deflation-euro-zone-all-too-close-and-extremely-dangerous-worlds-biggest-economic>>

unemployment, old age or illness.<sup>226</sup> The similarities between France and Germany makes an analysis of the social welfare and parental leave systems of these nations worthwhile to give background to this study.<sup>227</sup>

The welfare systems of France and Germany share these features:<sup>228</sup>

- a) Old age, health and work accident insurance were made compulsory for all dependent workers and the self-employed;
- b) Benefits are paid in cash, proportional to past earnings, and adjusted according to payment of social contributions such as tax; and
- c) Finance came from social schemes and coverage was somewhat uneven.

The welfare systems of France and Germany focused around the male breadwinner model, with men working full-time in long and uninterrupted careers before a short period of retirement, while women stayed at home or left the workforce to care for children.<sup>229</sup> As a result, the focus was given to promoting male employment at the expense of women's employment and the employment of people from marginalised groups such as immigrants.<sup>230</sup> By the 1970s, the economic and social systems of Europe (including the Scandinavian countries, Southern Europe, France and Germany) came under severe strain from social and economic factors.<sup>231</sup> These included declines in fertility rates, globalisation and liberalisation of markets, the 1973 oil price crisis, mass unemployment, economic stagnation and changes in family structures related to

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<sup>226</sup> Bruno Palier (2010), 'Continental Western Europe', in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 605. The welfare systems of France and Germany are similar to several other countries, but these will be discussed in other sections of this Chapter.

<sup>227</sup>For historical reasons France and Germany were also among the first countries to participate in the ILO. See Antony Alcock, *History of the International Labour Organisation* (MacMillan Press, 1971) 1-37.

<sup>228</sup>Bruno Palier (2010), 'Continental Western Europe', in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010) 600-615, 606.

<sup>229</sup>Ibid 607.

<sup>230</sup>Ibid 607-08.

<sup>231</sup>Francis G. Castles et al (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010) 600-615, 608.

female participation in the workforce.<sup>232</sup> To adapt to these changes, three primary strategies were followed:

- a) France and Germany (and some other European nations) aimed to reduce the supply of labour,<sup>233</sup> particularly ‘irregular’ forms of work (women, immigrants, the unskilled and young) in favour of ‘regular’ labour in the shape of highly-paid, skilled male workers;
- b) In Scandinavian countries, to increase the size of the public sector and also increase welfare spending and increase gender equality by increasing female participation in the workforce,<sup>234</sup> and
- c) In English-speaking nations, to pursue a neoliberal pattern of economic and social reform based on slashing public sector spending, reducing welfare dependency, market deregulation and increasing flexibility in labour markets (usually by encouraging more competition and cutting entitlements).<sup>235</sup>

In the 1980s and 1990s social protections in France and Germany focused on the notion of maintaining full-time employment for the male breadwinner of the family, at the expense of women and also of employees with uncertain status.<sup>236</sup> While these changes had the effect of decreasing the overall unemployment rate and increasing social contributions, it did little to deal with the greater structural economic problems and their effects and were strongly resisted by the voting publics in these nations.<sup>237</sup> By the early 1990s and 2000s, the French and German governments introduced a new set of more radical reforms designed to take their economic and welfare systems away from the earlier male-breadwinner model, in favour of more flexible social and working roles.<sup>238</sup> These included changes to entitlement models for unemployment insurance,

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<sup>232</sup>Ibid 608. These factors continue to be debated today; see Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 690-720.

<sup>233</sup>Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 601-615.

<sup>234</sup>Ibid 586-600.

<sup>235</sup>Ibid 631-642.

<sup>236</sup>Bruno Palier (2010), ‘Continental Western Europe’, in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 609.

<sup>237</sup>Ibid 610-611.

<sup>238</sup>Ibid 613-4.

early retirement and the aged pension, as well as measures to encourage ‘irregular’ workers (including women, immigrants and the low-skilled) to work and return to the workforce.<sup>239</sup> West Germany introduced paid maternity leave in 1979.<sup>240</sup> In 1986, the Christian Democrats/Liberal government of West Germany moved this into parental leave that could be taken by either parent.<sup>241</sup> Both mothers and fathers could go on leave, however not both at the same time.<sup>242</sup> The parental leave was originally for a ten-month period, but extended to a period of up to three years.<sup>243</sup> Two out of three of these years could be paid at a rate of 307 Euro a month.<sup>244</sup> In the following decades, this scheme was subject to significant criticism on some grounds.<sup>245</sup> These ranged across several factors including the low rate of payment, low take-up and eligibility issues.<sup>246</sup> By the 1990s after re-unification Germany (along with its neighbour, Austria) had generous paid parental leave schemes, but only offering replacement payments at a relatively low level and on the assumption the male breadwinner model was still the family norm.<sup>247</sup>

From the 2000s onward, Germany undertook a significant series of reforms to its parental leave system in response to EC directives,<sup>248</sup> economic pressures and criticism the system was inadequate and gender-biased.<sup>249</sup> In 2001, the German coalition government implanted reforms to parental leave that allowed both parents to take leave up to the 8<sup>th</sup> birthday of their child.<sup>250</sup> Parental leave

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<sup>239</sup>Ibid 613-4.

<sup>240</sup> Sonja Blum, ‘Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria’ (2010) 6(3) *German Policy Studies* 83, 90.

<sup>241</sup>Ibid 90.

<sup>242</sup>Ibid 90.

<sup>243</sup>Ibid 90.

<sup>244</sup>Ibid 90.

<sup>245</sup>Ibid 91.

<sup>246</sup>Ibid 91.

<sup>247</sup>Ibid 92.

<sup>248</sup>Markus Gangel and Andrea Ziefle, ‘The Making of a Good Woman: Extended Parental Leave Entitlements and Mothers’ Work Commitment in Germany’ (2015) 121(2) *American Journal of Sociology* 511, 511-563.

<sup>249</sup>Sonja Blum, ‘Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria’ (2010) 6(3) *German Policy Studies* 83, 93. See also Geisler, Esther and Michalea Kreyenfeld, (2007), ‘How Policy Matters: Germany’s Parental Leave Benefit Reform and Fathers’ Behavior 1999-2009’ (MPIDR Working Paper No WP 2012-021, Max Planck Institute for Demographic Research, July 2012), 5-6.

<sup>250</sup>Sonja Blum, ‘Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria’ (2010) 6(3) *German Policy Studies* 83, 93.

recipients were also allowed to work for fewer hours to be eligible (19 as opposed to 30 hours) and parents could elect for a higher rate of payment in return for taking a shorter period of leave.<sup>251</sup> Germany also undertook further parental leave reforms in 2007.<sup>252</sup> The benefit of paid parental leave changed from a flat rate to a wage replacement of up to 67% of the person's former income, capped at 1800 Euros a month.<sup>253</sup> This parental leave scheme was available to both mothers and fathers for up to 12 months following the birth of the child.<sup>254</sup> If the father and mother both participate, they can take up to 14 months of leave between them.<sup>255</sup> This formed part of a new 'daddy month' entitlement modelled on Nordic countries.<sup>256</sup> A flat rate of 300 Euro per month was made available to those who had no prior earnings.<sup>257</sup>

The new German paid parental leave scheme was a significant change in policy and law,<sup>258</sup> especially since it was directed at men and women on an equal basis.<sup>259</sup> The new parental leave scheme had the effect of rewarding men and women with higher incomes rather than lower incomes, and the entitlement in Germany for unemployed parents was removed in 2010.<sup>260</sup> The new German parental leave scheme was also designed to achieve four objectives: to smooth the earning declines of parents in the first year of their child's life, to increase incentives for parents to re-enter the workforce when the benefit expires, to make

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<sup>251</sup>Ibid 93.

<sup>252</sup>Ibid 95.

<sup>253</sup>Sonja Blum, 'Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria' (2010) 6(3) *German Policy Studies* 83, 95. 1800 Euros is equivalent to about \$2,765 Australian.

<sup>254</sup>Marcus Tamm and Jochen Kluge, 'Parental Leave Regulations, Mother's Labour Force attachment, and Father's Child Care Involvement: Evidence from a Natural Experiment' (2010) 50(4) *Journal of Population Economics* 984, 984-2005.

<sup>255</sup>Ibid 984.

<sup>256</sup>Sonja Blum, 'Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria' (2010) 6(3) *German Policy Studies* 83, 95.

<sup>257</sup>Marcus Tamm and Jochen Kluge, 'Parental Leave Regulations, Mother's Labour Force Attachment, and Father's Child Care Involvement: Evidence from a Natural Experiment' (2010) 50(4) *Journal of Population Economics* 984. 300 Euros is about \$460 Australian.

<sup>258</sup>Markus Gangel and Andrea Ziefle, 'The Making of a Good Woman: Extended Parental Leave Entitlements and Mothers' Work Commitment in Germany' (2015) 121(2) *American Journal of Sociology* 511, 511-563.

<sup>259</sup>Geisler, Esther and Michalea Kreyenfeld, (2007), 'How Policy Matters: Germany's Parental Leave Benefit Reform and Fathers' Behavior 1999-2009' (MPIDR Working Paper No WP 2012-021, Max Planck Institute for Demographic Research, July 2012), 1-35.

<sup>260</sup>Sonja Blum, 'Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria' (2010) 6(3) *German Policy Studies* 83, 96.



it more attractive for working fathers to spend more time at home caring for their child, and making parenthood more attractive for working women.<sup>261</sup> However, Germany's parental leave policy was influenced by a unique set of social and demographic problems.<sup>262</sup> First, Germany had one of the lowest rates of childbirth in Europe, even after re-unification in 1990.<sup>263</sup> Germany also had consistently low rates of female labour force participation and employment rates among women with young children.<sup>264</sup> The new German parental leave reforms were designed to provide, among other things, increases in the German fertility rate, better rates of income replacement for middle and high-income parents, and encourage more men to take parental leave.<sup>265</sup> The new German parental leave model was also designed to replace the traditional 'male breadwinner' model of parental responsibility, where the man earns the first income and the female engages in most of the caring responsibilities.<sup>266</sup> The new changes instituted protection from dismissal for either parent for taking parental leave, for a maximum period of up to three years.<sup>267</sup> The paid benefit did not extend to the entire three years but was limited to six months.<sup>268</sup> The new policy replaced an old system of a flat means-tested childcare benefit with a parental leave benefit returning 67% of the earnings of the stay at home parent for a year after birth.<sup>269</sup> The new scheme involved a payment set at a maximum of 1800 Euro per month and a minimum of 300 Euro a month, the lower rate aimed primarily at low-income earners.<sup>270</sup> The changes represented a significant adoption by Germany

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<sup>261</sup>Marcus Tamm and Jochen Kluge, 'Parental Leave Regulations, Mother's Labour Force Attachment, and Father's Child Care Involvement: Evidence from A Natural Experiment' (2010) 50(4) *Journal of Population Economics* 984, 984-985.

<sup>262</sup>Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review* 575, 575-591.

<sup>263</sup>*Ibid* 575-91.

<sup>264</sup>*Ibid* 575.

<sup>265</sup>*Ibid* 575.

<sup>266</sup>*Ibid* 576.

<sup>267</sup>*Ibid* 576.

<sup>268</sup>*Ibid* 576.

<sup>269</sup>Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review* 575, 575-91.

<sup>270</sup>*Ibid* 576.

of the 'Nordic' models of parental leave, regarding duration, eligibility and the financial benefits paid to parents.<sup>271</sup>

The new German scheme also removed certain working hour limits to eligibility.<sup>272</sup> However, the benefit could be reduced under certain circumstances and counted as income under the prevailing German social welfare legislation.<sup>273</sup> A number of studies were conducted to examine what effect the new parental leave policy had in Germany.<sup>274</sup> A study by German social researchers Katherina Spiess and Katherina Wrohlich<sup>275</sup> showed a number of positive outcomes arising from the German parental leave policy.<sup>276</sup> Their study showed the new scheme would not add many costs to the social welfare system (the new system would cost 3.5 billion Euro instead of 3 billion Euro) and there would be positive income gains for high income, middle income and low-income families.<sup>277</sup> However, the benefits were biased towards the higher income households, and also couples rather than single families.<sup>278</sup> Spiess's and Wrohlich's study also showed a substantial increase would occur in the labour force participation rate and working hours for young mothers with children aged between 12-24 months.<sup>279</sup> Their modelling indicated mothers would increase working hours by 12% and labour force participation would increase by 3%.<sup>280</sup> Their modelling also indicated there would be a slight increase in tax receipts and employee contributions to social security contributions, such as

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<sup>271</sup>Ibid 576.

<sup>272</sup>Ibid 576.

<sup>273</sup>Ibid 575.

<sup>274</sup>See Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review* 575, 575-591; Markus Gangel and Andrea Ziefle, 'The Making of a Good Woman: Extended Parental Leave Entitlements and Mothers' Work Commitment in Germany' (2015) 121(2) *American Journal of Sociology* 511, 511-563; Sonja Blum, 'Between Instrument Tinkering and Policy Renewal: Reforms of Parental Leave in Germany and Austria' (2010) 6(3) *German Policy Studies* 83, 95.

<sup>275</sup>Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review*, 575, 575-91.

<sup>276</sup>Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review* 575, 575-582.

<sup>277</sup>Ibid 582.

<sup>278</sup>Ibid 582.

<sup>279</sup>Ibid 583.

<sup>280</sup>Ibid 583-4.

superannuation and unemployment contributions, but not enough to make the scheme self-sustaining financially.<sup>281</sup> However, the econometric modelling by Spiess and Wrohlich indicated the parental leave scheme would have a much less substantial impact on the behaviour of fathers.<sup>282</sup> Their research indicated the rate of fathers taking up leave would not increase, and the working hours of fathers would increase slightly.<sup>283</sup> The changes in labour force participation for male parents also would not change substantially.<sup>284</sup> Spiess and Wrohlich concluded from their study that to succeed in Germany, paid parental leave had to be part of a broader mix of progressive social welfare change including increasing the numbers of publically-funded childcare places, changes in the German tax system and greater flexibility of work and working hours for German parents, particularly mothers.<sup>285</sup>

Another longitudinal study by German social researcher Pia Schober<sup>286</sup> examined the take up of leave in West Germany over a period of 20 years.<sup>287</sup> Pia Schober's study examined the history of parental leave in West Germany and the impact of significant changes to parental leave policy, including the 2007 changes, and measured these against the predictions of classical economic theory and enterprise bargaining theory.<sup>288</sup> Classical liberal economic theory predicted the introduction of paid parental leave reduces the opportunity costs of the parent who chooses to leave the labour market to care for a child.<sup>289</sup> The reforms of the 1990s in West Germany indicated that unpaid or low-paid parental leave resulted in mothers spending more time at home looking after children while fathers increased their work hours and decreased participation in child-rearing to compensate for the loss of household income while the mother took time away

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<sup>281</sup>Ibid 584.

<sup>282</sup>Ibid 583.

<sup>283</sup>Katherina Spiess and Katherina Wrohlich, 'The Parental Leave Benefit Reform in Germany: Costs and Labour Outcomes of Moving Towards a Nordic Model' (2009) 27(5) *Population Research and Policy Review* 575, 583.

<sup>284</sup>Ibid 585.

<sup>285</sup>Ibid 586.

<sup>286</sup>Pia Schober, 'Parental Leave and Domestic Work for Mothers and Fathers: A Longitudinal Study of Two Reforms in West Germany' (2014) 43(2) *Journal of Social Policy*, 351, 351-372.

<sup>287</sup>Ibid 351-355.

<sup>288</sup>Ibid 355.

<sup>289</sup>Ibid 355.

from work.<sup>290</sup> The leave scheme in the 1990s tended to reflect a gender-role construction focused around the ‘male breadwinner’ model.<sup>291</sup> Pia Schober’s analysis of the 2007 German leave reforms showed the take up of leave had increased, particularly by German fathers, who traditionally took only short periods of parental leave.<sup>292</sup> The increases in time spent with children, however, had not increased by a huge amount by either parent.<sup>293</sup> The evidence from the study indicated that 1992 reforms involving unpaid leave for long periods promoted traditional gender roles by encouraging men to work longer hours and spend less time with their families.<sup>294</sup> With the introduction of a paid scheme in 2007, fathers took on more leave and thus spent more time caring for children, though there was little evidence to suggest changes in the balance of housework had changed.<sup>295</sup>

Another study on the take-up of leave by fathers by Esther Geisler and Michaela Kreyenfeld also showed some interesting findings.<sup>296</sup> The authors looked at traditional liberal economic theory, especially economic principles of social and family organisation, which tended to evaluate parental leave regarding a cost/benefit or bargaining approach that judged parental leave to be one way for couples to balance different economic imperatives and social obligations.<sup>297</sup> In the context of male/female relations, men were superior in bargaining power due to higher earning capacity, and better-educated women were working in higher status jobs were expected to return to the labour market more quickly than lower status women.<sup>298</sup> Geiser and Kreyenfeld were critical of this model of understanding parental leave, arguing economic theory and rationality is not the only consideration, but negotiations about social relations and beliefs about normative gender roles also played an important element in care

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<sup>290</sup>Ibid 356.

<sup>291</sup>Ibid 357.

<sup>292</sup>Ibid 365.

<sup>293</sup>Ibid 365.

<sup>294</sup>Ibid 368.

<sup>295</sup>Ibid 369.

<sup>296</sup>Esther Geisler and Michaela Kreyenfeld, ‘Against All Odds: Father’s Use of Parental Leave in Germany’ (2011) 21(1) *Journal of European Social Policy*, 88, 88-99.

<sup>297</sup>Ibid 88-9.

<sup>298</sup>Ibid 88-9.

responsibilities.<sup>299</sup> Their study indicated that men who are more educated than their partners are least likely to be on leave.<sup>300</sup> It also indicated men with more educated partners were more likely to take parental leave.<sup>301</sup> Geisler and Kreyenfeld reported that it is likely only well-educated men with well-educated partners would take the full benefit of parental leave, as men with less educated partners would be attracted back to the workforce by comparatively good conditions and higher rates of pay than to spend more time with their children.<sup>302</sup> The studies seem to support the argument that parental leave is beneficial not only for mothers but also for encouraging men to take greater responsibility for child rearing and improving gender equity.<sup>303</sup>

France, like Germany, has a long history of progressive social legislation, including maternity leave, which was first introduced into France in 1913.<sup>304</sup> By OECD standards, France also has relatively high levels of affordable child-care, generous family allowances and other benefits designed to help families balance work and family obligations.<sup>305</sup> These allowances and benefits were designed to help parents replace foregone wages after taking time away from work for family responsibilities.<sup>306</sup> France also has relatively high rates of full-time female employment, with evidence indicating childcare was particularly important in this respect.<sup>307</sup>

By 2003, France had introduced universal, paid job-protected maternity leave for women six weeks before birth and ten weeks after the birth of a child, increasing to longer periods for those having more children or multiple births.<sup>308</sup>

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<sup>299</sup>Ibid 89.

<sup>300</sup>Ibid 96.

<sup>301</sup>Ibid 96.

<sup>302</sup>Ibid 96.

<sup>303</sup>Gerardo Meil, 'European Men's Use of Parental Leave and Their Involvement in Child Care and Housework' (2013) 44(5) *Journal of Comparative Family Studies* 557-570, 569.

<sup>304</sup>Rachel Henneck (2003), 'Family Policy in the US, Japan, Italy and France' (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 24.

<sup>305</sup>Ibid 24.

<sup>306</sup>Ibid 25.

<sup>307</sup>Rachel Henneck (2003), 'Family Policy in the US, Japan, Italy and France' (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 25.

<sup>308</sup>Ibid 26.

The benefits paid to the mother were up to 80% of her pre-maternity salary, paid for 16 weeks for the first and second child, and 26 weeks for the birth of a third child.<sup>309</sup> In France, paid parental leave was available to either parent and could be claimed for up to three years following the birth of a child or if two or more children needed home care.<sup>310</sup> Despite the availability of paid leave to either parent, women continued to be the main users of parental leave.<sup>311</sup> France also offered various other cash benefits for families that were means tested and depended on household income and size.<sup>312</sup> France had introduced paid parental leave originally in 1985 to deal with several issues similar to those faced in Germany.<sup>313</sup> Although parental leave is available to both parents, by 2005, statistical information showed that 97% of the users of paid parental leave in France were women.<sup>314</sup> Studies<sup>315</sup> into the effectiveness of parental leave in France following the changes made to the French paid parental leave scheme in France 1994 in the years afterwards suggested there was a modest increase in fertility levels combined with a substantial decrease in the female labour supply of mothers with two or more children, concentrated on French mothers with education and skill levels.<sup>316</sup>

The conclusion drawn from studies of France<sup>317</sup> was that the introduction of paid parental leave in France had a significant negative influence on female labour supply as women took paid leave to care for children.<sup>318</sup> Detailed analysis of France indicated that the French paid parental leave scheme created a strong incentive for mothers (especially those with two or more children) to leave the

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<sup>309</sup>Ibid 26.

<sup>310</sup>Ibid 26.

<sup>311</sup>Ibid 27-8.

<sup>312</sup>Ibid 28.

<sup>313</sup>Julie Moschion, 'Reconciling Work and Family Life: The Effect of Paid French Parental Leave' (2010) 100(99) *Annals of Economics and Statistics*, 217, 217-246.

<sup>314</sup>Ibid 218.

<sup>315</sup>Julie Moschion, 'Reconciling Work and Family Life: The Effect of Paid French Parental Leave' (2010) 99/100 *Annals of Economics and Statistics*, 217, 217-246.

<sup>316</sup>Ibid 220.

<sup>317</sup>Ibid 221; Theron, Olivier and Anne Solaz, 'Labour Market Effects of Parental Leave Policies in OECD Countries,' (OECD Social, Employment and Migration Working Papers No 141, OECD Publishing, December 11, 2012)., 14-17, 19-20.

<sup>318</sup>Julie Moschion, 'Reconciling Work and Family Life: The Effect of Paid French Parental Leave' (2010) 100(99) *Annals of Economics and Statistics*, 217, 221. According to Moschion this was around 4-7%.

workforce to engage in caring responsibilities.<sup>319</sup> These rates of female departure from the labour market in France were often high, with estimates that labour force participation among some categories of women decreased by as much as 17%.<sup>320</sup> The introduction of paid parental leave in France also did not appear to have a large effect on female fertility, with scrutiny not showing a significant change in reproductive behaviour following the introduction of parental leave.<sup>321</sup>

These findings were supported by other studies.<sup>322</sup> French families tended to embrace more conservative social models where the female partner took the bulk of caring and being with the child.<sup>323</sup> French men interviewed in the study indicated their personal preference to keep working and not take paid leave while French women took leave to care for the child.<sup>324</sup> This outcome contrasted with studies of Scandinavian men, who shared parental leave with their partners to spend more time with their children.<sup>325</sup> Paid parental leave, therefore, does not seem to have been as useful in France as in other European nations in achieving its policy goals.<sup>326</sup>

#### **4.5 Central Continental Europe: The Netherlands and Luxembourg**

The Netherlands introduced paid parental leave in 1991.<sup>327</sup> The original 1991 *Netherlands Parental Leave Act* granted an unpaid part-time period of parental leave for a maximum of 6 months to employees who had been employed by their current employer for at least one year for children aged up to four years.<sup>328</sup> The original Netherlands policy was designed to balance the substantial care responsibilities of parents who have children (mainly female workers) with the

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<sup>319</sup>Ibid 227.

<sup>320</sup>Ibid 227.

<sup>321</sup>Ibid 234-5.

<sup>322</sup>Anna-Lee Almqvist, 'Why Swedish Fathers and Few French Fathers Use Paid Parental Leave' (2008) 6(2) *Fathering: A Journal of Practice and Theory*, 192 – 200.

<sup>323</sup>Ibid 196.

<sup>324</sup>Ibid 196.

<sup>325</sup>Ibid 196-7.

<sup>326</sup>Ibid 198-9.

<sup>327</sup>Jaaneke Plantenga and Chantal Remery, 'Parental Leave in the Netherlands' (CESifo DICE Report 2/2009, Utrecht University School of Economics, June 2009), 1.

<sup>328</sup>Ibid 1.

practical needs of the economy and labour market.<sup>329</sup> The Netherlands parental leave entitlement initially structured introduced a part-time employment right requiring an employee to remain active in the labour market for at least 20 hours a week before being eligible.<sup>330</sup> The leave right was initially defined as an individual, non-transferable right designed to favour gender equity.<sup>331</sup> In the Netherlands, parental leave was unpaid in nature due to a policy aim to make Dutch parents assume the financial burdens of raising children themselves and concerns tax increases to fund paid parental leave would undermine the economic success of the private and public sectors in the Netherlands.<sup>332</sup>

Due to some flaws in the scheme, the Netherlands parental leave scheme legislation was reviewed and amended.<sup>333</sup> In 1995-1996, the Netherlands government proposed a set of amendments to the *Parental Leave Act*, including revising the number of hours of parental leave someone could request to take into account the growing use of part-time employment and flexible working arrangements.<sup>334</sup> Employees were also granted the right to request the employer's permission to spread leave hours over a period of up to six months. Employers were obliged to consent unless granting leave would place the business at risk.<sup>335</sup> The parental leave entitlement was extended to parents of children of up to 8 years of age.<sup>336</sup> The amended entitlement remained unpaid.<sup>337</sup> The Netherlands made further amendments to its parental leave entitlement legislation in 2001.<sup>338</sup> The new changes included a right to paid maternity leave for 16 weeks, paid paternity leave for two days, unpaid parental leave for up to 6 months, and included parental leave entitlement provisions for adoptive parents and those with multiple births.<sup>339</sup> In 2005, the legislation was further

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<sup>329</sup>Ibid 1.

<sup>330</sup>Ibid 1.

<sup>331</sup>Ibid 1.

<sup>332</sup>Ibid 1.

<sup>333</sup>Ibid 2.

<sup>334</sup>Ibid 2.

<sup>335</sup>Ibid 2.

<sup>336</sup>Ibid 2.

<sup>337</sup>Ibid 2.

<sup>338</sup>Jaaneke Plantenga and Chantal Remery, 'Parental Leave in the Netherlands' (CESifo DICE Report 2/2009, Utrecht University School of Economics, June 2009), 2.

<sup>339</sup>Ibid 3.



amended to allow all employees to take unpaid long-term leave to care for a terminally ill child or relative.<sup>340</sup>

As in Australia, the Netherlands scheme is designed to constitute a statutory minimum where collective labour agreements or employer plans can ‘fill in the gaps.’<sup>341</sup> There is some flexibility in the Netherlands parental leave law to allow for variation from the statutory entitlements through collective agreement of other methods.<sup>342</sup> The legislation also generally left the question of paid leave to be negotiated between employers and employees utilising collective agreements.<sup>343</sup> The rate of taking up of leave in the Netherlands has been relatively small, due to the mostly unpaid nature of parental leave.<sup>344</sup> Employers in the Netherlands have been reluctant to share or shoulder the costs of granting parental leave, while for employees the replacement payments (if made) are usually too small.<sup>345</sup> But the statistical data from the Netherlands does indicate parental leave has been taken up in greater numbers by both men and women, though at a slow rate of increase.<sup>346</sup> The evidence indicates at least in the Netherlands working families deal with work/family balance issues by using part-time working hours, parental leave entitlements and part-time use of child-care facilities.<sup>347</sup>

More recently, the Netherlands has conducted additional reform of social security laws designed to introduce more flexibility into welfare payments.<sup>348</sup> This new reform has taken the shape of a ‘life-course savings scheme’ from which money earned may be diverted into a ‘special fund’ that can then be used

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<sup>340</sup>Ibid 3.

<sup>341</sup>Ibid 3.

<sup>342</sup>Jaaneke Plantenga and Chantal Remery, ‘Parental Leave in the Netherlands’ (CESifo DICE Report 2/2009, Utrecht University School of Economics, June 2009), 3.

<sup>343</sup>Ibid 3.

<sup>344</sup>Ibid 3.

<sup>345</sup>Ibid 3.

<sup>346</sup>Ibid 3.

<sup>347</sup>Ibid 3.

<sup>348</sup>Jaaneke Plantenga and Chantal Remery, ‘Parental Leave in the Netherlands’ (CESifo DICE Report 2/2009, Utrecht University School of Economics, June 2009), 4.

by an employee for non-labour force participation activities (such as study and having children).<sup>349</sup>

By 2017,<sup>350</sup> the Netherlands framework on parental and maternity leave had the following structure:<sup>351</sup>

- a) A mandatory period of paid maternity leave of up to 16 weeks at 100% of earnings up to the maximum daily payment for a sickness benefit (194.85 Euro) for all female employees;
- b) Self-employed women are entitled to 16 weeks of pay up to 100% of the statutory minimum wage (1469.40 Euro a month pre-tax);
- c) Two days of paid paternity leave at 100% of earnings;
- d) Unpaid, non-transferable parental leave for employees who have worked for at least one year for the same employer for up to 26 weeks in a six month period;
- e) Unpaid, part-time parental leave taken on another basis for up to 12 months;
- f) Carer's leave; and
- g) Flexible working arrangements.

However, compared to other OECD European nations, the Netherlands lags behind that of many European nations in the effectiveness of its parental leave system and is in need of further reform.<sup>352</sup>

The small central European country of Luxembourg introduced parental leave in 1999 as a policy to promote equality between women and men.<sup>353</sup> Luxembourg had a relatively low rate of female participation in the labour market and

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<sup>349</sup>Ibid 4.

<sup>350</sup>Expatica, *Having a Baby in the Netherlands*, (1<sup>st</sup> January 2018), Expatica, [https://www.expatica.com/nl/healthcare/Having-a-baby-in-the-Netherlands\\_107665.html](https://www.expatica.com/nl/healthcare/Having-a-baby-in-the-Netherlands_107665.html)

<sup>351</sup>Lauren Den Dulk, *The Netherlands*, (1<sup>st</sup> April 2013), Leave Network, [http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2013/Netherlands.FINALcitation.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2013/Netherlands.FINALcitation.pdf)

<sup>352</sup>Jaaneke Plantenga and Chantal Remery, 'Parental Leave in the Netherlands' (CESifo DICE Report 2/2009, Utrecht University School of Economics, June 2009), 5.

<sup>353</sup>Marie Valentova 'Anticipated Take up of Parental Leave in Luxembourg' (2011) 10(2) *Social Policy* 123, 123-38.

workforce compared to other OECD nations due to caring responsibilities.<sup>354</sup> The Luxembourg government introduced paid parental leave to encourage women to re-enter the workforce after having children.<sup>355</sup> Traditionally the roles of gender and work in Luxembourg were structured along the ‘male breadwinner’ model, supported by a corporatist state.<sup>356</sup> Luxembourg government policy traditionally favoured the heterosexual married family and traditional gender roles because of the majority national religion (Roman Catholicism)<sup>357</sup> and related social and political conservatism.<sup>358</sup> Tax benefits and family payments in Luxembourg are directed towards married couples headed by a male householder, with family payments being among the highest in the EU.<sup>359</sup> Luxembourg had one of the lowest family service payments and subsidised childcare levels in the EU.<sup>360</sup>

Labour force participation data indicated that Luxembourg had a serious problem with female rates of labour force participation employment, with up to 30% of women aged 25-55 years being inactive in the job market in 2004.<sup>361</sup> Even with recent improvements, this figure remains low compared to the EU and OECD.<sup>362</sup> Under pressure from the EU to implement EU directives<sup>363</sup> on family and parental leave, Luxembourg moved from the corporatist ‘male breadwinner’ model to a more progressive social model with paid parental and family leave.<sup>364</sup> Luxembourg introduced its universal scheme of parental leave in 1999.<sup>365</sup>

The Luxembourg parental leave scheme allowed parents to take parental leave when the period of maternity leave ended.<sup>366</sup> Both parents were eligible to take parental leave, provided one took the parental leave period immediately after the

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<sup>354</sup>Ibid 123.

<sup>355</sup>Ibid 125.

<sup>356</sup>Ibid 125.

<sup>357</sup>Ibid 125-6.

<sup>358</sup>Ibid 125.

<sup>359</sup>Ibid 125.

<sup>360</sup>Ibid 125.

<sup>361</sup>Ibid 126.

<sup>362</sup>Ibid 126.

<sup>363</sup>Ibid 126.

<sup>364</sup>Marie Valentova, ‘Anticipated Take up of Parental Leave in Luxembourg’ (2011) 10(2) *Social Policy* 123, 128.

<sup>365</sup>Ibid 128.

<sup>366</sup>Ibid 129.

maternity leave period finished.<sup>367</sup> The parental leave could be taken up to six months full-time or twelve-months part-time, with the rate of payment being a monthly lump sum equivalent to the Luxembourg minimum wage.<sup>368</sup> When the parental leave entitlement is taken full-time, the employment contract between the parent and the employer is suspended, while part-time leave requires the consent of the company and a 50% reduction of working hours.<sup>369</sup> The parental leave entitlement focused on the parent who engages in the bulk of care duties related to the child, who can be aged up to five years.<sup>370</sup>

The data surveyed indicated about 60% of parents took up the six-month leave option, and 40% took up the 12-month parental leave option.<sup>371</sup> The vast majority of people taking parental leave were women, with only about 19% of men taking up parental leave.<sup>372</sup> The reason for low-take up of parental leave among women seemed to be entrenched traditional gender stereotypes, particularly the notion that the woman's primary role is to be the main caregiver, while the man's role in the household is that of the primary income earner.<sup>373</sup> This fact means it is less likely Luxembourg mothers will remain in the workforce after birth, though younger Luxembourg women aged 18-35 had more liberal views in this area.<sup>374</sup>

Statistical information indicated that around 65% of Luxembourg women planning to have children would take parental leave.<sup>375</sup> Of the women surveyed who expected to take leave, about 61% planned to take at least of six months of full-time leave, and 39% would prefer to take the part-time leave of 12 months.<sup>376</sup> Also most Luxembourg women in the workforce (86%) planned to return to employment after taking maternity leave.<sup>377</sup> Around 41% of women also wanted to return to the same job after coming back from leave, and 51%

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<sup>367</sup>Ibid 129.

<sup>368</sup>Ibid 129.

<sup>369</sup>Ibid 129.

<sup>370</sup>Ibid 129.

<sup>371</sup>Ibid 129.

<sup>372</sup>Ibid 129.

<sup>373</sup>Ibid 129.

<sup>374</sup>Ibid 129-30.

<sup>375</sup>Ibid 133.

<sup>376</sup>Ibid 133.

<sup>377</sup>Ibid 133.

wanted part-time hours or flexible work when returning to work.<sup>378</sup> Only a small percentage (8%) wished to leave the workforce.<sup>379</sup> Women who did not plan to take parental leave gave several reasons, but a majority still indicated a strong desire to return to the workforce in some capacity.<sup>380</sup>

The study by Valentova also indicated that younger Luxembourg women wanted to retain an attachment to the labour market after having children and strongly favoured paid parental leave.<sup>381</sup> Only a small percentage of women surveyed in Luxembourg indicated they desired to leave the labour market to care for children full-time.<sup>382</sup> The data indicated parental leave played a strong incentive for younger women to remain attached to the labour market in Luxembourg.<sup>383</sup>

#### **4.6 Southern Europe (Italy, Greece, Spain and Portugal)**

The social dimensions of welfare policies such as parental leave are somewhat different for the Southern European nations of Italy, Greece, Spain and Portugal as compared to the rest of Europe.<sup>384</sup> These countries entered the 20<sup>th</sup> century with relatively under-developed economies with little industry and powerful family and religious institutions that helped insulate them from the influence and effects of capitalism and industrialisation.<sup>385</sup> Despite disruptions due to political instability and conflict in the first half of the 20<sup>th</sup> century, all these nations (especially Italy) enjoyed robust economic growth and living standards in the post-WWII era.<sup>386</sup> The economies of these nations ran into a number of problems from the 1970s onward.<sup>387</sup> The labour markets of these countries tended to be rigid and divided between ‘insiders’ with stable jobs (primarily men working in manufacturing and for the public service) while women, migrants and young people tended to be concentrated into part-time and insecure

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<sup>378</sup>Ibid 133.

<sup>379</sup>Ibid 133.

<sup>380</sup>Ibid 135.

<sup>381</sup>Marie Valentova, ‘Anticipated Take up of Parental Leave in Luxembourg’ (2011) 10(2) *Social Policy* 123, 135.

<sup>382</sup> Ibid 135.

<sup>383</sup> Ibid 135.

<sup>384</sup>Francis G Castles et al. (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010).

<sup>385</sup>Ibid 618.

<sup>386</sup>Ibid 620.

<sup>387</sup>Ibid 620.

employment.<sup>388</sup> The barriers against women entering the workforce in Southern Europe were reinforced with low female participation rates in nations such as Italy that were among the lowest in Europe and worsening with the economic crises and neoliberal reforms in the 1980s causing high levels of structural unemployment.<sup>389</sup>

As with the other European countries surveyed earlier,<sup>390</sup> the Southern European states constructed welfare systems to deal with the problems arising from capitalism and the industrial revolution in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries including state-funded pensions and insurance for injured workers.<sup>391</sup> Despite advances in areas such as universal healthcare, inequality remained strong, particularly between those in ‘secure’ employment and those outside this framework.<sup>392</sup> In the Southern European nations, government intervention in society has been relatively weak while families, churches or private charities have been expected to fill in the gaps when it comes to caring and parenting.<sup>393</sup> The Southern European states have encouraged policies that strengthened and reinforced traditional gender roles and norms, especially by encouraging women to stay out of the workforce and undertake caring duties while the husband worked.<sup>394</sup> In the 1990s and early 2000s, the Southern European nations were forced to undertake a series of harsh economic reforms to deal with internal economic crises, including those relating to public spending, to implement EU directives on economic and social policy.<sup>395</sup> These policies were also directed at addressing the dramatically low fertility rate and marginalisation of women from the workforce.<sup>396</sup> These policies have had different effects in the different countries with varying levels of success.<sup>397</sup>

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<sup>388</sup>Ibid 620.

<sup>389</sup>Ibid 620.

<sup>390</sup>See sections 4.3-4.5 of this Chapter.

<sup>391</sup>Ibid 620.

<sup>392</sup>Ibid 621.

<sup>393</sup>Ibid 622.

<sup>394</sup>Francis G Castles et al, (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 622-3.

<sup>395</sup>Ibid 624-5.

<sup>396</sup>Ibid 624-5.

<sup>397</sup>Ibid 627-9 and see also country by country analysis below.

Reflective of the Southern European social situation, parental leave in Italy has traditionally focused on the simple but strong tradition of the family as being the normative caregiver in Southern European society and culture.<sup>398</sup> Italian women have relatively low rates of workforce participation and are expected to leave the workforce when they have a child.<sup>399</sup> State-supported childcare availability was inadequate and parental leave periods (while long) was poorly paid.<sup>400</sup> The employment levels of Italian women has consistently been well-below the EU average, and there is substantial evidence<sup>401</sup> indicating Italian women face a high ‘market penalty’ for choosing to have children.<sup>402</sup> These ‘market penalties’ include reduced wages, reduced opportunities for advancement in careers, discrimination and other problems.<sup>403</sup> Italy also has one of the lowest rates of birth in the EU, with replacement rates falling to 1.17 children per woman in the mid-1990s<sup>404</sup> and increasing to only 1.41 in 2008.<sup>405</sup>

In Italy, maternity leave is compulsory for five months after birth.<sup>406</sup> The maternity payment is 80% of the mother’s pre-maternity earnings.<sup>407</sup> At the end of the maternity leave period, either parent can access up to 6 months of paid

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<sup>398</sup>Rachel Henneck (2003), ‘Family Policy in the US, Japan, Italy and France’ (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 29.

<sup>399</sup>Ibid 29. See also Lia Pacelli, Silvia Pasqua and Claudia Villosio, ‘Labour Market Penalties for Mothers in Italy’ (2011) 34(4) *Journal of Labour Research* 408, 408-432.

<sup>400</sup>Rachel Henneck (2003), ‘Family Policy in the US, Japan, Italy and France’ (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 29.

<sup>401</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, ‘Labour Market Penalties for Mothers in Italy’ (2011) 34(4) *Journal of Labour Research* 408, 408-412; Francesca Modena and Fabio Sanatini, ‘I would if I Could: Precarious Employment and Childbearing Intentions in Italy’ (2012) 10(1) *Review of Economics of the Household* 77, 77-97.

<sup>402</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, ‘Labour Market Penalties for Mothers in Italy’ (2011) 34(4) *Journal of Labour Research* 408, 408-412.

<sup>403</sup>Ibid 410-3.

<sup>404</sup>Rachel Henneck (2003), ‘Family Policy in the US, Japan, Italy and France’ (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 30. Henneck attributes this to a slump in child care benefits for working women.

<sup>405</sup> The World Bank, *Data, Fertility rate, total (births per woman) Italy* <<https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=IT>>.

<sup>406</sup>Rachel Henneck (2003), ‘Family Policy in the US, Japan, Italy and France’ (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 30.

<sup>407</sup>Ibid 30.

parental leave at a rate of 30% of their salary for a child aged up to 8 years old.<sup>408</sup> Childcare coverage for children aged 0-2 years of age is meagre compared to the EU average,<sup>409</sup> although the situation improves for older children.<sup>410</sup> The monetary sum payable as parental leave or in childcare benefits is relatively small, being contingent on employment and funded by the employer.<sup>411</sup>

Flexible working hours are an important way Italian women have used to balance work and family commitments.<sup>412</sup> Since 2000, part-time work contracts in Italy were deregulated, and there is evidence many Italian women use this option to cope with family and work responsibility.<sup>413</sup> However, the conditions available under these work contracts are often biased against the employee and can be changed by the employer without consent at short notice, causing difficulties for gender equity and fairness in employment conditions.<sup>414</sup> Some studies done in Italy suggests that part-time jobs do help Italian women, but the benefits from these part-time jobs are offset by insecure part-time or irregular employment arrangements.<sup>415</sup>

In Spain, a country with a similar historical background and culture to Italy, parental leave arrangements are slightly different.<sup>416</sup> As in Italy, Spain is a nation with a relatively low female employment rate combined with a low fertility rate.<sup>417</sup> In comparison to Italy, Spain has a somewhat more generous parental leave system.<sup>418</sup> In Spain, employees of both sexes are entitled to

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<sup>408</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, 'Labour Market Penalties for Mothers in Italy' (2011) 34(4) *Journal of Labour Research* 408, 413-4. The rate of take up among men is very low in Italy – see Lucia Pacelli et al at 413.

<sup>409</sup>Ibid 414.

<sup>410</sup>Ibid 414.

<sup>411</sup>Rachel Henneck (2003), 'Family Policy in the US, Japan, Italy and France' (Council for Contemporary Families Briefing Paper No 141, US Department of Education, 5<sup>th</sup> March 2003), 31.

<sup>412</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, 'Labour Market Penalties for Mothers in Italy' (2011) 34(4) *Journal of Labour Research* 408, 415.

<sup>413</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, 'Labour Market Penalties for Mothers in Italy' (2011) 34(4) *Journal of Labour Research* 408, 415.

<sup>414</sup>Ibid 415-6.

<sup>415</sup>Lia Pacelli, Silvia Pasqua and Claudia Villosio, 'Labour Market Penalties for Mothers in Italy' (2011) 34(4) *Journal of Labour Research* 408, 428.

<sup>416</sup>Irene Lapuerta, Pau Baizan and Maria Gonzalez, 'Individual and Institutional Constraints: An Analysis of Parental Leave Use and Duration in Spain' (2011) 30(2) *Population Policy and Research Review* 185, 185-210.

<sup>417</sup>Ibid 187.

<sup>418</sup>See following discussion below.



parental leave paid at full wage replacement level.<sup>419</sup> In the case of women, the paid parental leave period is up to 16 weeks, and for men, it is 13 days.<sup>420</sup> Both sexes are also entitled to unpaid parental leave for up to one year for children aged three years and over.<sup>421</sup>

Parental leave eligibility in Spain is determined by criteria such as employment history, status and level of social security contributions from employee wages.<sup>422</sup> The self-employed are not eligible apart from certain exceptions.<sup>423</sup> Spanish workers also have the right to return to their position after the duration of leave has expired.<sup>424</sup> The rate of take-up of leave in Spain is relatively small, with one study indicating only about 3% of women and 0.1% of men are willing to take paid or unpaid parental leave.<sup>425</sup> An interesting parental leave reform in Spain is the introduction of paid leave for men.<sup>426</sup> Traditionally as with other Southern European countries, Spanish society was configured around the male breadwinner model.<sup>427</sup> In the last 30 years however, Spain has moved towards a more egalitarian social model where men were encouraged to take part in caring for their children, rather than leaving the care burden entirely on the mother.<sup>428</sup> More Spanish women have also entered the workforce, leading to a greater need for couples to balance work and family responsibilities.<sup>429</sup> Spanish fathers who are employed are entitled to 15 days of fully paid paternity leave and can take transferable maternity leave for up to 10 weeks.<sup>430</sup> While the take-up of leave among Spanish fathers appeared to be quite small, more recent

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<sup>419</sup>Irene Lapuerta, Pau Baizan and Maria Gonzalez, 'Individual and Institutional Constraints: An Analysis of Parental Leave Use and Duration in Spain' (2011) 30(2) *Population Policy and Research Review* 185, 187-88.

<sup>420</sup>Ibid 188.

<sup>421</sup>Ibid 188.

<sup>422</sup>Ibid 187-88.

<sup>423</sup>Ibid 188.

<sup>424</sup>Ibid 188.

<sup>425</sup>Ibid 190.

<sup>426</sup>P Romero-Balsas et al, 'Decision-Making Factors within Paternity and Parental Leaves: Why Spanish Fathers Take Time Off from Work' (2013) 20(6) *Gender Work and Organisation* 678, 678-691.

<sup>427</sup>Ibid 679.

<sup>428</sup>Ibid 679-680.

<sup>429</sup>P Romero-Balsas, et al, 'Decision-Making Factors within Paternity and Parental Leaves: Why Spanish Fathers Take Time Off from Work' (2013) 20(6) *Gender Work and Organisation* 678, 680.

<sup>430</sup>Ibid 680. Spanish fathers can also take 'lactation breaks' for children aged up to nine months.

information seems to indicate take up rates of parental leave by Spanish fathers has increased substantially.<sup>431</sup>

Another Spanish study<sup>432</sup> demonstrated that Spanish men were willing to take parental and paternity leave provided certain conditions were satisfied.<sup>433</sup> These included stable employment, access to facilities for reconciling work and family obligations, and a partner who was also in paid employment.<sup>434</sup> The male workers who took parental leave tended to be those on a permanent employment contract, those working in the public sector, those living in regions encouraging parents to take leave, and those with working spouses.<sup>435</sup> While men and women could access up to three years of unpaid parental leave, the evidence in the study did indicate parents preferred maternity leave to parental leave, and only a small percentage of men traditionally took the parental leave entitlement.<sup>436</sup>

The male use of paternity leave in Spain measurably increased by a significant amount with reforms undertaken in the 2000s.<sup>437</sup> However, the take up of leave by Spanish men and women declined during the 2008 global financial crisis and its aftermath, which hit Spain's economy extremely hard and led to a massive increase in unemployment.<sup>438</sup> Also, take-up of paternity leave tended to be more common among better-educated men with working partners, although men in senior executive or management positions showed a reluctance to take leave because of potential 'opportunity costs' in lost workplace standing or promotional opportunities.<sup>439</sup> Men and women in temporary contracts (which made up about 25% of all employment contracts in Spain) were also reluctant to take leave because of the insecurity of employment.<sup>440</sup> Spain therefore still has some way to go to balancing the caring gender roles of men and women with

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<sup>431</sup> Ibid 680.

<sup>432</sup> Escot, Lorenzo, Jose Andres Fernandez-Cornejo and Carlos Poza, 'Father's Use of Childbirth Leave in Spain: The Effects of the 13-Day Paternity Leave' (2014) 33(3) *Population Research and Policy Review* 419, 419-453.

<sup>433</sup> Ibid.

<sup>434</sup> Ibid 419.

<sup>435</sup> Ibid 421.

<sup>436</sup> Ibid 424.

<sup>437</sup> Ibid 424. These changes included the introduction of an Australian style 'baby bonus.'

<sup>438</sup> Ibid 424-5.

<sup>439</sup> Ibid 428-30.

<sup>440</sup> Ibid 442-444.

their work responsibilities as well as having to deal with depression era levels of unemployment.<sup>441</sup>

In Greece, maternity leave and other coverage exist for parents with children.<sup>442</sup> Women's leave entitlements in Greece vary according to the classification given to the employed woman under Greek law, which include women working in the public service, those working for a private employer with social security insurance, those working in the informal economy, and women working in agriculture.<sup>443</sup> Women working in the Greek public sector are entitled to paid maternity leave up to two months prior and three months after their birth, with further entitlements.<sup>444</sup> Those working for a private enterprise can claim paid maternity leave eight weeks before and nine weeks following birth, with unpaid parental leave available to both parents for three to five months after birth. Those working in the so called 'informal' economic sectors are not eligible for any benefit, while women working in agriculture are entitled to maternity benefits.<sup>445</sup>

In Greece, pregnant women are protected from employment discrimination and being dismissed from employment because of pregnancy.<sup>446</sup> Some other social protections have also been extended to single parent households headed by women.<sup>447</sup> The Greek government also extended bonuses to large families due to concerns about low fertility levels.<sup>448</sup> However, Greece has reduced social benefits after the 2008 global financial crisis and the aftermath.<sup>449</sup> As with Spain, Greece and Italy, Portugal developed slowly from a conservative, agrarian society to a modern economy only towards the latter part of the 20<sup>th</sup> century.<sup>450</sup> Portuguese society was influenced by the ideals of the male-led

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<sup>441</sup>Ibid 450-1.

<sup>442</sup>N Salakos et al 'Protection of Maternity in Greece and the EU: A Comparative Analysis' (2007) 18(1) *Journal of Reproduction and Contraception* 49, 49-60.

<sup>443</sup>Ibid 52-3.

<sup>444</sup>Ibid 52-3.

<sup>445</sup>N Salakos et al (2007), 'Protection of Maternity in Greece and the EU: A Comparative Analysis' (2007) 18(1) *Journal of Reproduction and Contraception* 49, 53.

<sup>446</sup>Ibid 53.

<sup>447</sup>Ibid 56.

<sup>448</sup>Ibid 57.

<sup>449</sup>M Matsaganis, 'Social Policy in Hard Times – The Case of Greece' (2012) 32(3) *Critical Social Policy* 406, 406-421.

<sup>450</sup>I Tavora and J Rubyer, 'Female Employment, Labour Market Institutions and Gender Culture in Portugal' (2013) 19(3) *European Journal of Industrial Relations* 221, 221-237.

household and the heterosexual nuclear family, reinforced by a conservative right-wing government and by a conservative Portuguese Catholic Church for most of the 20<sup>th</sup> century.<sup>451</sup> Later in Portugal's history, high levels of emigration and economic imperatives forced Portuguese women into the workforce in larger numbers.<sup>452</sup>

Portuguese women have a relatively high employment rate, though many Portuguese women are relatively less well educated and poorer due to working in low-skilled jobs for low wages.<sup>453</sup> Despite higher levels of poverty and inequality, Portuguese women usually have to work to contribute to the family budget as male wages in Portugal remain relatively low compared to the EU and OECD averages.<sup>454</sup> Studies also show women in Portugal face discrimination, lower wages, concentration in lower-status work and other gender issues shared with the other Southern European nations.<sup>455</sup>

The track of women's employment and balance of work/family responsibilities in Portugal was initially similar to that of more egalitarian welfare states like Finland.<sup>456</sup> Evidence from studies<sup>457</sup> indicates that the influence of motherhood on work is not substantial, though as with other southern European nations, Portuguese women tend to be gender-segregated into insecure and lower paid forms of work, informal work, or are unemployed.<sup>458</sup> In the Portuguese situation, changes in society during the 1970s acted as a strong incentive for women to enter the workforce and for families to move away from the 'male breadwinner' model of the household.<sup>459</sup>

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<sup>451</sup>Ibid 223-5.

<sup>452</sup>Ibid 224-5.

<sup>453</sup>I. Tavora, and J. Rubyer, 'Female Employment, Labour Market Institutions and Gender Culture in Portugal' (2013) 19(3) *European Journal of Industrial Relations* 221, 221-237.

<sup>454</sup>Ibid 225-6.

<sup>455</sup>Ibid 226.

<sup>456</sup>I Tavora, 'The Southern European Social Model: Familialism and the High Rates of Female Employment in Portugal' (2012) 22(1) *Journal of European Social Policy* 63, 63-76.

<sup>457</sup>Ibid. See however Sevil Sumer et al, (2015), 'Becoming Working Mothers: Reconciling Work and Family at Three Particular Workplaces in Norway, the UK and Portugal' (2008) 11(4) *Work, Community and Family* 365, 365-384, which gives a bleak insight into the difficulties working women in Portugal face in trying to reconcile work and family responsibility.

<sup>458</sup>Ibid 65.

<sup>459</sup>I Tavora, 'The Southern European Social Model: Familialism and the High Rates of Female Employment in Portugal' (2012) 22(1) *Journal of European Social Policy* 63, 63-76.

Traditionally the Portuguese family has also provided ‘unpaid’ social services (especially relating to care obligations) as opposed to the state in Portugal.<sup>460</sup> Most parenting care and domestic work in Portuguese society is done by women and is also unpaid.<sup>461</sup> Portugal does have a ‘child payment’ aimed at providing income support to low-income families with children, which increases with the size of the household.<sup>462</sup> Portugal also has near universal childcare for about 80% of children under three years of age.<sup>463</sup>

Portugal has also amended its parental leave legislation to reflect a dual-earner rather than male-breadwinner model of work and family.<sup>464</sup> Paid maternity leave is available for 17 weeks at 100% of pre-maternity salary or 80% of pre-maternity salary for 21 weeks.<sup>465</sup> Unpaid parental leave is available in Portugal to both parents full-time for three months or part-time for 12 months, though the father can take up to 15 days of this leave as paid paternity leave.<sup>466</sup> Workers in Portugal are also entitled to an additional benefit of sick child leave (for children aged up to 10 years) up to a maximum of 30 days per year.<sup>467</sup> Despite progress in social legislation and female employment, Portugal, as with other Southern European nations however, Portugal tends to lag in the economic and social indicators of gender equality.<sup>468</sup>

#### **4.7 The United Kingdom and the Republic of Ireland**

Along with the Nordic nations and the continental European nations, the UK was one of the first advanced European countries to develop a comprehensive welfare state,<sup>469</sup> though the UK developed its welfare system on the policies of classical liberalism.<sup>470</sup> The UK, as with Australia and other English speaking nations,

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<sup>460</sup>Ibid 66.

<sup>461</sup>Ibid 66.

<sup>462</sup>Ibid 69.

<sup>463</sup>Ibid 70.

<sup>464</sup>Ibid 71.

<sup>465</sup>Ibid 71.

<sup>466</sup>Ibid 71.

<sup>467</sup>Ibid 71.

<sup>468</sup>Ibid 74.

<sup>469</sup>Francis G. Castles (2010), ‘The English Speaking Countries’, in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 630-641.

<sup>470</sup>Francis G. Castles (2010), ‘The English Speaking Countries’, in Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010), 630-641. See also

also has a large gender-based pay gap as well as other forms of gender inequality, with UK women less likely than men to be in well-paid jobs and to be promoted to senior positions in their organisations.<sup>471</sup>

The UK government, in response to lobbying from women's groups and the feminist movement, introduced paid maternity leave in 1973.<sup>472</sup> In the original 1973 parental leave legislation, eligible women could be paid a 'maternity allowance' at a statutory rate for up to 18 weeks, starting from 11 weeks before birth.<sup>473</sup> After the 1973 legislation, new laws were introduced in the UK in 1975 that extended the leave period to 29 weeks and gave the right to return to work with the original employer.<sup>474</sup> In more recent times, the UK extended parental leave times to 52 weeks, with women being eligible for 'statutory maternity pay' from their employer if they have worked for the same employer for 26 weeks or more.<sup>475</sup> Six weeks of this parental leave is paid at 90% of the pre-leave earnings, 33 weeks are paid at the statutory level of 135.43 pounds per week (or 90% of salary, whichever is lower) and the remaining 13 weeks is unpaid.<sup>476</sup> UK fathers are entitled to one or two consecutive weeks of paternity leave for each pregnancy, and the father has the right to paid paternity leave where he has worked for the same employer for at least 26 weeks by the end of the 15<sup>th</sup> week before the expected birth date.<sup>477</sup>

Paternity leave rights were extended in the UK in 2010 to allow fathers of children born on or after 3 April 2011 the opportunity to take up to 26 weeks of paternity leave in addition to the previous two weeks give under the former legislation.<sup>478</sup> The additional entitlement was subject to the following conditions

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Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Cambridge University Press, 1990), 2-38.

<sup>471</sup>Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9(12) *The Equal Rights Review* 53, 52-65.

<sup>472</sup>Ibid 54.

<sup>473</sup>Ibid 54.

<sup>474</sup>Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9(12) *The Equal Rights Review* 53, 54.

<sup>475</sup>Ibid 54.

<sup>476</sup>Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9(12) *The Equal Rights Review* 53, 54.

<sup>477</sup>Ibid 55.

<sup>478</sup>Ibid 55.

being fulfilled: (a) the claimant had been employed for at least 26 weeks by the 15<sup>th</sup> week before birth, (b) the child's mother was entitled to paid maternity leave, and (c) the child's mother had returned to work.<sup>479</sup> During the 26 weeks paternity leave period, UK men can claim 'additional paternity pay' payable at the same rate as the maternity leave payment.<sup>480</sup> Under the UK parental leave scheme, both parents also have the right to use an additional 13 weeks of parental leave on an unpaid basis before the child reaches five years of age.<sup>481</sup> The eligible parent must satisfy certain conditions for this entitlement, including having worked continuously for one year.<sup>482</sup> The UK leave policy has not been without criticism from certain quarters.<sup>483</sup> A problem that has been raised<sup>484</sup> is the 'differential treatment' of men and women under the existing laws, which encourage a gender imbalance in favour of women relating to parenting roles and men as the primary income earners.<sup>485</sup> It has also been argued the policy relating to parental leave and 'differential treatment' on the grounds of gender reflects entrenched stereotypes about gender roles and responsibilities such as the 'male breadwinner' model, which is a holdover from Victorian times.<sup>486</sup> Evidence from studies in the UK<sup>487</sup> also indicates the structure of the UK leave arrangements often forces women in the UK to take very long periods of time off work, leading to reduced professional experience and indirect losses in lifetime earnings, career opportunities and promotions.<sup>488</sup> In 2015, the UK to introduced 'shareable' parental leave for men on a more equal footing with

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<sup>479</sup>Ibid 55.

<sup>480</sup>Ibid 55. This payment is only available during the period that the mother would have been entitled to paid maternity leave, had she not returned to work. See Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9(12) *The Equal Rights Review* 53, at 55.

<sup>481</sup>Ibid 56.

<sup>482</sup>Ibid 56.

<sup>483</sup>Vanessa Long, 'Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination' (2012) 9(12) *The Equal Rights Review* 53, 56.

<sup>484</sup>Jamie Atkinson, 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co-parents?' (2017) 13(3) *International Law in Context* 356-368, 357-367.

<sup>485</sup>Ibid 56.

<sup>486</sup>Ibid 58.

<sup>487</sup>Jamie Atkinson, 'Shared Parental Leave in the UK: Can It Advance Gender Equality by Changing Fathers into Co-parents?' (2017) 13(3) *International Law in Context* 356-368, 357-367.

<sup>488</sup>Ibid 59. Long periods of time off work is generally regarded as detrimental by social researchers. See discussion below.

women, to deal with perceived inequities in existing leave arrangements.<sup>489</sup> There were strong reservations though from both men and their employers about the proposed extension of parental leave,<sup>490</sup> and consequent follow-up research of the effects of the reform showed the ‘male breadwinner’ ideal was still influential in UK workplaces for male and female workers despite the UK reforms.<sup>491</sup>

In Ireland, under the *Parental Leave Acts 1996-2006*, either parent is entitled to take up to 14 weeks of unpaid parental leave for the birth of a child.<sup>492</sup> This leave must be taken before the child turns eight years of age.<sup>493</sup> An employee is eligible if they have worked for the same employer for a continuous period of 12 months.<sup>494</sup> An employee taking leave has their rights protected, including the right to return to the same job, though not the right to receive remuneration.<sup>495</sup> The employee planning to take leave must inform their employer at least six weeks before they intend to take leave.<sup>496</sup> An employer is entitled to refuse the request for leave if they believe the employee is not eligible but must do so in writing and give the employee written reasons for doing so.<sup>497</sup>

The Irish policy grew out of a social and political context dominated by private institutions such as the Catholic Church, which engaged in the bulk of poor relief and was also the major provider of education, healthcare and social services in Ireland until relatively recently.<sup>498</sup> These included education, care for the sick,

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<sup>489</sup>Gayle Kaufmann and Anna-Lena Almqvist, ‘The Role of Partners and Workplaces in British and Swedish Men’s Parental Leave Decisions’ (2017) 20(5) *Masculinities* 533-551, 534-537.

<sup>490</sup>Luke Heighton, *Most Fathers Don’t Want Shared Parental Leave*, (1<sup>st</sup> December 2014), Telegraph Online, <<http://www.telegraph.co.uk/men/relationships/fatherhood/11264347/Most-fathers-dont-want-shared-parental-leave.html>>

<sup>491</sup>Gayle Kaufmann and Anna-Lena Almqvist, ‘The Role of Partners and Workplaces in British and Swedish Men’s Parental Leave Decisions’ (2017) 20(5) *Masculinities* 533-551, 539-547.

<sup>492</sup>Workplace Relations Ireland, *Your Parental Leave Rights Explained*, (28 March 2018), <[http://www.workplacerelations.ie/en/Publications\\_Forms/Guide\\_to\\_the\\_Parental\\_Leave\\_Act\\_s.pdf](http://www.workplacerelations.ie/en/Publications_Forms/Guide_to_the_Parental_Leave_Act_s.pdf)>, 4.

<sup>493</sup>Ibid 4.

<sup>494</sup>Ibid 4.

<sup>495</sup>Ibid 7-8.

<sup>496</sup>Workplace Relations Ireland, *Your Parental Leave Rights Explained*, (28 March 2018), <[http://www.workplacerelations.ie/en/Publications\\_Forms/Guide\\_to\\_the\\_Parental\\_Leave\\_Act\\_s.pdf](http://www.workplacerelations.ie/en/Publications_Forms/Guide_to_the_Parental_Leave_Act_s.pdf)>, 8.

<sup>497</sup>Ibid 12.

<sup>498</sup>P Kennedy and H Einasto, ‘Changes and Continuities in Maternity Policies: A comparison of maternity legislation in Ireland and Estonia’ (2011) 12(2) *European Societies* 187-207.



poor relief, hospitals, adoption and childcare facilities and other areas such as social housing and workhouses for the unemployed or marginalised in Irish society.<sup>499</sup> Irish society, like most conservative European countries, also focused heavily on the male breadwinner model of the family with the male householder contributing to the finances while Irish women generally took care of domestic tasks such as housework and child-rearing.<sup>500</sup>

Maternity payments were introduced into Ireland in 1911 in the context of general economic and social backwardness, poverty, and high rates of infant mortality which made Ireland one of the poorest places in Europe.<sup>501</sup> Initially only available to an insured male labourer or his wife, in the 1950s this benefit was extended to a period of 6 weeks during the ‘confinement’ period of pregnancy.<sup>502</sup> The Irish government in 1973 introduced a new flat maternity leave payment available to women who previously were expected to withdraw from the workforce when they married.<sup>503</sup> Further changes were made in the 1980s when Ireland joined the EU.<sup>504</sup> As at 2017, in line with EU guidelines, the Republic of Ireland offers both parents up to 18 weeks of paid parental leave per child up to the age of 16.<sup>505</sup> In 2016, the Republic of Ireland also introduced by legislation an entitlement for eligible fathers or partners to claim up to two weeks of paternity leave, which may or may not be paid depending on the circumstances and eligibility of the claimant.<sup>506</sup>

#### **4.8 Conclusion**

Chapter 4 of this thesis has provided a review of international labour law standards relating to paid parental leave, particularly drawing on ILO standards, international treaties and legal materials. It has also examined the applicable standards in the European Union and Chapter 4 of this thesis also discussed key

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<sup>499</sup>Ibid 5.1.

<sup>500</sup>Ibid 5.1.

<sup>501</sup>Ibid 8.

<sup>502</sup>Ibid 8.

<sup>503</sup>Ibid 8.

<sup>504</sup>Ibid 9.2.

<sup>505</sup>Ibid 2.

<sup>506</sup>Workplace Relations Ireland, *Your Parental Leave Rights Explained (28 March 2018)*, <[http://www.workplacerelations.ie/en/Publications\\_Forms/Guide\\_to\\_the\\_Parental\\_Leave\\_Act\\_s.pdf](http://www.workplacerelations.ie/en/Publications_Forms/Guide_to_the_Parental_Leave_Act_s.pdf)>, 4.

features of the maternity and parental leave schemes of different European countries, including the Nordic states, countries in Western and Central Continental Europe, Southern Europe, as well as the UK and Ireland. The discussions in Chapter 4 of the thesis has showed that the selected European countries in the OECD discussed above have comprehensive leave schemes in place for working parents and active measures to discourage gender or parental responsibility-based discrimination in the workplace.

To adapt to these changes, three primary strategies were followed: France and Germany (and other nations) aimed to reduce the supply of labour, particularly ‘irregular’ forms of work (women, immigrants, the unskilled and young) in favour of ‘regular’ labour in the shape of highly-paid, skilled male workers; in the Nordic countries, to increase the size of the public sector, and in English-speaking nations, to pursue a neoliberal pattern of reform based on cutting public sector spending, reducing welfare dependency, market deregulation and increasing flexibility in labour markets (usually by encouraging more competition and cutting entitlements).<sup>507</sup>

The selected OECD European countries discussed in Chapter 4 of this thesis have parental leave frameworks with the following characteristics: a) leave periods are generally around 18-26 weeks and often longer in duration for several nations, b) paid parental or maternity leave is provided to eligible employees on a wage-replacement level rather than at the level of the national minimum wage, c) eligibility criteria tend to be inclusive rather than exclusive in nature to include types of employment beyond only full-time employment and d) paid parental leave is shareable and transferable between partners and e) paid parental leave is connected to related ‘family-friendly’ entitlements including flexible work options, protections from dismissal from work on the basis of parental responsibility and state-funded childcare places.<sup>508</sup>

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<sup>507</sup>Francis G Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010) 608-9.

<sup>508</sup>See above discussion in sections 4.3-4.7 of this Chapter and also Chapter 5 for a discussion of Sweden see Chiara Saraceno and Wolfgang Keck, ‘Towards an Integrated Approach for the Analysis of Gender Equity in Policies Supporting Paid Work and Care Responsibilities’ (2011) 25(1) *Demographic Research* 371-405; Olivier Theron and Anne Solaz, ‘Labour Market Effects

The nature of these parental leave regulatory frameworks has both similarities and differences from the Australian paid parental leave framework as discussed in Chapter 3, including the 2010 *Paid Parental Leave Act*. The similarities can be summarised as follows:

- a) There is a legislative scheme in place to regulate the nature, eligibility, payment levels and administration of paid parental leave;
- b) Paid parental leave payments are mostly directed towards parents in employment of some kind;
- c) Paid parental leave is shareable and transferable; and
- d) Paid parental leave is restricted in time to generally no more than a year.

The differences can be summarised as follows:

- a) Paid parental leave in the selected OECD European countries is paid at a wage replacement level calculated on the basis of pre-natal earnings up to a fixed point rather than set at a ‘floor’ such as the national minimum wage;
- b) The maximum period of paid leave is generally longer in the selected OECD European nations when compared to Australia (26 to 52 weeks as compared to 18 weeks in Australia)
- c) Parents of either sex are eligible for leave while in the Australian framework the primary carer (who may in rare cases decide to transfer their leave entitlement to another primary carer) is eligible for the full 18-week maximum period while fathers specifically are entitled to two weeks of ‘Dad and Partner Pay’ (DAPP) subject to certain eligibility criteria; and
- d) In the selected European OECD nations those taking periods of leave have stronger employment protections against redundancy and unfair dismissal.

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of Parental Leave Policies in OECD Countries’ (OECD Social, Employment and Migration Working Papers No 141, OECD Publishing, December 11, 2012), 1-20.

## CHAPTER 5 THE SWEDISH MODEL OF PAID PARENTAL LEAVE: LESSONS FOR AUSTRALIA'S SCHEME

### 5.1. Introduction

As discussed in Chapter 4 of the thesis, OECD European countries have both a long history of legislating maternity and parental leave as well as offering a rich variety of different examples of how parental leave schemes can be adjusted to the requirements of different legal jurisdictions, national social and economic conditions, and also to social and economic change.<sup>509</sup> However, it is constructive to bring more precision to the argument by selecting the paid parental leave regulatory system of one country that can be discussed as a 'best practice' model.<sup>510</sup> As discussed previously, the Nordic nations of Europe (Iceland, Finland, Denmark, Norway and Sweden) have drawn attention for being OECD countries with the best legislative schemes of paid parental leave.<sup>511</sup> As discussed in Chapter 4 of this thesis, each of the selected Nordic nations discussed has a well-designed paid parental leave regulatory system in place that has evolved coherently over time to face social and economic changes and challenges<sup>512</sup> that potentially provides valuable insights for the potential further development of the legislative design of the Australian regulatory scheme of paid parental leave.<sup>513</sup>

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<sup>509</sup>See Chapter 4 of this thesis.

<sup>510</sup>Pernilla Tunberger and Wendy Sigle-Rushton, 'Continuity and Change in Swedish Family Policies' (2011) 21(3) *Journal of European Social Policy* 225, 225-237; Linda Haas, 'Parental Leave and Gender Equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89, 89-114; Barbara Hobson, 'The Individualised Worker, the Gender Participatory and the Gender Equity Models in Sweden' (2003) 3(1) *Social Policy and Society* 75, 75-83.

<sup>511</sup>Andrew Scott, 'Northern Lights', 1-25 and see also Linda Haas, above, 2.

<sup>512</sup>Ruth Lister, 'A Nordic Nirvana? Gender, Justice and Citizenship in the Nordic Welfare States' (2009) 16(2) *Social Politics* 242, 242-278; Jade Lewis and Gertrude Astrom, 'Equality, Difference and the Welfare State: Labour Market and Family Policies in Sweden' (1992) 18(1) *Feminist Studies* 59, 59-87; Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-37.

<sup>513</sup>Also one nation is selected because a detailed analysis of the paid parental leave framework of more than one country is beyond the present scope of this discussion. For a useful overview of the leave schemes of all five Nordic nations, see Peter Moss and Fred Dreven, 'Leave Policies and Research: A Cross-National Overview' (2006) 39(3/4) *Marriage and Family Review* 255,

For this reason, it is useful to discuss the parental leave of one Nordic country that can serve as a ‘useful model’ for Australia to inform its policies and legal issues relating to regulation of paid parental leave. The country that will be selected for the discussion in Chapter 5 will be Sweden, which has been recognised as providing a useful model in this area.<sup>514</sup> Chapter 5 of this thesis will therefore discuss the Swedish paid parental leave regulatory system with reference to the Swedish legal system and applicable European Union and International Legal standards. Further, some current challenges and limitations of the Swedish parental leave will be discussed. Then the rest of Chapter 5 will be devoted to a discussion of the similarities and differences between the Swedish and Australian parental leave frameworks, focusing on what lessons, if any, Australia can learn from Sweden’s regulatory model of paid parental leave.

## **5.2 Swedish Family Policy Frameworks**

As discussed in Chapter 4 of this thesis, the Scandinavian countries have a strong reputation for developing an equitable social and economic workplace relations framework that includes generous paid parental leave and childcare, funded mainly by the government.<sup>515</sup> However, as with other legal and social systems in other nations, the policies and laws of a country do not develop in a vacuum but come from a certain historical and social context, and Sweden is no exception.<sup>516</sup>

By the early of the 20<sup>th</sup> century, Sweden had already developed a progressive and egalitarian ethos relating to family structures and the role of children.<sup>517</sup> This

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255-285; Anne Lise Ellingsaeter, ‘Leave Policy in the Nordic Welfare States: A Policy for High Employment/High Fertility?’ (2009) 12(1) *Community, Work and Family* 1, 1-19.

<sup>514</sup>For an overview see Andrew Scott above, 3 and Nadine Zacharias, ‘Work-life balance: ‘Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *International Employment Relations Review* 32, 32-37.

<sup>515</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 1-25.

<sup>516</sup>*Ibid* 1-25.

<sup>517</sup>Anna Lundqvist and Christine Roman, ‘Constructions of Swedish Family Policy 1930-2000’ (2008) 33(2) *Journal of Family History* 216, 216-236; Bo Burstrom, ‘Social Differentials in the Decline of Infant Mortality in Sweden in the 20<sup>th</sup> century: The Impact of Politics and Policy’ (2003) 33(40) *International Journal of Health Sciences* 723, 723-741; Alison McIntosh, ‘European Population Policy in the 20<sup>th</sup> Century: Is It Relevant for Australia?’ (1998) 6(3) *People and Place* 1, 1-16; Maria Stanfors and Frances Goldsieder, ‘The First and the Trees:

change continued through the 20<sup>th</sup> century until the early 21<sup>st</sup> century, replacing the previously religiously motivated and traditionally patriarchal model of Swedish society with a more secularised and egalitarian/feminist model of social relations.<sup>518</sup> By the time of the contemporary era, Sweden was among the best performing countries of the OECD nations regarding positive outcomes for children.<sup>519</sup> The social policy of Swedish society is in the words of Andrew Scott, a ‘dual earner’ model.<sup>520</sup> The ‘dual earner’ model is premised on the fundamental assumption of ‘total gender equity,’<sup>521</sup> in the sense both men and women are expected to work full-time and undertake caring obligations in a way that equally distributes the burdens.<sup>522</sup> The dual earner model is in contrast to the ‘traditional family’ model where men work full-time in paid employment while women work part-time or not at all while remaining the primary person in the family responsible for child-rearing, caring and housework.<sup>523</sup>

These differences between Australia and Sweden are shown in statistics such as the numbers of women in levels of part-time employment in Sweden, which is lower than in Australia.<sup>524</sup> As shown by Scott<sup>525</sup> and also discussed in this thesis earlier,<sup>526</sup> studies show that women who work part-time as a ‘sacrifice’ to care for children face lower wages, reduced lifetime earnings and lost opportunities for career development and advancement when compared to male co-workers

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Industrialisation, Demographic Change, and the Ongoing Gender Revolution in Sweden and the United States, 1870-2010’ (2017) 35(1) *Demographic Research* 173, 173-226.

<sup>518</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 62-83.

<sup>519</sup>Ibid 63-65. These include low rates of child poverty, healthy levels of child health, low levels of infant mortality, better results regarding education and development, and higher than OECD average outcomes on many social indicia.

<sup>520</sup>Ibid 66. See also the typology of Gospa Esping-Andersen, *The Social Foundations of Post-industrial Economies* (Oxford University Press, 1999), 1-38, where Sweden is among the ‘social democratic’ class of nations and Carmen Castro-Garcia and Maria Pazos-Moran, ‘Parental Leave Policy and Gender Equality in Europe’ (2016) 22(3) *Feminist Economics* 51, 51-73.

<sup>521</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014), 66.

<sup>522</sup>Ibid 66-67.

<sup>523</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 66-67.

<sup>524</sup>Ibid 67. See also Nadine Zacharias, ‘Work-life balance: ‘Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *International Employment Relations Review* 32, 32-37.

<sup>525</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 1-25.

<sup>526</sup>See Chapters 2 and 3 of this thesis.

and also female colleagues who choose not to have children.<sup>527</sup> Paid parental leave and affordable public child-care services are a key element of the Swedish dual earner household system.<sup>528</sup>

The parental leave system of Sweden is premised on the ‘dual-earner’ and ‘shared parental responsibility’ model.<sup>529</sup> Sweden was one of the first nations in Europe to introduce maternity leave,<sup>530</sup> and later paternity leave was introduced and expanded to encourage Swedish fathers to be more involved in the care and raising of their children.<sup>531</sup> Paternity leave was amended in the 1990s in Sweden to include ‘father quotas’ requiring Swedish fathers to take parental leave, rather than relying simply on the child’s mother to take the available parental leave time.<sup>532</sup>

Sweden was also among the first of the Scandinavian states to emancipate women and develop reforms to traditionally patriarchal institutions such as marriage.<sup>533</sup> By the first decades of the 20<sup>th</sup> century, ‘Legislative reforms changed marriage from an institution where the man dictated to his wife, to an institution between equal partners with mutual obligations to maintain and support each other.’<sup>534</sup> Sweden also introduced progressive social legislation such as ‘no-fault’ divorce<sup>535</sup> and established the principle of best interests of the

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<sup>527</sup>Ibid 67. See also the discussion below.

<sup>528</sup>Ibid 66-67. See also Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 1-25.

<sup>529</sup>Norden Publications, ‘Parental Leave, Child-care, and Gender Equality in Nordic Countries,’ (Norden Publications Report, Norden Publications, 2011), 32. Childcare in Sweden is not entirely free and requires a contribution from parents. As will be seen however later in this Chapter, these contributions are far less than those paid by Australian parents.

<sup>530</sup>Rianne Mahon, Christina Bergqvist and Deborah Brennan, ‘Social Policy Change: Work-Family Tensions in Sweden, Australia and Canada’ (2016) 50(2) *Social Policy and Administration* 165, 165-182.

<sup>531</sup>Norden Publications, ‘Parental Leave, Child-care, and Gender Equality in Nordic Countries,’ (Norden Publications Report, Norden Publications, 2011), 33.

<sup>532</sup>Ibid 34. However, as will be seen below, statistical data shows Swedish mothers still use around 70% of total available parental leave time.

<sup>533</sup>Norden Publications, ‘Parental Leave, Child-care, and Gender Equality in Nordic Countries,’ (Norden Publications Report, Norden Publications, 2011), 149.

<sup>534</sup>Ibid 149.

<sup>535</sup>Sweden introduced no-fault divorce laws (i.e. not requiring proof of adultery, madness, abandonment) in 1915 and amended its laws to allow for one spouse to initiate divorce in 1973. Australia introduced no-fault divorce laws in 1975. See Livia Sz Olah, ‘Policy Changes and Family Stability: The Swedish Case’ (2001) 15(1) *International Journal of Law, Policy and the Family* 118, 118-134.

child were the primary considerations in marriage disputes as early the 1920s, predating Australia by more than 50 years.<sup>536</sup> Swedish society and the government continued to work on promoting gender equity through government policy and law from the early 20<sup>th</sup> century until the current era.<sup>537</sup> Thus in Sweden, the emancipation and full-participation of women in society was implemented in three phases: the legal equality of men and women, the movement of women into the workforce, and finally the full-integration of men and women on an equal basis in the labour market and private sphere, a development that was mostly accomplished by the 1970s.<sup>538</sup>

Sweden also offers a useful example to Australia in the area of family policies for several reasons.<sup>539</sup> Firstly, Sweden and other Scandinavian countries have had progressive development of gender equality policies from the beginning of the 20<sup>th</sup> century until the present.<sup>540</sup> Sweden also offers a positive example to Australia in the implementation of progressive social policies aimed at gender and social equality over the past century.<sup>541</sup> Sweden also has low rates of income inequality, high levels of female employment and large numbers of women with children in full-time work, and low levels of child poverty, combined with excellent scores across a range of socio-economic indicators such as the human development index (HDI).<sup>542</sup> Sweden is characterised as a ‘welfare state’<sup>543</sup> and a ‘social democracy’<sup>544</sup> typified by relatively high rates of public spending, high levels of income taxation, and a universal public welfare system that was

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<sup>536</sup>Norden Publications, ‘Parental Leave, Child-care, and Gender Equality in Nordic Countries,’ (Norden Publications Report, Norden Publications, 2011), 149. Australia did not introduce similar legislation until 1975. See Patrick Parkinson, ‘When is Parenthood Dissoluble?’ (2012) 26(1) *Brigham Young Journal of Public Law* 147.

<sup>537</sup>Norden Publications, (2011) ‘Parental Leave, Child-care, and Gender Equality in Nordic Countries’, 150.

<sup>538</sup>*Ibid* 150.

<sup>539</sup>M Wells and D Bergnehr, (2014), ‘Families and Family Policies in Sweden’, in Mihaela Robina (ed), *Handbook of Family Policies Across the Globe* (Springer, 2014), 91. See also Andrew Scott and Nadine Zacharias, above, 16.

<sup>540</sup>*Ibid* 91-109.

<sup>541</sup>*Ibid*.

<sup>542</sup>*Ibid* 92.

<sup>543</sup>*Ibid* 92.

<sup>544</sup>*Ibid* 92.



developed from the 1930s to the 2000s under the influence of the Swedish Social Democratic Party, based on a policy goal of social equality.<sup>545</sup>

Swedish scores are also high concerning parents remaining attached to the workforce before, during and after the decision to have children.<sup>546</sup> Therefore, Sweden has a higher Total Fertility Rate (TFR) than comparable OECD nations, higher rates of both parents returning to work after the birth of a child, and lower rates of single parent households characterised by disengagement from the workforce and poverty.<sup>547</sup> Sweden is also noted as a country that has prospered, with Swedes ‘Living healthier lives, attending higher quality schools, and increasing their disposable income due to both genders participating in the paid labour force, with the state providing affordable, high-quality childcare.’<sup>548</sup> Features such as these make Sweden a nation worth examining more closely for Australia to find pointers to improve its own parental leave system.<sup>549</sup>

### **5.3 An Overview of Swedish Labour Relations Laws and the Family/Work Balance**

This section will give an overview to how EU and International standards on parental leave have influenced the Swedish industrial relations system framework in relation to paid parental leave and anti-discrimination law.<sup>550</sup> This section will discuss Sweden’s ratified ILO Code Conventions and Human Rights

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<sup>545</sup>Ibid 92.

<sup>546</sup>Ibid 92.

<sup>547</sup>Ibid 92.

<sup>548</sup>M Wells and D Bergnehr, (2014), ‘Families and Family Policies in Sweden’, in Mihalea Robina (ed), *Handbook of Family Policies Across the Globe* (Springer, 2014), 92.

<sup>549</sup>Nadine Zacharias, ‘Work-Life Balance: ‘Good Weather Policies or Agenda for Social Change?’ A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *International Employment Relations Review* 32, 32-42.

<sup>550</sup>This area of law is complex. For a useful overview, see Catherina Calleman, ‘Family Ties in Swedish Employment Law’ (2009) 25(4) *International Journal of Comparative Labour Law and Industrial Relations* 431, 431-445; Tore Sigman, ‘Consequences for Swedish Labour Law of the Treaty of the European Economic Area’ (1994) 10(2) *International Journal of Comparative Law and Industrial Relations* 99, 99-118; Laura Carlson, ‘Anchoring the Union Mandate: A Look at the Swedish Labour Law Model’ (2013) 4(1) *REVISTA ROMÂNĂ DE DREPTUL MUNCII* 99, 99-122.

Instruments and selected EU Directives,<sup>551</sup> before moving on to discuss the constitutive elements of Sweden's parental leave system in section 5.4.

The influence of EU parental leave standards on Swedish industrial laws is complex in nature.<sup>552</sup> However, a useful place to start is to examine which ILO *Code Conventions* Sweden has ratified as well as selected human rights treaties and EU directives to give a broad perspective on the development of Swedish law, given Sweden's legal system is strongly influenced by its treaty obligations as a member of the European Union.<sup>553</sup> Sweden has ratified a substantial number of ILO and UN Conventions relating to employment and human rights including 93 ILO Conventions and 3 protocols.<sup>554</sup> Sweden has also ratified the 1981 ILO Convention on Workers with Family Responsibilities,<sup>555</sup> though it has declined from ratifying the ILO 2000 Maternity Protection Convention.<sup>556</sup> Sweden is an active member of the ILO and sponsors or supports a number of ILO programs to improve working conditions in other countries in Europe and around the world.<sup>557</sup> Sweden thus makes it a major policy aim to make its domestic laws comply with ILO and International Human Rights standards (including those on gender equality).<sup>558</sup> According to the ILO, Sweden has ratified a number of key

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<sup>551</sup>For an overview of the Swedish legal system in general see Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2002) 13(1) *Indiana International and Comparative Law Review* 405, 405-447; for a general overview of Swedish Labour Law, see Axel Adlercruetz and Birgitta Nystrom, *Labour Law in Sweden* (Wolters Kluwer, 2010) 19-27.

<sup>552</sup>Axel Adlercruetz and Birgitta Nystrom, *Labour Law in Sweden* (Wolters Kluwer, 2010) 109-11, 134-148. The discussion here is unfortunately limited by the fact that only a limited selection of Swedish laws are available in English translation. In this Chapter's discussions, only Swedish legal materials available in English translation will be referred to.

<sup>553</sup>EU law will be discussed in relation to Sweden in more detail below in section 5.3.

<sup>554</sup>For a list of ILO conventions that Sweden has ratified, see ILO, 'Ratifications by Country: Sweden' (28 March 2018), Normlex, <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102854](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102854)>

<sup>555</sup>See above, 47.

<sup>556</sup>Sweden gave a number of reasons for this including conflict of the treaty provisions with domestic laws. For a discussion of ILO standards in relation to Sweden see Stina Lagergren, 'The Influence of ILO Standards on Swedish Law and Practice' (1986) 125(1) *International Labour Review* 305, 305-328 and Christopher McCrudden and Harris Kountouros 'Human Rights and European Equality Law' in Helen Meenan (ed) *Equality Law in an Enlarged Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007), 73-116.

<sup>557</sup>Christopher McCrudden and Harris Kountouros 'Human Rights and European Equality Law' in Helen Meenan (ed) *Equality Law in an Enlarged Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007), 80-84.

<sup>558</sup>See ILO, *Government of Sweden and ILO Co-operation*, (May 2014), ILO, <[http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/genericdocument/wcms\\_243793.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/genericdocument/wcms_243793.pdf)>

ILO Conventions relating specifically to gender equality, parental leave, and workers with family responsibilities.<sup>559</sup> Sweden has also ratified the UN Conventions relating to equality and gender discrimination.<sup>560</sup> Also as a member of the European Union (the EU),<sup>561</sup> Sweden is also integrated EU legislation into its domestic laws from EU Treaties to EU Directives that govern most aspects of politics and law.<sup>562</sup> In the area of labour law, the main EU instruments of importance to Sweden are the EU treaties relating to employment and social rights matters, treaties relating to economic policy goals, EU directives,<sup>563</sup> other sources of legislation used to frame policy at the supra-national and national level in EU member states.<sup>564</sup>

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<sup>559</sup>ILO, 'Ratifications

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102854](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102854), 'Ratifications by Country – Sweden.' Relevant to the discussion include *ILO Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (opened for signature 29 June 1951) 1975 ATS 45 (entered into force 23<sup>rd</sup> May 1953), *ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (opened for signature 25 June 1958) [1974] ATS 12 (entered into force 15 June 1974), and *ILO Convention (No 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (opened for signature 23 June 1981) [1991] ATS 7 (entered into force 30 March 1991). Like Australia, Sweden has not at the time of writing ratified the *ILO Maternity Protection Convention* (No 183) 2000 (opened for signature 15 June 2000) (not yet in force).

<sup>560</sup>*UN International Covenant on Civil and Political Rights* opened for signature 16 December 1966) [1980] ATS 23 (entered into force 23 March 1976); *Convention on the Elimination of all forms of Discrimination against Women* (opened for signature 17 July 1980), 1983 ATS 9 (entered into force 27 August 1983); *UN International Covenant on Civil and Political Rights* opened for signature 16 December 1966) [1980] ATS 23 (entered into force 23 March 1976); *UN Convention on the Rights of the Child* opened for signature 20 November 1989) [1991] ATS 4 (entered into force 16 January 1991); *UN Convention on the Elimination of all Forms of Racial Discrimination* (opened for signature 7 March 1966) [1975] ATS 40 (entered into force 30 October 1975). For a more detailed introduction of these treaties see Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, 2012), 1-32.

<sup>561</sup>Sweden formally joined the EU in 1994 via the *Treaty of Accession of Austria, Finland, and Sweden 1994* (opened for signing 12 April 1994) (entered into force 1 January 1995).

<sup>562</sup>For an overview of EU Law and practice generally, see David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 3-411; Paul Craig and Grianne de Burca, *The Evolution of EU Law* (Oxford University Press, 2<sup>nd</sup> ed, 2010) 611-685; Roger Blanpain, *European Labour Law* (Wolters Kluwer, 14<sup>th</sup> ed, 2014) 69-147. The following discussion will focus only on areas of EU law touching mainly on maternity and parental leave standards that Sweden has adopted in its own legislation.

<sup>563</sup>These will be discussed further below.

<sup>564</sup>See Roger Blanpain, *European Labour Law* (Wolters Kluwer, 14<sup>th</sup> ed, 2014) 69-147 and 1037-1058; David Edward and Robert Lane, *European Union Law* (Edward Elgar, Student Edition, 2013) 858-880. Further discussion on relevant EU Law is to be found below.

A useful starting point into this complex web of EU law is the 2007 Treaty on the Functioning of the European Union (TFEU),<sup>565</sup> which forms one of the bedrock treaties of EU Law in EU sex discrimination and employment law standards.<sup>566</sup> The TFEU deals with these matters in Title IV, ‘Workers,’ Title X, ‘Employment’ and Title X, ‘Social Policy’ which have specific articles dealing with workers and matters relating to employment.<sup>567</sup> Articles 8 and 10 of the TFEU also aim to ‘Eliminate all inequalities and promote equality between men and women,’<sup>568</sup> and ‘In defining and implementing all of its policies, the Union shall aim to combat discrimination based on sex, racial and ethnic origin, religious belief, disability, age or sexual orientation’<sup>569</sup> and the EU members shall ‘Take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health.’<sup>570</sup>

The TFEU under Title X, ‘Social Policy’, has specific treaty articles dealing with measures to further equality between men and women and elimination of discrimination.<sup>571</sup> Those articles of particular importance include these articles relating to work and family responsibilities applicable to EU member states and their citizens:

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<sup>565</sup>Also known as the *Treaty on the Functioning of the European Union opened for signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) (‘FEU’) or The ‘Maastricht Treaty,’ which is regarded as a foundational legal document for the EU in its present form. Sweden ratified the TFEU in 1994 upon becoming an EU member state with the *Treaty of Accession of Austria, Finland, and Sweden 1994* (opened for signing 12 April 1994) O J L C 241/01 (entered into force 1 January 1995) available at Eur-Lex, *Access to European Law*, (29 August 1994), <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1994:241:TOC>> and Blanplain, above, 58.

<sup>566</sup>Eur-Lex, *Consolidated Version of the Treaty on the Functioning of the European Union 2007* (29 August 2004), <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>>. See also David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 858-880.

<sup>567</sup>See following discussion.

<sup>568</sup>*Treaty on the Functioning of the European Union Opened for Signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) (‘FEU’), Art 8.

<sup>569</sup>Ibid Art 10.

<sup>570</sup>Ibid Art 9.

<sup>571</sup>Ibid Arts 151-160.

- 1) The removal of discrimination and the protection of basic worker rights including from unfair termination of employment, access to social security and equality of opportunity in employment;<sup>572</sup>
- 2) Encourage member states to harmonise their laws and social security systems with each other to achieve best practice and achieve these goals;<sup>573</sup>
- 3) Each member state shall ensure that the principle of equal pay for male and female workers for equal work of equal value is applied; and<sup>574</sup>
- 4) Equal pay for equal work of equal value is clearly defined and calculated and includes the principle of equality of opportunities and equality of treatment for men and women in matters of employment and occupation.<sup>575</sup>

The EU's Charter on the Fundamental Rights of the European Union<sup>576</sup> also outlines a number of basic legal rights for EU citizens relating to work and family responsibility and parental leave including:

- 1) Everyone is equal before the law;<sup>577</sup>
- 2) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited;<sup>578</sup>
- 3) Equality between men and women must be ensured in all areas, including employment, work and pay, and the principle of equality shall not

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<sup>572</sup>*Treaty on the Functioning of the European Union Opened for Signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) ('FEU'), Arts 151-153, particularly Arts 153(h), 153(i) and 153(j) combating discrimination between men and woman-based discrimination .

<sup>573</sup>*Treaty on the Functioning of the European Union Opened for Signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) ('FEU'), Art 156.

<sup>574</sup>*Ibid* Art 157(1).

<sup>575</sup>*Ibid* Arts 157(2), 157(3) and 157(4).

<sup>576</sup>*Charter on the Fundamental Rights of the European Union* (2012/C 326/02) (2012) OJC 326/391.

<sup>577</sup>*Ibid* Art 20.

<sup>578</sup>*Ibid* Art 21(1).

prevent the maintenance or adoption of measures for providing for specific advantages in favour of the underrepresented sex;<sup>579</sup>

- 4) Workers are to be protected from unjustified dismissal,<sup>580</sup> to appropriate work conditions including paid leave<sup>581</sup> and access to maternity and other forms of leave when required; and<sup>582</sup>
- 5) Workers shall have a right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.<sup>583</sup>

The EU Charter on The Fundamental Rights of the European Union is not just a statement of prescriptive ideals but has the same legal authority as a treaty by virtue of article 6(1) the Treaty of 7 February 1992 establishing the European Union<sup>584</sup> and therefore the provisions listed in (1) – (5) above have the status of ‘A right, freedom or principle.’<sup>585</sup> In effect, the EU Charter on Fundamental Rights sets out the basic employment rights in treaty form.<sup>586</sup>

Within the EU, there is also the *Community Charter on the Fundamental Rights of Workers*.<sup>587</sup> This Charter is also legally binding on EU Member States by

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<sup>579</sup>Ibid Art 23.

<sup>580</sup>*Charter on the Fundamental Rights of the European Union* (2012/C 326/02) (2012) OJ C 326/391 Art 30

<sup>581</sup>Ibid Arts 31(1) and 31(2).

<sup>582</sup>Ibid Art 34

<sup>583</sup>Ibid Art 33(2). Art 33(1) states the family shall enjoy ‘legal, economic and social protection.’

<sup>584</sup>*Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1992) (‘*EC Treaty*’). See also also David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 866-867.

<sup>585</sup>David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 866. There is also the *European Social Charter* and *European Convention on Human Rights* but the legal status of the *European Social Charter* is at a lower level of legal authority than the *TFEU*. Also the *EU Charter on Fundamental Rights of the European Union* and the *European Convention on Human Rights* treaties overlap to a considerable extent in their subject matter so a discussion of these will not be included here. For more information on this complex area of law see David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 863-866 for an explanation of these treaties and associated legal principles. Article 14 of the *European Convention on Human Rights* has strong anti-sex discrimination provisions.

<sup>586</sup>See David Edward and Robert Lane, *European Union Law* (Edward Elgar, Student Edition, 2013), 866-867 for a discussion of these standards.

<sup>587</sup>EU Community Charter on the Fundamental Social Rights of Workers 1989.

virtue of the *Treaty of Lisbon*<sup>588</sup> and sets out these basic standards in relation to employment:

- 1) All employment shall be fairly remunerated;<sup>589</sup>
- 2) Equal treatment for men and women must be assured and equal opportunities for men and women must be developed.<sup>590</sup>
- 3) Action should be intensified to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.<sup>591</sup>
- 4) Measures should also be developed enabling men and women to reconcile their occupational and family obligations.<sup>592</sup>

Therefore, the prohibition of sex-based discrimination or discrimination on the basis of taking parental leave forms a foundational legal principle within in the EU Employment Law Framework.<sup>593</sup> As Edward and Lane indicate,<sup>594</sup> ‘The laws against sex discrimination in work ‘have teeth,’’<sup>595</sup> and a substantial amount of EU labour law has been drafted specifically to ‘combat sex discrimination in particular,’<sup>596</sup> through the legislation of treaty standards to the drafting of binding EU ‘Directives’ on employment law standards to prohibit gender-based discrimination and provide for parental leave in the employment laws of EU states.<sup>597</sup> The relevant EU Directives in this area serve as a legal ‘bridge,’ acting as ‘enabling legislation’ for treaty obligations to be implemented

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<sup>588</sup>See *Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community* [2007] OJ C306/01 (opened for signature 13 December 2007) (entered into force 13 December 2009). See also Sionaidh Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon,’ (2011) 11(4) *Human Rights Law Review* 645-682 and Ronnie Eklund, ‘The Laval Case’ (2006) 35(2) *Industrial Law Journal* 202.

<sup>589</sup> *European Union Community Charter on the Fundamental Social Rights of Workers 1989*, Art 5.

<sup>590</sup>*Ibid* Art 17.

<sup>591</sup>*Ibid* Art 17.

<sup>592</sup>*Ibid* Art 17.

<sup>593</sup>David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 868-869.

<sup>594</sup>Case C-50/96 *Duetsche Telekom v Schroeder* [2000] ECR I-743 at 57.

<sup>595</sup>David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 867.

<sup>596</sup>*Ibid* 869.

<sup>597</sup>*Ibid* 869-970.

into domestic laws for EU states.<sup>598</sup> EU Directives are part of the machinery under the TFEU that the legislative organs of the European Union can use to make legally binding standards for EU member states.<sup>599</sup> For example, Article 288 of the TFEU provides ‘to exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.’<sup>600</sup>

- a) A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- b) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- c) A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
- d) Recommendations and opinions shall have no binding force.<sup>601</sup>

A succinct explanation of the nature of the EU Directive is given by Edward and Lane as follows: ‘A Directive is addressed – always – to member states. In principle, it describes a particular result to be achieved by a particular date, leaving it to member states, in accordance with their own constitutional rules, to determine how and by whom it should be implemented in, or transposed into, national law.’<sup>602</sup> EU Directives in any area are to be implemented in a timely manner by the relevant domestic legal authority in an EU member state<sup>603</sup> and there are penalties for non-compliance and ‘The provisions of directives must be

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<sup>598</sup>Ibid 869-871, 326-328, 342-354. .

<sup>599</sup>See *Treaty on the Functioning of the European Union Opened for Signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) (‘FEU’), Art 288 and David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 326-7.

<sup>600</sup>*Treaty on the Functioning of the European Union opened for signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) (‘FEU’), Art 288.

<sup>601</sup>Ibid Art 288. For a general discussion of how EU legislation is drafted, interpreted and applied, see David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 327-346. This section will only discuss EU Directives as applicable to gender equality and paid parental leave.

<sup>602</sup>David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 342.

<sup>603</sup>*Treaty on the Functioning of the European Union Opened for Signature 7 February 1992* [2009] OJ C 115/119 (entered into force 1 November 1993) (‘FEU’), Art 288.



implemented with unquestionable binding force, and the specificity, precision and clarity needed to satisfy the requirements of legal certainty.’<sup>604</sup>

These following EU Directives on anti-discrimination, employment protection and paid parental leave measures are important to understanding the standards in Sweden’s employment law and parental leave legislative framework:<sup>605</sup>

- a) EU Equal Pay and Treatment at Work Directive (Article 157 TFEU & Directive 2006/54/EC
- b) EU Pregnancy, Maternity, and Parental Leave Related to Workplace Balance Directives (Directives 92/85, 2006/54/EC and 2010/18/EC)
- c) EU Statutory schemes of Social Security (Directive 79/7)
- d) EU Parental Benefits for Self-employed (Directive 2010/41/EU)
- e) EU Working Time Directive 2003/88/EC;
- f) EU Equality Framework Directive 2000/78/EC;
- g) EU Part-time Work Directive 97/81/EC

EU Directive 2006/54/EC deals with a number of issues, including access to employment, promotions and training, sexual harassment, equality in pay and protection from dismissal on the grounds of maternity.<sup>606</sup> The purpose of this EU Directive is to ‘Ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.’<sup>607</sup> This EU Directive prohibits any kind of gender-discrimination regarding to pay and both direct and indirect forms of discrimination are forbidden and ‘equal work must mean equal pay.’<sup>608</sup> Sex-based discrimination is excluded from occupational social security schemes, in

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<sup>604</sup>Case C-225/97 *Commission v France* [1999] ECR I-3011, 37 and Case C-159/99 *Commission v Italy* [2001] ECR I-4007, 32. See also Edward and Lane, above, 94 at 343.

<sup>605</sup>For a more detailed discussion see Axel Adlercruetz and Birgitta Nystrom, *Labour Law in Sweden* (Wolters Kluwer, 2010), 69-69, 109-11, 134-148; This discussion will focus on EU Directives since these are binding legislative instruments. A more systematic discussion of the EU directives can be found in David Edward and Robert Lane, *European Union Law* (Edward Elgar Publishing, Student Edition, 2013), 867.

<sup>606</sup>Council Directive 2006/54/EC of 5 July 2006 on The Implementation of The Principle of Equal Opportunities and Equal Treatment of men and Women in Matters of Equal Pay and Occupation (Recast) (2006) O JL 204/23, Arts 1(a), 1(b), 1(c).

<sup>607</sup>*Ibid* Art 1.

<sup>608</sup>*Ibid* Art 4.

terms of scope, access, calculation of contributions and benefits.<sup>609</sup> Article 14 of this EU Directive provides for equal treatment regarding access to employment,<sup>610</sup> including requiring member states to remove direct and indirect forms of discrimination relating to conditions of employment, access to training and work experience, pay and membership of vocational organisations.<sup>611</sup> This EU Directive also requires protections against dismissal for those taking maternity, paternity or parental leave, and the opportunity to return to the same or an equivalent position no less favourable to the one left once the leave period has expired.<sup>612</sup> These protections are to be enforced through substantive rights and recourse to appropriate remedies.<sup>613</sup>

The EU Directives in 2) deal with pregnancy and maternity protection in the workplace, forms of maternity and parental leave and balance between work and family.<sup>614</sup> EU Directive 92/85/EEC deals primarily with the safety and health of workers who are pregnant or who have recently given birth and are breastfeeding.<sup>615</sup> This EU Directive provides for the legislation for suitable occupational health and safety laws for pregnant workers as well as appropriate spaces in workplaces for breastfeeding mothers.<sup>616</sup> This EU Directive also mandates a period of maternity leave of at least 14 weeks allocated before, and or after confinement and protection from dismissal on the grounds of pregnancy or maternity leave.<sup>617</sup> These rights are to be enforceable via the appropriate

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<sup>609</sup>Ibid Arts 5(a),5(b), 5(c). This protection extends also to the self-employed; Art 6.

<sup>610</sup>Ibid Art 14.

<sup>611</sup>Ibid Art 14(a)-(d). The list in the Directive is very inclusive.

<sup>612</sup>Council Directive 2006/54/EC of 5 July 2006 on The Implementation of The Principle of Equal Opportunities and Equal Treatment of men and Women in Matters of Equal Pay and Occupation (Recast) (2006) O J L 204/23, Arts 15 and 16.

<sup>613</sup>Ibid Arts 17, 18 and 19.

<sup>614</sup>See Council Directive 92/85/EEC of 19 October 1992 on The Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who have Recently given Birth or Are Breastfeeding (Tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) O J L 348/1, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast) O J L 204/23 and EU Council Directive 2010/18/EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), O J L 68/13.

<sup>615</sup>See Arts 1-3.

<sup>616</sup>See Arts 5-7.

<sup>617</sup>See Arts 8, 10 and 11.

judicial or curial process as substantive employment rights.<sup>618</sup> EC Directive 2006/54/EC deals with much of the same material as discussed in (1) and this will not be repeated.<sup>619</sup> EU Directive 2010/18/EC<sup>620</sup> is highly important as it lays out the enabling legislation for the Revised Framework Agreement on Parental Leave and sets out several major clear and binding standards on anti-discrimination, gender equality, the right to paid parental leave, leave periods, protection from dismissal or redundancy during leave and other related matters.<sup>621</sup>

EC Directive 2010/18/EC provides that it puts into effect the revised Parental Leave Regulatory Framework as set out in its annex.<sup>622</sup> This EC Directive provides that all member states shall bring into force laws, regulations and administrative provisions that are necessary to make the Directive effective,<sup>623</sup> and establish appropriate penalties when ‘National provisions pursuant to this Directive are infringed.’<sup>624</sup> The preamble of the Framework Agreement<sup>625</sup> states the purpose of the agreement is to set out ‘The minimum requirements of parental leave, as an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women.’<sup>626</sup> The Annexe to this EC Directive also lists 24 different policy considerations<sup>627</sup> including fundamental treaty obligations and Directives,<sup>628</sup>

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<sup>618</sup>Ibid Arts 11 and 12.

<sup>619</sup>Council Directive 2006/54/EC of 5 July 2006 on The Implementation of The Principle of Equal Opportunities and Equal Treatment of men and Women in Matters of Equal Pay and Occupation (Recast) (2006) O J L 204/23.

<sup>620</sup>Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ L 68/13.

<sup>621</sup>See following discussion.

<sup>622</sup>Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), OJ L 68/13, Annexe 1. This will be discussed further below.

<sup>623</sup>Ibid Art 2.

<sup>624</sup> Ibid Art 1.

<sup>625</sup>EU Council Directive 2010/18/EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and Repealing Directive 96/34/EC (Text with EEA Relevance), OJ L 68/13. Annexe 1, Preamble section.

<sup>626</sup>Ibid Annexe 1, Preamble section.

<sup>627</sup>Ibid Annexe 1, ‘General Considerations’, nos 1-24.

<sup>628</sup>Ibid nos 1-3.

economic goals,<sup>629</sup> gender equality principles,<sup>630</sup> equal division of paid and unpaid domestic labour between men and women,<sup>631</sup> flexible working arrangements<sup>632</sup> and to make parental leave an enforceable right.<sup>633</sup>

This EC Directive states the purpose of introducing parental leave standards is to ‘Lay down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice.’<sup>634</sup> This purpose ‘Applies to all workers, men or women, who have an employment contract or employment relationship as defined by law,’<sup>635</sup> and includes part-time workers, those on fixed-term contracts and those working through a temporary agency.<sup>636</sup> The substantive parental leave standards themselves are listed in the directive as follows.<sup>637</sup>

- a) Men and women workers shall have an individual right to parental leave on the grounds of birth or adoption of that child to take care of the child up to an age of eight years;<sup>638</sup>
- b) The leave shall be granted for a period of four months and to promote gender equality, shall be non-transferable;<sup>639</sup>
- c) Member states shall work out matter such as whether leave is granted on a part or full-time basis, make it that entitlement to parental leave is not subject to a requirement of an employment period of more than one year, to allow employers to postpone or make special arrangements or

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<sup>629</sup>Ibid nos 5-7.

<sup>630</sup>Ibid nos 8-10.

<sup>631</sup>Ibid nos 12-13.

<sup>632</sup>Ibid nos 13-14.

<sup>633</sup>Ibid nos 15-20. See also nos 21-24 for economic goals, national autonomy and social policy goals.

<sup>634</sup>Council Directive 2010/18/EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and Repealing Directive 96/34/EC (Text with EEA Relevance), OJ L 68/13, Annexe II, Clause 1.1.

<sup>635</sup>Ibid Annexe II, Clause 1.2.

<sup>636</sup>Annexe II, Clause 1.3.

<sup>637</sup>Annexe II, Clauses 1.3-2.2.

<sup>638</sup>Annexe II, Clause 2.1.

<sup>639</sup>Annexe II, Clause 2.2.

- exemptions to leave standards, and matters related to notice and also special provisions for sickness and disability of the parent or the child.<sup>640</sup>
- d) Workers taking parental leave shall be protected from discrimination or dismissal on the grounds of parental leave and shall have the right to return to the same or an equivalent position when the period of leave is completed.<sup>641</sup>
  - e) Workers taking parental leave may request changes to working hours or flexible work conditions when returning from leave and appropriate reintegration measures;<sup>642</sup> and
  - f) Workers shall have the right to take time of work in case of emergencies, urgent family reasons or sickness.<sup>643</sup>

The impact of these EU treaties and directives on Swedish domestic legislation will be further discussed below. However, Sweden is obliged by virtue of being a member of the European Union to legislate the standards for non-discrimination and paid parental leave into its domestic laws by treaty and also by European law generally.<sup>644</sup>

#### **5.4 The Swedish Parental Leave Policy Framework – The Swedish *Parental Leave Act* and Allied Legislation**

As discussed in sections 5.2 and 5.3. of this chapter, paid parental leave forms a cornerstone of Swedish family policy based on the history of Sweden's development of domestic legislation and also because of Sweden's incorporation of anti-discrimination, maternity leave, employment protection and parental leave standards from international and European Union legislation into its own legal framework due to international engagement.<sup>645</sup> This section will discuss the nature of Sweden's parental leave laws in more detail to give some more context to the parental leave discussion and Sweden's regulatory relevance to

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<sup>640</sup>Annexe II, Clause 3.1.-3.3.

<sup>641</sup>Annexe II, Clause 5.1-5.4.

<sup>642</sup>Annexe II, Clause 6.1-6.2.

<sup>643</sup>Annexe II, Clause 6.1-6.2.

<sup>644</sup>See *Treaty of Accession of Austria, Finland, and Sweden 1994* (opened for signing 12 April 1994) O J L C 241/01 (entered into force 1 January 1995). See also Axel Adlcruetz and Birgitta Nystrom, *Labour Law in Sweden* (Wolters Kluwer, 2010) 63-71; 144-145.

<sup>645</sup>See sections 5.2 and 5.3 of this Chapter.

Australia's present paid parental leave scheme.<sup>646</sup> However, as not all Swedish labour laws are available in official English translations, this section will reference only Swedish laws materials available in English translation by the Swedish government, combined with reference to secondary literature when appropriate.<sup>647</sup> Therefore this section aims to give an accurate overview of the Swedish parental leave framework.<sup>648</sup>

As mentioned in section 5.2 of this chapter, Sweden has one of the most comprehensive systems of publically funded parental leave in the world.<sup>649</sup> Sweden's parental leave system took its modern form from 1974 onwards after its initial introduction and was designed to achieve policy aims including achieving greater gender equity in society and helping parents of both sexes better reach a healthy balance between work and family living.<sup>650</sup> Sweden implemented its policies into labour relations legislation incrementally over a time of three decades, and on top of a framework of pre-existing employment protections for parents, particularly working mothers.<sup>651</sup>

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<sup>646</sup>See for example Government Offices of Sweden, *Gender Equality is Part of The Solution to Challenges in Society*, (11 November 2015), Swedish Government, <<http://www.government.se/articles/2015/11/gender-equality-part-of-the-solution-to-challenges-in-society/>>

<sup>647</sup>For a review of the Swedish legal system in general, see Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2002) 13(1) *Indiana International and Comparative Law Review* 405, 405-447; for a review of the basic principles of Swedish Employment law, see Axel Adlercruetz and Birgitta Nystrom, above, 137.

<sup>648</sup>A number of key Swedish statutes on employment law are only available in Swedish. Where possible this thesis will discuss only materials available in English translation, taken primarily from the official Swedish Government website which has translated some Swedish statutes into English. These are available at Government Offices of Sweden, *Parental Leave: Non-Official Translation*, (17 November 2016), <<http://www.government.se/government-policy/labour-law-and-work-environment/1995584-parental-leave-act-foraldradighetslagen/>>. The Swedish government website disclaimer notes the translations however do not carry official status, which only applies to Swedish legislation that is printed in Swedish and is available only in hard-copy format by special order from the Swedish government. It is not possible at the time of writing to obtain proper English translations of Swedish laws without the assistance of a professional translator. Where possible, links will be provided to English versions of the Swedish laws being discussed. For a further discussion and analysis of the legal system of Sweden and its laws see Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2002) 13(1) *Indiana International and Comparative Law Review* 405, 405-447 and Stieg Stromholm (ed), *An Introduction to Swedish Law* (Springer, Vol 1, 1981), 21-43, 279-300.

<sup>649</sup>M Wells and D Bergnehr, 'Families and Family Policies in Sweden' in Mihalia Robina (ed) *Handbook of Family Policies Across the Globe* (Springer, 2014), 91, 96.

<sup>650</sup>*Ibid* 96. Australia's parental leave scheme focused on virtually the same goals.

<sup>651</sup>*Ibid* 96-7.

Sweden's parental leave system is regulated primarily by its employment laws and two pieces of legislation in particular: a) the *Parental Leave Act* and the b) Social Insurance Code<sup>652</sup> and to a lesser degree by related Swedish industrial laws which implement EU Treaty obligations and EU Directives as well as ILO and UN standards.<sup>653</sup> The Swedish *Parental Leave Act*, sets out the following basic standards:<sup>654</sup>

- a) An employee has the right, as a parent, to leave his or her employment in accordance with this Act;<sup>655</sup>
- b) The same right in section 1 extends to an employee who although not a parent is a legal custodian and takes care of a child, has taken a child for permanent care and fosterage into his or her home, or is permanently living together with a parent provided that the employee is, or has been, married to, or has, or has had, a child with that parent;<sup>656</sup>
- c) Disfavourable treatment of employees or job applicants on the grounds of parental responsibility is forbidden;<sup>657</sup>
- d) There are six different types of parental leave;<sup>658</sup>
- e) Disfavourable treatment or summary dismissal on the grounds of taking parental leave are strictly forbidden;<sup>659</sup>

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<sup>652</sup>To note, the English translation of the Swedish *Parental Leave Act* is only available in an online unofficial English translation published online by the Swedish government. A non-official English translation is available at Government Offices of Sweden, *Parental Leave: Non-Official Translation*, (17 November 2016), <<http://www.government.se/government-policy/labour-law-and-work-environment/1995584-parental-leave-act-foraldradedighetslagen/>>

<sup>653</sup>Also much of EU Human Rights and employment law reflects ILO and UN standards acceded to by European nations and as such, EU instruments will be the primary point of reference for legal standards regarding Sweden. See section 5.3. of this Chapter.

<sup>654</sup>*Parental Leave Act*, 1995 (Sweden).

<sup>655</sup> *Parental Leave Act* 1995 (Sweden), s 1. Unofficial English translation available at Government Offices of Sweden, *Parental Leave: Non-Official Translation*, (17 November 2016), <<http://www.government.se/government-policy/labour-law-and-work-environment/1995584-parental-leave-act-foraldradedighetslagen/>>

<sup>656</sup>*Parental Leave Act* 1995 (Sweden), s 1.

<sup>657</sup>*Ibid* s 16.

<sup>658</sup>*Ibid* s 3. These types of leave will be discussed in more detail below.

<sup>659</sup>*Ibid* ss 16 and 17.

- f) A woman who is pregnant, has recently given birth or is breast-feeding has the right to be transferred to other work while retaining her employment benefits;<sup>660</sup>
- g) A person wishing to take leave or be transferred to other work must give their employer one months' notice or otherwise as soon as reasonably possible;<sup>661</sup> and
- h) An employer who infringes on these rights shall pay damages<sup>662</sup> and further, the Equality Ombudsman may also bring an action against the employer on behalf of an employee or job applicant who believes their rights were infringed.<sup>663</sup>

The Swedish *Parental Leave Act* mentioned above<sup>664</sup> provides six different types of maternity and paid parental leave. These will be set out in a numbered list for reference as follows:

- a) Maternity leave, available full-time to a female employee following the birth of her child and while breastfeeding for a continuous period of at least seven weeks prior to the time of delivery and seven weeks after the time of delivery, with a minimal period of two weeks of maternity leave prior to and after delivery;<sup>665</sup>
- b) Full-time leave for a parent until the child has reached the age of 18 months or provided the parent is receiving then receiving the full benefit during a period or after that point, the right of which terminates once the child reaches the age of eight years;<sup>666</sup>
- c) A parent may take parental leave in the form of reduced working hours, which are reduced by three-quarters, half, one-quarter or one-eighth of

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<sup>660</sup>Ibid ss 18-19. However, this is subject to whether the employer can reasonably be required to provide alternative work. See s 20.

<sup>661</sup>Ibid s 21.

<sup>662</sup>Ibid s 22.

<sup>663</sup>Ibid ss 22, 23 and 25. ss 23 and 24 of the Act outline procedure and burdens of proof.

<sup>664</sup>See *Parental Leave Act* 1995 (Sweden), ss 4-9.

<sup>665</sup>*Parental Leave Act*, 1995 (Sweden) s 4. The payment levels are determined by Chapter 12 of Sweden's *Insurance Code*, which unfortunately is not available in English translation. However, an English-language reference discussing the Code is available at ILO, *Sweden Social Security: General Standards* (28 March, 2018), NATLEX, <[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=88493](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88493)>

<sup>666</sup>*Parental Leave Act*, 1995 (Sweden) s 5.



regular working hours with a proportionate share in the parental benefit under Sweden's Social Insurance Code;<sup>667</sup>

- d) A parent is entitled to a reduction of the normal working hours by up to one-quarter for the care of a child which has not reached the age of eight years but has not yet concluded its first year of school;<sup>668</sup> and
- e) An employee is entitled to leave during the period in which he or she 1. receives temporary parental benefit under Chapter 13 of the Social Insurance Code; 2. would have been entitled to temporary parental benefit under Chapter 13, Sections 10–31 or Sections 31e and 31f of the Social Insurance Code, if the employee had not been covered by the provisions in Chapter 37, Section 3 of the same Code; or 3. would have been entitled to temporary parental benefit under Chapter 13, Section 8 or 9 of the Social Insurance Code, if the employee had not been covered by the provisions in Chapter 37, Section 3 of the same Code.

The parental benefit available under these different types of leave is set at a maximum of 480 days between both parents.<sup>669</sup> Each parent can choose to take up to 240 days of paid leave maximum.<sup>670</sup> To be eligible for the parental benefit, the person must be the parent (biological or adoptive) of the child or have care or custody of the child.<sup>671</sup> The rate of payment depends on the type of leave being taken and how much leave is being claimed and also the proportion of time being taken off from work during the leave period.<sup>672</sup> The base rate of parental benefit payment is 180 Swedish Kroner.<sup>673</sup> Maternity allowance is calculated at 80% of pre-leave salary, up to 7.5 times the base level of parental benefit

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<sup>667</sup>Ibid s 6.

<sup>668</sup>Ibid s 7.

<sup>669</sup>See ILO, *Sweden Social Security: General Standards* Natlex, <[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=88493](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=88493)> The Swedish *Social Insurance Code* and Swedish Social Insurance Website were not available in English translation at the time of writing.

<sup>670</sup>Ibid.

<sup>671</sup>*Parental Leave Act 1995*, (Sweden) s 2.

<sup>672</sup>*Parental Leave Act 1995*, (Sweden) ss 5-9.

<sup>673</sup>See Försäkringskassan Website, *What Försäkringskassan Can Do for You*, Försäkringskassan (2013) <<https://kassakollen.forsakringskassan.se/?locale=en#barn>> At the time of writing (12<sup>th</sup> January, 2018) this is 18.38 Euro or \$27.60 Australian per day. Paid at a full level for a maximum period of 240 days, this would amount to \$6,624 for one parent or \$13,248 for two parents. For reference, the 'Newstart' Allowance is paid at a rate of \$35 per day or \$490 per fortnight in Australia and generally regarded as being below the poverty line.

payment, multiplied by a factor of 0.97 or a maximum of 708 Swedish Kroner per day after tax.<sup>674</sup> For a period of 390 days,<sup>675</sup> parental leave is payable for up to 80% of pre-leave salary set at a maximum monthly income of 37,083 Swedish Kroner.<sup>676</sup> Along with paid parental leave, which is then paid at a flat rate for the 90 days after the first 390 days,<sup>677</sup> the Swedish government also provides a monthly child allowance for the parent or parents until the child reaches the age of 16, paid at the rate of 1,050 Swedish Kroner per month.<sup>678</sup> Residents or citizens of Sweden can also enrol their children into childcare and preschool for a maximum fee of 1287 Swedish Kroner per month, while public school for children aged 6-19 years is free of charge with free lunches.<sup>679</sup> The Swedish government also provides government funded doctor visits, healthcare

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<sup>674</sup> See Försäkringskassan Website, *What Försäkringskassan Can Do for You*, Försäkringskassan (2013) <<https://kassakollen.forsakringskassan.se/?locale=en#barn>> At the time of writing (12<sup>th</sup> January, 2018) this is 72.3 Euro or \$110.75 Australian per day. Over a 14-week period, the maximum payment of maternity benefit would be \$10 878 Australian. The Swedish parental sickness benefit is paid at a higher level of between 250-952 Swedish Kroner per day, depending on the individual circumstances of the applicant. Temporary leave or temporary parental benefits are calculated according to the rules set out in the Swedish Parental Leave Act, (1995), ss 7-9 and the relevant Chapters in the Swedish Insurance Code. A calculator in English is available at Försäkringskassan Website, *What Försäkringskassan Can Do for You*, Försäkringskassan (2013) <<https://kassakollen.forsakringskassan.se/?locale=en#barn>>

<sup>675</sup> Sweden Se, *Ten Things that Make Sweden Family Friendly*, (10 January 2018), Sweden Se, <<https://sweden.se/society/10-things-that-make-sweden-family-friendly/>>

<sup>676</sup> About 3785 Euro or \$5796 Australian. 80% of this figure is about \$4636 Australian per month.

<sup>677</sup> See Sweden Se, *Ten Things that Make Sweden Family Friendly*, (10 January 2018), Sweden Se, <<https://sweden.se/society/10-things-that-make-sweden-family-friendly/>>. 90 Days of the leave period is reserved exclusively for either parent and is not transferable from one to the other.

<sup>678</sup> Ibid. This amounts to about 108 Euro or \$164.30 Australian per month. Over 16 years the total payment per child for an average family would be \$23 659. According to one estimate, the cost of raising a child in Sweden from 0-18 years is \$212 000 US. (\$261 958 Australian). See Nordstjernan News, *The Cost of Children*, March 28, 2018), Nordstjernan News, <<http://www.nordstjernan.com/news/education%7Cresearch/5783/>> For comparison, the estimated cost of raising two children in Australia to the age of 18 is estimated to be \$812 000. See AMP NATSEM, *Cost of Kids: The Cost of Raising Children in Australia*, (May 2013), NATSEM Canberra, <[http://www.natsem.canberra.edu.au/storage/AMP\\_NATSEM\\_33.pdf](http://www.natsem.canberra.edu.au/storage/AMP_NATSEM_33.pdf)> 1.

<sup>679</sup> Sweden Se, *Ten Things that Make Sweden Family Friendly*, (10 January 2018), Sweden Se, <<https://sweden.se/society/10-things-that-make-sweden-family-friendly/>> This would be around \$200 Australian per month or \$2400 per annum. For comparison, in Australia, childcare costs can be up to \$415 per week per child (adding up to \$21 580 per year). See for example Phoebe Wearn, *Rising Childcare costs Hit Perth Families*, (February 1, 2018), Perth Now (online), <<https://www.perthnow.com.au/news/education/rising-child-care-costs-hit-perth-families-ng-b88730844z>>

protection schemes and sickness benefits for those meeting the eligibility criteria.<sup>680</sup>

The Swedish *Parental Leave Act* is complemented with other Swedish employment gender equality legislation. These include the *Employment Protection Act*,<sup>681</sup> the *Annual Leave Act*,<sup>682</sup> the *Agency Work Act*,<sup>683</sup> the *Working Hours Act*<sup>684</sup> and the *Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act* and the *Anti-Discrimination Act*.<sup>685</sup> The *Employment Protection Act* has a number of provisions relating to the regulation of different types of employment contracts and implementing EU Directives.<sup>686</sup> The *Employment Protection Act* requires employers to provide detailed information to employees about their rights and obligations under the contract of employment, including their rights to parental leave.<sup>687</sup> The *Employment Protection Act* sets out certain obligations of the employer regarding termination of employment such as notice requirements, which depend on the length and type of employment undertaken,<sup>688</sup> and the employer has the right to summarily dismiss an employee ‘where he has grossly neglected his duties to his employer.’<sup>689</sup> Summary dismissal must meet certain notice and procedural grounds to be valid under the *Act*,<sup>690</sup> otherwise the dismissal shall be deemed invalid and the employee is granted certain remedies.<sup>691</sup> The *Annual Leave Act*<sup>692</sup> provides for an entitlement to annual holiday leave benefits or other benefits in lieu of annual leave.<sup>693</sup> The *Annual Leave Act* provides for at least 25 days of annual leave in every leave year.<sup>694</sup> In

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<sup>680</sup>Sweden Se, *Ten Things that Make Sweden Family Friendly*, (10 January 2018), Sweden Se, <<https://sweden.se/society/10-things-that-make-sweden-family-friendly/>>

<sup>681</sup>*Employment Protection Act*, 1982 (Sweden).

<sup>682</sup>*Annual Leave Act*, 1977 (Sweden).

<sup>683</sup>*Agency Work Act*, 2012 (Sweden).

<sup>684</sup>*Working Hours Act*, 1982 (Sweden).

<sup>685</sup>*Prohibition of Discrimination of Employees Working Part-time and Employees with Fixed-Term Contracts Act*, 2002 (Sweden).

<sup>686</sup>*Employment Protection Act* 1982 (Sweden) ss 1-4, 4-6.

<sup>687</sup>*Employment Protection Act* 1982, (Sweden) s 6.

<sup>688</sup>*Ibid* ss 8-17.

<sup>689</sup>*Ibid* s 18.

<sup>690</sup>*Ibid* ss 19-20.

<sup>691</sup>*Ibid* ss 34-39. These include damages or restoration of employment.

<sup>692</sup>*Annual Leave Act*, 1977 (Sweden).

<sup>693</sup>*Ibid* ss 1-4.

<sup>694</sup>*Ibid* s 4. See ss 5-16 for calculations, details, holiday pay and other benefits.

the *Annual Leave Act*, paid parental leave is counted as absence from work for the purpose of holiday pay.<sup>695</sup> Suitable remedies are available if these rights are breached.<sup>696</sup> The *Working Hours Act*<sup>697</sup> regulates matters pertaining to working times and hours.<sup>698</sup> The *Working Hours Act* provides the maximum working time per week is 40 hours, though overtime may be permitted on a number of grounds and subject to appropriate compensation.<sup>699</sup> Employees have remedies available and employers may be liable for various penalties if they fail to comply with these standards.<sup>700</sup>

The *Agency Work Act*<sup>701</sup> regulates matters concerning Swedish workers who are employed through alternative employment arrangements involving entities such as temporary work agencies.<sup>702</sup> The *Agency Work Act* provides that a temporary work agency may not abrogate basic employment conditions and protections had the employee been recruited directly, including regarding pregnancy, breastfeeding, and discrimination on the grounds of gender and other forbidden grounds.<sup>703</sup> Swedish employees have remedies in case of breach of these minimum standards.<sup>704</sup> The *Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act*<sup>705</sup> aims to protect part-time and fixed-contract employees from discrimination in terms of pay and other conditions.<sup>706</sup> This *Act* forbids direct and indirect discrimination against part-time and fixed-term contract employees unless made on reasonable grounds or disadvantageous treatment is necessary to achieve a reasonable goal

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<sup>695</sup>Ibid s 17a.

<sup>696</sup>*Annual Leave Act*, 1977 (Sweden), s 32 and 33. There is a limitation on actions after two years.

<sup>697</sup>*Working Hours Act*, 1982 (Sweden).

<sup>698</sup>Ibid s 5 and 6.

<sup>699</sup>Ibid ss 6-7.

<sup>700</sup>Ibid ss 22-32.

<sup>701</sup>*Agency Work Act*, 2012 (Sweden).

<sup>702</sup>Ibid ss 1-4.

<sup>703</sup>*Agency Work Act*, 2012 (Sweden) ss 6-12.

<sup>704</sup>Ibid ss 13-15.

<sup>705</sup>*Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act*, 2002, (Sweden).

<sup>706</sup>Ibid s 1.

and the means is reasonable and necessary to do so.<sup>707</sup> Swedish employees are entitled to damages and other remedies in the case of breach by employers.<sup>708</sup>

The Swedish *Discrimination Act*<sup>709</sup> puts in place a number of protections for Swedish employees against discrimination.<sup>710</sup> The first section of the *Discrimination Act* sets out the purpose of the *Act* is to combat discrimination and to promote equal rights for people regardless of sex, gender identity, and other protected grounds.<sup>711</sup> The *Discrimination Act* sets out two types of discrimination: direct and indirect discrimination.<sup>712</sup> The *Discrimination Act* prohibits direct and indirect discrimination on listed forbidden grounds (sex, religion, race and others) as well as sexual harassment and disability.<sup>713</sup> The right to non-discrimination extends to employment, recruitment and promotion, subject to certain exemptions.<sup>714</sup> Discrimination is also not permitted regarding labour market policy activities and services not under public contract<sup>715</sup> and to the supply of goods and services, with certain exemptions.<sup>716</sup> Discrimination is also prohibited under the *Act* regarding the provision of social insurance and related benefit schemes.<sup>717</sup> Chapter 3 of the *Discrimination Act* titled ‘Cooperation between employees and employers’,<sup>718</sup> requires employees and employers to ‘Cooperate on active measures to bring about equal rights and opportunities in working life regardless of sex, ethnicity, religion or other belief’,<sup>719</sup> and to combat discrimination in working life on these grounds.<sup>720</sup> Section 2 of the same chapter of the *Act* places a special onus on employers and

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<sup>707</sup>Ibid ss 3-4.

<sup>708</sup>*Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act, 2002*, (Sweden), ss 4-7.

<sup>709</sup>*Discrimination Act, 2008* (Sweden).

<sup>710</sup>Ibid s 1.

<sup>711</sup>Ibid s. 1.

<sup>712</sup>Ibid s 4.

<sup>713</sup>Ibid s 4.

<sup>714</sup>*Discrimination Act, 2008*, (Sweden), Chapter 2, ss 2-3. These exemptions include the nature of the work involved, the context of the work involved, whether genuine occupational health and safety requirements or an exclusive requirement is necessary to perform the job in question, or the measures involve means to achieve gender equality.

<sup>715</sup>Ibid s 9.

<sup>716</sup>Ibid s 12, ss 12(a)-(c).

<sup>717</sup>Ibid s 14(1).

<sup>718</sup>*Discrimination Act, 2008* (Sweden) s 1-3.

<sup>719</sup>Ibid ch 3, s 1.

<sup>720</sup>Ibid ch 3, s 1.

employees to endeavour to equalise and prevent differences ‘In pay and other terms of employment between men and women who perform work which is to be regarded as equal or of equal value.’<sup>721</sup>

The Swedish *Discrimination Act* also places positive obligations on employers regarding gender equality between men and women.<sup>722</sup> These include that employers are required to help both male and female employees to combine parenthood and employment,<sup>723</sup> and employers are to take measures to prevent employees being subjected to or harassment or reprisals associated with prohibited grounds of discrimination.<sup>724</sup> The *Discrimination Act* also requires employers to ensure that in the process of recruitment that ‘People have the opportunity to apply for vacant positions regardless of sex, ethnicity, religion or other belief,’<sup>725</sup> and are required ‘To promote an equal distribution of men and women in different types of work and in different employee categories, by means of education and training, skills development and other appropriate measures.’<sup>726</sup>

Sweden’s parental leave regulatory system is designed to harmonise with its labour law legislation framework (including anti-discrimination laws to prevent women with children being discriminated against by employers) with the wider EU framework to help Swedish parents reconcile the work and family responsibility by allowing parental leave to be flexible rather than rigid.<sup>727</sup> For example, in the first two weeks following the birth of the child in Sweden, both parents are entitled to parental leave at the same time to help care for the child in the very early stages of its life.<sup>728</sup> After this two-week period, only one parent can take leave, but leave periods can be taken until the child’s first year at school.<sup>729</sup> Swedish parental leave can also be tailored depending on whether the

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<sup>721</sup>*Discrimination Act*, 2008 (Sweden) ch 3 s 2.

<sup>722</sup>*Ibid* ch 3 ss 4-13.

<sup>723</sup>*Discrimination Act*, 2008 (Sweden) ch 3 s 5.

<sup>724</sup>*Ibid* ch 3, ss 5-6.

<sup>725</sup>*Discrimination Act*, 2008 (Sweden) ch 3 s 7.

<sup>726</sup>*Discrimination Act*, 2008 (Sweden) ch 3 s 8.

<sup>727</sup>*Ibid* 96-7. See also section 5.3 of this Chapter.

<sup>728</sup>*Ibid* 97. As mentioned in Chapter 3, Australia only introduced paid paternity leave after the initial *Parental Leave Act 2010* (Cth) was introduced.

<sup>729</sup>*Ibid*. In the Australian context, the period is much more restricted. Sweden also complements this with its publically funded childcare system. See section 5.7 of this Chapter for a more detailed discussion.

parent(s) are taking full-time, part-time or are in other working arrangements while caring for their child.<sup>730</sup> Swedish parents also have more choice in how to take leave arrangements that best suit their working and family responsibilities in comparison to other countries.<sup>731</sup> Swedish employers are also required by the *Discrimination Act* to take positive action to actively recruit new employees in the under-represented gender if there is a gender imbalance in a certain category of worker.<sup>732</sup> The *Discrimination Act* also requires employers to conduct a survey every three years of employer practices and provisions regarding pay and work conditions and pay differences between male and female workers and determine whether the differences are based on sex.<sup>733</sup> If so, employers are required every three years by the *Act* to draw up and implement a plan to make required pay adjustments and other measures to ensure there is equal value for equal work with details of implementation and time-frame for completion in three calendar years.<sup>734</sup> There is a further requirement in the *Act* to draw up a 'gender equality plan' covering measures in previous provisions which applies both to private sector businesses<sup>735</sup> and the public service and education providers.

The administration for enforcement of rights under the Swedish *Discrimination Act* involves a mixture of public and private machinery and remedies.<sup>736</sup> First, the government agency called the 'Equality Ombudsman'<sup>737</sup> is tasked to monitor compliance with the *Discrimination Act*<sup>738</sup> and is granted certain administrative

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<sup>730</sup>Ibid 97.

<sup>731</sup>Ibid 97.

<sup>732</sup>*Discrimination Act*, 2008 (Sweden) ch 3 s 9. This is subject however to the reasonable requirements of the employer's business and their resources.

<sup>733</sup>Ibid s 10.

<sup>734</sup>Ibid ch 3, s 11. There is an exemption for businesses with 25 employees or less.

<sup>735</sup>Ibid ch 3, ss 13-15. However, there is again an exemption for small enterprises with 25 employees or less.

<sup>736</sup>*Discrimination Act*, 2008, (Sweden) ch 4, 5, 6.

<sup>737</sup>The 'Equality Ombudsman' is a specialist Swedish government agency that is given powers to monitor and prosecute cases of discrimination under the *Discrimination Act* 2008 (Sweden). It is a merger of four previous different offices. See Government Offices of Sweden, *The Equality Ombudsman*, (6 March 2015), <Government Offices of Sweden, *The Equality Ombudsman*, (6 March 2015), < <http://www.do.se/other-languages/english-engelska/>>. A specific location on the website deals with parental-leave related discrimination: Government Offices of Sweden, *The Equality Ombudsman*, (4 December 2017), < <http://www.do.se/other-languages/english-engelska/disadvantaging-a-person-on-parental-leave-is-prohibited/>>

<sup>738</sup>In some ways these powers are similar to those of the Fair Work Ombudsman in Australia under the *Paid Parental Leave Act*. This will be discussed further in section 5.6 of this Chapter.

and legislative powers including to conduct investigations, request information, act in court on behalf of someone making a complaint about discrimination, and order financial penalties against those who fail to comply with the *Discrimination Act*.<sup>739</sup> There is also another government agency, the ‘Board of Discrimination’, which is given statutory powers to examine applications by the Ombudsman for financial penalties and appeals against financial penalties made under the Act.<sup>740</sup> There are similar powers for a ‘Board of Higher Education’ that handles matters relating to educational institutions.<sup>741</sup> The *Discrimination Act* also provides that breaches of the Act by a natural or legal person (including employers) may be ordered to pay compensation if they breach the provisions of the Act against discrimination.<sup>742</sup> Any employment contract that contains terms that violate the *Discrimination Act* may also be declared invalid, either in regards to specific terms or as a whole, whether the contract is of an individual or collective nature and the terms of the contract containing such provisions may be declared void.<sup>743</sup>

#### 5.4.1 Concluding Discussion

The above discussion of EU standards and treaties shows that Sweden’s labour laws are directly influenced by a complex web of international and EU regulations, primarily in the form of treaties and EC Directives.<sup>744</sup> Unlike Australia, where the Commonwealth has more autonomy and discretion in the creation and modification of its national employment laws because the Australian Constitution only gives the Commonwealth the discretion to legislate obligations Australia has under signed and ratified international treaties (and hence violations of Australia’s treaty obligations are a matter of international rather than domestic law), Sweden’s government is mandatorily required by the EU treaties it has acceded to when it became a member of the EU and also under

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<sup>739</sup>*Discrimination Act*, 2008 (Sweden) ch 5 ss 1-6.

<sup>740</sup>*Ibid* ch 4, s 7. Appeals on non-financial matters cannot be made. Procedural and evidentiary matters are dealt with in ss 8-17 of the Act.

<sup>741</sup>*Ibid* ch 4, s 18.

<sup>742</sup>*Discrimination Act*, 2008 (Sweden) ch 5 ss 1-2.

<sup>743</sup>*Ibid* ch 5, s 3.

<sup>744</sup>For a more detailed discussion of this point see Axel Adlercruetz and Birgitta Nystrom, *Labour Law in Sweden* (Wolters Kluwer, 2010) 63-71; 144-145; Mia Ronmar (ed), *Labour Law, Fundamental Rights and Social Europe* (Hart Publishing, 2011) 113-137, 137-153, 183-199.



subsequent treaties it ratified to ensure the employment law standards discussed above are implemented as soon as practicable into Sweden's domestic employment legislation.<sup>745</sup>

As seen above, Sweden has a comprehensive suite of domestic laws relating to parental leave, anti-discrimination laws to protect employees who are taking leave, and laws designed to foster gender equality, and also a specialist government agency tasked with ensuring employers comply with gender equality and parental leave standards in the workplace with powers to investigate complaints and prosecute employers who breach these standards.<sup>746</sup> The next section of Chapter 5 will discuss some challenges and limitations to the Swedish parental leave system and measures undertaken in Sweden to overcome them.

## **5.5 Challenges to the Swedish Welfare State and Parental Leave System**

According to a 2017 report prepared by the Swedish Social Insurance Agency (SSIA Report),<sup>747</sup> in 2017 Sweden spent approximately 5% of its GDP or 227 billion Swedish Kroner on social insurance, with a third of that spending (roughly 75 billion Kroner) being spent on child and family support.<sup>748</sup> Eligibility for Swedish social security payments are based on work and residence

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<sup>745</sup>For a more detailed discussion of the incorporation of EU standards see Mia Ronmar (ed), *Labour Law, Fundamental Rights and Social Europe* (Hart Publishing, 2011) 113-137, 137-153, 183-199.

<sup>746</sup>The existence of a specialist government agency to investigate and prosecute cases of discrimination and breaches of parental leave standards will be discussed further in Chapter 6 of this thesis.

<sup>747</sup>Swedish Social Insurance Agency, '*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>>

<sup>748</sup>Ibid 6. This amounts to about \$26 billion US. The outgoings on family payments would be around \$9 billion US. For a discussion of welfare spending in the Nordic states compared to the OECD average see Matti Heikkila et al (eds), *Nordic Social Policy: Changing Welfare States* (Routledge, 1999), 27-31 and Christopher J Anderson and Jonas Pontusson, 'Workers, Worries and Welfare States: Social Protection and Job Insecurity in 15 OECD Countries' (2007) 46(2) *European Journal of Political Research* 211, 211-235. Australia spent \$164 billion Australian in the 2017-8 period on social welfare and is projected to spend \$191.2 billion Australian in the 2020-21 period, about 35-36% of total federal government spending. See Peter Whiteford, *Budget 2017: Welfare Changes Stigmatise Recipients and are Sitting on Shaky Ground*, (May 11, 2017), The Conversation Online, <<http://theconversation.com/budget-2017-welfare-changes-stigmatise-recipients-and-are-sitting-on-shaky-ground-77394>> and see also Ben Spies-Butcher, 'Marketisation and The Dual-Welfare State: Neoliberalism and Inequality in Australia' (2014) 25(2) *Economic and Labour Relations Review* 185, 185-201.

requirements in Sweden.<sup>749</sup> In Sweden, most beneficiaries of social insurance spending are aged 2-64 years.<sup>750</sup> According to the SSIA report, in 2017, around 870 037 people in Sweden claimed the temporary parental benefit and 814 851 claimed the parental benefit, with the ratio between the sexes being close to equal.<sup>751</sup> The SSIA report noted that social insurance spending in Sweden had increased by 49% in real terms since 1980, though social spending had decreased from around 10% of GDP in the 1980s to around 5% by 2016.<sup>752</sup> Spending on sickness and disability benefits made up the biggest component of social insurance spending,<sup>753</sup> while family payments remained relatively constant.<sup>754</sup>

Compared to other European countries, the SSIA report indicated Sweden fell somewhere in the ‘middle’ for ‘tax and transfer’ spending in Europe.<sup>755</sup> Eastern European nations tended to spend much less on social insurance while other Nordic states paid more, and Italy topped the comparative list at 22% of GDP.<sup>756</sup> The take-up of parental benefit, temporary parental benefit and pregnancy benefit increased, though payments for child maintenance decreased.<sup>757</sup> Figures in the 2017 report showed that Swedish men were increasingly taking up parental

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<sup>749</sup>Swedish Social Insurance Agency, ‘*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>, 8-9.

<sup>750</sup>Ibid 9.

<sup>751</sup>Swedish Social Insurance Agency, ‘*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>

, 12. More women claimed both benefits than men and only women claimed the pregnancy benefit. Women also constituted the majority of claimants for the childcare allowance, child allowance, maintenance support and carer benefit for related persons. See page 13 of the report. Sweden’s total population is about 10 million.

<sup>752</sup>Ibid 14. The report noted as a proportion of GDP, Swedish social spending was at the lowest level in 30 years.

<sup>753</sup>Being around 3-6% of Swedish GDP. See Swedish Social Insurance Agency, ‘*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>>, 16.

<sup>754</sup>Being around 2-3% of Swedish GDP. Swedish Social Insurance Agency, ‘*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>

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<sup>755</sup>Ibid 17.

<sup>756</sup>Ibid 17.

<sup>757</sup>Ibid 18-31.

benefit and temporary parental benefit payments, though at a lower rate than Swedish women.<sup>758</sup> The report also showed increasing numbers of Swedish women received childcare allowance, particularly to assist caring for children with disabilities.<sup>759</sup>

A number of challenges to the Swedish parental leave system have also been noted in academic commentary on the topic.<sup>760</sup> Critics point out that while there is evidence paid parental leave, paid paternity leave and paid maternity leave periods can be beneficial for Swedish women in terms of fewer employment interruptions and increasing women's possibilities of keeping the same job held before childbearing,<sup>761</sup> there is also evidence that long periods away from work erode Swedish women's skills and opportunities for promotion, thus having a negative long-term impact on their careers similar to the 'motherhood pay gap' discussed in Chapter 2 of this thesis.<sup>762</sup> The problem is explained by Evertsson and Duvander in these terms: 'Long maternal leaves (or labour market exits) are a major reason for women's labour market disadvantages) have in comparative analyses shown that policies enabling longer leave are associated with higher

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<sup>758</sup>Ibid 18-31 and 21. The proportion of Swedish men was highest at about 32% in one region of Sweden and lowest at 25% in another region with the average being around 27% for all men. See Swedish Social Insurance Agency, 'Social Insurance in Figures 2017, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>>, 21.

<sup>759</sup>Swedish Social Insurance Agency, 'Social Insurance in Figures 2017, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <<https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>>>, 36-40.

<sup>760</sup>Marie Evertsson and Ann-Zofie Duvander, (2011), 'Parental Leave – Possibility or A Trap? Does Parental Leave Effect Swedish Women's Labour Market Opportunities?' 4(1) *European Sociological Review* 435, 435-450; Haya Stier, Noah Lewin-Epstein, Michael Braun. 'Welfare Regimes, Family-Supportive Policies and Women's Employment Along the Life-Course' (2001) 106(6) *European Sociological Review* 1731, 1731-1760; B. Pettit and J. Hook, (2005), 'The Structure of Women's Employment in a Comparative Perspective' 84(1) *Social Forces* 779, 779-801; J.C. Ruhm, (1998), 'The Economic Consequences of Parental Leave Mandates' 113(1) *The Quarterly Journal of Economics* 285, 285-317.

<sup>761</sup>Marie Evertsson and Ann-Zofie Duvander, (2011), 'Parental Leave – Possibility or A Trap? Does Parental Leave Effect Swedish Women's Labour Market Opportunities?' 4(1) *European Sociological Review*, 435, 435-450. See also M. Sundstrom and Anne-Zofie Duvander, (2002), 'Gender Division of Childcare and the Sharing of Parental Leave among New Parents in Sweden' 18(1) *European Sociological Review* 433, 433-447.

<sup>762</sup>Marie Evertsson and Ann-Zofie Duvander, (2011), 'Parental Leave – Possibility or A Trap? Does Parental Leave Effect Swedish Women's Labour Market Opportunities?' 4(1) *European Sociological Review*, 435, 435-440.

shares of women with children age 0-6 years in employment. However, this is true only in countries where the entitled leave does not exceed 3 years. In countries where the leave exceeds 3 years, the probability that a woman with small children will be employed is lower. Consequently, extended parental leaves seem to support the breadwinner-homemaker model.<sup>763</sup>

Similarly, Evertsson and Duvander argue the evidence is best equivocal that Sweden's parental leave and child-care schemes have greatly improved problems relating to gender pay gaps, occupational segregation and inequalities between paid and unpaid labour, particularly domestic labour and unpaid care (including childcare).<sup>764</sup> Evertsson and Duvander's argument is supported by arguments put forward by other social researchers.<sup>765</sup> Ruhm for example,<sup>766</sup> argues that 'Proponents (of parental leave) believe that parental leave results in healthier children and improves the position of women in the workplace. Opponents counter that the mandates, by restricting voluntary exchange between workers and employers, reduce economic efficiency and may have a particularly adverse effect on women. The results of previous research on parental leave are ambiguous.'<sup>767</sup>

Ruhm's study,<sup>768</sup> which conducted a comparative analysis of nine European countries from 1969-1993, attempted to identify and quantify the benefits and costs parental leave mandates on workers, particularly employed women taking parental leave.<sup>769</sup> Ruhm found the argument that parental leave mandates reduce

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<sup>763</sup>Marie Evertsson and Ann-Zofie Duvander, 'Parental Leave – Possibility or A Trap? Does Parental Leave Effect Swedish Women's Labour Market Opportunities?' (2010) 4(1) *European Sociological Review* 435, 435-436.

<sup>764</sup>Ibid 436-7. This argument is supported by the statistical report cited earlier showing the majority of those in Sweden taking parental payments, childcare payments and maintenance support were women. Those who claimed pregnancy benefits were 100% female.

<sup>765</sup>See for example, Barbara Hobson et al, (2006), 'Men and Women's Agency and Capabilities to Create a Work/life Balance in Diverse and Changing Institutional Contexts' in J. Lewis (Ed), *Children, Changing Families and Welfare States* (Edward Elgar Publishing, 2006), 267-295. See also Gayle Kaufman and Anna-Lena Almqvist, 'The Role of Partners and Workplaces in British and Swedish Men's Parental Leave Decisions' (2017) 20(5) *Men and Masculinities* 533, 533-551.

<sup>766</sup>Christopher J Ruhm, 'The Economic Consequences of Parental Leave Mandates: Lessons from Europe' (1998) 113(1) *The Quarterly Journal of Economics* 285, 285-317.

<sup>767</sup>Ibid 285.

<sup>768</sup>Ibid 285-287.

<sup>769</sup>Ibid 285-287.

female unemployment unconvincing, arguing: ‘It is also frequently asserted that leave mandates decrease female unemployment and increase firm-specific human capital by reducing the need for women to change jobs, if they wish to spend time at home with young children. Lacking some source of market failure, this argument is unconvincing. Employers and workers can always voluntarily negotiate maternity leave, mitigating the joblessness and retaining the specific investments.’<sup>770</sup>

Ruhm was also sceptical that leave mandates could reduce gender pay gaps and occupational segregation for economic reasons: ‘Moreover, with competitive labor markets, the groups most likely to use parental leave will pay for it by receiving lower wages, implying that females of childbearing age will continue to obtain lower and possibly reduced compensation if the benefit is mandated. Entitlements that allow substantial time off work may cause employers to limit women to jobs where absences are least costly, thereby increasing occupational segregation, as Stoiber [1990] suggests has occurred in Sweden.’<sup>771</sup> Ruhm also pointed out that even where parental leave had been given for fathers, it was still invariably mothers who took most of the leave time.<sup>772</sup>

After conducting his analysis, Ruhm concluded there was little evidence to suggest paid parental leave policies had a substantial positive effect on women’s wages, except in the short-term.<sup>773</sup> Further, Ruhm’s study suggested long periods of mandated leave may adversely affect women workers, particularly in lowering wages and also decreasing opportunities for return to full-time employment and promotions because of prolonged absence from work.<sup>774</sup> Such absences can cause problems for employers who lose skilled staff and have difficulties finding equivalent replacements due to skilled staff members being away for long periods of time, and also human capital depreciation if female

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<sup>770</sup>Ibid 288.

<sup>771</sup>Ibid 288.

<sup>772</sup>Ibid 291. This point will also be taken up in further detail below.

<sup>773</sup>Ibid 311.

<sup>774</sup>Ibid 314.

employees choose to stay out of the workforce for several years to raise and care for children.<sup>775</sup>

Similarly, Haya Stier et al<sup>776</sup> suggest studies indicate that periods away from work, whether on parental leave or other leave, can have a detrimental impact on gender pay gaps, occupational segregation, skill atrophy and reduced productivity and wages for the employee who chooses to take leave to look after children.<sup>777</sup> Stier et al note that ‘In all industrial countries, women still bear the major responsibility for child rearing, independent of welfare regime and specific family policies,’<sup>778</sup> and ‘None of the public policies, even in the most egalitarian models, has been effective enough to change the household division of labour between the genders.’<sup>779</sup>

Stier et al note in their analysis of Sweden that in a social-democratic regime, if the economy is still governed mainly by market forces, women not in full-time continuous employment will face a high cost for deciding to interrupt employment in order to care for their children.<sup>780</sup> Stier et al in their study found that even though Sweden could be characterised as a socially democratic country with a high-level of support given to women to help them return to work after having children, the actual correlations between the effectiveness of these policies and their aims was fairly weak at best, even when compared to more conservative nations, and other factors such as culture also played an important role.<sup>781</sup> What is more important according to the study conducted by Stier et al is that ‘High support for women’s employment minimises the costs of employment interruptions and the transition to part-time (work).’<sup>782</sup> What seems to count most overall is whether employment and welfare policies provide the

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<sup>775</sup>Christopher J Ruhm ‘The Economic Consequences of Parental Leave Mandates: Lessons from Europe’ (1998) 113(1) *Quarterly Journal of Economics* 285, 314-5.

<sup>776</sup>Haya Stier, Noah Lewin-Epstein, Michael Braun, ‘Welfare Regimes, Family-Supportive Policies and Women’s Employment Along the Life-Course’ (2001) 106(6) *American Journal of Sociology*, 1731, 1731-1760.

<sup>777</sup>Ibid 1732.

<sup>778</sup>Ibid 1734.

<sup>779</sup>Ibid 1734.

<sup>780</sup>Ibid 1737-8.

<sup>781</sup>Ibid 1747-1748.

<sup>782</sup>Ibid 1754.

most support for women to remain attached to continuous employment, rather than the specific type of regime in place.<sup>783</sup>

The argument that taking long periods of time off work damages women's careers, even when supported by extended periods of parental leave, is supported by other research.<sup>784</sup> Marie Evertsson for example in a paper<sup>785</sup> points out that a number of studies have shown taking long periods of time off from work depresses wages, reduces chances for opportunities for work promotion and advancement and contributes in part to the gender pay gap between men and women workers.<sup>786</sup> Evertsson notes that before deciding to form a couple and have children, in countries such as Sweden (or those with similar goals regarding gender equality), labour market outcomes for male and female workers such as salary, career progression and other metrics are fairly even.<sup>787</sup> However, soon after people form relationships and have children, the gap in pay and career outcomes between male and female workers becomes apparent, as has been shown in a number of studies.<sup>788</sup> The reasons for this are complex.<sup>789</sup>

Although Sweden's paid parental leave system design (particularly non-shareable parental leave and mandatory 'daddy-months') was designed to combat this, the evidence of success is only equivocal, with only around 24% of

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<sup>783</sup>Ibid 1757.

<sup>784</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages after Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-7. See also Dennis Gorlich, 'Human Capital Depreciation During Hometown' (Oxford Economic Papers Volume 61, Issue suppl\_1, 1, Oxford Department of Economics, April 2009), i98-i121.

<sup>785</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages after Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-40.

<sup>786</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages After Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-7. See also Dennis Gorlich and Andries de Grip, 'Human Capital Depreciation during Family-related Career Interruptions in Male and Female Occupations' (ROA Research Memorandum No 007, Maastricht University, Research Centre for Education and the Labour Market (ROA), 7 October 2007) and James Albrecht et al, 'Career Interruptions and Subsequent Earnings: A Reexamination Using Swedish Data' (1999) 34(2) *Journal of Human Resources* 294, 294-311.

<sup>787</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages after Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-7. See also Marie Evertsson and Daniela Grunow, 'Women's Work Interruptions and Career Prospects in Germany and Sweden' (2012) 32(9-10) *International Journal of Sociology and Social Policy* 561, 561-575.

<sup>788</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages after Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-28. See also Silke Aisenbrey, Marie Evertsson, Daniela Grunow, 'Is There a Career Penalty for Mothers' Time Out? A Comparison of Germany, Sweden and the United States' (2009) 88(2) *Social Forces* 573-605.

<sup>789</sup>See discussion in Evertsson at 280, above, 26-30.

Swedish men on average taking up paid parental leave.<sup>790</sup> The problem Marie Evertsson argues, lies in the cultural inertia surrounding the tradition of the man being both the ‘male breadwinner’ who economically supports his household with a supportive wife behind him to care for the children, and the man also being a loyal employee doing whatever is required to help his employer: ‘The caring function in the family is mainly assumed by mothers, who are thus accorded a lower status than women without children or men. Motherhood can be a signal that leads to expectations that a person is unwilling to work overtime and/or sometimes forced to leave work on short notice, for instance, when a child falls ill. Fathers, in contrast, are expected to be more, rather than less, committed and loyal employees, given that, traditionally, they have had to provide for their families. The implication is that fathers should be more deserving of status than men without children. When mothers and fathers act as employers expect them to (i.e. recent mothers take parental leave of a year or so and fathers take little or no leave), their leave-taking pattern has little signaling value to the employer, given that it does not separate them from other women/mothers and men/fathers.’<sup>791</sup>

In her own analysis and study of Swedish men and women taking parental leave, Evertsson found strong support for the hypothesis that taking long periods of parental leave was in fact detrimental to both men and women, particularly in terms of lost wages and long-term earnings, though more so for women than for men.<sup>792</sup> Further, Evertsson’s research showed that the negative impacts of taking long-term parental leave seemed to be more strongly correlated to parents who had better educational backgrounds, skill sets, work experience and training, and higher pay, than on people from lower social-economic backgrounds for both

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<sup>790</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 27-28.

<sup>791</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 26-28. See also Silke Aisenbrey, Marie Evertsson, Daniela Grunow, ‘Is There a Career Penalty for Mothers’ Time Out? A Comparison of Germany, Sweden and the United States’ (2009) 88(2) *Social Forces* 573, 573-605.

<sup>792</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 36-7.



sexes.<sup>793</sup> This seemed to be due to a number of factors, including that mothers suffer human capital depreciation while on long periods of leave which have long knock-on effects in the longer-term, while men who decide to take parental leave and adopt more of a ‘caring’ role ‘also violate the norms associated with conventional masculinity, according to which fathers are expected to be the main financial providers of the family and therefore more stable and reliable employees than non-fathers and women with or without children.’<sup>794</sup> Those who are in jobs that require long hours of work or travel for opportunities also face drawbacks for taking long periods of leave, including lower wages or cancelled promotions.<sup>795</sup>

Similarly, in another paper,<sup>796</sup> Evertsson and Grunow argued long periods of paid parental leave, such as those offered in Sweden, can approach periods of unemployment in terms of ‘scarring effects’ on the careers of the parents (mainly women) who choose to take it.<sup>797</sup> In their paper, Evertsson and Grunow argue the problem is that while a person remains at work, their skills either remain stable and are not lost or reduced, and there are opportunities for the employee to improve their skills and experience (and hence derive a higher wage premium for these) through opportunities such as on-the-job training and promotions, further education and also indicating to their employer that they are willing to be ‘on the job’ for their employer and are personally committed to employer goals (such as increased profitability or other metrics).<sup>798</sup>

A further problem with paid parental leave in Sweden is statistical data indicates women rather than men take up the majority of parental leave, with between 24-

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<sup>793</sup>Ibid 36-7. See also Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 913.

<sup>794</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 36-37.

<sup>795</sup> Ibid 36-37.

<sup>796</sup> Marie Evertsson and Daniela Grunow, ‘Women’s Work Interruptions and Career Prospects in Germany and Sweden’ (2012) 32(9-10) *The International Journal of Sociology and Social Policy* 561, 561-562.

<sup>797</sup>Ibid 561-562.

<sup>798</sup>Marie Evertsson and Daniela Grunow, ‘Women’s Work Interruptions and Career Prospects in Germany and Sweden’ (2012) 32(9-10) *The International Journal of Sociology and Social Policy* 561, 561-563.

33% of men taking up parental leave.<sup>799</sup> The most recent report into leave take-up prepared by the Swedish Social Insurance Agency indicated that women claimed about 2 to 3 times as many parental benefit days than men in the period between 2002 and 2016,<sup>800</sup> and the number of female claimants for parental benefit exceeded males across all age demographics.<sup>801</sup> The same report showed that on average about Swedish men took up about 27% of available parental leave and women remained the major claimants of parental leave.<sup>802</sup>

As indicated earlier, high levels of differentials in time spent on paid employment and unpaid care work (such as maternity or parental leave) can have detrimental economic effects on both men and women, but especially on women.<sup>803</sup> Although Sweden has made substantial efforts to make the use of paid parental leave as equal as possible,<sup>804</sup> Duvander comments: ‘Even if the employment is well protected and discrimination laws for parents are strong in Sweden, it is shown that a long leave is detrimental for career and income development. It seems that the attitude toward leave at the workplace is of importance for the decision on leave length among parents.’<sup>805</sup> There are a number of disincentives towards men taking up parental leave on an equal basis that are extremely difficult to overcome, even in a country such as Sweden which has a strong regulatory system of employment protection from discrimination

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<sup>799</sup>See Swedish Social Insurance Agency, ‘*Social Insurance in Figures 2017*, (1<sup>st</sup> June 2017), Swedish Social Insurance Agency, <[<sup>800</sup>Ibid 20.](https://www.forsakringskassan.se/wps/wcm/connect/6fa0e434-a212-4e6b-8c8d-5d7a498a253d/socialforsakringen-siffror-2017-engelsk.pdf?MOD=AJPERES&CVID=>>”, 21-22.</a></p></div><div data-bbox=)

<sup>801</sup>Ibid 20.

<sup>802</sup>Ibid 21. The report also showed the highest proportion of take up was only 31% in one Swedish cantonment at 27.

<sup>803</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 26-7.

<sup>804</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 910-913.

<sup>805</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 913.

and by international standards, a generous and inclusive paid parental leave system.<sup>806</sup>

The first reason, as already discussed previously<sup>807</sup> and noted in a number of studies,<sup>808</sup> is that evidence suggests that long periods of time spent away from work for whatever reason (including family leave) have negative effects on the employability and career prospects of the individual concerned, because of lack of access to continuous employment or engagement with the job market ‘depreciates’ the human capital of the individual (skills, experience, training and knowledge, up to date skills compared to colleagues, etc) and can also suggest to a prospective or actual employer a reluctance or unwillingness to commit fully to their job.<sup>809</sup>

A second factor is that despite attempts to change cultural values and attitudes, even in Swedish society, patriarchal ideals about male and female roles at work and in the family are difficult to change, and men who take leave can be seen as transgressing traditionally prescribed social ideals such as that of the main economic provider of the family, as well as being the model hard-working full-time employee or manager.<sup>810</sup> Further, studies on the take-up of leave by men shows that higher-educated and higher-earning men tend to take more paid leave

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<sup>806</sup>Ibid 914-915 and see also Marie Evertsson et al, ‘Work Interruptions and Young Women’s Career prospects in Germany, Sweden and the US’ (2016) 30(2) *Work Employment and Society* 291, 297.

<sup>807</sup>See Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 26-40.

<sup>808</sup>Marie Evertsson and Daniela Grunow, ‘Women’s Work Interruptions and Career Prospects in Germany and Sweden’ (2012) 32(9-10) *The International Journal of Sociology and Social Policy* 561, 561-575

<sup>809</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 913-915. See also Dennis Gorlich, ‘Human Capital Depreciation during Hometime’ *Oxford Economic Papers*, Volume 61, Issue suppl\_1, 1 April 2009, i98–i121.

<sup>810</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 913-915.

and on a more equal basis than men of lower educational and occupational attainment, reinforcing economic inequality as well.<sup>811</sup>

The end result is different ‘patterns’ or ‘orientations’ of men and women toward work and family in Sweden, with men being reluctant to take time off work to care for children even when provided with paid parental leave, and for women to be encouraged to take time off work to care for children even when doing so is detrimental to their careers.<sup>812</sup> The analysis here by Duvander to explain these different patterns of time use and sharing of leave is instructive: ‘Even if both women and men, to the largest extent, fully agree about the importance of work (including its economic rewards), family, and gender equality, there are differences that seem to determine parental leave lengths in gendered ways.’<sup>813</sup>

A final and third factor to note is that in many cases, as has been shown in studies<sup>814</sup> is that business cultures can also be hostile to fathers taking leave even if it is granted as a basic social right.<sup>815</sup> A business culture hostile to male employees taking leave can act as a strong incentive for men to not take up paid parental leave, even in countries such as Sweden.<sup>816</sup> An aspect of this culture is the way businesses or corporations can reflect the social climate and traditions that surround them. As Haas and Hwang explain:

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<sup>811</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 915-6.

<sup>812</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 26-40; Marie Evertsson and Daniela Grunow, ‘Women’s Work Interruptions and Career Prospects in Germany and Sweden’ (2012) 32(9-10) *The International Journal of Sociology and Social Policy* 561, 561-575.

<sup>813</sup>Ann-Zofie Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *Journal of Family Issues* 909, 922-923.

<sup>814</sup>Linda Haas and Phillip Hwang, ‘Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden’ (2009) 7(3) *Fathering* 303, 303-321. See also Ghazala Nasm, ‘Usage of Parental Leave by Fathers in Norway’ (2010) 30(5-6) *International Journal of Sociology and Social Policy* 313, 313-325; Elly-Ann Lindstrom, ‘Gender Bias in Parental Leave: Evidence from Sweden’ (2013) 34(2) *Journal of Family and Economic Issues* 235, 235-248.

<sup>815</sup>Linda Haas and Phillip Hwang, ‘Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden’ (2009) 7(3) *Fathering* 303, 304.

<sup>816</sup>*Ibid* 304-5.

(Swedish) workplaces have traditionally been organized around a work-life model that assumes that the average worker (a man) arrives at work unencumbered by family responsibilities, so that employers need not offer workers flexibility to give family care. While some workplaces have adapted themselves to a workforce that includes mothers, most companies give little consideration to children's relations with fathers and have rendered fatherhood invisible at work. For gender equality to be reached, workplace practices must support a 'presumption of shared parenting,' whereby fathers are regarded as capable, willing, and involved parents, and where both fathers and mothers are responsible for children's development.<sup>817</sup>

Workplace cultures, whether 'professional' white-collar ones, or 'working class' blue-collar ones, can also have cultures or shared ideals that discourage men away from gender equality and taking leave.<sup>818</sup> Various aspects of business and workplace cultures including formal and informal support from managers, senior staff, or corporate CEO's, gender equality policies, education programs and the number of women in senior managerial positions all have a strong impact on how Swedish men in either blue or white collar industries decided to take up parental leave.<sup>819</sup> This indicates business cultures can be just as important as any other factor in helping overcome the gender imbalance in the take up of parental leave in Sweden and elsewhere.<sup>820</sup>

### **5.5.1 Concluding Discussion**

This section discussed the challenges faced by the Swedish parental leave system and as mentioned above, statistical data and the review of the academic commentary on the Swedish parental leave system has also shown that paid

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<sup>817</sup>Linda Haas and Phillip Hwang, 'Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden' (2009) 7(3) *Fathering* 303, 304-5.

<sup>818</sup>Ibid 306-7. See also Christina Boll, Julian Leppin, Nore Reich, 'Paternal Childcare and Parental Leave Policies: Evidence from Industrialised Countries' (2014) 12(1) *Review of Economics of the Household*, 129-158.

<sup>819</sup>Linda Haas and Phillip Hwang, 'Is Fatherhood Becoming More Visible at Work? Trends in Corporate Support for Fathers Taking Parental Leave in Sweden' (2009) 7(3) *Fathering* 303, 310-318.

<sup>820</sup>Ibid 316-318. This will also be further discussed in section 5.7 of this Chapter.

parental leave, even when it is generous, does not seem to be able to fully counteract the negative economic impacts and costs employees of either sex must face when taking long periods of time away from work.<sup>821</sup> The next section will discuss similarities and differences between the Swedish and Australian parental leave laws and how they contribute or negate the problems mentioned earlier.

## **5.6 Similarities and Differences between the Paid Parental Leave Acts of Australia and Sweden**

The Australian and the Swedish models of parental leave and family benefits have both similarities and differences in their structures and features.<sup>822</sup> These difference and similarities are based on different factors, including different cultural and historical traditions in both countries, different legal regimes, and differences in social and economic policies.<sup>823</sup> However, Australia and Sweden also share sufficient similarities in both the problems faced by working women discussed in earlier chapters in this thesis and also in policy solutions which make a comparison between Australian and Swedish approaches to the ‘problem’ of paid parental leave for female employees insightful to give guidance for the Australian policy and legal context.<sup>824</sup> This section will review key provisions of the Australian *Paid Parental Leave Act* and the Swedish *Parental Leave Act* to note similarities and differences before moving on to the academic commentary on the issue.

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<sup>821</sup>Marie Evertsson, ‘Parental Leave and Careers: Women and Men’s Wages after Parental Leave in Sweden’ (2016) 29(1) *Advance in Life Course Research* 26, 26-40; Marie Evertsson and Daniela Grunow, ‘Women’s Work Interruptions and Career Prospects in Germany and Sweden’ (2012) 32(9-10) *The International Journal of Sociology and Social Policy* 561, 561-575.

<sup>822</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47; Marian Baird and Gillian Whitehouse (2011), ‘Paid Parental Leave: First Birthday Policy Review’ 38(3) *Australian Bulletin of Labour*, 184, 184-198; Rianne Mahon, Christina Bergqvist and Deborah Brennan, ‘Social Policy Change: Work-Family Tensions in Sweden, Australia and Canada’ (2016) 50(2) *Social Policy and Administration* 165, 165-182.

<sup>823</sup> Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47.

<sup>824</sup>See Chapters 2 and 3 of this thesis.

The policy goals of *Australia's Paid Parental Leave Act*<sup>825</sup> are set out in the legislation itself under Division 1A, 'Objects of the Act.'<sup>826</sup> It sets out two kinds of payments; 'parental leave pay' and 'dad and partner pay.'<sup>827</sup> These two payments are set out to achieve a number of objects set out in s 3A including:<sup>828</sup>

- a) Signal that taking time out of the paid workforce to care for a child is part of the usual course of life and work for both parents; and
- b) Promote equality between men and women and balance between work and family life.
- c) Allow those carers to take time off work to care for the child after the child's birth or adoption; and
- d) Enhance the health and development of birth mothers and children; and
- e) Encourage women to continue to participate in the workforce.
- f) increase the time that fathers and partners take off work around the time of birth or adoption; and
- g) Create further opportunities for fathers and partners to bond with the child; and
- h) Allow fathers and partners to take a greater share of caring responsibilities and to support mothers and partners from the beginning; and
- i) To complement and supplement existing entitlements to paid or unpaid leave in connection with the birth or adoption of a child.

These legislative objects are further explained in s 4 of the *Act*<sup>829</sup> that explains how the act is to be administered, the terms under which parental leave pay or DAPP is payable, how payments are administered and the rate at which they are administered, provisions for breaching the *Act* by employers or employees, and other matters.<sup>830</sup> The Guide in the *Act* sets out that paid parental leave in Australia is only open to Australian citizens or residents who satisfy certain

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<sup>825</sup>*Paid Parental Leave Act 2010* (Cth).

<sup>826</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 div 1A s 3A.

<sup>827</sup>*Ibid* ch 1 div 1A s 3A(1A).

<sup>828</sup>*Ibid* ch 1 div 1A ss 3A(1A) – 3A(1B).

<sup>829</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 div 2 s 4 'Guide to this Act.'

<sup>830</sup>*Ibid* ch 1 div 2 s 4 'Guide to this Act.' See also ch 1 pt 1-2 div 1-2 ss 5-6 for a more detailed discussion of these legislative terms.

conditions including tests related to employment, income and residency and who have primary care of the child.<sup>831</sup> The payment rate is at the Australian federal minimum wage for a period of no longer than 18 weeks in duration.<sup>832</sup> DAPP payments are available for a maximum of two weeks at the federal minimum wage to the partner or secondary carer of the child subject to certain criteria.<sup>833</sup> The parental leave or DAPP payments must be made either through the employer or the Secretary if an ‘employer determination’ is not made.<sup>834</sup>

Chapter 4 of the *Act* sets out powers for the ‘Secretary’<sup>835</sup> for enforcement of provisions of the *Act* against either employers or employees, including the power to enforce compliance with the provisions of the *Act*,<sup>836</sup> firstly by referring employers to the Fair Work Ombudsman for investigation if the Secretary believes a breach of the *Act* has occurred,<sup>837</sup> allowing the Secretary to apply to the Federal Court to make civil penalty orders against persons who breach the *Act*,<sup>838</sup> to issue compliance and infringement notices for non-compliance,<sup>839</sup> and make debt recovery orders due to the Commonwealth for breaches of the Act in relation to paid parental leave of DAPP payments,<sup>840</sup> and employees to recover payments owed to them as a debt from employers,<sup>841</sup> and various provisions for recovery, waiver and writing off debts.<sup>842</sup> The remainder of the *Act* is concerned with matters including powers of review and appeal of decisions,<sup>843</sup> and ancillary matters.<sup>844</sup>

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<sup>831</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 div 2 s 4 ‘Guide to this Act.’

<sup>832</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 t 3-1 Div 2 s 65.

<sup>833</sup>*Ibid* ch 3 pt 3-1 div 2 s 65 and ch 3, pt 3A-5 div 2 s 115EC. The criteria are similar to those claiming parental leave pay except the DAPP recipient must satisfy the criteria set out in ch 3A pt 3A-, div 2 s 115CB of the Act.

<sup>834</sup>*Paid Parental Leave Act 2010* (Cth) ch 3 pt 3-5 div 1-5 ss 100-115; ch 3A pt 3A-2 div 3 ss 115BC-115BF.

<sup>835</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-1-4-3 ss 111-201A. The Secretary is the government authority that administers parental leave payments and DAPP pay.

<sup>836</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-2 div 2-5 ss 140-163..

<sup>837</sup>*Ibid* ch 4 pt 4-2 div 2 ss 141-147.

<sup>838</sup>*Ibid* ch 4 pt 4-2 div 3 ss 141-146.

<sup>839</sup>*Ibid* ch 4 pt 4-2 div 4 ss 157-158 and ch 4 pt 4-2 div 5 ss 159-163.

<sup>840</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-3 div 1-5 ss 164-192(A).

<sup>841</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-3 div 1-7 ss 164-200.

<sup>842</sup>*Ibid* ch 4 pt 4-3 div 2-7 ss 141-200.

<sup>843</sup>*Paid Parental Leave Act 2010* (Cth) ch 5 pt 5-1-5-4 ss 202-273A; ch 6 pt 6-1-6-3 ss 274-308. These include matters such as payments to nominees, adoption, and the jurisdiction of Federal Courts to hear matters under the Act.

<sup>844</sup>*Ibid*.



The *Paid Parental Leave Act* has a number of similarities to the Swedish *Parental Leave Act*.<sup>845</sup> The first is the *Paid Parental Leave Act* offers paid parental leave to eligible carers and also ‘Dad and Partner Pay’ which can be regarded as a form of paternity leave.<sup>846</sup> However, paid parental leave and DAPP payments under the *Paid Parental Leave Act* are not a ‘right’ but rather a type of payment from the government a claimant is eligible for provided after an objective assessment by the Secretary<sup>847</sup> following an application by the claimant demonstrates the applicant to parental leave pay or DAPP satisfies the required criteria.<sup>848</sup> These criteria for those claiming paid parental leave include the ‘income test’, ‘work test’ and ‘Australian residency test’, also the claimant must be the primary carer of the child, and must have not returned to work.<sup>849</sup> Claimants for DAPP payments must also satisfy objective criteria including satisfying the income, work, and Australian residency tests, be caring for the child, and to have not returned to work.<sup>850</sup> The *Paid Parental Leave Act* only offers these two types of paid leave and no other types of paid leave on the basis of pregnancy, maternity or parental responsibility.<sup>851</sup>

The Australian parental leave scheme also does not offer paid parental leave equally between the two types of available leave, making a key distinction between the ‘primary carer’ of the child who is eligible for 18 weeks of paid parental leave under the scheme, and a person ‘caring for the child’ who is eligible only for two weeks of DAPP payments under the scheme.<sup>852</sup> A further distinction is made in the Act under eligibility for parental leave pay between ‘primary’, ‘secondary’ and ‘tertiary’ claimants.<sup>853</sup> A ‘primary’ claimant can only either be the child’s birth mother or adoptive parent<sup>854</sup> while a ‘secondary’ claimant can only either be a child’s partner of the primary claimant, a person

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<sup>845</sup>See following discussion.

<sup>846</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 1 s 30; ch 3A pt 3A(1) s 115AA.

<sup>847</sup>The Secretary is defined in s 6 of the Act as ‘The Secretary of the Department.’

<sup>848</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 1 s 30 and ch 3A pt 3A(1) s 115A.

<sup>849</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 1 s 30. For a detailed discussion of these criteria please see Chapter 3 of this thesis.

<sup>850</sup>*Paid Parental Leave Act 2010* (Cth) ch 3A pt 3A(3) div 1 s 115CA.

<sup>851</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-3 div 1 s 30.

<sup>852</sup>*Paid Parental Leave Act 2010* (Cth) ch 1 pt 1-1 div 1A s 3A; ch 2 pt 2-3 div 6 s 47.

<sup>853</sup>*Paid Parental Leave Act 2010* (Cth) ch 2 pt 2-4 div 2 ss 53-55.

<sup>854</sup>*Ibid* ch 2 pt 2-4 div 2 ss 54(1)(a) and (b). This is unless exceptional circumstances apply.

who is the child's parent but not the primary claimant, a person defined by certain exceptional circumstances under the *Paid Parental Leave Act* rules.<sup>855</sup> Parental leave is not shareable or transferable unless the Secretary makes a special determination that it is shareable and transferable in the particular case being considered according to the case scenarios described in the legislation.<sup>856</sup> Claimants to parental leave pay or DAPP payments have certain rights to appeal a determination made regarding parental leave pay or DAPP payments, as does the employer and the Secretary.<sup>857</sup> While the Fair Work Ombudsman has some powers regarding enforcement of rights under the *Paid Parental Leave Act*,<sup>858</sup> these are not comprehensive and require action to be taken through the Fair Work Commission or the Federal Court to take place.<sup>859</sup>

Following this discussion, the differences and similarities between the Australian and the Swedish schemes now start to become quite apparent.<sup>860</sup> While the Australian scheme only offers two basic kinds of paid parental leave, parental leave pay and DAPP payments, in the Swedish *Parental Leave Act* claimants can choose between six different types of parental, maternity or paternity leave that can also be mixed with flexible work options,<sup>861</sup> while in the Australian system, leave can only be claimed by claimants for parental leave pay

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<sup>855</sup>Ibid ch 2 pt 2-4 div 2 ss 55(2)(a)-55(2)(d).

<sup>856</sup>*Paid Parental Leave Act 2010*, (Cth) ch 2 pt 2-2 div 2 ss 13-17. For information about rates of payment, see s 5.4 of this Chapter.

<sup>857</sup>*Paid Parental Leave Act 2010*, (Cth) ch 5 pt 5-2 div 2 ss 213-235; ch 5 pt 5-3 div 1-3 ss 236-243.

<sup>858</sup>See for example *Paid Parental Leave Act 2010* (Cth), ch 4, pt 4-2, div 1-5, ss 141-163 for the statutory powers under the *Act* to refer matters to the Fair Work Ombudsman for determination and related powers given to the FWO to enforce compliance with the provisions of the *Act*. These should be read together with the related sections of the *Fair Work Act* related to unpaid parental leave, which by the time of passage of the *Fair Work Act* was a well-established industrial right thanks to the arbitration decisions discussed in Chapter 3.

<sup>859</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-2 div 2 ss 141-144.

<sup>860</sup>Paula Brough, Michael P O'Driscoll, Amanda Briggs, 'Parental Leave and Work-family Balance Among Employed Parents Following Childbirth: An Exploratory Investigation in Australia and New Zealand' (2009) 4(1) *New Zealand Journal of Social Sciences* 71, 71-87; Ray Broomhill and Rhonda Sharp, 'Australia's Parental Leave Policy and Gender Equality: An International Comparison' (2012) Adelaide: Australian Workplace Innovation and Social Research Centre, The University of Adelaide, 1-23; Marian Baird, Jenni Whelan, Alison Page, 'Paid Maternity, Paternity and Parental Leave for Australia: An Evaluation of the Context, Evidence and Policy Options' (Discussion Report, Faculty of Economics and Business, University of Sydney, February 2009), v-xvi, 54-58, 60-64, 75. Broomhill and Sharp note in their paper the Australian parental leave payment is only 53% of the Australian average wage compared to 80% for Sweden and 90-100% for Norway at 8.

<sup>861</sup>*Parental Leave Act 1995* (Sweden) ss 3-9.

or DAPP while absent from work.<sup>862</sup> Australia's parental leave scheme also only permits the sharing of parental leave between parents or carers upon a special determination made upon an application for determination by the relevant statutory authority, and the longer period of parental leave pay is focused on the female caregiver rather than being gender-neutral.<sup>863</sup> A further specific difference that is more apparent is that unlike Sweden, Australia's *Paid Parental Leave Act* does not have specific provisions that are strongly proscriptive against gender discrimination or adverse action made against workers who decided to take leave.<sup>864</sup> The Swedish legislation on parental leave clearly encourages parents to share parental leave with each other<sup>865</sup> and also sets aside special periods of leave for fathers.<sup>866</sup> While the Australian *Paid Parental Leave Act* also has similar provisions under 'DAPP' payments, the maximum period of time someone can claim DAPP payments (if they are not relying on shared leave) is two weeks, while under the Swedish *Parental Leave Act* fathers can claim specific parental leave time of up to three months.<sup>867</sup>

### **5.7 Discussion and Review of the Australian Parental Leave System in Light of the Swedish Parental Leave System**

As discussed earlier in Chapter 5,<sup>868</sup> Sweden and Australia have paid parental leave schemes already in place.<sup>869</sup> However, while both countries have parental leave systems in place and ancillary benefits such as family assistance payments, childcare subsidies and anti-discrimination legislation, the policy designs and legislative frameworks of Australian and Sweden are driven by different

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<sup>862</sup>*Parental Leave Act 1995*, (Sweden) ss 3-9, *Paid Parental Leave Act 2010* (Cth).

<sup>863</sup>*Parental Leave Act 2010* (Cth).

<sup>864</sup>*Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-2 div 2-5 ss 140-163, *Parental Leave Act 1995* (Sweden) ss 16-17. However, Australia does have specific protections for workers against adverse action on the grounds of sex, pregnancy and use of parental leave under other federal industrial legislation and as mentioned earlier, the Fair Work Ombudsman has certain powers to bring cases to the FWC or Federal Court and to issue infringement and compliance orders. See *Paid Parental Leave Act 2010* (Cth) ch 4 pt 4-2 div 4-5 ss 157-163.

<sup>865</sup>*Parental Leave Act 1995* (Sweden) ss 3(1) – 3(6); ss 4-9.

<sup>866</sup>*Parental Leave Act 1995* (Sweden) ss 3(1) – 3(6).

<sup>867</sup>*Ibid.*

<sup>868</sup>See section 5.6 of this Chapter.

<sup>869</sup> Mihaela, Robina (ed) 'Handbook of Family Policies Around the Globe' (Springer, 2014) 91-93; 335-337.

underlying policy goals.<sup>870</sup> This inevitably creates some tensions and difficulties in ‘translating’ lessons learned in the Swedish model to other countries such as Australia which may have different social policies around different underlying theoretical frameworks.<sup>871</sup>

Keeping this potential problem in mind, social researchers comparing the parental leave frameworks of Australia and Sweden have made useful analyses of the similarities and differences between the two countries.<sup>872</sup> An important issue noted earlier in this difference noted earlier in this thesis<sup>873</sup> regarding the ‘neoliberal’ policies pursued by Australia, the UK, US and other English-speaking countries that prioritise economic goals such as maximising wealth and economic efficiency at the expense of social welfare goals,<sup>874</sup> and the ‘social democratic’ welfare model pursued by Sweden focused on maximising social and gender equity balanced the demands of a capitalist system.<sup>875</sup> As Wells and Bergnehr explain: ‘The Swedish welfare state is part of what can be called a ‘social democratic’ model, which is characterised by having universal benefits for all (i.e. gender, economic classes, racial, ethnic groups and children).’<sup>876</sup> Australia is classified by social researchers as a ‘liberal democratic’ state.<sup>877</sup> The

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<sup>870</sup>Ibid. See also Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47.

<sup>871</sup>Riane Mahon et al., ‘Social Policy Change: Work Family Tensions in Sweden, Australia and Canada’ (2016) 50(2) *Social Policy Administration* 165, 165-182. See also Andrea Leitner and Angela Wroblewski, ‘Welfare States and Work-Life Balance: Can Good Practices be Transferred from the Nordic Countries to Conservative Welfare States?’ (2006) 8(2) *European Societies* 295, 295-317.

<sup>872</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47.

<sup>873</sup>See Chapter 2 of this thesis.

<sup>874</sup>See Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 9-38, 143-161. The relative costs of childcare and parenting in Australia in relation to Sweden and the amounts paid in Australia in parental leave pay and childcare subsidies is instructive in this regard. See Rianne Mahon et al, ‘Convergent Care Regimes? Child-care Arrangements in Australia, Canada, Finland and Sweden’ (2012) 22(4) *Journal of European Social Policy* 419, 419-431.

<sup>875</sup>Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990), 9-38 and see also Andrew Scott, *Northern Lights* (Monash University Press, 2014), 1-25.

<sup>876</sup>M Wells and D Bergnehr, Families and Family Policies in Sweden’ in Mihaela, Robina (ed) *Handbook of Family Policies Around the Globe* (Springer, 2014), 92.

<sup>877</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47 and also Haya Stier, Noah Lewin-Epstein, Michael Braun, ‘Welfare Regimes, Family-supportive Policies, and Women’s

liberal democratic model<sup>878</sup> characteristic of Australia has a different set of characteristics to the Swedish social democratic model, including more emphasis on a division between private and public life and a less interventionist approach by governments to issues of social welfare.<sup>879</sup> The consequence arising from this is parental leave becomes a ‘workplace right’ rather than an entitlement delivered through parental leave legislation and social security provisions for family welfare.<sup>880</sup> As Nadine Zacharias explains in her article:

This means that in the Australian context the workplace relations system replaces parental leave legislation and social security provisions with regard to work and family entitlements. This is in line with a liberal welfare state ideology which implies that Australia does not place high priority on political solutions to achieve a compatibility of work and private spheres but instead leaves the initiative to employers. Private life concerns are regarded as such, and the role of the state is considered to be non-interventionist. This also means that the gendered division of labour is a largely unchallenged assumption and women’s labour market participation is neither actively encouraged nor outspokenly discouraged.<sup>881</sup>

The Australian approach to economics and welfare legislation, characterised by neoliberal emphasis on government deregulation of markets and workplaces allowing blind market forces to determine the allocation of goods such as jobs, wealth and childcare, is also driven by economic demands for services produced by female employees such as cheaper labour, despite over a century of law and

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Employment Along the Life-Course’ (2001) 106(6) *European Sociological Review* 1731, 1731-1760.

<sup>878</sup>See also Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990) 8-38 and Christopher Ruhm, ‘The Economic Consequences of Parental Leave Mandates: Lessons from Europe’ (1998) 113(1) *Quarterly Journal of Economics* 285, 285-318.

<sup>879</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47, and Chapter 1 of this thesis.

<sup>880</sup>Nadine Zaharias, ‘Work-life Balance: Good weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 39 and see Marian Baird, ‘Orientations to Paid Maternity Leave: Understanding the Australian debate’ (2004) 46(3) *Journal of Industrial Relations* 259, 259-273. However, some researchers classify Australia’s paid parental leave as a welfare entitlement rather than an employment right. See Barbara Pocock, Sara Charlesworth, Janine Chapman, ‘Work-family and Work-life Pressures in Australia: Advancing Gender Equality in Good Times?’ (2013) 33(9-10) *International Journal of Sociology* 594, 594-612.

<sup>881</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47.

policy reform in Australia to further equality between the sexes.<sup>882</sup> Further, the Australian liberal democratic model diverges from the Swedish social democratic one in labour relations in other fundamental ways as well.<sup>883</sup> For most of the 20<sup>th</sup> century, as Gillian Whitehouse explains, the framework for Australian industrial relations law was focused on reflecting rather than shaping Australian social norms, particularly that of the ‘male breadwinner’ model for family relationships.<sup>884</sup>

Whitehouse explains examples of the male breadwinner can be seen to be deeply entrenched in the Australian labour relations system framework of arbitration decisions, labour legislation and workplace structures.<sup>885</sup> For example, case law in the early 20<sup>th</sup> century era regarding decisions made by Australian arbitration courts including the *Family Wage Case*<sup>886</sup> reinforced the notion an average Australian worker was male and had to support the family economically while his wife undertook the traditional ‘female’ roles of childcare, unpaid domestic work and care for relatives.<sup>887</sup> This was based on the ideal of ‘A couple of a family with a full-time male breadwinner and a female full-time housewife/mother.’<sup>888</sup> While having origins in the late 19<sup>th</sup> and early 20<sup>th</sup> century, this ‘male breadwinner’ model persisted stubbornly into the 1960s and beyond in Australia, even with the rise of feminism and attempts to change relationships between men and women in the workplace and at home.<sup>889</sup>

Whitehouse explains that the earlier decisions in Australian Commonwealth Conciliation and Arbitration Court and the Australian Industrial Relations

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<sup>882</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 400-412.

<sup>883</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47; Gillian Whitehouse ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 400-412.

<sup>884</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 400-412.

<sup>885</sup>*Ibid* 400-402.

<sup>886</sup>*Ibid* 400-402.

<sup>887</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 400-402.

<sup>888</sup>*Ibid* 401.

<sup>889</sup>*Ibid* 402.

Commission reflect the presumption of strict differentiation of the gender roles between men and women both in the workplace and the home.<sup>890</sup> The determination of wages payable to men and women in work was based on the premise of the woman being destined in society to become a mother and a carer while the man was destined to become the family breadwinner and the full-time worker.<sup>891</sup> Consequently, early arbitration court decisions setting wages for workers focused on a 'social' or 'family' wage that was thought necessary to support an unskilled male labourer and his dependents.<sup>892</sup> As Gillian Whitehouse explains: 'Wage determination at this time drew on the view that a woman's primary goal in life was motherhood and that in the normal course or events they would be supported by their husbands or fathers.'<sup>893</sup>

As Whitehouse further explains, it was also assumed that women would be paid less than men for their labour because of concerns making female pay equal to those of men would undermine their devotion to motherhood and caring duties on the assumption women were not usually economically responsible for dependents.<sup>894</sup> It was also assumed keeping wage payments for women small was necessary to encourage women to have more children, strengthening the welfare of the nation through population growth.<sup>895</sup> In the words of one judge,<sup>896</sup> keeping wages low for women was a good policy aim because 'The typical mother of the white race cannot endure childbirth and the more or less prolonged period after childbirth unless she is helped and helped materially.'<sup>897</sup>

In other decisions, women were awarded equal pay to men in certain sectors such as fruit picking and tailoring.<sup>898</sup> However, these decisions were not motivated by a desire to help women achieve social or economic equity with their male colleagues, but was instead a measure designed to make hiring women

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<sup>890</sup>Ibid 405.

<sup>891</sup>Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family' (2004) 46(4) *Journal of Industrial Relations*, 400, 405.

<sup>892</sup>Ibid 405.

<sup>893</sup>Ibid 405.

<sup>894</sup>Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family' (2004) 46(4) *Journal of Industrial Relations*, 400, 405-406.

<sup>895</sup>Ibid 406.

<sup>896</sup>Brown J, cited by Whitehouse at 406.

<sup>897</sup>Brown J, cited in Whitehouse at 406.

<sup>898</sup>Ibid 406.

unattractive to employers and ensure there were sufficient jobs available to men in these industries.<sup>899</sup> Again citing the reasons given by another judge in one decision involving tailors, Whitehouse makes this point apparent: ‘If there are not enough jobs to go around, it is better that men get the jobs than the women, as a matter of social expediency.’<sup>900</sup> Gillian Whitehouse points out that as a result of these ‘Sexist assumptions built into these determinations,’<sup>901</sup> the industrial arbitration system in Australia at the time tended to reflect, rather than change, prevailing social attitudes towards men and women and their role in the workplace and society.<sup>902</sup>

While through the early period until the middle of the 20<sup>th</sup> century the Australian government made some provisions for family welfare payments,<sup>903</sup> until the 1970s it was mostly left to the discretion of employers to determine what they would pay their workers, subject to determinations by the relevant arbitration tribunal.<sup>904</sup> Employers often opposed wage determinations in favour of a ‘family’ wage, on the grounds the assessments were incorrect or forced companies to provide for dependents of their male workers who in all likelihood did not exist.<sup>905</sup> However it was not until the 1960s and 1970s the arbitration commission formally abandoned the idea of a male ‘living wage’ in favour of equal pay for men and women.<sup>906</sup>

The concept of a male ‘family wage’ was formally abandoned in the 1974 *National Wage Case*<sup>907</sup> where the Australian Industrial Relations Commission stated: ‘The Commission is an industrial tribunal and not a social welfare agency. We believe the case for (meeting) family needs is principally a task for the

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<sup>899</sup>Ibid 406.

<sup>900</sup>Ibid 406. The quotation is from Higgins J who also was involved in the *Harvester Case*. For an overview see Anna Chapman, ‘Industrial Law, Working Hours and the Family’ (2010) 36(3) *Monash University Law Review* 190, 190-217 and Mark Hearn, ‘Making Liberal Citizens: Justice Higgins and his Witnesses’ (2007) 93(1) *Labour History* 57, 57-72.

<sup>901</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations*, 400, 405-406.

<sup>902</sup>Ibid 406.

<sup>903</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 407.

<sup>904</sup>Ibid 405-7.

<sup>905</sup>Ibid 407.

<sup>906</sup>Ibid 408-9.

<sup>907</sup>Ibid 408-9. This was the *National Wage Case* (1974) 157 CAR 293.



government.<sup>908</sup> While the Australian government supplemented the male ‘living wage’ with a maternity allowance since 1912,<sup>909</sup> unpaid (and in some cases paid parental leave) leave was allowed and extended to certain classes of worker in later decisions,<sup>910</sup> The formal separation of labour and welfare systems did not necessarily shift the balance of workplace relations power in favour women.<sup>911</sup> Rather, this situation created a problematic schism between welfare ‘rights’ as a citizen (i.e. to particular welfare entitlements such as parenting payments), workplace rights as employees and the outcome of arbitration decisions which were not always consistent, and also did not always deal effectively with the split between public and private sector employment.<sup>912</sup> Later arbitration commission and industrial commission decisions to grant parents unpaid leave were not necessarily beneficial for work and family balance and were often contested by employers and employer advocacy groups, who claimed they would create disincentives to employment by increasing employee-related costs.<sup>913</sup>

In more recent times in Australia under the neoliberal model, Australian women have entered the workforce in greater numbers and have worked more hours, while taking up the majority of part-time positions.<sup>914</sup> Further, a significant proportion of Australian women were still burdened with family responsibilities (including wives, women in de facto relationships and single mothers) and were also concentrated in part-time jobs and insecure jobs, while Australian males continued to be employed in full-time positions.<sup>915</sup> As Gillian Whitehouse comments: ‘While these figures underline the decline of the ‘traditional’ male breadwinner model, they do not indicate gender equality, but rather the emergence of a contemporary variant of the male breadwinner model, with the most common family arrangement a male full-time wage earner as the primary

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<sup>908</sup>Ibid 409. See the *National Wage Case* (1974) 157 CAR 293.

<sup>909</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 405-406.

<sup>910</sup>Ibid 409-410 and see also Chapters 2 and 3 of this thesis.

<sup>911</sup>Ibid 409.

<sup>912</sup>Ibid 409.

<sup>913</sup>Ibid 409-10. See also Chapter 3 of this thesis.

<sup>914</sup>Ibid 403.

<sup>915</sup>Ibid 403.

breadwinner, and a female part-time wage earner presumably taking the primary responsibilities for family care.’<sup>916</sup>

Following the passage of paid parental leave legislation in Australia in 2010,<sup>917</sup> further analysis has been conducted into the nature of the Australian neoliberal model for welfare, family payments and paid parental leave.<sup>918</sup> More generally, this analysis has shown both the left and right of Australian politics did not seem to place much emphasis on assisting women to participate fully in the workplace, at least until the mid-1990s.<sup>919</sup> While the Whitlam Labour government of the early 1970s was a pioneer in attempting to reform Australian law and policy to be more favourable for women in the workplace,<sup>920</sup> Australia progressed very slowly in terms of moving towards workplace equality by having lower rates of female workplace participation, often unsatisfactory child care regimes and also being one of the last countries in the OECD to introduce paid parental leave for women.<sup>921</sup>

In the 1990s as part of Australia’s ratification of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) treaty,<sup>922</sup> pressure was placed on both the Labour and Coalition governments by women’s lobbyists, feminist activists and equality agencies to introduce paid parental leave.<sup>923</sup> Also in the 2000s, additional pressure came from gender equality research which recommended the introduction of paid parental leave as a fundamental right for women (working or not) who had become mothers.<sup>924</sup> While there were initial scepticism and hostility to the idea of introducing paid

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<sup>916</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship between Arbitration and the Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 403.

<sup>917</sup>See Chapter 3 of this thesis.

<sup>918</sup>Rianne Mahon, Christina Bergqvist and Deborah Brennan, ‘Social Policy Change: Work-Family Tensions in Sweden, Australia and Canada’ (2016) 50(2) *Social Policy and Administration* 165, 165-182. See also discussion below.

<sup>919</sup>*Ibid* 172.

<sup>920</sup>*Ibid* 172.

<sup>921</sup>*Ibid* 173-174.

<sup>922</sup>*Convention on the Elimination of all Forms of Discrimination Against Women* (opened for signature 17 July 1980), 1983 ATS 9 (entered into force 27 August 1983).

<sup>923</sup>Rianne Mahon et al, ‘Social Policy Change: Work-family Tensions in Sweden, Australia and Canada’ (2016) 50(2) *Social Policy Administration* 165, 173. See also Chapter 3 and 4 of this thesis.

<sup>924</sup>*Ibid* 173 and see Chapter 2.

parental leave in Australia either as a government-funded entitlement or as an employer-funded aspect of employee benefits from both government and employers, paid parental leave was legislated formally in 2010 as part of the then Labour government's package of workplace law reforms.<sup>925</sup> By international standards, Australia's leave scheme was described as 'generous' and considered to be an important first step towards assisting Australian women to achieve workplace equality with their male colleagues.<sup>926</sup> However while the creation of legislated parental leave was considered a significant achievement, it was argued more needed to be done.<sup>927</sup>

The trends in Australia up to and including the time when paid parental leave was legislated suggested that despite past developments and the introduction of a paid parental leave scheme, a number of issues remained to be addressed.<sup>928</sup> Christine Malatzsky remarked in her article examining Australia's parental leave framework noted that despite the Australian scheme being legislated as a general social right, the application and access to the scheme by Australian women were 'Far from straightforward.'<sup>929</sup> The Australian parental leave scheme suffered problems in application and implementation from inception and these included the complexities of parents of different backgrounds applying for paid and unpaid leave, the lack of serious attention to the issue in the public forum, and problems with the eligibility criteria for leave under the *Paid Parental Leave Act*.<sup>930</sup>

A further problem identified by Malatzsky in her article with the Australian parental leave scheme is the lack of harmony between the Commonwealth scheme and the plans or coverage by the public sector and private sector

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<sup>925</sup>Ibid 173-4 and see Chapter 3.

<sup>926</sup>Ibid 173-4; Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: A First-Year Review' (2011) 38(3) *Australian Bulletin of Labour* 184, 184-198.

<sup>927</sup>Rianne Mahon, Christina Bergqvist and Deborah Brennan, 'Social Policy Change: Work-Family Tensions in Sweden, Australia and Canada' (2016) 50(2) *Social Policy and Administration* 165, 174-5.

<sup>928</sup>Christina Malatzsky, 'Don't Shut Up – Australia's First Paid Parental Leave Scheme and Beyond' (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>929</sup> Christina Malatzsky, 'Don't Shut Up – Australia's First Paid Parental Leave Scheme and Beyond' (2013) 28(76) *Australian Feminist Studies* 195, 195.

<sup>930</sup>Ibid 195-6.

arrangements on paid parental leave.<sup>931</sup> Leave schemes in the public sector (at both Commonwealth and State levels) often differ and are inconsistent, sometimes being more or less generous than the ‘basic’ entitlement available under the Commonwealth scheme.<sup>932</sup> A further issue highlighted by Malatzsky in her article is the lack of consistency in private sector parental leave schemes, some of which are quite generous (particularly in large companies or businesses) but less so in small firms, which is a major employer of female workers (especially in casual and part-time roles which are important to women).<sup>933</sup> Christine Malatzky in her article cites several instances of parental leave schemes among employers in the state public and private sector whose plans are more generous than the Commonwealth one, including universities.<sup>934</sup>

Christine Malatzky also points to the lack of consistency in schemes across Australian workplace sectors and the lack of public debate on Australia’s ‘liberal’ system of structuring society.<sup>935</sup> Malatzsky criticises the neoliberal model of economics and society which draws on more conservative notions about the differing social roles of men and women in society, with a ‘Notion that reproduction is a private matter (and) rests on an artificial distinction that serves specific social powers.’<sup>936</sup> According to Malatzsky, this serves the overall social ideology of neoliberalism as ‘Neoliberalism constructs two social realms: the ‘private’ and the ‘public.’<sup>937</sup> Malatzsky further argues the difference between ‘private’ and ‘public’ realms works to undermine gender equality in the way the ‘risks’ and ‘benefits’ of reproduction and labour are socially allocated. In a neoliberal society, ‘Neoliberalism assigns responsibility for reproduction, along with other social risks, including illness and unemployment (to the private sphere).’<sup>938</sup> However, reproduction also has a primary social element which when assigned to the ‘private’ sphere and overlooked by policy makers,

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<sup>931</sup>See Chapter 3 of this thesis and the related debate concerning ‘double-dipping.’

<sup>932</sup>Christina Malatzsky, ‘Don’t Shut Up – Australia’s First Paid Parental Leave Scheme and Beyond’ (2013) 28(76) *Australian Feminist Studies* 195, 196.

<sup>933</sup>Ibid 196.

<sup>934</sup>Ibid 196.

<sup>935</sup>Ibid 196.

<sup>936</sup>Ibid 196.

<sup>937</sup>Christina Malatzsky, ‘Don’t Shut up – Australia’s First Paid Parental Leave Scheme and Beyond’ (2013) 28(76) *Australian Feminist Studies* 195, 196.

<sup>938</sup>Ibid 196.

government and industry, ends up unfairly penalising women for reproductive choices which encourage them to leave or rejoin the workforce, requiring something beyond only the existing legislative entitlements to deal with.<sup>939</sup>

The research conducted by Christine Malatzky indicated Australian employers and Australian workplace cultures still had a negative view of women who tried to reconcile work and family responsibilities, after the introduction of government-funded paid parental leave and much social research done to support its introduction.<sup>940</sup> For example, in her doctoral studies, Malatzky found research participants she interviewed still experienced some stigma associated with the decision to have children and to take paid maternity or parental leave, often supported by a culture of ‘silence’ which amounted to a kind of social ostracism for some female workers.<sup>941</sup> This was also backed up in her research findings that some members of the public viewed choosing to work and have children was akin to a ‘lifestyle choice’ which should not be funded by taxpayer’s money. To this effect, Malatzky cited a letter submitted to the *Letters to the Editor* section in the major Western Australian daily paper the *West Australian* that reflected this view: ‘So, since the federal government is going to use tax payer’s money to pay for parental leave for up to 18 weeks? Gee whiz, I wish the government would agree to pay for some of my ‘lifestyle choices.’ I could do with an overseas holiday.’<sup>942</sup>

As Malatzky argues, the views of this letter writer reflect the neoliberal principle that ‘Conceptualise reproduction as a private matter and not a public concern.’<sup>943</sup> This reflects a wider social prejudice in Australia that the social function of the female to care and reproduce and the male to earn the necessary income to support the family.<sup>944</sup> Malatzky summarises the problematic views around gender, reproduction and works in this manner: ‘This type of commentary (from the letter writer) contributes to the dismissal of gender equality as a concern in

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<sup>939</sup>Ibid 196-7.

<sup>940</sup>Ibid 197.

<sup>941</sup>Ibid 197-201. Her findings correlate well with the points made in Chapter 2.

<sup>942</sup>Christina Malatzky, ‘Don’t Shut up – Australia’s First Paid Parental Leave Scheme and Beyond’ (2013) 28(76) *Australian Feminist Studies* 195, 201.

<sup>943</sup>Ibid 201.

<sup>944</sup>Ibid 201-202.

Australia and an undervaluation of the unpaid work that many Australian women perform. Equating paid parental leave with an overseas holiday demonstrates a lack of understanding of the economic and personal consequences of reproduction faced by many families. It also fails to account that Australia needs women to participate in paid employment and to have children and that women, as much as men, have a right to paid employment.<sup>945</sup>

This argument is supported by other researchers in the area.<sup>946</sup> For example, Tom Dreyfus analysed the impact of the Australian paid parental leave legislation on the ‘male-breadwinner’ model that had dominated the conceptual framework of Australian industrial relations in the 20<sup>th</sup> century.<sup>947</sup> Dreyfus reviewed the history of Australian industrial relations law in this area and argued that while the ‘ideal worker’ of previous times, defined as ‘An unencumbered male citizen available for long hours, without the home or care responsibilities,’<sup>948</sup> can ‘no longer represent a majority of the Australian workforce,’<sup>949</sup> and the rate of change towards an more gender-equal model in Australia has been ‘glacial.’<sup>950</sup>

Dreyfus noted the core policy aim by introducing paid parental leave into Australia was to ‘Take a positive step towards rectifying gendered workplace inequality.’<sup>951</sup> This need arose from the changing social and economic context in Australia, which required both men and women to contribute to the workplace as well as in family situations.<sup>952</sup> In the context of both social relations and

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<sup>945</sup>Ibid 200-1.

<sup>946</sup>Nadine Zacharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47. See also discussion below.

<sup>947</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 107-119. See also Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and The Family’ (2004) 64(4) *Journal of Industrial Relations* 400, 400-412; Ray Broomhill and Rhonda Sharp, ‘The Changing Male Breadwinner Model in Australia: A New Gender order?’ (2004) 15(2) *Labour and Industry* 1, 1-23.

<sup>948</sup>Tom Dreyfus, ‘Paid Parental Leave and the Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107-119, 107.

<sup>949</sup>Tom Dreyfus, ‘Paid Parental Leave and the Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107-119, 107.

<sup>950</sup>Ibid 107.

<sup>951</sup>Ibid 108.

<sup>952</sup>Ibid 108-9.

workplace relations law, Dreyfus argued: ‘Australian labour law has played an integral role in shaping two separate spheres of existence: the public sphere of paid work and the private sphere of the family.’<sup>953</sup> Similarly, social expectations of gendered roles have influenced workplace law and policy.<sup>954</sup> Even towards the end of the 20<sup>th</sup> century and in the dawn of the 21<sup>st</sup>, Dreyfus notes conservative social values and roles played a vital role in reinforcing the traditional spheres and expectations around work and family.<sup>955</sup>

In this sense, the traditional ‘Social construction of these spheres has led to a gendered division of labour,’<sup>956</sup> where ‘Women are responsible for the unpaid domestic and caring work of reproducing citizens and caring for other dependents,’<sup>957</sup> while ‘The breadwinning role still dominates notions of Australian masculinity.’<sup>958</sup> Dreyfus in his analysis raises the hypothetical question as to why these roles have persisted for so long to influence both Australian labour relations law and the allocation of gender roles in society in a wider sense. The answer Dreyfus gives is this: ‘There are two key pillars that reinforce these (traditional) roles.’<sup>959</sup> The first pillar is ‘A lasting affinity in Australian society for the essentialist notion that reproductive and caring labour is a woman’s domain,’<sup>960</sup> and the second pillar is ‘Labour law’s persistent inability to challenge a man’s position of financial (and therefore familial) advantage in the workplace.’<sup>961</sup>

Citing research from other scholars such as Rosemary Owens and others,<sup>962</sup> Dreyfus notes that despite some changes in Australian labour law over recent decades, employment law tends to reinforce and integrate these norms into itself, with industrial relations law being primarily concerned to legislate for the public

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<sup>953</sup>Ibid 108.

<sup>954</sup>Ibid 108.

<sup>955</sup>Ibid 108.

<sup>956</sup>Ibid 108.

<sup>957</sup>Ibid 108.

<sup>958</sup>Ibid 108.

<sup>959</sup>Ibid 108.

<sup>960</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>961</sup>Ibid 109.

<sup>962</sup>Ibid 108-109.

sphere of paid work but not the unpaid sphere of domestic work.<sup>963</sup> Even modern Australian labour law retains the ‘distinction between productive and reproductive labour,’<sup>964</sup> and focuses on the idea that ‘The normative subject of labour law has been, and continues to be, a male breadwinner, while the (usually female) worker in the home is for the most part ignored.’<sup>965</sup> In such a social model, the norm also remains the heterosexual unit of a nuclear family, which is not necessarily reflective of contemporary Australian society.<sup>966</sup>

Dreyfus argues like other researchers surveyed earlier in this Chapter<sup>967</sup> that this model of social relationships is no longer viable in the contemporary social and economic situation Australian society finds itself in.<sup>968</sup> While traditionally the ‘ideal worker’ has been defined in Australian labour law as ‘Someone who takes no time off for childbearing or childrearing,’<sup>969</sup> and Australian workplaces have been designed around this idea, Dreyfus argues ‘The evolving needs and responsibilities of Australia’s workforce require the link between man and the normative concept of the ideal worker to be broken.’<sup>970</sup> Dreyfus notes that chronic problems in the Australian workplace such as ongoing discrimination against female workers or workers with care responsibilities, a large gender pay gap, class differentiation between men and women in different industries because of different expectations around care and work responsibilities, and increasingly men’s and women’s dual roles as carers and workers in Australian society demands reform of Australia’s labour relations system towards a more gender-equal basis.<sup>971</sup>

Dreyfus noted Australia’s new paid parental leave scheme had helped to move Australian labour relations law away from the ‘male-breadwinner model’, so

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<sup>963</sup>Ibid 108.

<sup>964</sup>Ibid 108.

<sup>965</sup>Ibid 108.

<sup>966</sup>Ibid 108.

<sup>967</sup>See also Malatzsky, 434, above.

<sup>968</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian labour law’ (2013) 23(1) *Labour and Industry* 107, 108.

<sup>969</sup>Ibid 109.

<sup>970</sup>Ibid 109.

<sup>971</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 109.



pervasive in Australian society in the past, towards a ‘worker-carer’ model.<sup>972</sup> The paid parental leave scheme introduced in 2010 had policies aimed at its heart designed to achieve this goal.<sup>973</sup> These included improving the position of women in the workforce, achieving greater gender equality, providing a financial support programme to new families, and offsetting disincentives to paid work generated by social welfare and taxation arrangements.<sup>974</sup> Additional goals in introducing paid parental leave in Australia included moving another incremental step to make Australian workplaces more ‘family-friendly’, aligning Australia with other OECD nations, and encouraging men and women to more evenly balance care and work responsibilities between themselves.<sup>975</sup>

However, despite these policy aims, the ‘report card’ some years after the introduction of the scheme in 2010 in Dreyfus’s view is mixed.<sup>976</sup> Firstly, Dreyfus’s research indicated that even after the introduction of paid parental leave, studies such as time use analysis showed the introduction of both unpaid and paid parental leave did little to change the differential allocation of care responsibilities between men and women, with few men taking up unpaid leave to care for children.<sup>977</sup> Furthermore, both before and after the introduction of paid parental leave, there was some controversy over whether it would be better for women to retain their social position to be ‘home and care centred’ rather than ‘work centred,’ and encouraged to be ‘stay at home mothers’ if that was their choice.<sup>978</sup> Challenges came from other quarters (often from politically conservative commentators)<sup>979</sup> who believed paid parental leave was a form of leftist social experimentation and activism which might have undesirable

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<sup>972</sup>Ibid 109-110.

<sup>973</sup>Ibid 110.

<sup>974</sup>Ibid 110, citing the Productivity Commission and other sources.

<sup>975</sup>Ibid 110-111.

<sup>976</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 110-111. See also Bill Martin et al, ‘Paid Parental Leave Evaluation: Phase 2 Report,’ (Occasional Paper No 44, University of Queensland, January 2013), IV-XIX.

<sup>977</sup>Dreyfus, above, 467, 111.

<sup>978</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 111.

<sup>979</sup>See for example Andrew Bolt, *Why is Labour defending \$50,000 Parental Leave Payouts for the Well-Off?* (May 16<sup>th</sup>, 2015), Andrew Bolt, <<http://www.heraldsun.com.au/blogs/andrew-bolt/why-is-labor-defending-50000-parental-leave-payouts-to-the-welloff-update-tips-for-liberals/news-story/f51257e65f534c3090c14155235927e1>>

consequences for society.<sup>980</sup> Further, even labour unions were sometimes reluctant to prosecute the case for workplace equality for various reasons, especially given the history of Australian trade unions in supporting the ‘*Harvester*’ decision and concept of the male breadwinner through past union activity to try and achieve social and economic justice for working men, especially for unskilled male workers.<sup>981</sup>

Dreyfus argues that despite all the historical baggage and increasing power of social conservatism in Australia since the late 1990s under both labour and liberal governments guided by neoliberal economic policies, ‘Ultimately, with a growing number of women and men with dual carer responsibilities, a re-creation of workplace and societal structures is needed, one that integrates non-normative care obligations into a new worker-carer norm.’<sup>982</sup> This requires Australian society to adapt and reshape itself in the 21<sup>st</sup> century into a more inclusive and equal society and introducing paid parental leave is a step in the right direction.<sup>983</sup> However, the Australian paid parental leave scheme both during and after its introduction has not necessarily eradicated the forces perpetuating gender inequality in Australia.<sup>984</sup> For example, studies of take-up of the leave scheme in Australia examined by Dreyfus indicated that around 99% of claimants of parental leave pay were women.<sup>985</sup> Despite some later modifications to the scheme such as introducing the ‘DAPP’ payment to encourage men to take leave, the scheme was later modified in ways that undermined its accessibility and hence its goals including gender equality and making workplaces more family friendly.<sup>986</sup>

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<sup>980</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian labour Law’ (2013) 23(1) *Labour and Industry* 107, 111 and also Andrew Bolt, 470 above. The debates under the Howard and Abbott governments are interesting in this context. For more detail, see Chapter 3 of this thesis.

<sup>981</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 111-112.

<sup>982</sup>*Ibid* 112-113.

<sup>983</sup>*Ibid* 112-113.

<sup>984</sup>*Ibid* 113.

<sup>985</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 113.

<sup>986</sup>*Ibid* 113. In 2016, the Coalition introduced changes to exclude employees from claiming the government scheme and from their employer’s systems concurrently on the grounds of alleged ‘double dipping.’ See Chapter 3 of this thesis.

Dreyfus also argued the scheme failed to displace the normative ‘breadwinner’ or ‘ideal worker’ as the ‘subject’ of Australian workplace relations law.<sup>987</sup> Dreyfus argued one issue is that paid parental leave is not a ‘workplace right’ with the same status as sick leave or long-service leave.<sup>988</sup> This could make it harder for an employee to request parental leave, possibly even requiring them to resign from their job or take parental leave under the rubrics of more accepted forms of leave such as long service leave.<sup>989</sup> A further issue highlighted by Dreyfus is the gender equity goals of the Australian scheme are undermined by the fact the amount of leave payable is small compared to the pre-leave earnings of the claimant, at least when compared to leave schemes in other OECD countries.<sup>990</sup> Dreyfus explained this point in these terms:

The marginal position of paid parental leave as a gender equity programme manifests itself in other ways. First, the parental leave payment is not expressed as a replacement of a worker’s real earnings, thereby distinguishing it from other entitlements such as annual leave and emphasising its position outside the paid work and industrial relations sphere. Employers have not at this stage been required to make compulsory superannuation payments during the period of paid parental leave. The single fixed rate of payment, determined solely concerning the ‘national minimum wage’ (s 65) is more akin to a welfare payment than a workplace entitlement.<sup>991</sup>

Further, Dreyfus draws attention to the fact the parental leave scheme is administered by the Family Assistance Office, accessible through Centrelink,

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<sup>987</sup>See the following discussion below.

<sup>988</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 114. It should be noted at this point there is some debate in the field about whether or if paid parental leave should be framed as another recognised industrial right such as unpaid parental leave, sick leave or long service leave, or whether it should be a social welfare-based payment such as the (now abolished) ‘baby bonus’ formerly given under the Howard-led Coalition government. A detailed discussion of this matter is beyond the scope of this thesis. The interested reader is directed to Marian Baird’s paper ‘Parental Leave in Australia: The Role of the Industrial Relations System,’ (2005) 25(1) *Law in Context* 45, 45-65 for a more detailed discussion of this point.

<sup>989</sup>Ibid 114.

<sup>990</sup>Ibid 114.

<sup>991</sup>Ibid 115.

indicating ‘That parental leave is to be considered as a social welfare payment rather than an industrial right.’<sup>992</sup>

According to Dreyfus’s analysis, the failure to have an adequate system of payment associated with work as an industrial right, rather than a more stigmatised form as a ‘low-end welfare payment’ for individual workers,<sup>993</sup> undermines the Australian parental leave scheme and its underlying goals when compared to the parental leave schemes of other countries such as Sweden.<sup>994</sup> Dreyfus argues the Swedish system works much more efficiently than the Australian one as the more generous parental leave available in Sweden acts as a strong incentive for men to become more involved in caring for their children while helping women to balance out their work and care responsibilities better.<sup>995</sup> Dreyfus further argues that the Australian scheme is weaker in comparison to Sweden in that it reinforces rather than challenges the male breadwinner model by targeting working women rather than men and being less accessible to Australian working men.<sup>996</sup>

Dreyfus concludes the current Australian parental leave scheme does not achieve its policy objectives for a number of reasons.<sup>997</sup> While Dreyfus admits paid parental leave ‘Has a clear role to play in encouraging the move away from the ideal worker model,’<sup>998</sup> it still falls short as ‘So far 99% of the recipients of paid parental leave are birth mothers,’<sup>999</sup> hence ‘The figure of an unencumbered, ‘ideal’ male worker continues to cast its shadow over every Australian

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<sup>992</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 115. As noted in FN 480, whether paid parental leave should be classed as a recognised industrial right contingent such as unpaid parental leave or a welfare-based payment is a complex issue discussed at some length in the literature. A full discussion of this point is beyond the scope of this thesis. For a discussion with pro and contra viewpoints including a ‘business case’ perspective, see Rowena Barrett and Susan Mayson, ‘Small firms, the paid maternity leave debate in Australian and the business case,’ (2008) 27(3) *Equal Opportunities International* 276, 276-291.

<sup>993</sup>Ibid 115-116.

<sup>994</sup>Ibid 115-116.

<sup>995</sup>Ibid 116. However, see also the discussion in section 5.5 of this Chapter.

<sup>996</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker – A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 116.

<sup>997</sup>Ibid 116-117.

<sup>998</sup>Ibid 117.

<sup>999</sup>Ibid 117.

workplace.’<sup>1000</sup> Tom Dreyfus’s criticism of the Australian parental leave regulatory scheme harmonises well with the points made by Christina Malatzsky in her article.<sup>1001</sup>

Nadine Zacharias also suggests a number of positive lessons Australian can learn from Sweden on the structure of its parental leave systems.<sup>1002</sup> Zacharias highlights a number of problems with the rhetoric around Australian parental leave policy and work-life balance, both from governments and also from employers as the rhetoric doesn’t always match the reality.<sup>1003</sup> Whether in places like Australia and other neoliberal countries where organisational (business) solutions are devised, or social-democratic places such as Sweden where government intervention is relied on, both countries have problems in resolving work-life balance issues.<sup>1004</sup> Zacharias argues it is useful to compare the two countries despite their differences as both are ‘Post-industrial OECD countries and are facing similar social, demographic and economic phenomena, such as the increase in female labour force participation, fertility rates below replacement level and globalising economies.’<sup>1005</sup>

The main difference between Australia and Sweden that Zacharias highlights is that Sweden, along with the other Nordic countries, ‘Developed a concept of reconciliation of paid employment and family life based on equal parenthood and the dual-earner family.’<sup>1006</sup> For Scandinavia, this meant that ‘Family policy is seen as equal opportunity policy supported by good state-sponsored childcare

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<sup>1000</sup>Ibid 117.

<sup>1001</sup>Christina Malatzsky, ‘Don’t Shut Up – Australia’s First Paid Parental Leave Scheme and Beyond’ (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>1002</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47. See also Marian Baird, and A.S. Litwin, ‘Rethinking Work and Family Policy: The Making and Taking of Parental Leave in Australia’ (2005) 17(5) *International Review of Psychiatry* 385, 385-400.

<sup>1003</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review*, 32, 33. These problems were also noted in the earlier discussions in this Chapter about the challenges to Sweden’s parental leave system, including the fact men still only take up about a third of all available parental leave time.

<sup>1004</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review*, 32, 33.

<sup>1005</sup>Ibid 35.

<sup>1006</sup>Ibid 36.

facilities and generous monetary transfers for any parent staying at home with a child during parental leave.<sup>1007</sup> This meant that from around the same time as Australia was also introducing principles of gender equity into employment law and other legal areas, Sweden was also examining ways to make society and the workplace more gender equal.<sup>1008</sup> However, the two states diverged in that in Sweden, parental and ancillary types of family-related leave were developed as citizenship rights to all parents, while in Australia, paid parental leave is a workplace right contingent on employment.<sup>1009</sup> Zacharias points out that in Australia, access to parental leave is not available to those who cannot demonstrate continued attachment to the workforce and is not easily available to those with a marginal attachment to the workforce, even though in Australia's liberal system 'The workplace relations system replaces parental leave legislation and social security provisions with regard to work and family entitlements.'<sup>1010</sup>

Zacharias further argues along lines similar with Dreyfus that the structure of Australia's 'neoliberal' economy and workplace regime acts to reinforce the 'male breadwinner' model of work-family balance and marginalise working mothers or women who have to 'earn' workplace rights such as paid parental leave.<sup>1011</sup> The neoliberal free-market oriented industrial relations framework 'leaves Australian mothers who are concentrated in the lowest ranks of the job hierarchy and are largely non-unionised most vulnerable,'<sup>1012</sup> and 'supports a

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<sup>1007</sup>Ibid 36.

<sup>1008</sup>Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review*, 32, 36-7, 37-39. This was around the 1960s and 1970s. The details of Sweden's paid parental leave system and its development are also discussed by Zacharias in her article at 36-39 but will not be repeated here.

<sup>1009</sup>Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review* 32, 39-40. See also Marian Baird, and A.S. Litwin, 'Re-thinking Work and Family Policy: The Making and Taking of Parental Leave in Australia' (2005) 17(5) *International Review of Psychiatry*, 385, 385-400.

<sup>1010</sup>Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review* 32, 39-40. Even though this article was written in 2006, similar issues still apply. See *Paid Parental Leave Act 2010* (Cth) ch 1 s 3A.

<sup>1011</sup>Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review* 32, 41-42.

<sup>1012</sup>Ibid 41.

contemporary variant of the traditional breadwinner/homemaker model,<sup>1013</sup> and ‘The liberal assumption of the Australian Government that the workplace relations framework is able to replace entitlements to paid parental leave that are granted as citizenship rights elsewhere, for example in Sweden, is fundamentally flawed.’<sup>1014</sup>

Zacharias notes that Sweden’s alternative ‘social democratic’ approach is not perfect, but when contrasted with Australia, Sweden’s parental leave system is better, as ‘The example of Sweden shows that it is possible for policy makers on a federal Government level to create a space in which parents can craft work-life arrangements that more closely align with the ideal of gender egalitarianism rather than with economic necessities or social norms that rely on conventional public/private dichotomies along gendered lines. By conceptualising care work as the shared responsibility of mothers, fathers and the state, the Swedish Government is able to buffer employees against workplace demands that are based on ‘ideal worker’ expectations.’<sup>1015</sup> Zacharias observes that while Sweden is not a perfect example as a model: ‘The Swedish approach (to parental leave) is not perfect but it provides guidance for social reforms that aim for improved work-life balance of all citizens. This can only be achieved by altering the ways in which women and men share the pleasures and responsibilities of paid and care work in public and private spheres. The old dichotomies cannot persist.’<sup>1016</sup>

### **5.7.1 Concluding Discussion – Lessons Learned**

As the discussion in section 5.6 of this chapter has shown, Australia’s *Paid Parental Leave Act* is arguably not achieving the goals and standards set out in the Act itself to reduce workplace gender inequality and help working parents

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<sup>1013</sup>Ibid 42 and Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and the Family’ (2004) 64(4) *Journal of Industrial Relations* 400, 400-412.

<sup>1014</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 41.

<sup>1015</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review*, 32, 42.

<sup>1016</sup>Ibid 43.

better balance work and family responsibility.<sup>1017</sup> The *Paid Parental Leave Act* is also arguably not working in an efficient and effective manner, as the research and studies into the effectiveness of Australia's paid parental leave system by specialist employment law academics discussed in section 5.6 of Chapter 5 demonstrated.<sup>1018</sup>

There are three major problems Australia's *Paid Parental Leave Act* has so far not addressed: a) that Australian working women make up by far the majority of those who take paid parental leave time and b), the level of take-up of paid parental leave by Australian men which further entrenches the traditional 'male breadwinner' model and c) the level of parental leave payment is arguably too low. To contrast this with the Swedish *Parental Leave Act*, the Swedish *Parental Leave Act* offers a) flexible types of different parental leave times that working parents can share and transfer between each other, b) the rate of payment is at the wage replacement level (rather than a flat minimum wage payment) and c), the Swedish *Parental Leave Act* has dedicated periods of paternity leave paid at the wage replacement level that evidence has indicated can act as a positive incentive for Swedish men to take up more parental leave time, so time taken off work to look after children is far more evenly balanced in Sweden than it is in Australia.<sup>1019</sup> These major lessons will form a basis for the recommendations for potential changes to Australia's *Paid Parental Leave Act* in Chapter 6 of this thesis.

## **5.8 Conclusion**

Chapter 5 of this thesis has conducted an analysis of the features of the Swedish parental leave system and the weaknesses and strengths of the system as well and the legal implications it has had. This chapter has considered the relative strengths and weaknesses of the Swedish system and subjected the Swedish system to critical analysis. The discussion in Chapter 5 has then considered the Australian parental leave system and some of its strengths and flaws when

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<sup>1017</sup>See above, 320.

<sup>1018</sup>See above, particularly 488 and 495.

<sup>1019</sup>See above in Chapter 5, sections 5.4, 5.5. and 5.6.



examined them in the light of what the Swedish system of paid parental leave and allied labour law and discrimination protections. What is manifest as an issue and brought to light in the discussions in Chapters 3, 4 and 5 is compared to the OECD average and ILO and UN standards, is that the Australian system of paid parental leave is under-developed, under-funded, gender-unequal and also in many respects inadequate as it presently stands<sup>1020</sup> and requires further reform and development.<sup>1021</sup> Chapter 6 of this thesis will recapitulate the findings in this thesis and make a few key recommendations for the further development of the Australian paid parental leave regulatory framework based on the findings of this thesis and positive examples Australia can learn from Sweden.<sup>1022</sup>

As the above discussion of Sweden and Australia's parental leave schemes has shown, neither country has achieved a 'perfect' solution to the problem of gender inequalities between men and women in the workplace or assisting people to balance work and family responsibilities, let alone wider issues of social justice.<sup>1023</sup> Further, attempts to transfer the parental leave design of one nation to another can cause difficulties.<sup>1024</sup> A particular problem that should be noted is that even if a country decides to simply to adopt elements of another country's regulatory scheme (or even an entire scheme) and transferring it to its own legal regime does not necessarily mean either the legislation or the policy motivating

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<sup>1020</sup>Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198.

<sup>1021</sup>Ibid 195-197.

<sup>1022</sup>See the discussion in Chapter 6 of this thesis below.

<sup>1023</sup>Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-37; Tom Dreyfus, 'Paid Parental Leave and The Ideal Worker: A Step Towards the Worker-Carer in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>1024</sup>Gayle Kaufman and Anna-Lena Almqvist, 'The Role of Partners and Workplaces in British and Swedish Men's Parental Leave Decisions' (2017) 20(5) *Men and Masculinities*, 533, 533-551; Anna Leitner and Angela Wroblewski, 'Welfare States and Work-Life Balance' (2006) *European Societies* 295, 295-317. It should be noted the problem of 'policy transfer' from one regulatory regime to another is not a simple matter and caution should be exercised in proposing how policies and laws in one regime can be transferred for another. A full discussion of the complexities of transferring the lessons of European or Swedish parental leave policy to Australia is beyond the scope of this thesis. For a review of how policy transfers in parental leave can be made from one jurisdiction to another, the reader is referred to the insightful article by Sonja Blum, 'No need to reinvent the wheel: Family policy transfers in Germany and Austria,' (2014) 35(4) *Policy Studies* 357, 357-376..

it will work in the new situation divorced if it is divorced from its original context, however well-intentioned.<sup>1025</sup> There is no evidence to indicate that in the case of paid parental leave policy and law, this would be any different.<sup>1026</sup> Another potential problem of ‘importing’ the regulatory system of another country is reproducing its flaws.<sup>1027</sup> As was seen in the discussion in Chapter 5, the Swedish parental leave system is not immune from flaws that appear to hinder it from working effectively even in the Swedish context<sup>1028</sup> and these issues and others need to be addressed before one legal system is changed on the basis of positive examples from another legal system.<sup>1029</sup> However, at the same time, the Swedish system with its strong focus on gender equity, non-discrimination and work-family balance, and therefore provides some valuable insights into how Australia might further address these issues through further development of its own parental leave policies.<sup>1030</sup> As the discussions in Chapter 2 of this thesis indicated, particularly with reference to the 2014 Australian Human Rights Commission Report regarding workplace discrimination against employees who take parental leave, discrimination against employees

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<sup>1025</sup>Gayle Kaufman and Anna-Lena Almqvist ‘The Role of Partners and Workplaces in British and Swedish Men’s Parental Leave Decisions’ (2017) 20(5) *Men and Masculinities* 533, 533-551. An example of this for consideration for the reader could be the differences in funding arrangements between the Swedish scheme and the Australian scheme. The structure of Sweden’s welfare model and the funding models for its welfare and social payments system differs substantially from that of Australia, i.e. in Sweden statutory contributions are made by employers and employees to fund industrial rights such as health insurance, unemployment insurance, parental insurance and pensions. Sweden also has relatively higher rates of marginal taxation on personal incomes used to support social spending that might be politically unacceptable in the Australian context. A full discussion of the complexities here in the ‘converging welfare state’ is beyond the scope of this thesis. The reader is referred to for a more thorough discussion in the helpful article by Gregg M Olsen, ‘Toward Welfare State convergence? Family Policy and Health Care in Sweden, Canada and the United States,’ (2007) 34(2) *Journal of Sociology and Social Welfare* 143, 143-163.

<sup>1026</sup>Ibid 533-551.

<sup>1027</sup>Anna Leitner and Angela Wroblewski, ‘Welfare States and Work-Life Balance’ (2006) *European Societies* 295, 295-317.

<sup>1028</sup>See the discussion in section 5.5 of this Chapter.

<sup>1029</sup>Anna Leitner and Angela Wroblewski, ‘Welfare States and Work-Life Balance’ (2006) *European Societies* 295, 295-317; Eric S Einhorn and John Logue, ‘Can Welfare States be Supported in a Global Economy? Lessons from Scandinavia’ (2010) 125(1) *Political Science Quarterly* 1, 1-29; Katherina Spiess and Katherina Wrohlich, ‘The Parental Leave Benefit Reform in Germany: Costs and Labour Market Outcomes of Moving Towards a Nordic Model’ (2008) 27(5) *Population Research and Policy Review* 575, 575-591.

<sup>1030</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47.

(particularly women) still remains a major issue.<sup>1031</sup> A further interesting point that has arisen both in Australia and in Sweden (and also in other OECD countries discussed in Chapters 4 and 5 of this thesis) is that men only take a fraction of the available parental leave.<sup>1032</sup> However, there is some evidence to indicate that where the paid parental leave system of a country is designed along the same lines as those of the Scandinavian nations, particularly in measures such as giving men ‘quotas’ for paid leave which are reasonable in length and payment level,<sup>1033</sup> and shared parental leave times can be effective measures to deal with this problem.<sup>1034</sup> Measures such as these may help Australia to move forward in the future in reforming its own paid parental leave system.<sup>1035</sup>

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<sup>1031</sup>See Chapter 2 and Dominique Allen, ‘Supporting Working Parents: Findings from the AHRC’s National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in The Workplace’ (2014) 27(3) *Australian Journal of Labour Law* 281, 281-291.

<sup>1032</sup>See Chapters 4 and 5 of this thesis and Gillian Whitehouse, Chris Diamond, Marian Baird, ‘Father’s Use of Leave In Australia’ (2007) 10(4) *Community, Work and Family* 387, 388-402; Linda Haas, ‘Parental Leave and Gender Equality: Lessons from the European Union’ (2003) 20(1) *Review of Policy* 89, 89-90-110; Linda Haas and Tina Rostgaard, ‘Father’s Rights to Paid Parental Leave in the Nordic Countries: Consequences for The Gendered Division of Leave’ (2011) 14(2) *Community, Work and Family* 177, 178-191.

<sup>1033</sup>Linda Haas and Tina Rostgaard, ‘Father’s Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave’ (2011) 14(2) *Community, Work and Family* 177, 189-193.

<sup>1034</sup>Linda Haas, Karin Allard, Phillip Hwang, ‘The Impact of Organisational Culture on Men’s Use of Parental Leave in Sweden’ (2002) 5(3) *Community, Work and the Family* 319, 321-323, 337-339.

<sup>1035</sup>Nadine Zaharias, ‘Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *Industrial Employment Relations Review* 32, 32-47; Tom Dreyfus, ‘Paid Parental Leave and the Ideal Worker: A Step towards the Worker/Carer in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 110-117. Dreyfus particularly notes that in Australia, 99% of recipients of the parental leave payment are birth mothers. See Dreyfus, above, 523 at 117.

## CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

### 6.1 Introduction

The research presented in Chapters 2 to 5 of this thesis indicates that the Australian workplace relations system has a long way to go in adequately resolving a) the issues of gender equity in the workplace, b) ensuring equality of opportunity for men and women in the workplace and stamping out adverse forms of discrimination based on gender and family responsibility in the workplace, c) finding a properly designed and funded Australian paid parental leave regulatory framework and d) helping Australian employees find flexibility between work and family.<sup>1</sup> The research undertaken in this thesis also suggests Australian policymakers and legislators can learn positive lessons from the policies of the Nordic nations, particularly Sweden, in these areas as was indicated in Chapter 5, section 5.7.1.<sup>2</sup>

The primary aim of this thesis was to investigate Australia's current regulatory system of paid parental leave as legislated in the *Paid Parental Leave Act 2010* (Cth) and examine the legal and policy issues that arose in relation to the introduction of this legislation and it was submitted that to better understand these issues. The thesis also provides a detailed analysis of selected European OECD countries that had introduced their own paid parental leave systems in the form of specific legislation with particular focus on Sweden as an exemplary model to better understand how Australia may use parental leave legislation to better address the issues identified in (a) – (d) above.

Chapter 6 sets out key findings of this thesis in relation to the issues identified in (a) – (d) above arising from the research in thesis with a particular focus on c) and to make recommendations to further develop Australia's paid parental leave framework and propose options for further advancing a culture of gender

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<sup>1</sup>Nadine Zaharias, 'Work-Life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review*, 32, 32-47.

<sup>2</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Denmark, Finland and Norway* (Monash University Publishing, 2014) 1-25.

equality in the Australian workplace based on the research questions and aims stated earlier in Chapter 1 of this thesis.<sup>3</sup>

## **6.2 Overview of this thesis**

In addressing the first research question, Chapter 2 of this thesis discussed the problem of gender discrimination in the Australian workplace and the factors that drove adverse forms of employment discrimination, particularly those targeted against women on the basis of pregnancy, maternity and family responsibility. Chapter 2 discussed the problem of gender inequality in the workplace and its connection to neoliberal economic policies. The discussion in Chapter 2 also covered aspects of neoliberal political and economic theory that were relevant to Australian Labour Law, with special regard to gender inequality issues relating to work and family responsibility. Chapter 2 considered how neoliberal workplace reforms, particularly the introduction of ‘Work Choices’ laws under the John Howard-led Coalition government that abolished standardised industry awards, reduced the powers of the AIRC and removed collective bargaining in favour of ‘enterprise bargaining’ played an instrumental role in ‘winding back the clock’ in Australian labour law by returning Australia to a more conservative and gender unequal model of industrial relations laws and social relationships.<sup>4</sup> It was therefore a key finding of Chapter 2 that neoliberal policies in Australia contributed to greater levels of workplace gender inequality.<sup>5</sup>

Chapter 2 of this thesis also reviewed academic literature that investigated the root social causes of gender inequality in the workplace, with a focus on gender pay gaps for women with work and family responsibility. An important finding was that the pay gap between male and female workers can be attributed to

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<sup>3</sup>See Chapter 1 of this thesis.

<sup>4</sup>Yolanda van Gellecum, Janeen Baxter, Mark Western, ‘Neoliberalism, Gender Inequality and the Australian Labour Market’ (2008) 44(1) *Journal of Sociology* 45-63; Damien Cahill, ‘Labour, the Boom and The Prospects for an Alternative to Neoliberalism’ (2008) 61(1) *Journal of Australian Political Economy* 321, 321-336.

<sup>5</sup>See Chapter 2 of this thesis and also Therese Jefferson and Alison Preston, ‘Australia’s other Two-speed Economy: Gender, Employment and Earnings in the Slow Lane’ (2010) 36(3) *Australian Bulletin of Labour* 327, 327-334; Patricia Todd and Joan Eveline, ‘The Gender Pay Gap in Western Australia: Gross Inequality, Women still Counting for Nothing?’ (2007) 18(2) *Labour and Industry* 105, 105-120.

different levels of paid and unpaid work done on a gender-segregated basis by men and women.<sup>6</sup> This discussion in Chapter 2 also noted that because unpaid domestic work like parenting of children requires time to be taken off from work, and also because most workplaces are not structured in a manner that allows people to both maintain continuous employment while caring for children at the same time, there is a negative social cost called ‘the ‘motherhood penalty’ that affects primarily women who take time off work to undertake parental responsibilities and which includes lost income and superannuation savings as well as direct or indirect discrimination from employers.<sup>7</sup>

After the issue of the ‘motherhood penalty’ was identified in Chapter 2 as a key cause of gender inequality in the workplace, the problem of direct and indirect workplace discrimination was examined with reference to a series of reports and working papers the Australian Human Rights Commission had prepared on the issue from the period between 1999-2014. The discussion of AHRC reports and working papers showed that workplace discrimination by employers against employees on the grounds of pregnancy status, gender, parental status and family responsibility were a continuous problem in this time period because Australian workplaces and associated workplace cultures and structures failed to reform themselves to accommodate employees with family responsibility and also because the Australian government, guided of neoliberal economic policy, was either unable or unwilling to intervene to foster workplace gender equality. The AHRC reports and working papers also found that a majority of female employees and also substantial number of male employees surveyed reported experiencing workplace bullying, harassment, and discrimination from their

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<sup>6</sup>Tanya Livermore, Joan Rodgers, Peter Siminski, ‘The Effect of Motherhood on Wages and Wage Growth: Evidence for Australia’ (2011) 87 (1) *Economic Record* 80, 80-91; Lynn Cook Prince, ‘Gendered Parent Penalties and Premiums Across the Earnings Distribution in Australia, the United Kingdom and the United States’ (2014) 30(3) *European Sociological Review* 360, 360-372.

<sup>7</sup>See Chapter 2 of this thesis and also Tamar Kricheli-Katz, ‘Choice, Discrimination and the Motherhood Penalty’ (2012) 46(3) *Law and Society Review* 557, 557-587; Stephen Bernard and Shelley Correll, ‘Normative Discrimination and the Motherhood Penalty’ (2010) 24(5) *Gender and Society* 616, 616-646.

employers on the specific grounds of gender, pregnancy status, maternity and family responsibility.<sup>8</sup>

A key recommendation consistently made in AHRC reports and working papers reviewed in Chapter 2 was the introduction of a legislative scheme of paid parental leave to address the problem of workplace discrimination against workers trying to balance work with family responsibility.<sup>9</sup> The structure and nature of the recommended scheme of paid parental leave included universal accessibility, a substantial period of leave time from work to care for newborn or younger children, and that parental leave was paid in nature rather than unpaid.<sup>10</sup> The discussion of the Productivity Commission in its own 2009 Final Report into paid parental leave in Australia made recommendations which aligned very closely to the AHRC reports and their recommendations, including a universally accessible government legislated scheme of paid parental leave that was universally accessible, particularly to women, to enable continuous employment in the workplace to continue.

Chapter 3 of this thesis further reviewed the development of parental leave in Australia, focusing on unpaid parental leave and maternity leave with reference to selected Australian Commonwealth Conciliation and Arbitration Court decisions involving determination of the ‘family wage’ deemed necessary to support a wage earner and his family to a civilised standard of living and then collective bargaining decisions involving the Australian Commonwealth Conciliation and Arbitration Court and AIRC. The famous *Harvester Case* was considered, which discussed the concept of the ‘family wage’ in the context of

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<sup>8</sup>See Chapter 2 of this thesis and Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 15-110; Sarah Charlesworth and Fiona MacDonald, ‘Women, Work and Industrial Relations in Australia in 2014’ (2015) 57(3) *Journal of Industrial Relations* 366, 366-382.

<sup>9</sup>Australian Human Rights Commission, ‘Supporting Working Parents: Pregnancy and Return to Work National Review Report’ (Australian Human Rights Commission 2014 Report, Australian Human Rights Commission, 2014), 131-132; Sarah Charlesworth and Fiona MacDonald, ‘Women, Work and Industrial Relations in Australia in 2014’ (2015) 57(3) *Journal of Industrial Relations* 366, 376-377.

<sup>10</sup>Unpaid parental leave was already well established in most industry awards by the time of the 1999 AHRC report discussed in Chapter 2. See Chapter 3 on Arbitration Decisions to see a review of the cases that set this precedent.

an average unskilled male workman earning enough from his employment to support his dependants and then further cases that extended some employment rights to female workers from the 1900s to the Second World War, were discussed, where it was shown little progress was made in changing the traditional ‘male breadwinner’ and ‘female home-maker’ gender roles in Australian society from the 1900s until WWII. A review of key post-WWII developments in a number of industrial arbitration cases including the *Maternity Leave Case*, the 1969 *Equal Pay Case*, *The Parental Leave Case*, the *Vehicle Industry Award Case* and the *Parental Leave Test Case* were then discussed to highlight the interplay between political, economic and social factors and the legal principles that led to the slow and incremental development of unpaid maternity and parental leave as an employment entitlement to expanding classes of workers.<sup>11</sup> These developments were reversed by the substantial changes to workplace relations law made by the introduction of ‘Work Choices’ legislation in 2005 by the Coalition government, which curtailed the powers of the Australian Industrial Relations Commission to make determinations about basic employment conditions and entitlements.<sup>12</sup>

Following this, there was a discussion of the 2010 *Paid Parental Leave Act*, introduced by the Rudd Labour government along with the *Fair Work Act 2009* and designed to restore ‘fairness’ to Australia’s industrial relations system and replace the ‘Work Choices’ laws. The 2010 *Paid Parental Leave Act* introduced a legislative scheme that was open to workers who could satisfy the criteria set out in the legislation regarding continuous employment (the work test), Australian residency (residency test) and caring responsibilities (the claimant test). The scheme provided at first instance one type of payment, ‘parental leave pay,’ which was paid either directly to the claimant through the Social Assistance Office (Centrelink) or to the employer who then paid the eligible employee.<sup>13</sup> Parental leave pay was later complemented by the introduction in 1<sup>st</sup> January

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<sup>11</sup>See Chapter 3 of this thesis.

<sup>12</sup>Nevertheless, these cases established at least a precedent for a period of unpaid parental leave to be available to employees covered by most standard awards, including casual employees. See for instance the *Maternity Leave Case* (1979) 218 CAR 120 and *Re Vehicle Industry Award* (2001) 107 IR 71 and *Parental Leave Test Case* (2005) 143 IR 245.

<sup>13</sup>See Chapters 3 and 5 of this thesis for a more detailed discussion.



2013 of ‘Dad and Partner Pay’ (DAPP) for eligible secondary carers. The payment level of both types of payment was set at the federal minimum wage and the maximum claim period was set at 18 weeks for parental leave pay and two weeks for DAPP.

Following the introduction of the *Paid Parental Leave Act* in 2010, analysis of the scheme indicated that reaction to the scheme was positive at first.<sup>14</sup> However, as time went on, the scheme was criticised as have a number of shortfalls,<sup>15</sup> including that the parental leave pay level was too low, that most claimants of parental leave pay were women, and that the scheme did not encourage either the sharing of parental leave time between partners or the sharing of work and family responsibility and that the scheme was inequitable in that it appeared male parents could only claim a far smaller amount of parental leave pay than women, further encouraging gender segregation in the workplace.<sup>16</sup> In response to these criticisms, the Coalition in 2013 made an election promise to replace the 2010 *Paid Parental Leave Act* with a new scheme that offered wage replacement levels of parental leave pay for a maximum period of 26 weeks for women and two weeks for men, based on explicitly stated goals around fostering gender equality in the workplace and bringing Australia’s parental leave laws into line with those of other OECD countries.<sup>17</sup> However, despite a strong election victory by the Coalition in 2013, political factors, economic constraints and criticism of the promised scheme prevented the proposed policy from being legislated into law to replace to 2010 *Paid Parental Leave Act*. In the period after the rejection and abandonment of the proposed revised scheme, a number of changes were made to the *Paid Parental Leave Act* in order to limit eligibility and access to the scheme and help reduce the cost of the scheme to the federal

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<sup>14</sup>Marian Baird and Gillian Whitehouse, ‘Paid Parental Leave: A First Birthday Policy Review’ (2011) 38(3) *Australian Bulletin of Labour* 184, 184-198.

<sup>15</sup>Tom Dreyfus, ‘Paid Parental Leave and The Ideal Worker: A Step Towards the ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>16</sup>Sarah Charlesworth and Fiona MacDonald, ‘Women, Work and Industrial Relations in Australia in 2014’ (2015) 57(3) *Journal of Industrial Relations* 366, 366-377; Christine Malatzky, ‘Don’t Shut Up: Australia’s First Paid Parental Leave Scheme and Beyond: Assisting Women and Men negotiate Two Worlds of Work’ (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>17</sup>See Chapter 3 of this thesis.

budget that were later blocked by the senate.<sup>18</sup> Subsequently, since the last election in 2016, no new major changes to the Australian paid parental leave scheme appear to be on the horizon, at least until the next election in 2021.

In Chapter 4, Australia's obligations under international labour and human rights law were discussed. It was shown in Chapter 4 that Australia has ratified and adopted a number of important International Labour Organisation Code Conventions and UN Human Rights treaties relating to employment law standards and non-discrimination in employment against women or those with family responsibilities.<sup>19</sup> Chapter 4 also discussed how these ILO Code Convention standards UN Convention standards had an important influence on Australia's paid parental leave and anti-discrimination law framework. Chapter 4 also discussed how non-binding treaties such as the ILO Maternity Protection Convention 2000 were also an important influence on Australian policies and law-making in the area of paid parental leave legislation.<sup>20</sup>

In Chapter 4, two ILO Code Conventions and one UN Convention, being the ILO Convention C156 Workers with Family Responsibilities 1981, the ILO 2000 Maternity Protection Convention and attached Recommendation 191, and the UN Convention on the Elimination of All forms of Discrimination against Women, formed the backbone of international legal standards that guided Australian labour relations law and policy-making in the areas of paid parental leave and anti-discrimination legislation to protect working parents from workplace discrimination. These ILO Code and UN Conventions also formed the international legal framework that was used by highly important bodies such as the Australian Human Rights Commission and the Productivity Commission in their 2009 Final Report to frame and guide deliberations on how a paid parental leave scheme should be designed and implemented in Australia to help achieve gender equality in the workplace. However as the discussions in Chapter 4 regarding Australia's complex legal approach to adopting treaty stipulations into domestic laws showed there are also drawbacks in that until very recently,

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<sup>18</sup>See Chapter 3.

<sup>19</sup>See Chapter 4 of this thesis.

<sup>20</sup>See Chapter 4.

most Australian legislation in the employment arena has not been influenced very strongly by international sources (excepting the heritage of the common law of contract, tort law, master/servant law and employment law from England)<sup>21</sup> and at times Australia has not always implemented international labour law standards in its domestic legislation.<sup>22</sup> As a result, Australian governments have sometimes passed employment laws aimed to achieve domestic goals (i.e. increased employer power to terminate employment or to reduce employee conditions for reasons of business expediency) that contravene international labour standards.<sup>23</sup> Nevertheless, international labour law still has an important effect on what The Australian government decides to do in all areas of law, including labour law.<sup>24</sup>

Following this discussion in Chapter 4, a review of parental leave policies and legislation was then made for three major areas of Europe. The first European area considered was the ‘Scandinavian’ or Nordic countries including Sweden, Denmark, Iceland, Norway and Finland. The Scandinavian countries were characterised by a ‘social democratic’ system of government and welfare generally aimed at fostering social and gender equality as much as possible. In the Scandinavian states, a general aim of public policy was the fostering of social equality through removing inequalities between men and women in compliance with their ‘social democratic’ approach to governance, relying on government regulation and intervention in the organisation of society and workplace structures to achieve these aims, particularly through passing appropriate workplace laws and introducing expansive parental leave schemes that were ‘gender-neutral’ in their approach and introducing affordable and government funded childcare for working parents, and encouraging men to take a greater role in parenting and domestic work.<sup>25</sup>

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<sup>21</sup>See discussion in Chapter 4, section 4.3. of this thesis.

<sup>22</sup>Chris White, ‘Work Choices: Removing The Right to Strike’ (2006) 56(1) *Journal of Political Economy* 66, 71-77.

<sup>23</sup>Ibid 71-77.

<sup>24</sup>See also Chapters 4 and 5 of this thesis.

<sup>25</sup>See Chapter 4 and Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014), 1-25, 63-162.

The 'Nordic' approach to paid parental leave was then discussed in detail in relation to the regulatory systems of paid parental leave in place in the jurisdictions of Norway, Sweden, Iceland, Denmark and Finland. A review of the regulatory systems of paid parental leave in these countries showed that in these countries, paid parental leave regulatory schemes had gone through an evolutionary development from maternity leave targeted primarily at women who had given birth to enable them to recover from natality, towards the introduction of paid parental leave that was universal, funded and administered by governments and available on an equal basis to workers of both sexes.<sup>26</sup> The Nordic systems of paid parental leave also had payments that were close to or at wage-replacement levels for eligible claimants, and paid parental leave periods were generally set from between 26 weeks to 52 weeks in duration, combined with publically funded schemes of affordable childcare.<sup>27</sup> In all of the Scandinavian nations surveyed, paid paternity leave allowances were also available to male workers, or alternatively, fathers can take periods of paid parental leave as shareable leave from their wives or partners if it is suitable for them to do so, and this trend is being strongly encouraged in Scandinavian states. In conclusion, following a review of the Nordic parental leave regulatory regimes and associated legislation, it was argued that these countries (including Sweden) have good parental leave systems by OECD standards.<sup>28</sup> However, the discussion noted the parental leave systems of these countries were also criticised for being expensive and inefficient because they required exorbitant levels of taxation to support them.<sup>29</sup> In balance however, the parental leave

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<sup>26</sup>Ibid and see Linda Haas, *Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden* (State University of New York, 1992) 19-59; Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47.

<sup>27</sup>Kimberley J Morgan and Kathrin Zippel, 'Paid to Care: The Origins and Effects of Care Leave Policies in Western Europe' (2003) 10(1) *Social Politics* 49, 49-85; Nabatina Datta Gupta, Nina Smith, Mette Verner, 'The Impact of Nordic Countries' Family-friendly Policies on Employment, Wages and Children' (2008) 6(1) *Review of Economics of the Household*, 65, 65-89.

<sup>28</sup>See Chapter 4 of this thesis and Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 1-25, 63-162.

<sup>29</sup>Sherwin Rosen, 'Public Employment and the Welfare State in Sweden' (1996) 34(2) *Journal of Economic Literature* 729, 729-740; Nabatina Datta Gupta, Nina Smith, Mette Verner, 'The Impact of Nordic Countries' Family-friendly Policies on Employment, Wages and Children' (2008) 6(1) *Review of Economics of the Household*, 65, 65-89.

systems of Scandinavian nations have been seen as among best in the selected OECD group of countries.<sup>30</sup>

The next countries to be considered in Chapter 4 were France and Germany. As with the Nordic countries, France and Germany started to introduce social welfare legislation as far back as the late-19<sup>th</sup> century to ameliorate the negative consequences of the industrial revolution and associated rapid social and economic change. Germany was one of the first European countries that introduced social welfare protections including pensions for the elderly, work safety laws and later, maternity leave payments and both Germany and France had introduced health insurance, sick leave and paid maternity leave before the end of the 19<sup>th</sup> century.<sup>31</sup> Germany first introduced parental leave that was unpaid in nature and targeted mainly at mothers in 1986, though later in the 1990s and 2000s Germany further reformed its parental leave scheme legislation to structure it more along 'Nordic' lines, with more emphasis given to paid rather than unpaid parental leave and also measures to encourage men as well as women to take time off work to care for children<sup>32</sup>. Follow-up studies by German researchers indicated this policy change had a number of benefits, including increasing female work participation rates, reducing gender inequality and increasing take up of parental leave among men. This contrasted with France, where the introduction of paid parental leave in the 2000s, apparently had a negative impact by encouraging more women to leave work to care for children, reinforcing conservative gender norms in the country around work and care responsibilities and not encouraging French men to take a greater and more active role in caring for children.<sup>33</sup>

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<sup>30</sup>Nabatina Datta Gupta, Nina Smith, Mette Verner, 'Child-care and Parental Leave in The Nordic Countries: A Model to Aspire To?' (IZA Discussion Paper Series No 2014, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labour, March 2006), 1-29. See 29-34 of the discussion paper for criticisms and responses to the Nordic model.

<sup>31</sup>Sheila Kamerman and Peter Moss, 'Conclusion' in Sheila Kamerman and Peter Moss (eds) *The Politics of Parental Leave Policies: Children, Gender, Parenting and the Labour Market* (Policy Press, 2009), 262-263.

<sup>32</sup>Geisler, Esther and Michalea Kreyenfeld, (2007), 'How Policy Matters: Germany's Parental Leave Benefit Reform and Fathers' Behavior 1999-2009' (MPIDR Working Paper No WP 2012-021, Max Planck Institute for Demographic Research, July 2012), 5-6.

<sup>33</sup>Anna-Lena Almqvist, 'Why most Swedish Fathers and few French Fathers use Paid Parental Leave: An Exploratory Qualitative Survey of Parents' (2008) 6(2) *Fathering* 192, 192-200; Julie

In Continental Europe, the Netherlands introduced unpaid parental leave rights in 1991. After 1991, the Netherlands further developed amendments to its parental leave and maternity leave system, eventually granting female employees up to 16 weeks of paid maternity leave (paid at the level of 100% of pre-leave earnings) and two days of paternity leave for male partners, with the option to take an additional three days of unpaid paternity leave. Additional types of parental leave are available for parents, though in the Netherlands, the approach tended to be a ‘middle path’ between the expansive government intervention of the Nordic countries and the minimalist ‘hands-off’ approach of the neoliberal dominated countries, with a lot left to employer discretion and individual enterprise structures to deliver the appropriate outcomes.<sup>34</sup> In Luxembourg, paid parental leave was introduced in 1999 to encourage greater levels of female workplace participation, which in Luxembourg were among the lowest in Europe. As a socially conservative and small country where the vast majority of the population followed Roman Catholicism, Luxembourg was more like Southern Europe in that the nuclear heterosexual family with a male head of the household and breadwinner formed the backbone of public and private life. However, research indicated paid parental leave was popular in Luxembourg, particularly among younger women, though the rate of men take up of parental leave was low by OECD and EU standards.<sup>35</sup>

In Southern Europe (Italy, Spain, Greece and Portugal), these countries experienced a slower transition from an agricultural economy to a more modern industrial/technological economy based on capitalist principles than the UK and Northern and Central Europe. Because of this, the nations of Southern Europe tended to be economically and socially backwards and less industrialised than their Northern counterparts. Consequently, more conservative models of society tied closer to religion, family and tradition remained in place, with the male-

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Moschion, ‘Reconciling Work and Family Life: The Effect of French Parental Leave’ (2010) 99/200 *Annals of Economics and Statistics* 217-246.

<sup>34</sup>Katia Begall and Daniela Grunow, ‘Labour Force Transitions around First Childbirth in The Netherlands’ (2015) 31(6) *European Sociological Review* 697-712; Sakiko Tanaka, ‘Parental Leave and Child Health across OECD Countries’ (2005) 115(501) *The Economic Journal* 7-28.

<sup>35</sup>Marie Valentova, ‘Anticipated Take up of Parental Leave in Luxembourg’ (2011) 10(2) *Social Policy* 123, 123-138.

headed household and workplace at the centre.<sup>36</sup> These nations however were forced to modernise in order to remain seriously engaged with the rest of Europe.<sup>37</sup> Italy introduced paid maternity leave in 1949 with the foundation of the ‘Second Republic’ after the Second World War. However, because of its social conservatism and lagging behind other countries in the transition from an agrarian to an industrial economy, female employment rates in Italy have and continue to remain among the lowest in the OECD.<sup>38</sup> Italy’s parental and maternity leave system appears to encourage female absence from the workplace after having children and does not appear to have had a positive effect on gender equality. Spain and Portugal are also countries that are similar to Italy and for historical reasons also transitioned relatively late to a more modern economy. Spain and Portugal had relatively low rates of female participation in the workforce, with the cultural expectation that women would leave employment once they married or had children.

However, in more recent times Spain and Portugal introduced more equitable regimes of paid parental leave as part of a wider program of economic modernisation. Spain, for example, introduced up to two weeks of paid paternity leave to encourage more Spanish men to engage in caring and parenting as well as paid work and to equalise their sharing of work and family responsibility with their partners. However, the effectiveness of these measures is still an open question because of the entrenched culture of masculinity in Spain and its slow recovery from a deep recession after the global financial crisis.<sup>39</sup> Greece followed much the same track on parental leave as Spain, with leave being more

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<sup>36</sup>Lia Pacelli, Silvia Pasqua, Claudia Villosio, ‘Labour Market Penalties for Mothers in Italy’ (2011) 34(4) *Journal of Labour Research* 408, 408-432.

<sup>37</sup>Karin Wall and Anna Escobedo, ‘Portugal and Spain: Two Pathways in Southern Europe’ in Sheila Kamerman and Peter Moss (eds) *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press, 2011), 207-226.

<sup>38</sup>Lia Pacelli, Silvia Pasqua, Claudia Villosio, ‘Labour Market Penalties for Mothers in Italy’ (2011) 34(4) *Journal of Labour Research* 408, 408-432.

<sup>39</sup>Irene Lapuerta, Pau Baizan, Maria Gonzalez, ‘Individual and Institutional Constraints: An Analysis of Parental Leave Use and Duration in Spain’ (2011) 30(2) *Population Policy and Research Review* 185, 185-210; P Romero-Balsas et al (2013), ‘Decision-Making Factors within Paternity and Parental Leaves: Why Spanish Fathers Take Time Off from Work’ 20(6) *Gender, Work and Organisation* 678, 678-691.

focused on women and evidence indicating overall, these policies have not had much effect on female rates of labour workforce participation.

Chapter 4 then showed how the UK and Ireland followed a slightly different path. The UK introduced social protections legislation in a similar manner to the countries above, particularly after the Great Depression and the Second World War.<sup>40</sup> The UK introduced paid maternity leave in 1973 and introduced further parental leave legislation in the 1990s through the 2015 designed to further gender equality and reduce the over-reliance on UK mothers to do unpaid parenting and domestic work.<sup>41</sup> These included paid maternity leave for up to 26 weeks, unpaid maternity leave available for a following 26 weeks, 18 weeks per parent of unpaid parental leave for each child subject to specific eligibility criteria, two weeks' of paid paternity leave for eligible fathers and partners, and up to 50 weeks of shareable parental leave (SPL) that can be shared between two parents subject to certain eligibility criteria and paid at either 90% of the average weekly pay or at a statutory flat rate for up to 37 weeks.<sup>42</sup> These measures brought the UK into line with relevant EU parental leave standards and also closer to the Nordic frameworks of parental leave legislation, however these reforms had an ambivalent outcome on actual behaviour and attitudes towards gender equity in UK workplaces.

In the Republic of Ireland, maternity leave was introduced in 1911, though in the background of general backwardness and poverty that made Ireland one of the most destitute nations in Europe.<sup>43</sup> Maternity leave benefits were gradually expanded in Ireland however, and from 1996-2006, the Republic of Ireland introduced a legislative scheme of paid parental leave that allowed for up to 14 weeks of paid parental leave for both parents. Ireland introduced further reforms in 2014 and 2016 that increased the parental leave period to 18 weeks per child

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<sup>40</sup>Jamie Atkinson, (2017), 'Shared Parental Leave in the UK: Can it Advance Gender Equality by Changing Fathers into Co-parents?' 13(3) *International Journal of Law in Context* 356, 356-368;

<sup>41</sup>Ibid 359.

<sup>42</sup>Ibid 359-360.

<sup>43</sup>Michael Rush, 'The Two Worlds of Father Politics in the Republic of Ireland: Swedish vs American Influences' (2011) 42(1) *Journal of Comparative Labour Studies* 37, 37-57.



for each parent and also introduced two weeks of paternity leave (which could be paid in certain circumstances) in 2016.<sup>44</sup>

In conclusion, in Europe the selected jurisdictions took approaches that could be categorised into three different groups: Firstly, in the Nordic states, the main aim was to foster gender equality through progressive proactive social legislative reforms designed to give women equal rights to men in all aspects of public and private life, including in the workplace. This required major government intervention in society the form of progressive legislative reform and progressive social policies that were at the heart of decision-making and legislation.<sup>45</sup> The Nordic countries also had to introduce high levels of income taxation and public spending, as well as government regulation of the economy to achieve these aims where it was seen to be required, including to introduce paid parental and maternity leave on as equal a basis between men and women as was possible.

The second group of nations, including France, Germany, Luxembourg, the Netherlands and those of Southern Europe introduced systems of social protection legislation aimed at protecting male workers/breadwinners and encouraging women to either remain at home or work part-time. Social policies and laws were in these nations were also designed to promote fertility and hence to maintain or increase the size of the working populations of these nations for political, social or economic reasons.<sup>46</sup> In Southern Europe, religious forces also played an important factor by encouraging male-headed households with women encouraged to be mothers and carers first and the work they undertook was

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<sup>44</sup> Eileen Drew and Anna Waters, 'We're Not Much Use, But Good for Logistics: An Exploratory Study of Parenting Leaves in Ireland' (2014) 30(3) *Journal of International and Comparative Social Policy* 245, 245-264; Clara Albrecht, Anita Fichtl, Peter Redler, 'Fathers in Charge? Parental Leave Policies for Fathers in Europe' (2017) 15(1) DICE Report 49-51.

<sup>45</sup> Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47; Jan M Hoem, 'Why does Sweden Have Such High Fertility?' (2005) 13(1) *Demographic Research* 559, 559-572.

<sup>46</sup> Jeanne Fagani, 'Recent Reforms in Childcare Policies in France and Germany: What Was at Stake?' (2012) 34(3) *Children and Youth Services Review* 509, 509-516; Lluís Flaquer, 'Family Policy and Welfare State in Southern Europe' (Working Paper No 185, Institut de Ciències Polítiques i Socials Barcelona, 2000), 1-19; Daniela Del Boca, Silvia Pasqua, Chiara Pronzato, 'Analyzing Women's Employment and Fertility Rates in Europe: Differences and Similarities in Northern and Southern Europe' (2003) *Centre for Household, Income, Labour and Demographic Economics* 1, 1-25.

mostly in the home.<sup>47</sup> In the English-speaking nations of Europe, initially the patterns of work and family policy were more ‘laissez-faire’, based on classical Victorian conceptions of morality, individual freedom and liberty, and also the central role of the male in both the public and private spheres of living.<sup>48</sup> However, in the 20<sup>th</sup> century, the UK also introduced social protection legislation and social welfare programs including paid maternity leave, particularly in the periods following the Second World War. The role of the welfare state remained important until the rise of neoliberalism in the 1970s and 1980s, which focused on market de-regulation (including in the workplace) to improve business and economic prosperity and to give employers more choice and power in the workplace. Social welfare spending was cut back, including in areas relating to education, childcare and parental leave. While neoliberal policies continued to dominate the economic and political discourses of the UK from the 1980s until the present, more recently the UK and Ireland introduced paid parental leave systems and allied employment protection legislation that moved them closer to the Nordic and Continental European nations, while retaining a neoliberal economic policy focus of keeping public spending under control, reducing welfare dependency, encouraging people to work wherever possible, deregulation of markets and tariffs and encouraging greater levels of female workplace participation.<sup>49</sup>

In the discussion of Sweden and Australia in Chapter 5, the Swedish scheme of parental leave was examined in relation to the framework of EU law and international conventions relating to parental leave, anti-discrimination law and gender equality that Sweden has implemented in domestic legislation. Sweden was also discussed as being a potential example for Australia in reforming its parental leave legislation, as a number of Australian and international

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<sup>47</sup>Pablo Branas-Garza and Shoshana Neumann, ‘Parental Religiosity and Daughter’s Fertility: The Case of Catholics in Southern Europe’ (2007) 5(3) *Review of Economics of the Household* 305, 305-327.

<sup>48</sup>Marian Sawyer, ‘Andrew Fisher and the Era of Liberal Reform’ (2012) 102(1) *Labour History* 71, 71-86; Shalene Werth, ‘Survival of the Male Breadwinner’ (2011) 37(1) *Hecate* 145, 145-156.

<sup>49</sup>Gayle Kaufmann and Anna-Lena Almqvist, ‘The Role of Partners and Workplaces in British and Swedish Men’s Parental Leave Decisions’ (2017) 20(5) *Men and Masculinities* 533, 533-551; Michael Rush, ‘The Two Worlds of Father Politics in the Republic of Ireland; Swedish vs American Influences’ (2011) 42(1) *Journal of Comparative Family Studies* 37, 37-57.

researchers and experts in the area of parental leave policy have subjected the Swedish parental leave system to detailed analysis.<sup>50</sup> This has been done for a number of reasons, including that Sweden performs well on a range of international metrics related to social equality, female participation in the workplace, child poverty, male and female sharing of family responsibility and access to affordable childcare services and education.<sup>51</sup> Like Australia, Sweden is an advanced industrial economy having to deal with many of the same issues that Australia also has to negotiate in the economic and social spheres, including employment law. A core feature of Sweden's political system as with other Scandinavian nations is the 'social democratic' model of society. In contrast to 'neoliberal' or 'corporatist' states that emphasize more conservative or free-market models to social policy and economics, Sweden's social democratic system is more oriented towards comprehensive government intervention and legislative action to achieve social goals and help to achieve equality, including gender equality.<sup>52</sup>

It was shown in Chapter 5 that Sweden has adopted anti-discrimination and gender equality measures from EU treaties and international conventions into its domestic laws, particularly ILO Code Conventions related to employment standards and UN Conventions including the Convention for the Elimination of All Forms of Discrimination Against Women. These standards, along with EU legislation in the form of Directives in employment law relating to parental and maternity leave, form an important part of the overall structural framework of Swedish parental leave and employment laws in these areas. It was further shown in Chapter 5 that upon closer examination of the Swedish paid parental leave framework in the *Parental Leave Act* and allied legislation such as the *Discrimination Act* that Sweden has a combination of different types of maternity, parental and paternity leave to encourage a dual-earner and dual-

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<sup>50</sup>Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47; Tom Dreyfus, 'Paid Parental Leave and The Ideal Worker: A Step Towards the 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>51</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014), 1-25, 63-162.

<sup>52</sup>Ibid 1-25.

parenting approach to work and family responsibility and at the same time Sweden's industrial relations system has specific workplace protections against gender or family responsibility-based discrimination and the termination of employment while a person is pregnant or taking paid parental or paternity leave.<sup>53</sup> A discussion of the challenges to the Swedish parental leave framework and also its relative strengths and weaknesses in Chapter 5 showed that while there was evidence to indicate the Swedish parental leave policy was generally popular in Sweden, statistical information showed Swedish women still used the vast majority of available leave time and took up the bulk of parenting and care work and Swedish men still were not taking up leave on an equal basis to women and that a certain level of cultural conservatism and inertia to change remain powerful challenges to make society more gender equal even in places such as Sweden.<sup>54</sup>

A further challenge to the Swedish scheme of parental leave was that social research increasingly showed in the contemporary globally competitive workplace, taking time off work has a substantial and measurable detrimental impact on employees who take the leave.<sup>55</sup> Research has suggested that excessive parental leave times can actually become a more costly and ineffective policy solution than potential alternatives and sometimes paid parental leave does not produce better gender equality outcomes.<sup>56</sup> The Swedish state, along with those of the other Scandinavian countries, is also finding it harder to sustain its current levels of government spending, with Swedish policy since the 1990s moving towards a social and economic model more like that of the neoliberal systems found in the United States, the UK and Australia.<sup>57</sup> Following a

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<sup>53</sup>See Chapter 5 of this thesis.

<sup>54</sup>Silke Ainsbrey, Marie Evertsson and Daniela Grunow, 'Is There a Career Penalty for Mothers' Time Out? A Comparison of Germany, Sweden and the United States' (2009) 88(2) *Social Forces* 573, 573-605.

<sup>55</sup>Marie Evertsson and Daniela Grunow, 'Women's Work Interruptions and Career Prospects in Germany and Sweden' (2012) 32(9-10) *International Journal of Sociology and Social Policy* 561, 561-574.

<sup>56</sup>Michelle J Budig and Paula England, 'The Wage Penalty for Motherhood' (2001) 66(2) *American Sociological Review* 204, 204-225; James Albrecht, Marianne Sundstrom and Susan Vroman, 'Career Interruptions and Subsequent Earnings: A Re-examination using Swedish Data' (1999) 34(2) *Journal of Human Resources* 294, 294-311.

<sup>57</sup>Eric S Einhorn and John Logue, 'Can Welfare States be Sustained in a Global Economy? Lessons from Scandinavia' (2010) 125(1) *Political Science Quarterly* 1, 1-30.

consideration of the challenges faced by the Swedish parental leave system, the Australian parental leave system was discussed in relation to Sweden's regulatory framework with the aim of seeing what lessons Australia might learn from Sweden.<sup>58</sup> While Australia cannot simply copy the entire Swedish regulatory system of parental leave,<sup>59</sup> Australian researchers have argued Sweden's focus on fostering gender equality between men and women in society, encouraging a 'dual earner' and 'dual parenting' rather than 'male breadwinner' household model, having a well-structured system of parental leave and strong employment laws against discrimination, dismissal from employment and forced redundancy while taking family-related leave were important lessons Australia could learn and apply to restructure the *Paid Parental Leave Act* to address some of the problems identified in Chapter 5 (particularly section 5.7.1) and the general Australian employment law framework.<sup>60</sup>

In conclusion, a comparison of the Australian and Swedish systems of paid parental leave conducted in Chapter 5 showed a number of similarities and differences. After introducing the *Paid Parental Leave Act* in 2010, Australia now has a statutory scheme of paid parental leave that regulates how parental leave is funded and administered and also who is eligible outside of paid parental leave arrangements made between employers and the employees as part of their employment contracts.<sup>61</sup> As with Sweden, Australia's paid parental leave scheme is focused on achieving gender equality goals, making it easier for working parents to share work and family responsibility, and encourage a move away from the 'male breadwinner' paradigm in society and workplace relations law.<sup>62</sup> Unfortunately by comparison to Sweden and the other Scandinavian

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<sup>58</sup>See Chapter 5 of this thesis.

<sup>59</sup>Tom Dreyfus, 'Paid Parental Leave and The Ideal Worker: A Step towards The 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119.

<sup>60</sup>Ibid 107-119. See also Nadine Zacharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47.

<sup>61</sup>Marian Baird, 'The State, Work and Family in Australia' (2011) 22(18) *International Journal of Human Resource Management* 3741, 3742-3754; Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198.

<sup>62</sup>Marian Baird, 'The State, Work and Family in Australia' (2011) 22(18) *International Journal of Human Resource Management* 3742, 3742-3754.

nations considered in this thesis, Australia's parental leave scheme has problems and gaps that need to be addressed before it can be considered a proper response to the problem of workplace gender inequality.<sup>63</sup> A discussion of the means of potentially addressing these are the focus of the next section.

### 6.3 Key Findings and Recommendations

The following section will summarise key findings and recommendations. It will further illustrate how these recommendations and findings can assist in determining how a legislative framework of paid parental leave should be designed and administered in Australia to be effective. To foreground the discussion of the findings of the thesis in this chapter, some key issues need be in briefly recapitulated.<sup>64</sup>

Firstly, as discussed in Chapters 2 and 3 of this thesis,<sup>65</sup> it was argued that Australia's economy, workplace laws and society are currently structured broadly in terms of what academic discourse describes as 'neoliberalism.'<sup>66</sup> Social research has shown neoliberal social and economic policy frameworks tend to reinforce gender inequality, particularly through its connections to the

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<sup>63</sup>Tom Dreyfus, 'Paid Parental Leave and the Ideal Worker: A Step towards the 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119. Note Dreyfus remarking at 117 that 99% of parental leave pay recipients in Australia are birth mothers.

<sup>64</sup>For a review see Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review*, 32, 32-47; Marian Baird, 'Parental Leave in Australia: The Role of the Industrial Relations System' (2005) 23(1) *Law in Context*, 45, 45-60; Marian Baird, 'The State, Work and Family in Australia' (2011) 18(22) *International Journal of Human Resource Management* 3742, 3742-3754; Gillian Whitehouse, 'From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and The Family' (2004) 46(4) *Journal of Industrial Relations* 400, 400-412. See also Chapters 2-5 of this thesis.

<sup>65</sup>See Chapters 2-5.

<sup>66</sup>See Chapter 2 of this thesis for a discussion of neoliberalism and related issues. See also Marian Baird, 'The State, Work and Family in Australia' (2011) 18(22) *International Journal of Human Resource Management* 3742, 3746-3748; Marian Baird and Margaret O'Brien, 'Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes' (2015) 18(2) *Community, Work and Family* 198, 199-205; Lucie Newsome, 'Female Leadership and Welfare State Reform: The Development of Australia's First National Paid Parental Leave Scheme' (2017) 52(4) *Australian Journal of Political Science* 537, 541-543; Rianne Mahom and Deborah Brennan, 'Federalism and the 'New Politics' of Welfare Development: Childcare and Parental Leave in Australia and Canada' (2013) 43(1) *The Journal of Federalism* 90, 90-108.

‘male breadwinner’ model of work and family.<sup>67</sup> Another key problem with neoliberal approaches to labour law is the focus on allowing the private law of contract to determine legal obligations is their fostering of dysfunctional outcomes for employees<sup>68</sup> because of the power imbalance that exists in an employment contract relationship between employer and employee.<sup>69</sup> Neoliberal approaches to employment obligations focused on ‘freedom of contract’ principles are advocated to be ‘In theory, a useful and adaptable device enabling workers and firms to mould their legal relationship in mutually beneficial ways.’<sup>70</sup> However, the same reliance on freedom of contract principles between two theoretically equal parties in reality sometimes results in harsh and inequitable outcomes for employees.<sup>71</sup>

Therefore, one of the key findings of this thesis is there is a reasonable argument that the pursuit of neoliberal policies by successive Australian governments in Australian industrial relations law reforms from the 1980s to the time of the introduction of the *Paid Parental Leave Act 2010* (particularly in the Work Choices regime introduced by the Coalition government from 1996-2005) has not successfully resolved the problem of paid parental leave in Australian workplace law, particularly in relation to four major areas: a) ensuring equality of opportunity regarding promotional opportunities and career advancement for employees with parental responsibilities in the workplace, b) protecting

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<sup>67</sup>Yolanda van Gellecum, Janeen Baxter, Mark Western, ‘Neoliberalism, Gender Inequality and the Labour Market’ (2008) 44(1) *Journal of Sociology* 45, 45-63.

<sup>68</sup>Ibid 45-62.

<sup>69</sup>Jill Murray et al, ‘Time and Money under Work Choices: Understanding the New Workplace Relations Act as A Scheme of Regulation’ (2006) 29(1) *University of New South Wales Law Journal* 215, 219-223. See also Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005), 40-48.

<sup>70</sup>Jill Murray et al, ‘Time and Money under Work Choices: Understanding the New Workplace Relations Act as A Scheme of Regulation’ (2006) 29(1) *University of New South Wales Law Journal* 215, 219-22.

<sup>71</sup>Jill Murray et al, ‘Time and Money under Work Choices: Understanding the New Workplace Relations Act as A Scheme of Regulation’ (2006) 29(1) *University of New South Wales Law Journal* 215, 219-223. See also Joellen Riley, *Employee Protection at Common Law*, (Federation Press, 2005), 40-48. Riley argues for the adoption of ‘good faith’ and ‘fair dealing’ principles to ensure fairness in employment contracts made at common law, based on parallel developments in equity. See Riley, *Employee Protection at Common Law* (Federation Press, 2005), ‘Preface’, XI-XII, 21-33, 51-65. Unfortunately, the High Court appears to have decisively ruled out any room for ‘good faith and fair dealing’ obligations for employers towards their employees after the decision of the High Court in *Commonwealth Bank of Australia v Barker*, (2014) 253 CLR 169. For a useful judicial analysis of these issues, see the discussions of French CJ, Bell and Keane JJ at 28-29, 35-42, Kiefel J at 91-108 and Gaegler J at 116-119.

employees of organisations (particularly female employees) from direct and indirect discrimination by their employers on the basis of pregnancy, maternity and parental responsibility and ensuring those discriminated against have access to adequate remedies, c) providing employees in Australian workplaces with fair, reasonable and equitable access to an adequately funded and structured government-funded paid parental leave scheme and d) enabling employees in Australian workplaces to maintain their ability to combine their work and family responsibilities in a manner that does not cause them long-lasting financial detriment and harm to their career paths and prospects.<sup>72</sup> It is further submitted that the neoliberal policy framework approach used to design Australia's employment laws by previous governments from the 1980s until the introduction of the *Paid Parental Leave Act 2010* to try and achieve gender equality through reliance on procedures such as 'enterprise bargaining' under the Work Choices and Fair Work legal regimes also failed,<sup>73</sup> because many Australian workplace cultures and their associated legal structures often adhere to deeply embedded gender-biased and patriarchal social norms that in the past have acted in the history of Australian labour relations law to reinforce the 'male breadwinner' model of work and family, which earlier discussions in this thesis have shown are a major cause of problems regarding the four key issues stated earlier in introduction to this chapter.<sup>74</sup> Further, it is submitted schemes of paid and unpaid parental leave that encourage employees (particularly female employees who are mothers) to take excessively long periods of leave from their workplaces are also problematic because they reinforce rather than improve gains in gender equality as they tend to encourage female employees to take long periods of time away from continuous employment with the attendant negative consequences for the person taking more time off work.<sup>75</sup>

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<sup>72</sup>Nadine Zaharias, 'Work-life Balance: Good Weather Policies or Agenda for Social Change? A Cross-country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *Industrial Employment Relations Review*, 32, 32-47.

<sup>73</sup>For a discussion of the relation between Work Choices and gender inequality see Yolanda van Gellecum, Janeen Baxter, Mark Western, 'Neoliberalism, Gender Inequality and the Labour Market' (2008) 44(1) *Journal of Sociology* 45, 46-60.

<sup>74</sup>Tom Dreyfus, 'Paid Parental Leave and the 'Ideal Worker': A Step towards the 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107-119.

<sup>75</sup>It should be noted that as discussed in Chapters 3, 4 and 5 of this thesis and also as pointed out in the source mentioned in this chapter at FN 54, the ability to access either continuous and stable



A further finding that emerged from the discussions in Chapters 2, 4 and 5 of this thesis is evidence workers who choose to take time away from work for family responsibility or other reasons face negative consequences.<sup>76</sup> These include loss of technical skills and knowledge, loss of earnings (the motherhood penalty), lost opportunities for occupational advancement and promotion and segregation into lower-paid and less secure forms of work, often divided along gender lines.<sup>77</sup> Given a key finding of this thesis that discontinuities in employment has serious negative consequences that are harmful to an employee's earnings, superannuation savings and long-term promotional prospects,<sup>78</sup> it is clear that maintaining employment continuity is very important to ensure working parents are not penalised by their decision to have children.<sup>79</sup> It is essential that this consideration is factored into the design of any future Australian paid parental leave legislation so that excessively long and unshared leave periods of parental leave are discouraged.<sup>80</sup>

Therefore, considering the above discussion and the research questions in Chapter 1 of this thesis, and the matters addressed in Chapters 2 and 5 of the thesis, it is submitted the central means of making parental leave work better in an Australian context (after the discussion of positive lessons that can be learned from Sweden as an exemplary model of one country where paid parental leave has long been in place in their employment law framework) policy

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employment or in its place, a suitable scheme of paid parental leave for the duration of time it takes to care for a new child is a key factor in the economic and social well-being of new parents (especially women) who are workers. This also relates closely to the earlier discussions of the 'motherhood effect' impact on female wages as mentioned earlier in Chapter 2 in this thesis.

<sup>76</sup>Marie Evertsson, 'Parental Leave and Careers: Women and Men's Wages after Parental Leave in Sweden' (2016) 29(1) *Advance in Life Course Research* 26, 26-28. See also Silke Aisenbrey, Marie Evertsson, Daniela Grunow, 'Is there A Career Penalty for Mothers' Time Out? A Comparison of Germany, Sweden and the United States' (2009) 88(2) *Social Forces* 573, 573-605.

<sup>77</sup>Ibid.

<sup>78</sup>Therese Jefferson and Alison Preston, 'Bargaining for Welfare: Gender Consequences of Australia's Dual Welfare Model' (2003) 29(1) *Australian Bulletin of Labour* 76, 76-96. A recent senate report has also recommended including superannuation in parental leave pay. See Australian Senate, 'A Husband is Not a Retirement Plan,' (April 2016), Australian Senate Economics Reference Committee Inquiry Report, 43-47.

<sup>79</sup>See Evertsson above, 76.

<sup>80</sup>Tom Dreyfus, 'Paid Parental Leave and The 'Ideal Worker': A Step Towards the 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119.

recommendations and legislative reform in the Australian paid parental leave scheme should focus on four specific areas:

**(a) Australia’s paid parental leave framework should be reviewed by the AHRC or another relevant body to ensure that equality of opportunity for employees with family responsibilities regarding promotions, career advancement, rates of pay, terms and conditions of employment and the basic principle of ‘equal pay for equal work’ is not undermined by a decision to take paid or unpaid parental leave.**

**(b) A further inquiry should be conducted by the AHRC or another relevant body to review Australia’s employment law framework regarding how employees with family responsibilities can be better protected from direct and indirect forms of discrimination and harassment in the course of their employment and dismissal or forced redundancy by their employer from their employment on the basis of gender, pregnancy status and parental responsibility.**

**(c) Australia’s paid parental leave framework should be amended so employees with family responsibilities in the Australian workplace of both sexes should have access to a properly structured and funded paid parental leave scheme either as a basic social right or as a recognised employment entitlement.**

**(d) Australia’s paid parental leave framework should be structured so that parents in the Australian workplace find it easier to combine work and parental responsibilities.**

Considering these findings, these recommendations are discussed below in the following sections.

**6.3.1. Australia’s paid parental leave framework should be reviewed by the AHRC or another relevant body to ensure that equality of opportunity for employees with family responsibilities regarding promotions, career advancement, rates of pay, terms and conditions of employment and the**

**basic principle of ‘equal pay for equal work’ is not undermined by a decision to take paid or unpaid parental leave.**

Chapter 2 of this thesis<sup>81</sup> argued that adverse forms of discrimination on the basis of gender, pregnancy status and parental responsibility are still highly prevalent in the Australian workplace. This was caused by several factors, including the persistence of the antiquated ‘male breadwinner’ model of work and family in Australia, workplace cultures that penalise parents (particularly women) for taking time away from work because they and because of employer unwillingness or inability to comply with employment protection and anti-discrimination laws.<sup>82</sup> Chapter 2 of this thesis discussed this matter in relation to the Australian Human Rights Commission inquiries into gender-based discrimination in the workplace that demonstrated adverse discrimination and harassment of Australian employees on the basis of gender, pregnancy status and parental responsibility was a systematic problem.<sup>83</sup>

Further, in Chapter 3 of this thesis, it was established in the discussion of Australia’s history of developing standards for maternity leave (and limited forms of parental leave) through the decisions of the Australian Conciliation and Arbitration Commission and later in cases, the Australian Industrial Relations Commission, that sexist assumptions about the nature and role of women in the workplace guided decision-making in these cases from the turn of the 19<sup>th</sup> century until at least the 1970s.<sup>84</sup> Further, Chapter 3 showed from the 1970s through until the contemporary period, the discussions in arbitration decisions

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<sup>81</sup>See discussion in Chapter 2 of this thesis including the Australian Government Productivity Commission, ‘Paid Parental Leave: Support for Parents of Newborn Children,’ (Productivity Commission Inquiry Report No 47, Australian Government Productivity Commission, 28 February 2009) and its recommendations at XXXIX.

<sup>82</sup> Dominique Allen, ‘Supporting Working Parents: Findings from The AHRC’s National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in the Workplace’ (2014) 27(3) *Australian Journal of Labour Law* 281, 281-292; Barbara Masser, Kirsten Grass, Michelle Nestic, ‘We Like You, But We Don’t Want You: The Impact of Pregnancy in The Workplace’ (2007) 57(9) *Sex Roles* 703, 703-712.

<sup>83</sup>Dominique Allen, ‘Supporting Working Parents: Findings from The AHRC’s National Inquiry into The Prevalence of Pregnancy and Return to Work Discrimination in The Workplace’ (2014) 27(3) *Australian Journal of Labour Law* 281, 281-292.

<sup>84</sup>Gillian Whitehouse, ‘From Family Wage to Parental Leave: The Changing Relationship Between Arbitration and The Family’ (2004) 46(4) *Journal of Industrial Relations* 400, 400-412.

and the later development of the ‘Work Choices’ legislation in 1996 and 2005-2006 by successive Coalition governments, combined with neoliberal policies of de-funding social services and deregulating the labour market, resulted in unfavourable outcomes for women in the workplace and also those with parental responsibilities.<sup>85</sup> The introduction the *Paid Parental Leave Act* in 2010 and the legal developments around it after it was introduced (including the retreat of a major election promise in 2013 from the Coalition government to expand the 2010 paid parental leave scheme and later attempts by the Coalition to wind it back) showed that the deeply-ingrained cultural assumptions behind the ‘family wage’ and the ‘male breadwinner’ model of work and family persisted in Australian culture and held back progress in Australia in the field of gender equality.<sup>86</sup> These issues continue to make it difficult for Australian employees, especially women, to share work and family obligations on an equal basis and reinforces workplace gender equality.<sup>87</sup>

In summary, it is submitted gender-based discrimination in the workplace against women and those with parental responsibility is still a major problem in Australian employment relations law which has not been adequately addressed.<sup>88</sup> The current features of the *Paid Parental Leave Act 2010* which encourage Australian women to take most of the time off from work reinforce long-term wage inequalities compared to male or childless female colleagues, and the current *Paid Parental Leave Act* appears to be ineffective in preventing this outcome.<sup>89</sup> Therefore, it is submitted firstly that the appropriate response by the

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<sup>85</sup>See Chapter 3 and Whitehouse above, 84, above and Yolanda van Gellecum, Janeen Baxter, Mark Western, ‘Neoliberalism, Gender Inequality and the Labour Market’ (2008) 44(1) *Journal of Sociology* 45, 45-63.

<sup>86</sup>Barbara Pocock, ‘Holding Up Half the Sky? Women at Work in The 21<sup>st</sup> century’ (2016) 27(2) *Economic and Labour Relations Review* 147, 147-163.

<sup>87</sup>Barbara Pocock, Sara Charlesworth, Janine Chapman, ‘Work-Family and Work-Life Pressures in Australia: Advancing Gender Equity in Good Times?’ (2013) 33(9-10) *International Journal of Sociology and Social Policy* 594, 594-612.

<sup>88</sup>See Chapters 2, 3, and 5 of this thesis for an analysis of Australian and Swedish anti-discrimination laws. For a more detailed overview of Australia’s anti-discrimination laws in relation to gender and other defined categories, see Peter H Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009), 451-625.

<sup>89</sup>Tom Dreyfus, ‘Paid Parental Leave and The ‘Ideal Worker’: A Step Towards The ‘Worker-Carer’ in Australian Labour Law’ (2013) 23(1) *Labour and Industry* 107, 107-119; Dominique Allen, ‘Supporting Working Parents: Findings from The AHRC’s National Inquiry into The Prevalence of Pregnancy and Return to Work Discrimination in the Workplace’ (2014) 27(3) *Australian Journal of Labour Law* 281, 281-292.

Australian government should be to establish an inquiry into the operation of the *Paid Parental Leave Act 2010* with the aim of seeing what changes could be made to the *Paid Parental Leave Act 2010* to encourage more men to take up more parental leave time.

Considering these findings, the following recommendation is made:

### **Recommendation 1**

**The Commonwealth government should establish a fresh AHRC inquiry to review the *Paid Parental Leave Act 2010* with the aim of making relevant changes to the Act to encourage men to take up more parental leave time.**

**6.3.2 A further inquiry should be conducted by the AHRC or another relevant body to review Australia's employment law framework regarding how employees with family responsibilities can be better protected from direct and indirect forms of discrimination and harassment in the course of their employment and dismissal or forced redundancy by their employer from their employment on the basis of gender, pregnancy status and parental responsibility.**

The second key issue examined by this thesis was the issue of gender-based discrimination and discrimination against employees by employers on the specific grounds of taking parental or family-related leave.

As discussed in Chapters 2 and 3 of this thesis, gender-based discrimination is an ongoing problem in the Australian workplace, and Australian workplace structures have yet to properly evolve to accommodate the needs of working parents, particularly mothers.<sup>90</sup> Despite the protections against workplace gender discrimination available to women under Australia's existing anti-discrimination laws, Chapter 2 of this thesis showed a substantial number of employees had their employment terminated, faced redundancy or discrimination from their employer after disclosing pregnancy status, an intention to take parental leave or maternity leave, or returning to work after taking parental leave. Workplace

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<sup>90</sup> See Chapters 2 and 3 of this thesis.

cultures that encouraged differential leave-taking between male and female employees was seen to be a problem in Chapter 2, and it was also seen that most employees who reported experiencing discrimination on the basis of family responsibility or gender took no legal action against their employer, but chose instead to resign from their job and look for other work or did not return to work at all.<sup>91</sup>

It is submitted on this basis that a further AHRC Inquiry into the impact of the *Paid Parental Leave Act* on gender-segregated leave times and employer practices with suggestions on measures to help reduce and remove gender-segregated divisions of leave-taking is one way to make Australia's paid parental leave legislation work more effectively, as well as looking at what changes could be made to other employment legislation such as the Fair Work Act to protect employees with family responsibilities from unfair dismissal, termination of employment or forced redundancy because of their parental status or family responsibilities.

Considering these findings, the following recommendations are made:

### **Recommendation 1**

**The Commonwealth government should establish a further AHRC Inquiry to understand the gender-segregated nature of parental-related leave-time taking in Australian workplaces and to suggest potential changes that can be made to the *Paid Parental Leave Act 2010* to remedy this problem.**

### **Recommendation 2**

**The same inquiry should also review the employment protections under the *Fair Work Act 2009* to ensure employees with family responsibilities are better protected from being dismissed, having their employment terminated**

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<sup>91</sup>Dominique Allen, 'Supporting Working Parents: Findings from the AHRC's National Inquiry into the Prevalence of Pregnancy and Return to Work Discrimination in the Workplace' (2014) 27(3) *Australian Journal of Labour Law* 281, 281-292; Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systematic Approach' (2010) 29(2) *University of Tasmania Law Review* 83, 83-110.

**unfairly or being made to take forced redundancies because of their family or parental responsibilities.**

**6.3.3 Australia's paid parental leave framework should be amended so employees with family responsibilities in the Australian workplace of both sexes should have access to a properly structured and funded paid parental leave scheme either as a basic social right or as a recognised employment entitlement.**

As discussed earlier in this chapter and also in Chapter 1 of this thesis, a key research question is whether the current Australian paid parental leave scheme is an adequate framework for addressing gender equality in Australia and if so, how Australia's scheme design may be improved in the future to be more effective as a tool achieving gender equality in the Australian workplace and ensuring the balance between work and family responsibilities.

Chapters 2 and 3 showed while paid parental leave was recommended both by the AHRC and the Productivity Commission Final Report as an important policy for achieving workplace gender equity in Australia, there was a high level of complexity involved in designing and implementing a paid parental leave scheme in Australia. Australia was one of the few OECD nations to not have a statutory scheme of paid parental leave, and because of disagreement among various stakeholders (including unions, women's lobby groups, employer and business lobby groups, academics, and government) to the fundamental design of a statutory paid parental leave scheme in areas such as eligibility criteria, the length of time parental leave time, the types and levels of parental leave payments, and the costs to employers and government were all areas of fundamental disagreement between the different stakeholders.<sup>92</sup>

The discussion in Chapter 3 also highlights while Australia's *Paid Parental Leave Act* was quite similar to the structure recommended by the AHRC and the Productivity Commission in their 2009 Final Report, the *Paid Parental Leave Act* was also heavily criticised after being legislated for failing to achieve

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<sup>92</sup>See Chapter 3 of this thesis.

important gender equity goals and also for not being in line with international standards.<sup>93</sup> Further discussion of Australia's parental leave scheme and the schemes of other countries in Chapters 4 and 5, particularly with reference to Sweden, also showed that Australia's current scheme of paid parental leave is failing to achieve a number of important goals in relation to gender equality in the workplace.<sup>94</sup> Therefore it is submitted Australia's basic scheme of paid parental leave should be fair and equitable to the stakeholders mentioned above, and also be effective in providing clear guidelines to employers and employees in important matters such as eligibility criteria, payment of parental leave pay, and who is responsible for funding and administering paid parental leave. It is also submitted the Australian parental leave payment system as currently structured is not gender-equal or fair as the parental leave payments are structured in such a way by the current legislation to a) act as a powerful incentive for only women to take up most of the leave and b) the level of parental leave pay is not in line with the general standard of 'wage replacement' as was the case in the OECD countries reviewed, including the UK and Sweden.<sup>95</sup>

The discussions in Chapters 2, 4 and 5 also showed there was a major problem in Australia and also in the selected OECD European jurisdictions relating to a stark gender bias in the use of parental leave times. In Australia, women make up around 99% of claimants for parental leave time and parental leave pay, while in Sweden, the time-use of parental leave by men is about 27%.<sup>96</sup> This thesis

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<sup>93</sup>Wendy Boyd, 'Maternal Employment and Childcare in Australia: Achievements and Barriers to Satisfying Employment' (2012) 38(3) *Australian Bulletin of Labour* 199, 199-213; Ray Broomhill and Rhonda Sharp, 'Australia's Parental Leave Policy and Gender Equality: An International Comparison (August 2012) Australian Workplace Innovation and Social Research Centre, University of Adelaide, 4, 4-23; Barbara Pocock, Sara Charlesworth, Janine Chapman, 'Work-family and Work-life pressures in Australia: Advancing Gender Equity in Good Times?' (2013) 33(9-100) *International Journal of Sociology and Social Policy* 594, 594-612.

<sup>94</sup>See Chapters 4 and 5 of this thesis and also Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184, 184-198.

<sup>95</sup>Tom Dreyfus, 'Paid Parental Leave and the 'Ideal Worker': A Step Towards The 'Worker-Carer' in Australian Labour Law' (2013) 23(1) *Labour and Industry* 107, 107-119; Christine Malatzky, 'Don't Shut Up: Australia's First Parental Leave Scheme and Beyond: Assisting Women and Men Negotiate Two Worlds of Work' (2013) 28(76) *Australian Feminist Studies* 195, 195-211.

<sup>96</sup>See Chapters 3 and 5 of this thesis and also Marian Baird and Andrea Constantin, 'Analysis of the Impact of the Government's MYEFO Cuts to Paid Parental Leave' (Women and Work Research Group Papers, University of Sydney Business School, October 2016). See also Chapter



argues such an imbalance in the use of parental leave time and pay is not fair from a gender equity perspective and not sound policy from an economic and legal standpoint. Therefore it is submitted the structure for parental leave payments in Australia's *Paid Parental Leave Act* where there are two very distinct types of pay, 'parental leave pay' and the 'DAPP' entitlement payable at the minimum wage is not an adequate legislative response to the problem of differential use of parental leave times by men and women and the problem of discontinuity in employment, which the earlier discussion in Chapters 2, 4 and 5 showed is a major problem for women with family responsibilities.<sup>97</sup> The maximum period of parental leave pay under the current Australian scheme is, as Chapters 4 and 5 showed, also not in line with OECD or best practice standards, based on the examples in the European nations considered or with Sweden as a model for Australia.<sup>98</sup>

The findings above indicate there is a need for clearer guidelines in the Australian paid parental leave framework around the core parts of the scheme, especially those relating to the different types of available parental payment, the levels of parental leave pay, and the proper time of leave that should be taken, and also the Act should be changed to bring Australia into line with the standards of other OECD nations. Therefore, this thesis proposes the following recommendations:

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4 of this thesis for a discussion of the UK take-up level of parental leave and Chapter 5 of this thesis for a discussion of the levels of leave take-up in Sweden.

<sup>97</sup>Shae McCrystal and Tashina Orchiston, 'Industrial Legislation in Australia in 2012' (2013) 55(3) *Journal of Industrial Relations* 321-337; Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38(3) *Australian Bulletin of Labour* 184-198.

<sup>98</sup>For example, the recommended time for parental leave under the *ILO Convention (No 103) Concerning Maternity Protection* (opened for signature 28 June 1952) (entered into force 28 June 1952) is not less than 14 weeks and the Council Directive 2010/18/EU of 8 March 2010 Implementing The Revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (2010) O J L 68/13 advises both parents require a parental leave period of at least 4 months, and the Nordic nations (including Sweden) offer paid parental leave to both parents for at least 26 weeks or longer. The UK also now offers parents of both sexes parental leave or paternity leave periods of 26 weeks and longer. See Chapter 4 of this thesis.

### **Recommendation 1**

The Commonwealth government should amend the *Paid Parental Leave Act 2010* to increase the level of parental leave payment and DAPP payment from the federal minimum wage to a wage replacement payment set at 80% of pre-leave earnings and a flat rate for the remainder capped at 100% of pre-leave earnings. The Commonwealth government should also amend the *Paid Parental Leave Act* to set a combined household income eligibility cap of \$100 000 per claimant to make the costs of the scheme affordable to the Commonwealth government and to ensure fairness and equity in access to the scheme.

### **Recommendation 2**

The Commonwealth government should amend the *Paid Parental Leave Act 2010* to abolish the two separate payments of ‘Parental Leave Pay’ and the ‘DAPP’ payment and replace this with a single ‘Parental Leave Pay’ payment that can be shared and transferred between primary and secondary carers of a child and the maximum period of parental leave pay is set at 18 weeks for both primary and secondary carers of the child, and the Commonwealth should also consider a review of the *Paid Parental Leave Act* to further increase that leave time period to 26 weeks for both primary and secondary carers of the child.

### **Recommendation 3**

The Commonwealth government should commission the AHRC or another relevant body to review the *Paid Parental Leave Act* to investigate whether the *Act* should be amended to include separate periods of paid paternity leave and maternity leave. The same inquiry should also investigate how the introduction of separate periods of paternity leave and maternity leave would relate to the issue of women taking up most of the shareable parental leave time.

#### **Recommendation 4**

**The same inquiry referred to in Recommendation 3 should investigate the period of continuous full-time, part-time or casual employment currently required for eligibility under the current *Act* with the aim of making paid parental leave available to greater numbers of workers, particularly those working in insecure forms of employment.**

**6.3.4 Australia's paid parental leave frameworks and policies should be structured so that parents in the Australian workplace find it easier to combine work and parental responsibilities.**

The last key question that was considered in this thesis was what further lessons Australia could learn from selected OECD European nations on the issues of workplace gender equality and paid parental leave, with Sweden as an exemplary model for Australia

Chapters 4 and 5 of this thesis showed that European countries that have introduced their own regulatory systems of paid parental leave and have managed them over a period of time have used different approaches. These approaches include the 'Nordic' model of actively pursuing gender equality proactively as a central policy goal and spending money on programs designed to achieve gender equality, such as by providing paid parental leave and affordable childcare to workers in a way that 'socialises' the costs of reproduction by moving the emphasis away from parents being primarily responsible as atomised 'individuals' for funding their life choices, including to have families, and deciding what economic 'sacrifices' they have to make to achieve this goal to a broader socialised concept of work and family as being a task for society to achieve and not just the individual.<sup>99</sup> This contrasted with the traditional approaches of countries in Central and Southern Europe, as well as the UK and Ireland, where social policy and economic settings were focused more on making the individual employee bear the consequences for deciding to

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<sup>99</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 1-25.

have children, rather than society having to share in the cost by providing services to workers such as paid parental leave or affordable childcare.<sup>100</sup>

A key finding of this thesis was that in discussing Australia with reference to selected OECD European countries including Sweden as a ‘example’ is that there are some similarities in the findings regarding three areas: a) that employees pay a series of social and economic penalties for choosing to have children and b) as a consequence, take absences from work due to family responsibility and c) the majority of workers who choose to take time away from work to parent are women, even in countries like Sweden, where the local culture is arguably more accepting of the ‘dual-earner’ and ‘dual-parenting’ model of work and family than in Australia.<sup>101</sup> This means that in the countries considered in this thesis, whether it is Australia or the OECD European countries, a full and complete transition from a male-dominated society and workplace to a gender-equal society and workplace is not yet complete and will take a long time.<sup>102</sup> It is therefore submitted that the Australian government, based on the examples of the Scandinavian nations and Sweden as an example, need to go beyond simply legislating a paid parental leave scheme and also needs to proactively engage in policies that assist businesses to make their workplaces more gender equal, diverse and conducive to workers to balancing work and family responsibility. An excellent example of this is Sweden, which has a policy of gender equality in the workplace as a central policy goal that is not just simply ‘window dressing’ designed to mask over the pervasive and systematic problem of workplace gender equality as discussed earlier in this chapter.<sup>103</sup> It is also clear from the

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<sup>100</sup> See Chapters 4 and 5 of this thesis. However, as was seen in Chapter 4, a number of European nations are moving more towards the ‘Nordic’ framework, including the UK, France, Spain, Germany and Ireland. In Chapter 5 of this thesis it was also shown how EU directives are also guiding laws in places such as Sweden.

<sup>101</sup> See Chapter 5 of this thesis and Nadine Zacharias, ‘Work-life Balance: ‘Good Weather Policies or Agenda for Social Change?’ A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden’ (2006) 12(2) *International Employment Relations Review* 32, 32-47.

<sup>102</sup> Barbara Pocock, Sarah Charlesworth, Janine Chapman, ‘Work-family and Work-life Pressures in Australia; Advancing Gender Equality in Good Times?’ (2013) 33(9/10) *International Journal of Sociology and Social Policy*, 594, 594-612.

<sup>103</sup> Miki Caul Kittilson, ‘Representing Women: The Adoption of Family Leave in a Comparative Perspective’ (2008) 70(2) *Journal of Politics*, 323, 324-333.

earlier discussion in this chapter that workplace cultures in Australia that foster gender inequality and discrimination against women remain a major problem.<sup>104</sup>

It is therefore submitted that measures such as a paid parental leave scheme and anti-discrimination laws to protect employees with family responsibility in Australia cannot be effective on their own without direct and clear government policies aimed to encourage gender equality as a goal in itself as a central policy aim. Therefore, it is proposed the following recommendations will assist in helping the Australian government make paid parental leave and work better in Australia:

### **Recommendation 1**

**The Commonwealth and state governments should consider what further policy measures and initiatives they could be make to educate and encourage employers in the private sector to make gender equality in their workplaces a central aim and to change workplace cultures and attitudes gender equal and gender diverse. The Commonwealth and state governments and the public service could do this for example such as by introducing suitable measures in their own workplaces such as establishing equal periods of paid parental leave time for male and female employees, allowing male employees to take paternity leave and introducing flexible working arrangements to help employees of both genders share work and family responsibilities more equally.**

### **Recommendation 2**

**The Commonwealth government and also the state and territory governments should consider creating a specific government agency focused on gender equality. As part of its mandate, this agency should be tasked with promoting, advocating and educating employers about paid parental leave the benefits to workplaces of gender equality and family friendly**

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<sup>104</sup>Ibid and see also Nadine Zacharias, 'Work-life Balance: 'Good Weather Policies or Agenda for Social Change?' A Cross-Country Comparison of Parental Leave Provisions in Australia and Sweden' (2006) 12(2) *International Employment Relations Review* 32, 32-47.

**policies. This promotion and advocacy should involve the recruitment of senior employment law experts in the relevant area, industry leaders and key government decision-makers such as the Minister for Employment Relations to give input and frame gender-equal policies for workplace structures and laws. This agency should also prepare educational materials, workshops and conferences on gender equality issues including education on the *Paid Parental Leave Act*. This agency should also be tasked with preparing policy submissions for further law reform in the area of paid parental leave frameworks in Australia and other measures to make it easier for employees to combine work and family responsibilities.**

#### **6.4. Further Research**

The research in this thesis has specifically focused on the regulation of paid parental leave in Australia in the form of the *Paid Parental Leave Act 2010* and considered the background reasons why paid parental leave was legislated in Australia, the legal issues this has caused in the framework of Australian employment law, and what effect this new legislation has had on women, working parents, employers and also Australian society. Given this research was limited in scope however, there are still considerable gaps in research in this area and this thesis does not propose all areas of potential research into the regulation of paid parental leave are exhausted by this thesis. Further research into these areas of paid parental leave would be beneficial to better understand the issue in future: a) how paid parental leave in Australia relates to childcare policies and laws to affect employment outcomes for women; b) how effective Australia's anti-discrimination laws are at stopping workplace harassment and bullying of female employees; c) what lessons Australia could learn in relation to its paid parental leave system compared to another selected Nordic country besides Sweden, d) a consideration of how paid parental leave in Australia compares with another Asia-Pacific OECD country such as New Zealand or Japan regarding paid parental leave frameworks and e) a review of Australia's parental leave mandates in comparison with another OECD country with a similar scheme.

This research also only focused on Swedish and European legal materials and academic research on parental leave available in English translation. Further research into European laws in jurisdictions such as Sweden and other non-English speaking countries where proper English translations of legislation are made available, or with an English-speaking nation such as the UK and Ireland may further assist research in this area. Lastly, this thesis focused mainly on the parental leave and employment legislation of one Nordic nation, Sweden as a comparison for Australia. Further research into the parental leave schemes and employment legislation of the other Nordic countries such as Iceland, Denmark, Norway and Finland would assist further research into parental leave regulatory systems in the future.

### **6.5 Concluding Remarks**

According to Andrew Scott, ‘The nations of Scandinavia and Finland, or Nordic Europe, do continue to provide important living proof that economically successful, socially fair and environmentally responsible policies can succeed.’<sup>105</sup> This argument has been considered throughout this thesis and it is evident that the policies of nations such as Sweden such as paid parental leave focused on gender equity can succeed if they are designed well. Paid parental leave, as a universal entitlement for male and female workers, can have many positive benefits, but it can also be highly challenging to conceive, design and implement in a manner that achieves its goals. Therefore this thesis undertook an examination of the regulation of paid parental leave in Australia and possible overseas regulatory approaches Australia needs to consider in the regulation of paid parental leave to better develop its scheme in the future.

An extensive examination into all aspects of paid parental leave regulation and allied measures to achieve workplace gender equality and to stamp out all forms of harassment, discrimination and bullying of employees on the basis of gender or family responsibility falls outside the scope of this thesis. However, the legal issues that were examined in this thesis are of considerable importance for the

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<sup>105</sup>Andrew Scott, *Northern Lights: The Positive Policy Example of Sweden, Finland, Denmark and Norway* (Monash University Publishing, 2014) 2.

Australian government at the state and federal levels, businesses and corporations, and workers who try to find the best ways to structure their policies, work and family lives, business structures and legislation to support work and family.

The findings and recommendations of this thesis propose supporting a renewed regulatory framework for paid parental leave and anti-discrimination industrial law in Australia, based on the positive examples learned from countries such as Sweden, to prevent workplace discrimination against working parents and to reduce the costs to business and society that arise due to gender inequality on the basis of parental responsibility. This thesis argued that it is possible through a properly designed and administered regulatory system of paid parental leave to limit discrimination against employees on the basis of gender and family responsibility and to create a fairer society and workplace environment in Australia so that Australia no longer has a reputation as being a 'laggard' when it comes to gender equality in the workplace.<sup>106</sup>

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<sup>106</sup>Barbara Broadway et al, (2017), 'Paid Parental Leave and Child Health in Australia' 93(301) *Economic Record* 214, 216-7.



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