



## Maternity Leave (Commonwealth Employees) Act 1973 (ML Act)

### Introduction

- a. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 300,000 nurses, midwives and carers across the country.
- b. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.
- c. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.
- d. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.
- e. The ANMF thanks the Australian Public Service Commissioner for the opportunity to comment on the questions raised in the terms of reference in relation to the *Maternity Leave (Commonwealth Employees) Act 1973 (ML Act)*.
- f. The ANMF represents members working in the Commonwealth public sector, primarily those engaged directly by the Department of Health. Members also work in various government agencies, including Aged Quality and Safety Commission, Australian Health Practitioner Regulation Agency and the Australian Nursing and Midwifery Accreditation Council. While the vast majority are not directly impacted by the operation of the ML Act, due to the operation of enterprise agreements, the ANMF acknowledges that the ML Act has the capacity to set benchmarks for parental leave and it is therefore important for those benchmarks to, at a minimum reflect contemporary standards, and ideally to set the highest of standards.
- g. The ML Act set new standards for maternity leave when it was passed in 1973. As time has elapsed, those standards have been superseded through a series of legislative and policy reforms. The ANMF welcomes the review of the Act as an opportunity to ensure that the Act provides contemporary, inclusive parental leave standards.
- h. Responses to the questions raised in the Terms of Reference are addressed below.



## Reducing administrative burden

### 1. How to draft terms in plain, modern language

The ANMF supports the use of plain language that is accessible, easily understood and reflective of contemporary expectations of gender inclusivity and parental entitlements and responsibilities. The clearest of these expectations would be to rename the Act as the Parental Leave Act, to ensure that all forms of parental responsibility are covered in the Act. Consultation with a broad range of stakeholders to ensure language is contemporary and inclusive would also be required.

### 2. How to reduce unnecessary prescription, process and complexity

The Act should be expressed in terms that are easily understood and do not impose unnecessary prescription, processes or complexity on people seeking to access entitlements under the Act. This comes with the caution that any simplification of processes must not come with any loss of entitlement for people accessing parental leave entitlements.

## Provision of appropriate support for new parents

### 3. Whether current entitlements are consistent with Government Policy

The Act in its current form is not consistent with Government policy or legislated entitlements under the NES and the *Paid Parental Leave Act 2010 (PPL Act)*. Key differences include:

- The ML Act only applies to female employees who are pregnant, the NES and PPL Act apply to partners, adoptive parents and other carers. A review of the ML Act, must ensure that the Act applies to all parents and carers recognised in the role of early child rearing. As outlined above, this must reflect contemporary standards, inclusivity and diversity of parenting roles.
- Entitlements are predicated on the birth of a child and on the concept of 'confinement' meaning either the birth of the child or other termination not less than 20 weeks before the expected birth of the child. Entitlements are limited to female employees who have become pregnant. In contrast, the FWA and PPL Act apply to employees, regardless of gender and extend entitlements to care givers and adoptive parents. Entitlements are not dependent on pregnancy and confinement.
- The ML Act requires female employees who are pregnant to be absent from work for the 6 weeks before the expected birth of the child and for the 6 weeks from the date of confinement. The female employee may apply to continue to work in the 6 week period, however, it is at the discretion of the employer as to whether permission to continue working is granted.



Under the NES, the employer may request medical evidence that the employee is fit to continue working in the 6 week period and can only direct the employee to take leave if such evidence is not provided or does not support the employee.<sup>1</sup>

The NES makes the assumption that a pregnant employee is fit to work unless evidence indicates this is not the case. This should be reflected in any amended Act.

- If the pregnancy terminates other than by way of confinement (miscarriage) leave granted after this date is not permitted. These provisions vary substantially from the NES entitlements, recent amendments to the Act, allow parental leave to be taken in the event of miscarriage or stillbirth.<sup>2</sup> The NES also provides that in the case of a child requiring hospitalisation after birth, a period of parental leave can be deferred.<sup>3</sup>
- The ML Act makes provision for the female employee to take 52 weeks leave parental leave. The NES makes provision for employees to take 52 weeks unpaid parental leave and for this to be extended by a further 12 months, or if the initial 52 weeks has not been taken for this period to be extended to the full entitlement. Provision for taking a minimum of 24 months parental leave should be included in the new Act.
- The chief advantage of the ML Act is that it provides for 12 weeks paid leave at the employees rate of pay (check). In contrast the FWA makes no provision for paid parental leave, save keeping in touch days, which are days worked. The PPL Act provides for 18 weeks pay at the National Minimum Wage and for this leave to be taken with some flexibility over a 24 month period. For some employees, the ML Act will result in the total amount of pay received by an employee over the 12 weeks in which the entitlement is payable, being higher than receipt of 18 weeks pay at the National Minimum Wage. It should be noted however, that some employees may be entitled to both PPL and payment under the ML Act, and these employees should not be disadvantaged.

The ANMF supports any amendment to the Act that results in the NES and PPL Act entitlements being incorporated into the Act and supports the inclusion of paid parental leave at the usual rate of earnings of the employee. The ANMF supports expanding improving paid parental leave to provide equal access to every worker to 52 weeks paid leave at full-wage replacement (or the national minimum wage, whichever is greater). If such a standard were adopted in the amended ML Act, it would certainly once again become an important benchmark document.

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<sup>1</sup> Fair Work Act s73

<sup>2</sup> Fair Work Act s77A

<sup>3</sup> Ibid, s78A



## How current entitlements compare to those offered by private sector employers, state and territory public services

The majority of nurses and midwives are employed under state and territory public sector agreements. The entitlement to paid leave under these agreements varies across states and territories. For nurses, midwives and personal care workers employed under respective state and territory public sector instruments, the range of paid parental leave entitlement varies from 10 weeks to 20 weeks. The majority offer 14 weeks paid leave to the primary carer. Attached is a table setting out the main entitlements provided under each state and territory public sector instrument.

The ML Act provides for 12 weeks paid leave, which, on the whole falls short of the amount of paid leave to employees in each of the respective state and territory public sectors. In bargaining the ANMF continually seeks to improve parental leave entitlements, including the quantum of paid leave for both parents and the ability to take unpaid leave that supports families and ensures job security.

#### **4. Whether to take a holistic approach in providing other parental leave entitlements and arrangements, such as:**

##### **(a) provisions for parents other than birth mothers – such as adoptive parents, long-term foster parents, supporting partners and other permanent carers**

The ANMF supports a holistic approach in providing parental leave entitlements and arrangements for all parents and permanent carers. An Act that does not encompass the broad range and diversity of parental roles engaged in early child rearing, would be discriminatory and fail to promote the important social benefit of supporting parents and carers in the early years of child rearing. Provision for the role of adoptive parents, long-term foster parents, supporting partners, permanent carers and others, for instance grandparents, should all be able to access parental leave entitlements and arrangements.

##### **(b) consideration of enterprise agreement terms which impact on people on parental leave, or preparing to go on parental leave, including arrangements for salary increments and availability of leave for obstetric appointments,-**

The ANMF supports provisions that allow salary increments to be passed on while a person is on parental leave. This may however, be subject to provisions that recognise or require the performance of hours of work to meet professional practice standards.

The ANFM strongly supports provision of leave to attend obstetric appointments in addition to any entitlements to personal leave. This is an important recognition of ensuring the health of both the birth parent and baby.



### **(c) payment of superannuation during maternity or parental leave**

The ANMF considers payment of superannuation during maternity or parental leave is vital to address the gender pay gap and to ensure women and low paid workers have sufficient retirement income. The gap in retirement income between men and women remains a persistent problem that has long term effects on the ability of women to retire when they choose and to live comfortably and securely in retirement.<sup>4</sup> The impact of loss of income during child bearing years has a compounding effect that persists throughout women's working lives. The ANMF strongly supports legislated payment of superannuation during periods of both paid and unpaid parental leave.

## **Promotion of gender equality and inclusion**

### **5. How to provide parents with more choice in dividing their caregiving roles**

The ANMF strongly supports any measure that provides parents with more choice in dividing caregiving roles. This can be done by removing the distinction between primary and non-primary parents. Both parents should be treated as equally responsible for caregiving and this should be supported by allowing both parents to take paid and unpaid leave to care for children in a way that supports family units, rather than defining roles on the basis of which parent has given birth. This is an important step toward gender equality. In addition, by removing the distinction of primary and secondary carer, or birth and non-birth giving parent, more diverse parenting roles can be included and gain access to parental leave entitlements.

### **6. How to balance women's economic empowerment and choice with considerations around maternal and child health**

The ANMF considers provision of a comprehensive package of parental leave entitlements are all essential to women's economic empowerment and choice and are wholly supportive and compatible with promoting maternal and child health. The following entitlements offer financial security during parental leave, which in turn create an environment where parents can prioritise their own health and that of their families:

- paid parental leave,
- payment of superannuation on parental leave,
- time to attend obstetric appointments and other pre and postnatal appointments
- flexible leave arrangements to allow parents and carers extended time to care for children and
- Protection of job security, such as the right to return to work part-time, the return to work guarantee

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<sup>4</sup> Senate Economic References Committee, 'A Husband is not a Retirement Plan': Achieving Economic Security for Women in Retirement (Canberra: The Australian Senate, 2016)



- The ability to work during periods of parental leave without the loss of protection of right to return from parental leave entitlements.

**7. How to facilitate flexible interaction of entitlements provided by the Maternity Leave (Commonwealth Employees) Act 1973 with agency industrial instruments, the National Employment Standards, the Paid Parental Leave scheme and other relevant legislation**

As noted in this question, parental leave entitlements are derived from a range of sources. The ML Act makes provision for 12 weeks paid leave, at the rate of pay an employee would otherwise have earned if on personal leave. This sets it apart from the provisions of the NES, which provide a range of protections and entitlements and responsibilities with respect to taking parental leave, but makes no provision for paid leave. The Paid Parental Leave scheme makes provision for paid parental leave and some flexibility as to how that leave can be taken. The amount of the payment will often be less than the wage that can be received under the ML Act. In addition, agencies may have enterprise agreements that provide the same or greater amounts of paid leave and that create additional or different entitlements and obligations.

The review should consider how these entitlements interact and make provision to ensure that no superior entitlement is diminished by virtue of the Act. If the Act sets a higher benchmark, it must take precedence over other instruments. It should be remembered that when the Act was first introduced it set benchmarks for paid parental leave and the opportunity for this to occur again as a result of the review must be considered.

**8. How to provide agencies with greater discretion to apply entitlements in individual circumstances, including situations of miscarriage, stillbirth, premature birth and other circumstances of serious neonatal health concerns.**

The ANMF supports measures that would assist parents in the circumstances set out in this question. The health of the birth parent and supporting parents can be significantly impacted by the loss of a pregnancy, both in physical and mental health terms. Provision of parental leave entitlements in these circumstances gives parents time to grieve, recover, and seek health and social supports as needed.

Premature birth or other birth complications also impact on the child and can involve many months of care. The ability to access parental leave entitlements in these circumstances should be supported in the Act as a base entitlement. Discretion as to how leave is taken should be predicated on the basic entitlement and make provision for that leave to be taken flexibly and in consultation with the needs and wishes of affected employees.



**9. How eligibility criteria for Commonwealth employee entitlements interact with part-time and casual work and periods of leave without pay**

Parents on parental leave should be able to undertake periods of part-time or casual work that does not result in loss of the protections associated with being on parental leave, such as the right to return to work in a comparable position.

Eligibility for parental leave entitlements should extend to parents engaged in casual work as defined by the Fair Work Act.<sup>5</sup>

**10. Whether steps could be taken to make using leave more flexible, including to whether leave could be used to facilitate part-time work arrangements, or taken in broken periods over a longer period than 52 weeks.**

As outlined above, the ability to take parental leave entitlements in a flexible manner gives parents the capacity to meet caring responsibilities in a way that suits individual family needs. It should be possible to take periods of paid and unpaid leave in blocks of time within the period of parental leave in a way that is flexible and accommodates both parents. Leave could also be taken in conjunction with periods of part-time and casual work during the period of parental leave entitlement. This would allow parents to earn income and stay connected to the workforce. This has long term career benefits and increases employment and retirement security.

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<sup>5</sup> Fair Work Act 2009 s15A

## ML Act Review

### Paid Parental Leave entitlements - Public Sector – Nurses and Midwives

ACT	NT	NSW	QLD
<p><a href="#">ACT Public Sector Nursing and Midwifery Enterprise Agreement 2020-2022.pdf</a></p> <p><b>Clause 125 Primary Care Giver leave</b></p> <p><b>Clause 125.6</b></p> <ul style="list-style-type: none"> <li>18 weeks paid leave</li> </ul> <p><b>Clause 127 – Bonding leave</b></p> <p><b>Clause 127.4</b></p> <ul style="list-style-type: none"> <li>Maximum of 2 weeks; May also access 5 days personal leave (Clause 110.28)</li> </ul> <p><b>Clause 129 - Adoption or Permanent Care Leave</b></p> <p><b>Clause 129.8</b></p> <ul style="list-style-type: none"> <li>18 weeks paid leave</li> </ul> <p><b>Clause 130 - Foster and short term care leave</b></p> <p><b>Clause 130.4</b></p> <ul style="list-style-type: none"> <li>Up to 10 working days/shifts paid leave per calendar year</li> </ul>	<p><a href="#">Northern Territory Public Sector Nurses and Midwives 2018-2022 Enterprise Agreement.pdf</a></p> <p><b>Primary caregiver parental leave</b></p> <p><b>Clause 61.6 (c) (i)</b></p> <ul style="list-style-type: none"> <li>Employees with at least 1 and less than 5 years service - 14 weeks</li> <li>Employees with 5 years + more service - 18 weeks</li> </ul> <p><b>Partner leave</b></p> <ul style="list-style-type: none"> <li>Employees with at least 1 and less than 5 years service - 1 week</li> <li>Employees with 5 years + more service - 2 weeks</li> </ul>	<p><a href="#">Public Health System Nurses' and Midwives (State) Award 2021.pdf</a></p> <p><b>Clause 34 - Maternity, adoption and parental leave</b></p> <p><b>Clause 34 A (iii) (a) Paid maternity leave and Clause 34 B (ii) (a) Paid adoption leave</b></p> <ul style="list-style-type: none"> <li>14 weeks at ordinary rate of pay</li> </ul> <p><b>Clause 34 (C) (iii) Parental leave</b></p> <ul style="list-style-type: none"> <li>Up to 52 weeks, including 1 week paid</li> </ul>	<p><a href="#">Nurses and Midwives (Queensland Health and Department of Education) Certified Agreement (EB10) 2018.pdf</a></p> <p>Schedule 7 of the Agreement incorporates the Queensland Health Human Resources Policy:</p> <p><a href="#">Queensland Health Human Resources Policy C26 Parental Leave.pdf</a></p> <p><b>Section 4 – Parental leave entitlements</b></p> <p><b>4.1.1 Paid Maternity leave</b></p> <ul style="list-style-type: none"> <li>14 weeks paid maternity/adoption leave</li> </ul> <p><b>4.2.1 Paid long spousal leave</b></p> <ul style="list-style-type: none"> <li>Employee whose spouse has given birth can access any paid maternity leave not used by that employee’s spouse as long spousal leave</li> </ul> <p><b>4.2.2 Paid short spousal leave</b></p> <ul style="list-style-type: none"> <li>1 week</li> </ul> <p><b>4.1.2 Paid pre-natal leave</b></p> <ul style="list-style-type: none"> <li>Access to re-natal leave up to a total of full time ordinary hours. (weekly)</li> </ul> <p><b>4.2.3 Paid spousal pre-natal leave</b></p>

			<ul style="list-style-type: none"> <li>Up to 1 day</li> </ul>
SA	TAS	VIC	WA
<p><a href="#">Nursing Midwifery (South Australian Public Sector) Enterprise Agreement 2020.pdf</a></p> <p><b>Clause 10.1</b></p> <p><b>Paid Maternity/Adoption leave</b></p> <ul style="list-style-type: none"> <li>Employees with at least 1 and less than 5 years' service - 16 weeks paid maternity or adoption leave;</li> <li>20 weeks paid maternity or adoption leave for employees with at least 5 years of employment with the SA public sector at the time the leave commences.</li> </ul> <p><b>Clause 10.2 Paid partner leave</b></p> <ul style="list-style-type: none"> <li>One week (5 days), of Personal/carers leave entitlement on the birth or adoption of a child/children for whom the e/ee has direct parental care responsibility</li> </ul>	<p><a href="#">Nurses-and-Midwives-Tasmanian-State-Service-Award-.S198 -T14821-No-1-of-2021.pdf</a></p> <p><b>Part VI Clause 2 Parental Leave</b></p> <p><b>Clause 2(c) and 2(f)</b></p> <ul style="list-style-type: none"> <li>Maternity/Adoption Leave – 14 weeks paid leave (also applies to eligible casual employees)</li> </ul> <p><b>Clause 2(e)</b></p> <ul style="list-style-type: none"> <li>5 days of paid partner leave for partner to attend birth</li> <li>May also access a further 2 weeks leave from accrued annual or LSL, or as leave without pay</li> </ul>	<p><a href="#">Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2016-2020.pdf</a></p> <p>(Note: A new enterprise agreement is pending approval by the Fair Work Commission. The new Agreement provides 14 weeks paid parental leave and 2 weeks paid leave for non-primary carers).</p> <p><b>Clause 68.5 Paid Parental Leave</b></p> <p><b>Paid parental and Adoption leave</b></p> <ul style="list-style-type: none"> <li>10 weeks paid leave for primary carer</li> <li>1 week – non Primary carer taking short parental leave</li> </ul>	<p><a href="#">WA Health System-Australian Nursing Federation-Registered Nurses, Midwives, Enrolled (Mental Health) and Enrolled (Mothercraft) Nurses-Industrial Agreement 2020.pdf</a></p> <p><b>Clause 41.3 - Paid Parental leave</b></p> <ul style="list-style-type: none"> <li>14 weeks paid leave available to employee who is primary carer of a newly born or adopted child</li> </ul> <p><b>Clause 41.23 (a) - Partner leave</b></p> <ul style="list-style-type: none"> <li>Unpaid partner leave in relation to the birth or adoption of a child</li> <li>For the birth of a child – up to 1 week at the time of the birth. For adoption, up to 3 weeks</li> <li>Can request to extend period of unpaid partner leave up to a maximum of 8 weeks</li> </ul>