

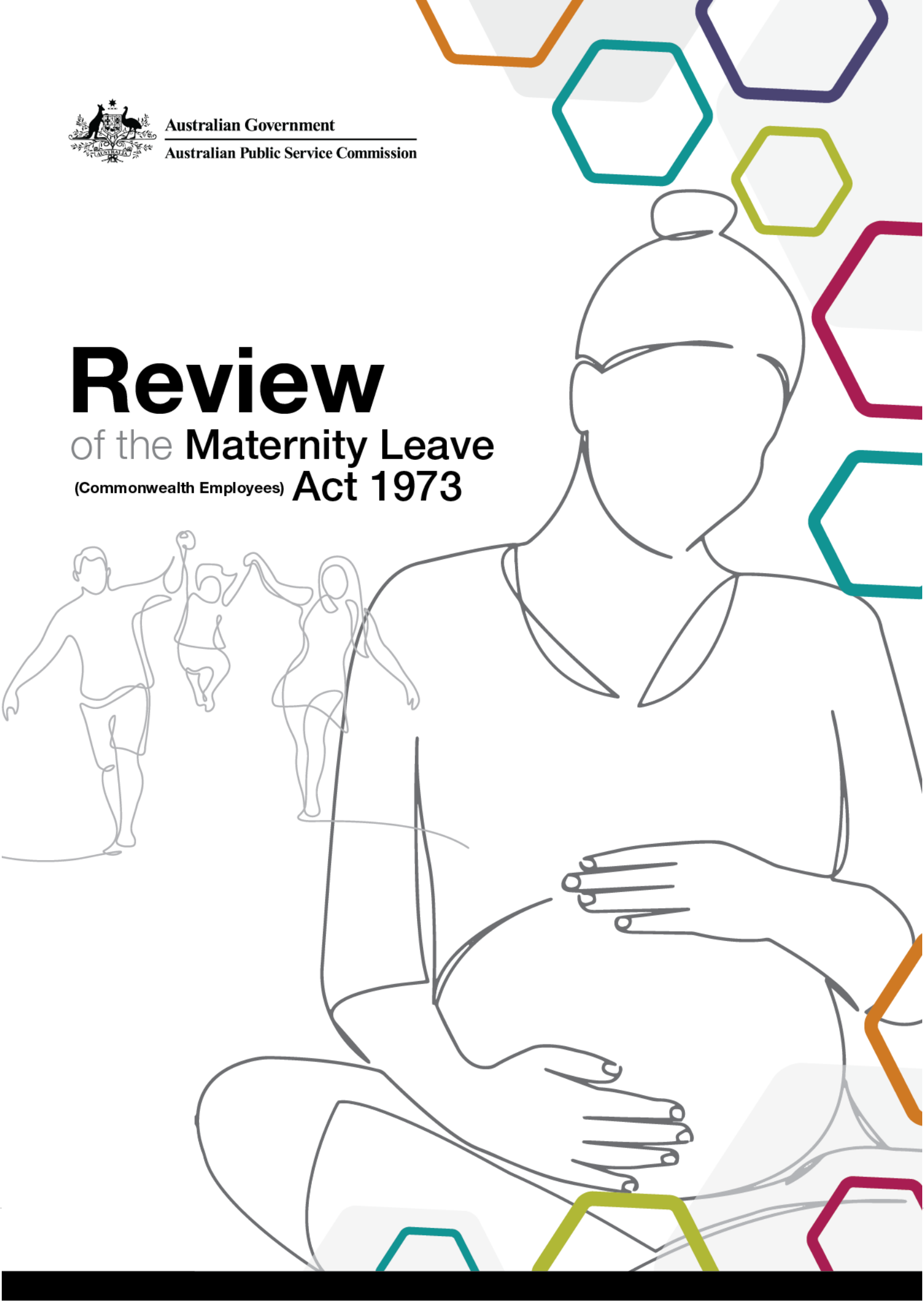


Australian Government

Australian Public Service Commission

Review

of the **Maternity Leave**
(Commonwealth Employees) **Act 1973**



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Foreword

I acknowledge the work of former Commissioner Peter Woolcott AO in undertaking and completing the first substantial review of the *Maternity Leave (Commonwealth Employees) Act 1973* (the Act) in over 40 years (the Review).

With a focus on health, equality and flexibility, the Review has explored parental leave eligibility and entitlements, the health needs of birth mothers, flexibility for all parents, superannuation issues and ease of administration.

The Review has underlined the need for the Act's entitlements to be competitive to ensure that the Commonwealth remains an employer of choice, supports all new parents to transition into and succeed in family life, protects and advances women's economic equality, provides employee parents and their employing agencies with greater flexibility and eases the administrative burden currently associated with the Act's entitlements.

The Review received nearly 190 public submissions from Commonwealth agencies, individuals, academics, employee networks, unions and peak bodies.

Submissions overwhelmingly advocated for changes to the Act to ensure that the Commonwealth as an employer remains competitive, attracts the best people and joins employers in other jurisdictions and the private sector in providing entitlements for all new parents. In particular, submissions called for equal provisions for all parents, greater flexibility, the payment of superannuation on all parental leave, and more modern and inclusive language. The Review's 26 recommendations address these issues, and provide a framework for change that can be progressively introduced over time.

The Review was also informed by an Expert Advisory Group of representatives from the following Commonwealth agencies, contributing either specialist expertise or knowledge through HR experience. Their contribution is appreciated.

Attorney-General's Department
Australia Post
Australian Bureau of Statistics
Australian Defence Force
Australian Public Service Commission
Australian Signals Directorate
Department of Defence
Department of Employment and Workplace Relations (formerly Department of Education, Skills and Employment)
Department of Finance
Department of Health and Aged Care
Department of the Treasury
The Office for Women
Workplace Gender Equality Agency

The assistance of the Australian Competition and Consumer Commission (ACCC) and the Attorney-General's Department in contributing staffing resources to the Review is acknowledged with appreciation.



Dr Gordon de Brouwer PSM
Australian Public Service Commissioner

Terms of Reference

Review of the Maternity Leave (Commonwealth Employees) Act 1973

The Review will consider:

Reducing administrative burden

1. How to draft terms in plain, modern language.
2. How to reduce unnecessary prescription, process and complexity.

Provision of appropriate support to new parents

3. Whether current entitlements are consistent with Government Policy.
4. How current entitlements compare to those offered by private sector employers, state and territory public services.
5. 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;
 - 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; and
 - c. payment of superannuation during maternity or parental leave.

Promotion of gender equality and inclusion

6. How to provide parents with more choice in dividing their caregiving roles.
7. How to balance women's economic empowerment and choice with considerations around maternal and child health.

Providing flexibility

8. 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.
9. 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.
10. How eligibility criteria for Commonwealth employee entitlements interact with part-time and casual work and periods of leave without pay.
11. 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.

Executive Summary

The *Maternity Leave (Commonwealth Employees) Act 1973 (the Act)* has been reviewed for the first time in more than 40 years. While the Act was ground-breaking for its time by recognising that working women should not lose their employment once becoming pregnant and becoming a mother, community standards and expectations have evolved.

This report provides evidence that the Act no longer meets the needs of today's employees as they establish families and maintain careers in Commonwealth employment. Today, women are looking to advance their career while having a family and partners are seeking to more equally share in the care of their children, with this opportunity being made available immediately on becoming parents. The Act is not aligned with Government and community expectations for gender equitable outcomes in work and care.

In a competitive marketplace, a growing number of employers are seeing the benefits of recognising the role that all parents take in caring for children. Employers are increasingly choosing to provide equal access to parental leave to all employees who become parents, regardless of their gender.

The Review has found that for the Australian Public Service (**APS**) to remain an employer of choice, a new Act is required.

Appropriate support to parents

Leave for pregnancy

The Review recognises the importance of safeguarding the health of pregnant employees in the later stages of their pregnancy, by recommending the introduction of paid **Pregnancy Leave**. This new leave type would be available from 6 weeks before the estimated date of birth. Parental Leave would then be available to the pregnant employee once the child is born.

The Review suggests that support for parents who experience a premature birth be provided through the introduction of **Premature Birth Leave**. This leave would be payable from the date of the premature birth until what would have been 37 weeks' gestation.

As with the Act's current provisions, paid and unpaid leave for pregnant employees who experience the loss of a child at 20 weeks' or more gestation would continue, and be provided as **Parental Leave**. The Review recommends the definition for stillbirth be consistent with the *Fair Work Act 2009* (Fair Work Act) to include births of less than 20 weeks' gestation where the child weighs more than 400 grams. An employee whose partner has given birth to a stillborn child would also be eligible for Parental Leave, although the paid leave would be limited to two weeks. Both parents would continue to be eligible for two days' paid compassionate leave for stillbirth under the Fair Work Act.

Paid leave for pregnancy loss is also recommended, where a miscarriage occurs between 12 weeks' gestation and the end of 19 weeks' gestation, where not a stillbirth. One week of paid **Pregnancy Loss Leave** would be provided to both parents and this would be in addition to paid compassionate leave for miscarriage under the Fair Work Act. The Fair Work Act's two days' paid compassionate leave for miscarriage continues to be available to both parents for miscarriages of less than 12 weeks' gestation.

Leave for parenting

The Review recommends that parents have access to a separate and equal entitlement to **Parental Leave**, available from the date of birth of the child. Parental Leave would be 18 weeks' paid leave, with any remaining leave period to 24 months after the child's birth as unpaid leave. New parents would be able to use the leave flexibly to best suit their family's needs, whether taken in blocks or for shorter periods, whether at the same time as their partner or at a different time. This gives parents more choice in dividing their care-giving roles. The qualifying service period will be removed to access paid leave.

Further, the Review recommends that Parental Leave be extended to include adoptive parents on the same basis as birth parents, from the date of placement of the child.

Gender equality and inclusion

The Review advances gender equality by recognising the caring responsibilities for all parents for birth and adoption and recommending a separate and equal entitlement to paid leave. This approach supports the Commonwealth public sector to be a leader in gender equality and encourages parents of all genders to access Parental Leave and be actively involved in caring for children.

Setting up shared caring of children from the beginning increases the opportunity for longer term benefits for the family as the shared caring continues into the child's school years, and with domestic duties more likely to be equally shared. This shared approach may also result in sharing of part-time work between parents.

There are other measures the Review recommends to minimise the financial impact of taking Parental Leave that have disproportionately affected women. These measures will provide a positive contribution towards addressing the gender pay gap. The Review recommends that Parental Leave – paid and unpaid – would count for incremental advancement of salary, and also for employer superannuation payments.

The Review recommends the use of language that is inclusive of all parents and families that make up the Commonwealth workforce.

Providing flexibility

The Review recommends that Parental Leave be flexible enough to allow families to use it in a way that best suits their needs. This could be in one block, in multiple smaller blocks, or even for a full-time employee to use a day or so each week to achieve part-time hours.

The flexibility would also extend to allowing parents to choose when they take their leave in the 24 months after the child's birth or placement, whether at the same time or at different times. Paid Parental Leave would be available at half pay, with the entirety of the doubled leave period counting as service for the accrual of other benefits.

This recommended flexibility will also allow parents to plan around meeting separate eligibility requirements that may apply for the Fair Work Act's Parental Leave and for the Government's Paid Parental Leave Scheme.

Reducing administrative burden

The Review recommends that the language used in the Act be simplified, so it can be understood by those who use, and those who administer, its entitlements.

Issues for future consideration

The Review recognises the importance of **Kinship care**, and recommends further consultation be undertaken to co-design an approach to Parental Leave for kinship care that is culturally sensitive.

Surrogacy is still an evolving area of law which makes providing leave for intended parents via legislation at the Commonwealth level difficult. The Review recommends agencies view cases with empathy, and consider using discretionary leave in the agency's enterprise agreement, based on the circumstances of each case. Leave for surrogacy should continue to be reviewed in line with legislative developments, state and territory arrangements, and broader community expectations.

The Review recognises that there are other family and household compositions that are not covered by the Review's recommendations, such as for sole parents and grandparents. These are areas open to further review once a revised Act is established, and as the recommendations from the Review are implemented over time.

Recommendations

No recommendations in chapters 1-3.

Chapter 4 – Leave Entitlements

Recommendation 1: Provide *Pregnancy Leave*

- 1.1 A pregnant employee is to be entitled to paid *Pregnancy Leave* to manage their health and the health of their unborn child.
 - a. *Pregnancy Leave* to be available from 6 weeks before the pregnant employee's expected date of birth, and finishes on the child's date of birth.
 - b. Evidence of the estimated date of birth can include from a registered midwife.
 - c. Where a pregnant employee chooses to remain at work closer to the expected date of birth, the agency may request a certificate from a medical practitioner if there are concerns regarding the employee's continued fitness to work.
- 1.2 *Pregnancy Leave* is only available during pregnancy from 34 weeks' gestation and cannot be transferred to a period after the birth of a child.

Recommendation 2: Provide *Parental Leave*

- 2.1 Provide up to 24 months of *Parental Leave* to new parents, to be used within 24 months from the date of the child's birth.
 - a. 18 weeks of *Parental Leave* is with pay, and the remainder without pay.
 - b. *Parental Leave* is to be provided as a separate and equal entitlement to new parents, so there is an equal opportunity to care for the child.
 - c. For employees who give birth, *Parental Leave* is in addition to *Pregnancy Leave*. The employee may not return to work within 2 weeks after giving birth. An employee who wishes to return to work within 2-6 weeks after giving birth must provide a medical certificate certifying fitness to work.

Recommendation 3: Extend *Parental Leave* to include adoption

- 3.1 *Parental Leave* under the Act is to be available to both parents of a child who is adopted from the day of placement of the child, provided that the child:
 - a. is under 16 as at the day of placement, or the expected day of placement;
 - b. has not lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement; and
 - c. is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.
- 3.2 Paid leave for a parent of a child under a long-term foster care arrangement may be considered for inclusion in an agency's industrial instrument or workplace arrangement, such as an enterprise agreement.

Recommendation 4: Undertake extensive engagement on extending *Parental Leave* to incorporate First Nations kinship care practices

- 4.1 Undertake engagement to inform future proposals to extend *Parental Leave* to include kinship care that takes into account traditional First Nations adoption, foster and kinship practices.

- 4.2 This should include significant national engagement and co-design with First Nations peak bodies and communities to ensure *Parental Leave* provisions are cultural appropriate and promote healing based, trauma informed, culturally safe and appropriate kinship practices, in accordance with the National Agreement on Closing the Gap.

Recommendation 5: Undertake research on extending *Parental Leave* entitlements to legal surrogacy arrangements

- 5.1 Research how *Parental Leave* could be extended to include the intended parents of a child born through a surrogacy arrangement that meets the requirements of applicable state or territory law, including the evidence that would be appropriate for such arrangements.
- 5.2 In approving leave applications, agencies to take steps to ensure the surrogacy arrangement is compliant with jurisdictional legislation, and may wish to seek legal advice given the complexity of this area.

Recommendation 6: Extend stillbirth entitlement to partners and broaden definition

- 6.1 Pregnant employees to retain entitlement to *Parental Leave* in the event of stillbirth.
- 6.2 Expand the Act's current provisions allowing pregnant employees to retain full entitlement to *Parental Leave* if their pregnancy ends other than by a live birth from 20 weeks' gestation, to include births of less than 20 weeks gestation where a child weighs at least 400 grams at delivery (consistent with the Fair Work Act and Paid Parental Leave Act).
- 6.3 An employee whose partner gives birth to a stillborn child remains entitled to *Parental Leave*, with the paid leave component to be limited to 2 weeks.

Recommendation 7: Provide paid *Pregnancy Loss Leave*

- 7.1 An employee who experiences pregnancy loss between 12 weeks' gestation and the end of 19 weeks' gestation that is not a still birth is to be entitled to one week (5 days) of paid *Pregnancy Loss Leave*.
- 7.2 *Pregnancy Loss Leave* is to be provided as a separate and equal entitlement to both parents.
- 7.3 *Pregnancy Loss Leave* must be taken in one continuous period and is in addition to entitlements to compassionate leave for miscarriage provided under the Fair Work Act.

Recommendation 8: Provide paid *Premature Birth Leave*

- 8.1 In circumstances of a live birth before 37 weeks' gestation, both parents are entitled to paid *Premature Birth Leave* from the date of the child's birth up to the end of what would have been 36 weeks' gestation. *Parental Leave* is then available from what would have been 37 weeks' gestation.

Chapter 5 – Other entitlements

Recommendation 9: Continued access to other accrued leave while on unpaid *Parental Leave*

- 9.1 Employees to continue to have the option to use their accrued paid leave entitlements while on unpaid *Parental Leave*.

Recommendation 10: *Pregnancy Leave* and *Parental Leave* (paid and unpaid) to count towards salary progression

- 10.1 All *Parental Leave* and pregnancy-related leave is to count towards the employee qualifying for their next salary increment, where the employee would otherwise be eligible for a salary increment.

Recommendation 11: Support agencies to establish practices so part-time flexible work arrangements are not ceased early simply for leave to be paid based on full-time hours.

- 11.1 Guidance or policy should support the intention that employees on a part-time flexible work arrangement about to commence parental and pregnancy-related leave do not seek to cease the arrangement early simply to access paid leave based on full-time hours.
- 11.2 Where there are reasonable business needs (balanced against the rights of employees to request flexible work arrangements under the NES), or an existing flexible work arrangement is expiring prior to the expected date of delivery, or other appropriate circumstance for moving from part-time to full-time hours prior to commencing leave, agencies may make a decision to change ordinary hours in agreement with an employee.

Recommendation 12: Improve agency communication to employees about *Parental Leave* policies

- 12.1 Agencies are to make available a policy guide that is comprehensive and easily accessible about the *Parental Leave* entitlements available in the agency, including how these interact with the Australian Government Paid Parental Leave scheme administered by Services Australia. Timely and accurate responses must be provided to *Parental Leave* queries from employees.
- 12.2 Agencies are to ensure managers understand their role in supporting employees who are pregnant or on *Parental Leave*, including with regard to transitioning to parental leave, keeping in touch days, transitioning back to work, flexible work arrangements on return, and support for breastfeeding.
- 12.3 Employees on *Parental Leave* are to be provided with employment verification or similar documents if requested, for example to confirm ongoing employment and salary to financial institutions.

Recommendation 13: Employee access to Fair Work Act Parental Leave entitlements

- 13.1 Employees entitled to paid or unpaid leave under the Act are to have access to the Fair Work Act's Parental Leave-related entitlements, including Unpaid Special Maternity Leave, Keeping in Touch days, extending unpaid Parental Leave, Flexible Unpaid Parental Leave, paid No Safe Job leave, right to request a return to work when a child is hospitalised, and unpaid pre-adoption leave. This includes any future additions or adjustments made to the Fair Work Act or the National Employment Standards (NES).

Recommendation 14: Facilitate access to the Government's Paid Parental Leave Scheme for all eligible parents

- 14.1 Agencies should support employees who wish to make a claim under the Australian Government Paid Parental Leave Scheme administered by Services Australia, or to meet other future Scheme requirements.

Chapter 6 – Superannuation

Recommendation 15: Superannuation be paid on all forms of *Parental Leave*

- 15.1 The employer component of superannuation is to be paid on all forms of paid or unpaid pregnancy and parental leave, regardless of superannuation scheme type or contribution method, to contribute to reducing the gender pay gap and improve women's long term economic equality.

Chapter 7 – Flexibility and Ease of Administration

Recommendation 16: Allow *Parental Leave* to be taken flexibly

- 16.1 *Parental Leave* may be used flexibly within 24 months after the date of birth or placement of the child, including in single days, blocks, or to facilitate a part-time working arrangement.
- 16.2 Parents may take *Parental Leave* concurrently or at separate times within this period.

Recommendation 17: *Parental Leave* may be taken at half pay

- 17.1 *Parental Leave* may be taken at half pay, on the basis that the leave period at half pay is twice as long. All *Parental Leave* taken at half pay is to count as service on the same basis as other paid leave.

Recommendation 18: Agencies encouraged to manage their budgeted Average Staffing Level (ASL) in central pool for all employees on parental-related leave

- 18.1 To ease the budget impact on local work teams and allow for temporary backfilling of roles, agencies to consider pooling the ASL for all employees on parental and pregnancy-related leave if not already in place.

Chapter 8 – Coverage and qualifying service

Recommendation 19: Simplify coverage under the Act

- 19.1 Coverage under the Act should be simplified for clarity and ease of administration. The Act is to apply to:
 - a. employees under the *Public Service Act 1999*;
 - b. employees under the *Parliamentary Service Act 1999*;
 - c. employees under the *Members of Parliament (Staff) Act 1984*;
 - d. Australian Federal Police (AFP) members and holders of a Commonwealth office where not remunerated by fees, allowances or commissions; and
 - e. employees of other Commonwealth corporate and non-corporate entities, as defined in the *Public Governance, Performance and Accountability Act 2013*, unless such entities choose to not be covered.
- 19.2 The Act would not apply to Commonwealth companies unless staffing is under the *Public Service Act 1999*.

Recommendation 20: Remove the qualifying service period to access paid leave

- 20.1 Remove the qualifying service period for employees to access any form of paid pregnancy or parental leave under the Act.

Chapter 9 – Language and drafting

Recommendation 21: Draft the Act in plain language

- 21.1 The Act be drafted in clear language that allows readers to easily understand entitlements. The Act's wording may be supported by use of notes, tables, and references to other legislation that interacts with the Act.
- 21.2 Outdated terms such as 'confinement' be removed and replaced with modern language that reflects the sensitivities of pregnancy and pregnancy loss.

- 21.3 The Act include an 'objects' section to facilitate interpretation. Recommended objects may include to:
- a. protect the health of pregnant employees and their children;
 - b. support parents to take time out of the workplace during pregnancy and to care for a child, as part of the usual course of life and work for parents;
 - c. facilitate flexibility for parents in balancing their caregiving with work in the Commonwealth; and
 - d. promote inclusion and gender equality .

Recommendation 22: Draft the Act using inclusive and gender neutral language

- 22.1 The Act be renamed the *Pregnancy and Parental Leave Act*.
- 22.2 The Act be drafted in language appropriate to employment conditions, and is inclusive and gender neutral as appropriate, including the terms:
- a. *Pregnancy Leave*
 - b. *Parental Leave*
 - c. Pregnant employee
 - d. Parent
 - e. Adoptive parent.

Chapter 10 – Return to work

Recommendation 23: Paid lactation breaks and access to breastfeeding facilities

- 23.1 Agencies to provide appropriate and flexible paid lactation breaks to breastfeeding employees, with respect to the individual lactation needs of the employee.
- 23.2 Agencies to ensure employees have access to appropriate breastfeeding facilities, which includes appropriate facilities to express, in line with the *APS Gender Equality Strategy 2021-2026*.
- 23.3 Agencies encouraged to seek Breastfeeding Friendly Workplace Accreditation with the Australian Breastfeeding Association.

Recommendation 24: Improved communication with employees during *Parental Leave*

- 24.1 Agencies to ensure regular communication with employees on *Parental Leave* about upcoming recruitment and training opportunities, and other key agency developments.

Recommendation 25: Improved return to work support

- 25.1 Agencies to ensure managers are equipped to discuss and plan with employees on *Parental Leave* their return to work, including any additional support or workplace adjustments they may require.

Recommendation 26: Ensure all parents have access to a flexible working arrangement

- 26.1 Agencies to ensure managers encourage and support all parents seeking a flexible working arrangement upon return to work from *Parental Leave*.

Chapter 1 - The Case for Change

Entitlements for the 21st Century

The 1973 introduction of the *Maternity Leave (Commonwealth Employees) Act 1973 (the Act)* marked a ground-breaking turning point in the Australian industrial landscape, legislating the first formal provision of paid maternity leave in Australia. Only seven years after the Commonwealth marriage bar was abolished, the introduction of paid maternity leave, in addition to protections for continuity of service and against pregnancy discrimination, represented a dramatic advancement in protecting the employment of women Commonwealth public servants.

This chapter examines how expectations since 1973 have changed, and notes that entitlements in the Act do not meet the needs of today's employees or of agencies and the talent they seek to attract and retain.

"The Australian Public Sector should be at the vanguard of offering non-discriminatory employment terms and benefits that align to community values and expectations. We support any move to change policy to bring it into line with the proposition expected by our current employees and the talented people we want to attract to our mission." – Agency submission¹

Though unprecedented when it was introduced, the Act's provisions are increasingly falling behind the expectations of employees and the offerings of other large employers in Australia. The Act has largely been maintained in its original form, with the exception of introducing a minimum qualifying service period and removing entitlements to paid paternity leave. Since then, interrelated entitlements under the *Fair Work Act 2009 (Fair Work Act)* and the *Paid Parental Leave Act 2010 (Paid Parental Leave Act)* have supplemented the Act, but this has further complicated its administration.

Stakeholders have raised concerns regarding the prescriptive nature of the Act, the resulting administrative burden on agencies, and the interpretation difficulties it often poses for both agencies and employees. A key issue is whether the Act provides appropriate support to new parents in the 21st Century.

For example, maternity leave is generally required to be taken in one continuous period despite this not being explicitly stated in the Act, and paid leave cannot be taken at half pay. The original Act provided one week of paid paternity leave for fathers, which was repealed in 1978. At the time the paid leave was considered 'unnecessary' and 'ahead of community standards',² however many current day parental leave schemes now provide for at least one week of paid leave for fathers. The Act does not provide support to adoptive parents or other permanent carers.

Currently these gaps are being filled by enterprise agreements, bargained by individual agencies. This results in inconsistent entitlements between agencies, barriers to mobility within the Australian Public Service (APS), and increased administrative burden. The Review recommends that a revised Act should reflect the strong level of existing support within the APS for more generous parental leave provisions.

Women's economic equality

Parental leave entitlements for both women and men have flow-on effects for women's economic equality. Women are more likely to take time out of the workforce due to unpaid caring

¹ Submission 196.

² Australian House of Representatives, *Debates*, 1978, HR42:2094.

responsibilities, and bear the brunt of career disruption and the systemic disadvantages this brings.³ A 2022 KPMG report found that the gendered impact of years not working due to career interruptions, part-time employment and unpaid care and work together account for 33 per cent of the gender pay gap.⁴ The impact of this pay gap accumulates over a lifetime, leading women to have less retirement savings than men and in some cases, an increased likelihood of living in poverty in old age.⁵

“Provisions for new parents should be improved and should not penalise a woman for taking time off for childbirth which should also be regarded as a key contribution to our society.” – Individual submission⁶

The current Act only entitles female employees to leave and does not facilitate sharing of unpaid caring responsibilities between parents. While the Act serves to protect maternal health and job security, it provides minimal choice for families of Commonwealth employees in dividing caregiving and reducing the economic impact on women of having children.

“Women are much more likely than men to make adjustments to their paid work after having a child, while paid work patterns for men remain essentially unchanged when they become fathers” – Women’s Budget Statement 2021-22⁷

Encouraging men to take parental leave

When all parents have access to paid parental leave and flexible work arrangements, families have greater choice about how to manage work and care.⁸ Research has found that Australian men and women overwhelmingly believe (90 per cent) that men should be as involved in parenting as women.⁹ However, parental leave and flexible working policies that provide minimal or no entitlements for fathers create major barriers to men playing a greater role in caregiving, setting a standard for future family dynamics that places mothers as primary caregivers.

For parental leave policies to be successful in improving gender equality, they need to be provided in a context that also enables or encourages uptake by men.¹⁰ Research demonstrates that fathers are more likely to take parental leave when there is incentive to do so, and cultural acceptance is also critical in improving uptake.¹¹ This includes managers and senior leaders promoting the use of parental leave and flexible working arrangements, and using these entitlements themselves where they are eligible. Extending paid parental leave to fathers and actively supporting them to use it helps employers attract and retain talent, but also improves women’s labour market outcomes and workforce participation.¹²

³ Workplace Gender Equality Agency (WGEA), [Women’s economic security in retirement](#), WGEA, Australian Government, 2020; TW Fitzsimmons, MS Yates and VJ Callan, [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), University of Queensland, AIBE Centre for Gender Equality in the Workplace, 2020.

⁴ KPMG, Diversity Council Australia and WGEA, [She’s Price\(d\)less \(wgea.gov.au\)](#), KPMG, Diversity Council of Australia and WGEA, 2022.

⁵ Australian Government, [Women’s Budget Statement 2022-23](#), Australian Government, 2022.

⁶ Submission 68.

⁷ Australian Government, [Women’s Budget Statement 2021-22](#), Australian Government, 2021.

⁸ Australian Government, [Women’s Economic Security Statement 2020](#), Australian Government, 2020.

⁹ Australian Human Rights Commission (ARHC), [Face the Facts: Gender Equality](#), ARHC, Australian Government, 2018.

¹⁰ M Baird, B Frino and S Williamson, ‘Paid Maternity and Paternity Leave and the Emergence of ‘Equality Bargaining’ in Australia: an Analysis of Enterprise Agreements, 2003-2007’, *Australian Bulletin of Labour Journal*, 2009, 35(671-691).

¹¹ Australian Institute of Family Studies (AIFS), [Bringing up baby: Fathers not always able to share the load](#) [media release], AIFS, 28 May 2019, accessed 12 January 2022.

¹² Workplace Gender Equality Agency (WGEA), [Towards gender balanced parental leave: Australian and international trends](#), WGEA, Australian Government, 2017.

More choice for families

Parental leave has a number of proven positive social impacts such as better health, economic and employment outcomes for working women, as well as improvements in attracting candidates, retention and productivity for employers.¹³ Large employers are also increasingly recognising the need to provide parents with more choice in dividing their caregiving roles, and how more equal parental leave entitlements facilitate retention, gender equality and inclusion. While common in other policies, the Act does not provide the scope for such flexibility, and does not allow for any transfer of leave or the ability to take leave at half pay.

“For parent(s), giving birth to a baby is life changing - there is nothing that can prepare you for the changes you experience as a parent.” – Individual submission¹⁴

Being an employer of choice

Increasingly, Commonwealth agencies are competing with state and territory public services and the private sector to attract and retain talent. As more large employers improve their parental leave offerings, a review of the Act provides an opportunity to ensure employees remain attracted to a career in Commonwealth employment and are supported to return to work once they start a family.

“A more modern Act will also enhance [agencies’] value proposition to current and future staff, boosting our ability to attract and retain the talent we require. It will assist us better compete with private sector and other non-government employers, who offer significantly enhanced parental leave benefits to their employees.” – Joint agency submission¹⁵

Large employers cite attraction, retention and productivity improvements as the main drivers behind improvements to parental leave offerings.¹⁶ While the Act was ground-breaking in its inception, its review seeks to ensure the Commonwealth remains an employer of choice in order to meet the needs of modern Australia.

“I come from the perspective of a young woman in her late twenties who is planning on having a family within the next five years. Better maternity leave entitlements is something that I will factor into my considerations to take a job outside the public service. The public service used to be the pinnacle of maternity leave entitlements, but in recent times these entitlements are being outstripped by better offerings by some areas of the private sector.” – Individual submission¹⁷

While improvements to parental leave may create an upfront cost for employers, there are long-term advantages and cost savings related to recruitment and training, as well as increasing productivity and morale.¹⁸ Research from the Workplace Gender Equality Agency (WGEA) indicates that parental leave can be a cost-effective means of retaining valued employees, and increasing the number of employees returning to work after parental leave.¹⁹ Providing paid parental leave also signals an employer’s values in supporting diversity and equality.²⁰

¹³ Workplace Gender Equality Agency (WGEA), [Designing and supporting gender equitable parental leave](#), WGEA, Australian Government, 2019.

¹⁴ Submission 93.

¹⁵ Submission 226.

¹⁶ Parents At Work, [Advancing Parental Leave Equality and Introducing Shared Care in Australia: The business case for action \[PDF 4.06MB\]](#), Parents At Work, n.d., accessed 12 January 2022.

¹⁷ Submission 137.

¹⁸ A Crabb, ‘Men at Work: Australia’s Parenthood Trap’, *Quarterly Essay*, 2019, 75:1-73.

¹⁹ WGEA, [Designing and supporting gender equitable parental leave](#).

²⁰ T Stroman, W Woods, G Fitzgerald, S Unnikrishnan and L Bird, Boston Consulting Group, [Why paid family leave is good for business \[PDF 1.3Mb\]](#), Boston Consulting Group, 2017.

Employees provided with support and flexibility when caring for a new child are more likely to be productive upon returning to work and to remain loyal to their employer.²¹ An Ernst & Young study of employers offering paid parental leave found 80 per cent of employers reported increased morale, with 70 per cent also reporting an increase in productivity.²² A 2017 Boston Consulting Group study found that providing paid parental and ‘family’ leave results in clear benefits for employers including improved employee engagement, morale, and productivity.²³ In particular, providing these entitlements brings cost savings associated with retention, such as costs in replacing and retraining employees.²⁴

More broadly, improving women’s economic security and participation in work and leadership has flow-on benefits for business, industry, and the economy.²⁵ “[Agencies’] greatest asset is the ingenuity and drive of its people. Ensuring [agency] can attract, support and retain the best talent is critical to protecting and advancing Australia’s national security.” – Joint agency submission²⁶

Superannuation

Across the Commonwealth, eligibility for payment of superannuation during parental leave varies depending on the superannuation fund and workplace entitlements. Employees who are members of a statutory fund administered by the Commonwealth Superannuation Corporation (**CSC**) and have their employer contribution calculated on a Fortnightly Contribution Salary (**FCS**) are generally entitled to be paid superannuation during their entire period of leave under the Act. However, if the employer contribution is calculated on Ordinary Time Earnings (**OTE**) or is provided through a non-statutory fund, often an employee is only eligible to be paid superannuation on the paid portion of their leave.

On average, Australian women are retiring with 42 per cent less superannuation than their male counterparts.²⁷ Women of retirement age represent the fastest growing homeless population in Australia²⁸, with the disparity in retirement savings acting as a major contributor to the gender pay gap and increases the vulnerability of Australian women as they reach retirement age. Therefore, the Review considers payment of superannuation on parental leave a key issue when considering what future parental leave entitlements in Commonwealth service looks like. Superannuation is discussed further in Chapter 6.

Language

The move towards more inclusive language in the national Paid Parental Leave scheme, the Fair Work Act, and in state and territory and private sector policies, highlights the complex and outdated language of the Act. The use of inclusive language is designed to promote gender equality and inclusion of employees of all genders, and provide choice in dividing caregiving roles while fostering women’s economic equality and participation. However, the use of gender neutral language should not neglect considerations of biology where appropriate, including in considering

²¹ Crabb, ‘Men at Work: Australia’s Parenthood Trap’.

²² PAW, [Advancing Parental Leave Equality and Introducing Shared Care in Australia: The business case for action \[PDF 4.06MB\]](#); Crabb, ‘Men at Work: Australia’s Parenthood Trap’.

²³ T Stroman, W Woods, G Fitzgerald, S Unnikrishnan and L Bird, Boston Consulting Group, [Why paid family leave is good for business \[PDF 1.3Mb\]](#), Boston Consulting Group, 2017.

²⁴ Stroman et al., [Why paid family leave is good for business \[PDF 1.3Mb\]](#).

²⁵ AG, [Women’s Economic Security Statement 2020](#).

²⁶ Submission 226.

²⁷ R Clare, [Superannuation Account Balances by Age and Gender \[PDF 800kb\]](#), The Association of Superannuation Funds of Australia Limited, 2017.

²⁸ Australian Human Rights Commission (AHRC), [Older Women’s Risk of Homelessness: Background Paper](#), ARHC, Australian Government, 2019.

the health needs of pregnant and breastfeeding employees, including in the immediate post-partum period.

The Act continuously references a pregnant woman's 'confinement' and is not written in plain, modern English. Its drafting is out of step with contemporary language about pregnancy and parenthood, and leads to confusion for both agencies and expecting parents about the period of leave they are entitled to and when they are expected to commence leave.

"[The Act] is drafted in archaic language, and very difficult for employees, HR practitioners and lawyers to understand. This leads to agencies spending significant time in trying to interpret it, and often dealing with disputes about its application." – Individual submission²⁹

Review of the Act

The Review heard from almost 190 submissions from individuals, APS and non-APS agencies, unions, academics, advocacy groups and peak bodies calling for change. The Review team has used feedback from these submissions and consultation with a range of stakeholders to present this report and its recommendations. In light of the changing social landscape surrounding work and parenting, the Review presents this report and its recommendations with a view to improve flexibility and ease of administration, improve women's economic equality and choice for families, and ensure the Commonwealth remains an employer of choice. This will ensure the Commonwealth remains effective in accommodating changing family structures and modern expectations, and provides appropriate support to employees embarking on the journey of parenthood. While the Review has placed emphasis on a new or revised Act, there may be options for the recommendations to be implemented over time through different means as opportunities arise.

²⁹ Submission 186.

Chapter 2 - The Current State

This chapter examines the entitlements provided by the Act, and the supplementation to those entitlements in agencies' enterprise agreements. Also examined is the interaction of these entitlements with other legislated benefits in the Fair Work Act and the Paid Parental Leave scheme.

The Maternity Leave Act

The Act, originally known as the *Maternity Leave (Australian Government Employees) Act 1973*, was legislated as a ground-breaking development for parents working in the Commonwealth public service, particularly women seeking to become mothers and maintain their employment. The first legislation of its kind in Australia, the Act provided women with 52 weeks of leave to have and care for a child, 12 weeks of which would be paid.

The Act also provided men with one week of paid paternity leave to care for the mother or newborn child.³⁰ Following the 1966 removal of the marriage bar, which prevented married women from being permanently employed as Commonwealth public servants, the introduction of paid maternity leave paved the way for women to enjoy careers in the public service while caring for their families.

The Act's introduction coincided with Australia signing the International Covenant on Economic, Social and Cultural Rights, which includes the right for working mothers to access paid leave or social security benefits during a reasonable period before and after childbirth.³¹ The treaty came into force for Australia on 10 March 1976, and remains in force.³²

The Act has only been reviewed once in the nearly 50 years since its introduction in 1973. A review in 1977 resulted in the Act being amended to remove the entitlement to one week of paternity leave for fathers, and to introduce a 12 month qualifying period for paid maternity leave.³³

Today, working mothers in Commonwealth employment are covered by identical entitlements as mothers working in the 1970s. As a result, entitlements are for birth mothers only, provided in an inflexible manner and uses dated language that is out of step with contemporary discussions around pregnancy and parental leave, using terms such as 'confinement' and 'confined'.

Current entitlements under the Act

The Act provides for 52 weeks of maternity leave, of which up to 12 weeks is paid where a pregnant employee has 12 months of continuous service. The 'required absence period' generally commences six weeks prior to the expected date of birth, and continues until six weeks after the actual date of birth. Work is only permitted during this period if the employee provides a medical certificate confirming fitness for duty. Leave commences when the employee reaches the required absence period or, if the required absence period has not yet begun, when the employee gives birth. Maternity leave is generally provided in one continuous block, with limited flexibility in the event of premature birth.

Mothers who experience stillbirth from 20 weeks' gestation or the death of the infant while on maternity leave are entitled under the Act to the entire paid and unpaid maternity leave

³⁰ Australian House of Representatives, *Debates*, 1973, HR21:2637.

³¹ Attorney-General's Department, [Right to maternity leave, Public Sector guidance sheet](#), Attorney-General's Department Website, accessed 6 February 2023.

³² Department of Foreign Affairs and Trade, [Australian Treaty Series Number \[1976\] ATS 5](#), Department of Foreign Affairs and Trade Website, 2009, accessed 6 February 2023.

³³ *Maternity Leave (Australian Government Employees) Amendment Act 1978* (Cth); Public Service Board (PSB), *54th Annual Report 1977-78*, PSB, Australian Government, 1978.

entitlement.³⁴ The Act does not provide for entitlements in the event of pregnancy loss before 20 weeks' gestation.

The Act covers all agencies in the APS, but only provides coverage for a handful of other Commonwealth agencies. Casual employees are excluded. Coverage under the Act is further discussed in Chapter 8.

Entitlements in the APS beyond the Act

Since agency-based enterprise bargaining was introduced in the late 1990s,³⁵ agencies have introduced differing parental leave entitlements in their enterprise agreements to supplement the Act, resulting in inconsistency across the Commonwealth for the length of paid leave and whether non-birth parents are covered. In the APS, all agencies provide additional paid maternity leave as well as leave for employees whose partners have given birth, adoption and long-term foster care leave.

The average paid leave available to birth mothers in the APS is currently 16.9 weeks³⁶, including the 12-week entitlement under the Act. APS enterprise agreements provide additional paid leave of anywhere between two to 14 weeks leave³⁷, with the most common additional leave being two weeks. For employees whose partners have given birth, the average paid leave available is 3.2 weeks.³⁸

Adoption and foster care provisions in agency enterprise agreements generally mirror the entitlements in the Act provided for birth mothers to primary carers of the child. All except two APS agencies provide the same paid leave for primary adoptive and long-term foster carers as for birth mothers. For supporting partner leave for adoption and long-term foster care, all except one APS agency provide identical arrangements to employees whose partner has given birth.³⁹

A small number of APS agencies provide equivalent paid primary carer's leave under their enterprise agreements to employees who will be the child's primary carer immediately following the birth, but who are otherwise ineligible for paid maternity, adoption or foster care leave. This may allow an employee whose partner is pregnant to access leave to be the child's primary carer. Such terms may also cover pregnant employees who have not met the minimum service requirement for access to paid leave under the Act. Discretionary leave in enterprise agreements (such as Miscellaneous leave) or individual flexibility arrangements (**IFAs**) are other options agencies may use to provide additional paid or unpaid leave on a case-by-case basis. Further information on Miscellaneous leave and IFAs is available in Chapter 5.

The Act does not currently provide for paid maternity leave to be taken at half pay. Some agencies allow for an administrative arrangement to spread the leave payment over an unpaid period of leave at half or a quarter of an employee's normal salary. This is an administrative change to payment rather than a legislated entitlement. While this approach offers flexibility to the employee, it also adds complexity as the Act does not allow the entire leave period at reduced pay to count as service for accruing other benefits.

³⁴ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), subsection 3(1).

³⁵ Australian Government 2016, [Siege of attrition: the Government's APS Bargaining Policy](#), Australian Government, 2016.

³⁶ Internal APSC data as at February 2022.

³⁷ Internal APSC data as at February 2022.

³⁸ Internal APSC data as at February 2022.

³⁹ Internal APSC data as at February 2022.

Other legislated entitlements

Parental leave entitlements for most employees in Australia are regulated through the Fair Work Act in addition to the community-based scheme provided in the Paid Parental Leave Act. While these entitlements also apply to APS employees, they raise a number of inconsistencies with the Act which are discussed throughout this report. These inconsistencies particularly relate to adoptive parents and flexibility in how leave is taken.

Fair Work Act – National Employment Standards

The National Employment Standards (**NES**) in the Fair Work Act provide the minimum standard for parental leave for most employees in Australia. The NES currently provides 12 months of job protected unpaid parental leave to permanent employees and regular and systematic casual employees with 12 months of continuous service.⁴⁰ The first employee parent to take leave has a right to request a further 12 months of job protected leave, with a maximum of two years' leave between a family. Parents may take up to eight weeks of this leave concurrently.

Birth-related leave must generally commence no later than the child's date of birth, and if a partner takes a block of unpaid parental leave this must be continuous from the end of the first parent's leave.⁴¹ Similar to the Act, a pregnant employee may be required to commence leave six weeks before the expected date of birth if they are unfit for work, however the onus is on the employer rather than the employee to gauge fitness for work.⁴² Each parent may also request up to 30 days of flexible unpaid parental leave, which may be used after any block of leave but must be taken before the child's second birthday.⁴³

In circumstances where a child is hospitalised immediately after birth, a parent may return to work for the duration of the hospitalisation and recommence their unpaid leave upon discharge.⁴⁴ This pauses the leave and does not break its continuity.

In the event of a miscarriage or a stillbirth, under the NES the mother and her partner are entitled to two days of paid compassionate leave. If the pregnancy ends after 12 weeks' gestation the mother may be entitled to Unpaid Special Maternity Leave if she is unable to work.⁴⁵ In the case of a stillbirth or infant death, if a parent has already commenced their unpaid parental leave or has leave planned related to the birth or care of the child, the parent is entitled to the remainder of their unpaid leave and this cannot be cancelled by their employer.⁴⁶

With respect to adoption, the NES provides 12 months of unpaid adoption-related leave where the child is under 16 years old. This leave must generally commence on the date of placement with any block of leave taken by a partner required to be continuous from the end of the first parent's leave.⁴⁷ Flexible unpaid parental leave is also available until the second anniversary of the adoption. Additionally, employees are entitled to up to two days of unpaid pre-adoption leave to attend required interviews or examinations, regardless of prior service.⁴⁸ There is no entitlement to parental leave under the NES for foster or kinship carers.

Further information on NES parental leave entitlements is provided in **Figure 2.1**.

⁴⁰ *Fair Work Act 2009*, section 67.

⁴¹ *Fair Work Act 2009*, section 72.

⁴² *Fair Work Act 2009*, section 73.

⁴³ *Fair Work Act 2009*, section 72A.

⁴⁴ *Fair Work Act 2009*, section 78A.

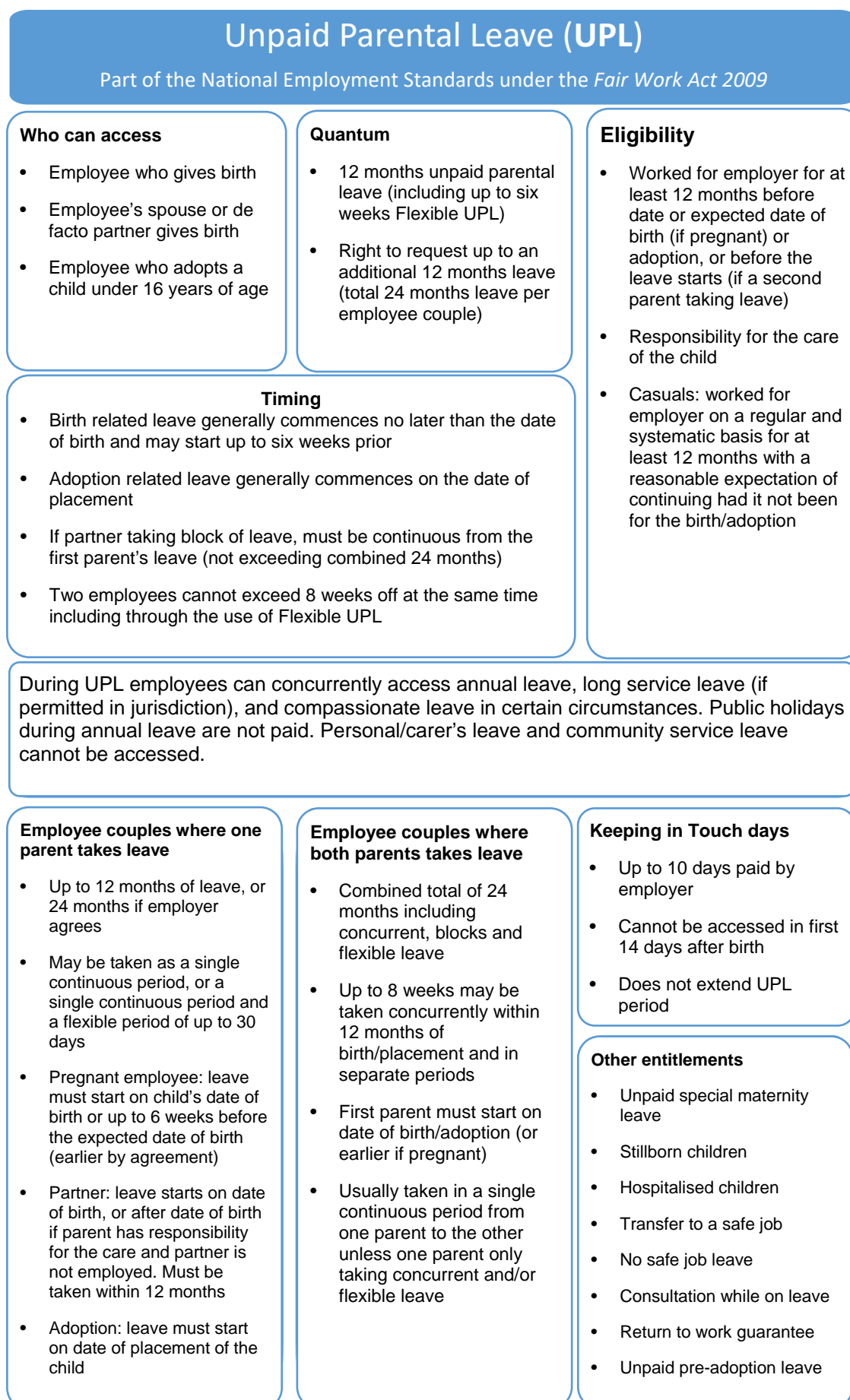
⁴⁵ *Fair Work Act 2009*, section 80.

⁴⁶ *Fair Work Act 2009*, section 77A.

⁴⁷ *Fair Work Act 2009*, section 72.

⁴⁸ *Fair Work Act 2009*, section 85.

Figure 2.1 – Unpaid parental leave under the Fair Work Act



Paid Parental Leave scheme

The Paid Parental Leave scheme provides eligible birth parents with up to 18 weeks of pay at the national minimum wage, split between 12 weeks of Parental Leave Pay and six weeks of Flexible Parental Leave Pay to use flexibly before the child's second birthday.⁴⁹ The scheme also provides for two weeks of Dad and Partner Pay at the national minimum wage. Equivalent payments are available for the primary carer of an adopted child and the primary carer's partner.

Parental Leave Pay may be transferred to a secondary claimant in part or full, but one individual cannot claim more than 18 weeks of payments.⁵⁰ Payments are means tested, and generally the birth mother or primary carer must have worked for at least 10 of the 13 months prior to the birth or adoption for at least one day per week.⁵¹ However, exemptions may be available for premature births, pregnancy related illness and other exceptional circumstances.

Similarly to the Fair Work Act, under the Paid Parental Leave scheme a birth mother eligible for Parental Leave Pay who experiences a stillbirth remains entitled to payment. In the event a child is hospitalised immediately after birth, the mother may also return to work from 14 days after the birth without compromising eligibility for Parental Leave Pay.⁵²

Further information on the Paid Parental Leave scheme is provided in **Figure 2.2**.

The *Women's Budget Statement October 2022-23* announced the Government's intention to 'modernise the Paid Parental Leave scheme and promote a more equal distribution of paid and unpaid work within households'.⁵³ From 1 July 2023, paid Parental Leave and Dad and Partner Pay will be combined to a total of 20 weeks paid leave to be shared between both parents, with increased flexibility on when the leave can be used. A portion of the paid leave will apply to each parent on a 'use it or lose it' basis. Sole parents will be able to access the full 20 weeks paid leave. From 1 July 2024, payment under the Paid Parental Leave scheme is to progressively increase by two weeks a year to reach 26 weeks.⁵⁴

Figure 2.2 – Paid Parental Leave scheme

⁴⁹ *Paid Parental Leave Act 2010*, section 31AA.

⁵⁰ Services Australia, [Parental Leave Pay, 'How much you can get'](#), Services Australia Website, 2021, accessed 10 Jan 2022.

⁵¹ *Paid Parental Leave Act 2010*, section 31 and 31AA.

⁵² *Paid Parental Leave Rules 2021*, section 18.

⁵³ *Women's Budget Statement October 2022-23*, page 39

⁵⁴ *Women's Budget Statement October 2022-23*, pages 39-40

Paid Parental Leave Scheme*

Administered under the *Paid Parental Leave Act 2010*

**The Government's Women's Budget Statement October 2022-23 announced an intention to combine Parental Leave Pay and Dad and Partner Pay from 1 July 2023 and progressively increase the paid leave limits detailed below*

Parental Leave Pay (PLP)

Who can claim

- Birth parent
- Initial primary carer of an adopted child
- Another carer (exceptional circumstances)

Quantum

Up to 18 weeks paid at the National Minimum Wage:

- 12 weeks PLP before returning to work
- 6 weeks of Flexible PLP

Eligibility

- Income test
- Work test
- Residency test

When to claim

- Cannot claim before date of birth/adoption
- PLP must be completed before first birthday/anniversary
- Flexible PLP must be completed before second birthday/anniversary

Keeping in Touch days

- Up to 10 days paid by employer
- Cannot be accessed in first 14 days after birth
- Does not extend PLP period

Transfer of all or some PLP or Flexible PLP to:

- Claimant's partner
- Child's other legal parent or their partner

Timing

PLP must be claimed before returning to work except in certain circumstances, including stillbirth, infant death, child hospitalisation immediately after birth, work to comply with a court-ordered summons, compulsory recall of duty of a defence force member or law enforcement officer, or a health professional, emergency services worker or other essential worker responding to a state, territory or national emergency

Dad and Partner Pay

Who can claim

- Child's biological father
- Partner of birth parent
- Adoptive parent
- Partner of adoptive parent
- Person caring for child born through a surrogacy arrangement
- Partner of biological father (limited circumstances)
- Partner of a new carer (limited circumstances)

When to claim

- Cannot claim before date of birth/adoption
- Must be claimed immediately following primary claimant and completed before first birthday/anniversary
- Flexible PLP must be completed before second birthday/anniversary

Quantum

- Up to two weeks paid at the National Minimum Wage
- Cannot exceed 18 weeks for one person if PLP transferred

Eligibility

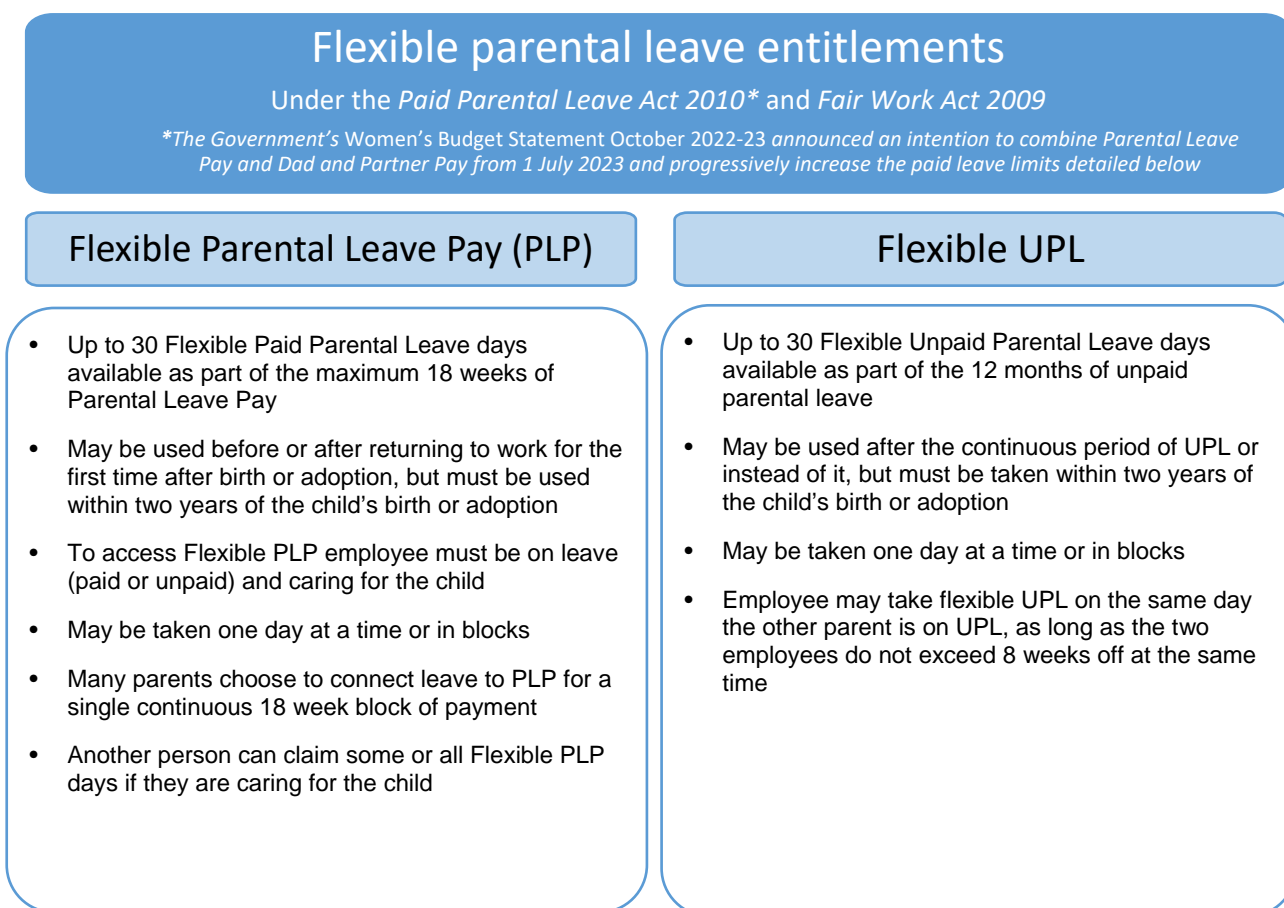
- Income test
- Work test
- Residency test

Flexible Parental Leave

Since 2020, Flexible Parental Leave Pay under the Paid Parental Leave Act and flexible unpaid leave under the Fair Work Act have allowed employees to portion off up to 30 days of leave to use flexibly before the child's second birthday, or within two years of the date of adoption. This provides employees with flexibility to care for their child while balancing returning to work.⁵⁵

Further information on flexible parental leave is provided in **Figure 2.3**.

Figure 2.3 – Flexible parental leave entitlements



⁵⁵ *Fair Work Act 2009*, section 72A; *Paid Parental Leave Act 2010*, section 31AA.

Chapter 3 – What are other employers doing?

This chapter provides an overview of parental leave policies and entitlements outside of Commonwealth employment, which are offered in addition to entitlements available under the Fair Work Act and Paid Parental Leave scheme.

Across the Australian community there are numerous paid and unpaid parental leave schemes operating through statutory entitlements, enterprise agreements, and workplace policies. While paid statutory schemes predominately cover public sector workers, the private sector has no statutory requirement for employers to provide paid parental leave. However, most large employers offer paid parental leave for primary carers.⁵⁶

Policies take a number of forms, including employers topping up Paid Parental Leave and Dad and Partner Pay to full pay, offering fully paid leave entitlements in addition to these payments, or providing a lump sum payment. They typically fall into three broad categories: maternity, paternity, and shared parental leave. Maternity leave is generally only available to mothers, and paternity leave is generally only available to fathers and partners of women who have given birth. Shared parental leave is usually available to both parents, however how it is offered varies between schemes.

"Providing employer funded paid parental leave sends a strong signal to employees that their organisation is committed to supporting and retaining them, and it can be a cost-effective measure to retain valued employees." – WGEA submission⁵⁷

As at 31 March 2022, approximately 19 per cent of current Fair Work Act national system enterprise agreements contain an entitlement to paid primary carer's leave, with these agreements capturing 53 per cent of employees covered by a federal enterprise agreement.⁵⁸ The average entitlement provided is 13.2 weeks of paid parental leave for primary carers, with the most common offering being 14 weeks. Paid secondary carer's leave is available in approximately 14 per cent of current federal enterprise agreements, covering 45 per cent of employees. For secondary carers the average entitlement provided is 2.1 weeks, with the most common offering being just one week.⁵⁹

Private sector

Employer-paid parental leave in the private sector has evolved significantly since a minimum standard was established in the Fair Work Act. Paid leave was originally provided only in the form of maternity leave. This progressed to include paid paternity leave, with terms such as 'primary and secondary carer' increasingly used in place of gendered language. Some private sector employers now provide parental leave of equal length to both parents regardless of gender, or a pool of leave to be shared between parents.

WGEA tracks paid parental leave provided by large private companies in Australia.⁶⁰ WGEA data shows that 60 per cent of large employers offer paid parental leave for primary carers in addition to the government scheme, with 91 per cent of those employers making no distinction between women or men taking the leave.⁶¹ Half of employers in the dataset offer paid secondary carer's

⁵⁶ Workplace Gender Equality Agency (WGEA), [Australia's gender equality scorecard 2020-21](#), WGEA, Australian Government, 2022.

⁵⁷ Submission 208 – WGEA (public)

⁵⁸ Attorney-General's Department (AGD), Workplace Agreement Database. Current enterprise agreements have not been terminated or passed their nominal expiry date.

⁵⁹ AGD, Workplace Agreement Database.

⁶⁰ The *Workplace Gender Equality Act 2012* requires non-public sector employers with 100 or more employees to submit an annual report to the Workplace Gender Equality Agency.

⁶¹ WGEA, [Australia's gender equality scorecard 2020-21](#).

leave.⁶² The average length of paid leave for primary carers is nearly 11 weeks and secondary carers receive an average of just over two weeks of paid leave.⁶³

WGEA also awards annual 'Employer of Choice for Gender Equality' citations. The citation criteria specified for 2022-24 includes a minimum of eight weeks of paid parental leave at full pay for primary carers, plus superannuation on that paid leave, and at least three weeks of paid parental leave at full pay for secondary carers. For primary carers, superannuation must be paid at the minimum wage rate on any unpaid leave that brings the total leave period (paid and unpaid) up to 18 weeks. There must be no minimum service period to access the paid leave, meaning all employees will be eligible for paid parental leave regardless of length of service.⁶⁴

The *Workplace Gender Equality Act 2012* requires non-public sector employers with 100 or more employees to submit a report relating to gender equality indicators to WGEA each year.⁶⁵ In April 2021 the Commonwealth Government announced that the APS will start reporting to WGEA from 2022-23.⁶⁶ The passage of the *Respect at Work Bill* on 28 November 2022 implements an amendment to the *Workplace Gender Equality Act 2012* to require Commonwealth public sector agencies to report on gender equality indicators.⁶⁷ Currently, the entitlements provided by the Act do not meet the standards required to qualify for WGEA's Employer of Choice for Gender Equality citation program.⁶⁸

"Our consultation noted that we are at significant risk of losing talent early in staff careers due to choices about maternity and paternity leave, because of the competitiveness of the policies in the private sector, compared to the Government." - Agency Employee Network submission⁶⁹

Quantum and distribution of paid leave

Significant employers are currently offering 18-26 weeks paid leave for either parent. In the private sector, Grant Thornton, KPMG, PWC, Ashurst, King & Wood Mallesons and Gilbert + Tobin provide 26 weeks paid leave, Stockland offers 20 weeks, with Accenture, Deloitte, EY and PwC providing 18 weeks paid leave.⁷⁰ Telstra offers 16 weeks paid leave to all parents, and Medibank offers 14 weeks of paid leave regardless of gender or whether the parent is a primary or secondary carer.

Most of these employers are offering these entitlements regardless of gender and do not use 'primary' and 'secondary' carer labels, however some are offering these entitlements as primary carer leave, or provide the option for it to be shared between employee couples.

Private sector employers are increasingly moving towards offering policies that encourage fathers to take leave, which have a positive impact on gender equality. Research shows that where both parents take parental leave, paid and unpaid work is more equitably divided between the parents, improving family work-life balance.⁷¹ Fathers taking parental leave supports bonding with their

⁶² WGEA, [Australia's gender equality scorecard 2020-21](#).

⁶³ WGEA, [Australia's gender equality scorecard 2020-21](#).

⁶⁴ Workplace Gender Equality Agency (WGEA), [WGEA Employer of Choice for Gender Equality \(EOCHE\): Criteria Checklist 2022-2024](#), WGEA, Australian Government, 2022.

⁶⁵ *Workplace Gender Equality Act 2012* (Cth), section 13.

⁶⁶ Attorney-General's Department (AGD), [A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces](#), AGD, Australian Government, 2021.

⁶⁷ WGEA, [Passage of Respect at Work Bill legislates federal public sector gender equality reporting | WGEA](#)

⁶⁸ Workplace Gender Equality Agency (WGEA), [Submission to the Review of the Maternity Leave \(Commonwealth Employees\) Act 1973 \[PDF 246KB\]](#), WGEA, February 2022, accessed 4 March 2022, p.2.

⁶⁹ Submission 215.

⁷⁰ H Trinca, 'Bidding war: Parental leave the new carrot to keep talent', *The Australian*, 29 October 2021.

⁷¹ WGEA, [Towards gender balanced parental leave: Australian and international trends](#).

children, and models a more equitable parenting arrangement to the next generation that reflects modern community expectations.

In 2018, Medibank introduced 14 weeks of paid leave within the first 24 months for all employees, with no distinction between primary and secondary carers. This policy change increased the proportion of men taking parental leave longer than two months from 2.5 per cent to 28 per cent, with men taking an average of eight weeks of parental leave.⁷²

Gender neutral parental leave policies, where all parents are entitled to an equal quantum of leave, does not automatically assume the mother will be the primary carer. The unintended consequences of policies where a distinction is made between the primary and secondary carer are discussed in Chapter 4.

Flexibility

Many private sector employers have adopted a flexible approach to paid parental leave to empower parents to take leave in a manner that best aligns with their circumstances. Often this includes allowing employees to take leave at any point during the first 12-24 months of a child entering the family, either in a single block, intermittent with periods of work, or both parents taking leave concurrently. Flexibility in private sector policies is also discussed in Chapter 7.

Additional entitlements

Private sector employers are also increasingly offering paid and unpaid leave for medical appointments related to pregnancy, support for attending fertility treatments, and other types of carers, such as grandparents.

Adoption / foster parents

Private sector employers are increasingly extending the scope of their parental leave policies to formal adoption and long-term fostering.⁷³ WGEA's Employer of Choice for Gender Equality citation criteria requires that parental leave entitlements are available under any circumstances where there is a new baby, including adoption.

As at 31 March 2022, 9.84 per cent of private sector enterprise agreements (covering 30.71 per cent of employees) include paid adoption leave. The average entitlement is 11.7 weeks of paid leave, and the most common entitlement to paid adoption leave is 14 weeks.⁷⁴

Recruitment and employee retention

Employers with strong parental leave policies have greater recruitment and retention of staff.⁷⁵ Paid parental leave is increasingly becoming an incentive for new employees, with a 2016 Deloitte survey finding that 77 per cent of employees with access to benefits reported the amount of leave had some influence on their choice of employer.⁷⁶

⁷² Parents At Work, [Medibank Case Study: Parental Leave Policy \[PDF 396kb\]](#), Parents At Work, 2019, accessed 3 Feb 2022.

⁷³ Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#).

⁷⁴ AGD, Workplace Agreement Database.

⁷⁵ WGEA, [Towards gender balanced parental leave: Australian and international trends](#).

⁷⁶ Parents At Work (PAW), [Advancing Parental Leave Equality and Introducing Shared Care in Australia: The business case for action \[PDF 4.06MB\]](#), Parents At Work, n.d., accessed 12 January 2022.

“A key component of [the agency] remaining an attractive place for current and future employees involves fostering a welcoming and supportive culture and offering conditions that are the same as or superior to key competitors. In important respects, Commonwealth employers are not keeping pace with employment conditions that support employees starting and raising families.” – Agency submission⁷⁷

A 2012 study from Diversity Council Australia found that parental leave was a key driver of employment decisions as well as job performance for both women and men, including young men, male managers, young fathers, and men approaching retirement.⁷⁸

State and Territory public sectors

The length of paid leave provided by jurisdiction for employer-paid maternity leave is generally 14 weeks (New South Wales, Northern Territory, Queensland and Western Australia) to 16 weeks (South Australia, Victoria and Tasmania). The Australian Capital Territory provides 18 weeks of paid leave to the primary care giver.

Paid leave for partners in each jurisdiction varies between one to fourteen weeks. Queensland and Victoria have adopted gender neutral approaches, providing the maximum entitlement to any parent who has a primary care role. From October 2022, New South Wales provides fourteen weeks' paid leave to each parent, with an additional two weeks' 'bonus leave' available to both parents if paid parental leave is 'more equally shared'.⁷⁹

State and territory public sectors follow a similar approach of incorporating leave relating to the adoption of a child under the broader parental leave provisions.

Further information on state and territory public sector parental leave policies is provided in **Figure 3.1**.

⁷⁷ Submission 202.

⁷⁸ G Russell and J O'Leary, [Men get flexible! Mainstreaming flexible work in Australian business](#), Diversity Council Australia, 2012.

⁷⁹ NSW Government, [Paid parental leave | NSW Public Service Commission](#), 2022.

Figure 3.1 – Summary of State and Territory parental leave policies.

| State/ territory | Paid leave – Birth parent or primary caregiver | Paid leave – Other parent | Gender neutral primary caregiver | Superannuation on paid and unpaid parental leave |
|-------------------------|---|---|--|--|
| CTH | 12 weeks ⁸⁰ Avg. 4.9 additional weeks provided through individual agency enterprise agreements ⁸¹ | Avg. 3.23 weeks provided through individual agency enterprise agreements ⁸² | No | Dependent on scheme rules and/or enterprise agreement terms |
| NSW⁸³ | 14 weeks | 14 weeks From October 2022, there is no distinction between primary and secondary carer, with both parents each entitled to 14 weeks paid leave, with an additional 2 weeks 'bonus leave' where there is more equal usage of the leave. | Yes | Yes, up to 52 weeks |
| VIC⁸⁴ | 16 weeks | 4 weeks + 12 weeks if employee assumes primary responsibility for child's care within first 78 weeks | Yes | Yes, up to 52 weeks |
| ACT⁸⁵ | 18 weeks | 2 weeks + 5 days of personal leave Can be converted to primary caregiver leave if unforeseen circumstances occur | Yes | Yes, up to 52 weeks |
| SA⁸⁶ | 16 weeks (12 months of service) 20 weeks (5 years of service) | 2 weeks (from accrued personal leave) 52 weeks of unpaid paternity leave | No | Yes, during paid leave |
| QLD⁸⁷ | 14 weeks | 1 week If parent becomes primary caregiver, they may access maternity leave not used by spouse | Yes | Yes, during paid leave |
| WA⁸⁸ | 14 weeks | 1 week | Yes | Yes, up to 12 weeks on unpaid leave |
| NT⁸⁹ | Between 1-18 weeks based on service: <ul style="list-style-type: none"> • 1-14 weeks (39 weeks to 12 months of service)⁹⁰ • 14 weeks (12 months of service) • 15-18 weeks (12 months to 5 years of service) • 18 weeks (5+ years of service) | 1 week (12 months of service) 2 weeks (5 years of service) Additional paid leave where employee becomes primary caregiver within 14 weeks or 18 weeks of child's birth or placement, depending on service. | Yes | Yes, first 12 months |
| TAS⁹¹ | 12 weeks | 1 day | No | Yes, up to 52 weeks |

⁸⁰ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth)

⁸¹ Internal APSC data as at February 2022.

⁸² Internal APSC data as at February 2022.

⁸³ NSW Government, [Paid parental leave | NSW Public Service Commission](#), 2022.

⁸⁴ Victorian Government (VG), [Victorian Public Service Enterprise Agreement 2020](#), Fair Work Commission, Australian Government, 2020.

⁸⁵ Australian Capital Territory Government, [ACT Public Sector Administrative and Related Classifications Enterprise Agreement 2021-2022](#), Fair Work Commission, Australian Government, 2021.

⁸⁶ Office of the Commissioner for Public Sector Employment (CPSE), [Determination 3.1: Employment conditions - Hours of work, overtime, and leave](#), CPSE, Government of South Australia, 2020.; South Australian Government, [South Australian Public Sector Enterprise Agreement: Salaried 2021 \[PDF 10 MB\]](#), South Australian Employment Tribunal, 2021.

⁸⁷ Queensland Government, [Paid Parental Leave \(Directive 05/20\)](#), Queensland Government, 2020.; Queensland Government, [Directive 05/20 – Paid Parental Leave Supporting Material](#), Queensland Government, 2020.

⁸⁸ Western Australian Government, [Public Sector CSA Agreement 2021](#), The Western Australian Industrial Relations Commission, 2021.

⁸⁹ Northern Territory Government (NTG), [Northern Territory Public Sector 2021-2025 Enterprise Agreement](#), Fair Work Commission, Australian Government, 2022.; Northern Territory Government, [Commissioner's Information Sheet, Parental Leave – new provisions 2018](#), Office of the Commissioner for Public Employment, 2018.

⁹⁰ NTG, [Northern Territory Public Sector 2021-2025 Enterprise Agreement](#), p.87.

⁹¹ Tasmanian Government, [Tasmanian State Service Award](#), Tasmanian Industrial Commission, 2011.

Chapter 4 – Leave entitlements

The Review received submissions from individuals and families describing how the Act's current provisions have impacted their parental leave and family planning. While many people had positive experiences in taking maternity leave under the Act, others experienced difficulties because of leave not being available, being insufficient in length, or involving strict rules around how it may be taken.

This chapter outlines feedback the Review received on leave entitlements under the Act, and provides recommendations on how the Act may be revised to more effectively meet the needs of families in the Commonwealth public sector today.

As detailed in Chapter 2, the Act provides 52 weeks' leave to employees who have become pregnant, the first 12 weeks of which is with pay.⁹² It does not provide any leave for fathers, partners, or any other type of parent or carer. To supplement the Act, agencies provide for additional leave – paid and unpaid – in individual enterprise agreements, with entitlements varying across the APS. The average additional paid leave provided by agencies is 4.9 weeks for birth mothers (16.9 weeks paid leave in total), and 3.2 weeks paid leave for partners⁹³.

The majority of submissions to the Review noted that the current quantum of paid leave is no longer competitive with the private sector or other public sector employers across Australia. As discussed in Chapter 3, the length of paid leave available at a number of other public sector employers and large private sector employers is higher than is available under the Act, especially for non-birth parents. For the APS to remain competitive as an employer of choice, the amount of paid leave provided to employees who become parents, needs to increase.

"We are at significant risk of losing talent early in staff careers due to choices about maternity and paternity leave, because of the competitiveness of the policies in the private sector, compared to the Government." – Employee network submission⁹⁴

Pregnant employees

To protect the health of the pregnant employee and their unborn child, the Act requires maternity leave to commence six weeks before the expected date of birth and continue until six weeks after the actual date of birth.⁹⁵ The employee may work within the six weeks before their expected due date only if they provide a medical certificate that certifies their fitness for duty.⁹⁶

Submissions to the Review observed that pregnant employees will often strive to continue to work during this period (with a medical certificate), in order to preserve sufficient paid leave for after their child is born. While many employees choose to work closer to the date of birth where they are able, feedback indicates that the current structure of leave entitlements may pressure pregnant employees to risk their health, and potentially that of their baby, so as to delay the Act's 12 weeks' paid leave until after the child is born. Submissions also reflected the view that the decision on when to stop working should be made by the pregnant employee and their medical practitioner, and not as a way to manage an insufficiency of paid maternity leave.

A number of submissions made the point that while access to equal parental leave entitlements for both parents is desirable, the pregnant employee's health and recovery from birth must be factored into the length of paid leave provided. In recognition of the need for pregnant employees to manage

⁹² *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 6.

⁹³ Internal APSC data as at February 2022, based on average entitlement within APS enterprise agreements.

⁹⁴ Submission 215.

⁹⁵ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), subsection 6(b).

⁹⁶ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 7.

their health and that of their child before and after the birth, the Review considers a separate period of paid leave for pregnant employees is appropriate.

Introducing a period of paid **Pregnancy Leave** from six weeks before the expected date of delivery would protect the health of employees in the late stages of pregnancy, and provide the employee with choice in managing this period without the flow on effect of reducing the paid leave available when their child is born. In line with medical evidence provisions in the Fair Work Act, should a pregnant employee choose to remain at work within the six week period, and the employer is concerned they are unfit to continue working, it is proposed the employer may request a medical certificate from a medical practitioner confirming the employee is fit to continue to work.⁹⁷

Submissions noted that it is currently unclear whether a medical certificate for this purpose could be also provided by a midwife and not just a medical practitioner, creating additional steps for mothers who primarily receive midwifery care. The Review took the view that evidence regarding the estimated date of birth, for the purpose of giving notice and planning leave dates, could include from a registered midwife. This is in keeping with the Fair Work Act's evidence requirements.⁹⁸ For certification of continued fitness in the 6 weeks before birth where requested by the employer, the Review took the view that the Fair Work Act standard of a certificate from a medical practitioner is appropriate.

The Review proposes that *Pregnancy Leave* would not be transferrable to the period after the child is born. This is so pregnant employees would have the option to take leave for the full period from 34 weeks' gestation and prioritise their health, as well as equal paid parental leave as partners and other parents after the birth. Following the birth, the employee would be entitled to a separate period of paid leave called **Parental Leave**, as discussed below.

Submissions called for greater flexibility regarding the Act's current mandated 'confinement period'. Introducing paid *Pregnancy Leave* will improve choice for pregnant employees in the final weeks of pregnancy, balanced with health safeguards.

Recommendation 1: Provide *Pregnancy Leave*

- 1.1 A pregnant employee is to be entitled to paid *Pregnancy Leave* to manage their health and the health of their unborn child.
 - a. *Pregnancy Leave* to be available from 6 weeks before the pregnant employee's expected date of birth, and finishes on the child's date of birth.
 - b. Evidence of the estimated date of birth can include from a registered midwife.
 - c. Where a pregnant employee chooses to remain at work closer to the expected date of birth, the agency may request a certificate from a medical practitioner if there are concerns regarding the employee's continued fitness to work.
- 1.2 *Pregnancy Leave* is only available during pregnancy from 34 weeks' gestation and cannot be transferred to a period after the birth of a child.

Parental leave

The Review recognises that the intent of Maternity leave in the Act is to not only protect the health of mothers and their newborn children, but also to care for the child. Submissions overwhelmingly called for **all** parents to have the opportunity to take parental leave and be actively involved in caring for their children.

⁹⁷ Fair Work Act 2009, subsection 73(1).

⁹⁸ Fair Work Act 2009, subsection 74(5).

Recovery from birth

Once an employee has given birth, there follows a period of time for recovery and caring for the newborn. As discussed previously, many mothers try to maximise the availability of paid leave under the Act by postponing their leave until after the child is born. The introduction of Pregnancy leave safeguards the health of the pregnant employee in the period leading up to the birth. It follows that another period of leave, specifically **Parental Leave**, should be available once the birth has taken place. The amount of leave – paid and unpaid – is discussed below.

Fathers and partners offered supporting role only

The Act does not provide any leave – paid or unpaid – for employees who are fathers or partners. These employees generally have access to supporting partner leave provided by agency enterprise agreements, with the average amount being 3.2 weeks in the APS⁹⁹. Submissions strongly conveyed the view that this is insufficient time for the employee to bond and care for the child, care for their partner recovering from childbirth, and ensure an equitable division of caring and domestic work is established early.

Partners also described the difficulty in balancing the use of other leave entitlements, such as annual leave to attend appointments with their partner before birth, and ensuring they had adequate remaining leave for the period following the birth.

“We are failing our dads and supporting partners in the APS. If a woman has a C-section and cannot drive for six weeks, the partner has to be back at work, it’s incredibly stressful for that household. The APS can and should do more to be competitive in the job market and to support its people.” – Individual submission¹⁰⁰

Minimal amounts of paid leave for partners also reinforces a standard that fathers will be ‘supporters’ at the time of birth, rather than being substantively involved in caring for their children in the early years.¹⁰¹ The current length of paid leave for fathers and partners in the APS creates barriers to these employees taking on a greater role in caring for a new child, which has flow-on effects for gender equality.

“Under the current employment agreements at many Commonwealth departments, the non-birth-giving parent would only be entitled to two weeks of paid leave. In some cases, there is not an option to even take this at half pay. Two weeks can’t adequately be described as an opportunity to look after or bond with a child” – Individual submission¹⁰²

Partners as caregivers

Supporting partner entitlements in agency enterprise agreements are insufficient for partners to take on primary or equal caring responsibility. This limits choice for APS families in managing caregiving in a way that suits their needs.

“In a tight labour market, it will become increasingly difficult for the Commonwealth to attract non-birth parents of child-bearing age when others are offering far more generous arrangements.” – Individual submission¹⁰³

⁹⁹ Internal APSC data as at February 2022.

¹⁰⁰ Submission 201.

¹⁰¹ S Williams, M Baird, E Hill and M Hamilton, [Submission to the Review of the Maternity Leave \(Commonwealth Employees Act 1973 \[PDF 443KB\]](#), Public Service Research Group, 2022, accessed 4 March 2022.

¹⁰² Submission 194.

¹⁰³ Submission 174.

The Review received submissions from employees who are fathers and partners who took on, or attempted to take on, the role of ‘primary caregiver’ for their newborn. These employees were generally unable to access parental leave equivalent to entitlements for birth mothers under the Act.

Instead, such employees had to rely on a combination of other leave in addition to any supporting partner leave available, such as annual leave, long service leave and personal leave, as well as unpaid miscellaneous leave. As with mothers taking maternity leave, unpaid leave has implications for superannuation, performance increments, and accrual of annual leave and long service leave, and actively discourages fathers and partners from taking leave.

It also creates administrative complications for agencies. Submissions noted that in many agencies, an employee who was the primary carer of an adopted child could receive the equivalent entitlement to birth mothers under the Act, but partners of birth mothers – even as the ‘primary caregiver’ – could not.

“Our approach was to both take leave from birth and then have dad (Commonwealth Public Servant) be the primary caregiver to allow mum (state/territory public servant) to return to work full time...We estimate that, all else being equal, a straight swap of roles (with a salary swap, mum taking more leave and being the primary caregiver and dad having a reduced caregiving role) would have seen the family being more than \$25,000 better off.

...One of our key frustrations throughout the process was that most of the schemes, legislation and enterprise agreements almost required birth mothers to be primary carers and disincentivised biological fathers from doing so.” – Individual submission¹⁰⁴

“In my case, my husband was wanting to share the primary care over the first year but was not eligible for any parental leave to do so. Until these structural, systemic inequalities with parental leave are addressed, we cannot work on the cultural change required to allow men to feel they can take that primary care role.” – Individual submission¹⁰⁵

Submissions highlighted how the current structure of entitlements affects same-sex and gender diverse couples in the APS. Employees discussed their experiences of planning for the non-birth parent to be the child’s primary carer, as they had seen peers employed outside the APS do. Being unable to access adequate leave created stress and financial burden, and failed to recognise the needs of their family. Feedback indicated that current entitlements may also send a message of a lack of employer support for all families.

“To my absolute shock, I realised...that the current drafting of the Act did not allow [employing agency] to offer maternity leave for the non-pregnant parent. I have been devastated by this and the flow on effects have applied extra stress and pressure on our relationship and this process.

“From a personal perspective, the continued implementation of the current Act makes me feel that [agency] and the APS place a higher value on the heteronormative relationship dynamic. It makes me feel like my family dynamic is less worthy and that to get what ‘they’ have, I have to sacrifice something for it – whether that’s financial sacrifice or sacrificing the emotional connection with my family. It has left me feeling unseen as an employee.

“While I love my job and working with the APS, I have been actively considering alternative employment solely because of this issue. I have also found myself hesitating and providing caution to peers in the private sector who are entering the age of creating a family and considering applying for roles with the APS.” – Individual submission¹⁰⁶

¹⁰⁴ Submission 128.

¹⁰⁵ Submission 108.

¹⁰⁶ Submission 149.

Primary and secondary caregiver, supporting partner labels

Submissions from individuals, agencies and advocacy groups reflected on attaching labels such as 'primary carer', 'secondary carer' or 'supporting partner' to leave entitlements. While the terms themselves are gender neutral, primary carer leave is most commonly used by mothers, and secondary carer leave is most commonly used by fathers.¹⁰⁷ Data from the Australian Bureau of Statistics shows that in the non-public sector, 93.5 per cent of primary parental leave in 2018-19 was taken by women, and 96 per cent of secondary parental leave was taken by men.¹⁰⁸

'Primary carer' parental leave is the type of leave most likely to affect a person's career trajectory.¹⁰⁹ Generally, it is significantly longer in duration than 'secondary carer' leave and research has found this sends a clear signal that the primary carer will do most of the care while the secondary carer will care for only a short period.¹¹⁰ Use of 'primary' and 'secondary' carer terms reinforce traditional gender roles where women are expected to be the 'primary' carer of a child and partners are not encouraged to share care and labour equally. Leading practice in the private sector is to remove these terms and provide all parents with equal access to parental leave regardless of their gender or carer status.¹¹¹

Shared leave pool

Some employers, including a small number of APS agencies,¹¹² offer parental leave where employee couples can access one shared pool of leave, or an employee can transfer unused leave to their partner in certain circumstances. These policies are often based on a distinction between primary and secondary carers. Shared leave arrangements may also serve to reinforce traditional gender roles, where a woman uses the entirety of the pooled leave and men are not incentivised to take parental leave.

Some submissions to the Review noted that shared arrangements may create risks for the health of the birth parent and child, and may be exploited in situations of family and domestic violence. For example, they may result in circumstances where a birth parent feels pressure to return to work earlier than preferred, in order for their partner to access additional leave. This can impact on a birth parent's recovery from birth as well as their ability to breastfeed.

The Review considers that a flexible approach with parental leave entitlements that are equal for each parent is appropriate to enable and encourage parenting that is equally shared. This simplifies administration and allows for greater flexibility in how parents may take leave and divide caregiving.

Shared care policies make it easier for both parents to return to work, particularly where these policies are flexible.¹¹³ Enabling parents to use parental leave flexibly provides greater opportunities for all parents to combine part-time work with care of their child.¹¹⁴ This approach also supports families as they adjust to new domestic arrangements in which care is shared for longer than just the child's early years but also into the school aged years.

¹⁰⁷ M Baird, M Hamilton and A Constantin, 'Gender equality and paid parental leave in Australia: A decade of giant leaps or baby steps?', *Journal of Industrial Relations*, 2021, 63(4):546–567, p.558.

¹⁰⁸ Australian Bureau of Statistics (ABS), [Gender Indicators, Australia](#), 2020, accessed 24 March 2022.

¹⁰⁹ ABS, [Gender Indicators, Australia](#).

¹¹⁰ Baird et al., 'Gender equality and paid parental leave in Australia: A decade of giant leaps or baby steps?', p.558.

¹¹¹ Workplace Gender Equality Agency (WGEA), [Submission to the Review of the Maternity Leave \(Commonwealth Employees\) Act 1973 \[PDF 246KB\]](#), WGEA, February 2022, accessed 4 March 2022, p.1.

¹¹² Internal APSC data as at February 2022.

¹¹³ Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), p.87.

¹¹⁴ Baird et al., 'Gender equality and paid parental leave in Australia: A decade of giant leaps or baby steps?', p.563.

"I support a holistic approach (including gender equality and inclusion) in providing other parental leave entitlements and arrangements to capture the needs of modern families – but not at the expense of provisions for the birthing parent/primary carer who have an emotional, physical and biological need for the support that makes it particularly complex to trade your entitlements to others. Any holistic approach should be additional and consider how to build on the existing entitlements rather than reducing the existing entitlements of the birthing parent." – Individual submission¹¹⁵

Equal access to parental leave

A key way for the APS to be more competitive in the current labour market is to provide appropriate paid parental leave to all parents and allow families choice in how they balance work with caring for their child. It would allow all parents, if they choose, to have quality time to care for their child and adjust to life as a parent.

"The time I spent sharing experiences, sharing the first few months of my children's lives and supporting my children and my wife, were immensely rewarding (at times challenging!!) but they were wonderful experiences that can only be experienced during those early stages of your child's life. There are many other experiences as they grow up, but those first few months and the critical support that I was able to provide will remain with me forever." – Individual submission¹¹⁶

Equal access to parental leave promotes gender equality by allowing families to choose how care will be provided to the child and allowing the birth parent to return to the workforce when they are ready. Women's disproportionate share of unpaid care and domestic work, lack of workplace flexibility and time out of the workforce is a key contributor to the gender pay gap.¹¹⁷

Submissions to the Review strongly advocated for access to equal entitlements for all employees who become parents. Reasons provided included attraction and retention in order to compete with the private sector, gender equality, productivity, and the opportunity to provide employees a healthy work-life balance. Particularly in a post COVID-19 world, managing work-life balance has become a priority for many parents.¹¹⁸

Families are looking for the flexibility to set up a domestic arrangements as soon as the child is born in which care is shared more equally, with new routines that can continue on more enduring basis as the child grows beyond the early years.

"Gender neutral parental leave enabled my family and I to make decisions that worked best for our family unit as both my husband and I took paid parental leave to care for our daughters. I returned to work when my babies were 8 months of age knowing they were cared for by their other parent and I continued to be able to breastfeed. Due to the support and flexibility, I completed my MBA and was able to progress my career." – Individual submission¹¹⁹

Duration of leave

As detailed in Chapter 3, a number of non-Commonwealth employers offer up to 26 weeks of paid leave. The quantum of paid parental leave offered by leading employers is increasing. Submissions, including from agencies, overwhelmingly supported increasing the duration of paid parental leave under the Act. Suggestions in agency submissions ranged from 14 to 36 weeks' paid leave, with the most common suggestion being 26 weeks.

¹¹⁵ Submission 93.

¹¹⁶ Submission 37.

¹¹⁷ Diversity Council Australia (DCA), [Let's Share the Care at Home and Work](#), DCA, 2019, p.1.

¹¹⁸ A De Smet, B Dowling, M Mugayar-Baldocchi and J Talloen, [Married to the job no more: Craving flexibility, parents are quitting to get it](#), McKinsey & Company website, 2021, accessed 2 March 2022.

¹¹⁹ Submission 40.

“The quantum of parental leave provided by employers is a competitive factor when individuals, particularly with high-demand skills, are choosing between roles.” – Agency submission¹²⁰

The International Labour Organization (ILO),¹²¹ World Health Organisation (WHO),¹²² and United Nations International Children’s Fund (UNICEF)¹²³ recommend 18 weeks of paid maternity leave as a period of rest relating to childbirth to safeguard the health and nutrition of the mother and her child.¹²⁴

Additionally, the WHO and UNICEF recommend paid paternity leave to protect the health of the mother and baby,¹²⁵ as leave taken by the partner around the time of the birth can be critical in caring for the mother while they recover and providing support with newborn care including breastfeeding.

“Receiving less leave than potential other employers that are open to me made me think that the APS and [the agency] does not value me as an employee.” – Individual submission¹²⁶

The Review considers providing both parents with an equal entitlement to up to 24 months of **Parental Leave**, with 18 weeks of that leave being with pay. This helps to ensure families have the opportunity to equally share the caring and set up enduring shared domestic routines. It also signals more broadly that the APS and the Commonwealth is an employer of choice for employees considering having children. Moving to 18 weeks for the partner is a significant advancement in paid leave for many agencies, and may need to be implemented in stages over time.

Aligning with the Fair Work Act’s parental leave, parents could use this 18 weeks of paid leave flexibly within 24 months of the child’s birth. Flexible parental leave and its benefits for families are discussed further in Chapter 7.

While parents may take *Parental Leave* flexibly it is important to safeguard the health needs of the employee who has given birth. In line with the Fair Work Act and Paid Parental Leave scheme, an employee may not return to work within 14 days of giving birth, and must provide a medical certificate confirming fitness for work if they seek to return within two to six weeks after giving birth.¹²⁷

“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.” – Union submission¹²⁸

¹²⁰ Submission 226.

¹²¹ International Labour Organization (ILO), [Maternity Protection Recommendation, 2000 \(No. 191\)](#), ILO, n.d., accessed 22 February 2022.

¹²² Global Breastfeeding Collective (GBC), World Health Organisation, United Nations International Children’s Fund, [Breastfeeding and family-friendly policies](#), GBC, 2019, p.2.

¹²³ United Nations International Children’s Fund (UNICEF), [Paid Parental Leave and Family-Friendly Policies: An evidence brief](#), UNICEF, 2019, p.12.

¹²⁴ World Health Organisation (WHO), [Maternity protection: Compliance with international labour standards](#), WHO website, n.d., accessed 22 February 2022.

¹²⁵ GBC, et al., [Breastfeeding and family-friendly policies](#), p.2.

¹²⁶ Submission 79.

¹²⁷ *Fair Work Act 2009*, section 79A; *Paid Parental Leave Act 2010*, section 50; *Paid Parental Leave Rules 2021*, section 14.

¹²⁸ Submission 224.

Recommendation 2: Provide *Parental Leave*

- 2.1 Provide up to 24 months of *Parental Leave* to new parents, to be used within 24 months from the date of the child's birth.
- a. 18 weeks of *Parental Leave* is with pay, and the remainder without pay.
 - b. *Parental Leave* is to be provided as a separate and equal entitlement to new parents, so there is an equal opportunity to care for the child.
 - c. For employees who give birth, *Parental Leave* is in addition to *Pregnancy Leave*. The employee may not return to work within 2 weeks after giving birth. An employee who wishes to return to work within 2-6 weeks after giving birth must provide a medical certificate certifying fitness to work.

Parental leave for all parents

Adoption and long-term foster parents

The Act does not provide leave entitlements to parents who adopt or foster a child. However as described in Chapter 2, most APS enterprise agreements provide primary carers of an adopted or long-term foster child with equivalent leave entitlements to those provided for birth mothers.¹²⁹ However, as with birth-related leave, entitlements are inconsistent across the APS, and focus on the primary carer only.

“By including all these provisions in the Act, it will formalise what is already taking place, provide consistency across APS agencies and facilitate processing, enabling entitlements to come from one instrument rather than several, as is currently the case.” – Agency submission¹³⁰

Submissions called for coverage of the Act to be expanded to include employees who adopt and foster, and to ensure these entitlements are protected in legislation in the same way as maternity leave. As noted in Chapter 3, private sector employers are also increasingly extending the scope of their parental leave policies to formal adoption and long-term fostering.¹³¹ Notwithstanding an increased focus on long-term fostering, it is noted that NES parental leave does not include leave for long-term fostering. The Review considers Parental Leave should be extended to included adoptive parents, however leave for long-term fostering not be included in a new Act at this time. Agencies may consider continuing to offer leave for long-term fostering through the agency's industrial instrument or workplace arrangement, such as an enterprise agreement.

Recommendation 3: Extend *Parental Leave* to include adoption

- 3.1 *Parental Leave* under the Act is to be available to both parents of a child who is adopted from the day of placement of the child, provided that the child:
- a. is under 16 as at the day of placement, or the expected day of placement;
 - b. has not lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement; and
 - c. is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.
- 3.2 Paid leave for a parent of a child under a long-term foster care arrangement may be considered for inclusion in an agency's industrial instrument or workplace arrangement, such as an enterprise agreement.

¹²⁹ Internal ASPC data as at February 2022.

¹³⁰ Submission 207.

¹³¹ Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), p.88.

Kinship care

Kinship care including traditional First Nations adoption and foster care practices were raised during the Review, with a small number of agencies already recognising these forms of care through paid parental leave entitlements in enterprise agreements.

The Review notes the importance of policies that are inclusive of First Nations employees. This aligns with the *Commonwealth Aboriginal and Torres Strait Islander Workforce Strategy 2020-2024* objective of increased ongoing representation of First Nations employees at all levels of the Commonwealth public sector, including by improving the employee experience for all First Nations employees across the Commonwealth.¹³²

The Review received feedback that the Act does not currently include culturally appropriate language or definitions of traditional First Nations adoption practices, caregiving or kinship structures. However, it is critical that further consultation is conducted to ensure any legislative change and its implementation is undertaken in a culturally appropriate way.

This includes consultation and co-design with First Nations peak bodies and communities to ensure healing based, trauma informed, culturally safe and appropriate solutions in accordance with the National Agreement on Closing the Gap.

Recommendation 4: Undertake extensive engagement on extending *Parental Leave* to incorporate First Nations kinship care practices

- 4.1 Undertake engagement to inform future proposals to extend *Parental Leave* to include kinship care that takes into account traditional First Nations adoption, foster and kinship practices.
- 4.2 This should include significant national engagement and co-design with First Nations peak bodies and communities to ensure *Parental Leave* provisions are cultural appropriate and promote healing based, trauma informed, culturally safe and appropriate kinship practices, in accordance with the National Agreement on Closing the Gap.

Surrogacy

As the Act applies to eligible female employees who have become pregnant, an employee acting as a surrogate is entitled to all maternity leave benefits under the Act.¹³³ On a similar basis, *Pregnancy Leave* is to be available to any pregnant employee and regardless of whether the pregnant employee is acting as a surrogate.

The Act does not currently provide entitlements to parents welcoming a child via surrogacy, and leave for intended parents is provided through individual agency enterprise agreements and policies. Many submissions to the Review called for surrogate parents to be entitled to parental leave noting that leading private sector employers are increasingly extending entitlements to surrogacy, and supporting parental leave being available in all circumstances where there is a new baby.¹³⁴

Australian laws relating to surrogacy are complex and evolving. Commercial surrogacy is illegal in all states and territories. It is also illegal for residents of the ACT, NSW and Queensland to enter into

¹³² Australian Public Service Commission (APSC), [Commonwealth Aboriginal and Torres Strait Islander Workforce Strategy 2020–24](#), ASPC, Australian Government, 2020, p.11.

¹³³ *Maternity Leave (Commonwealth Employees) Act 1973*, section 6(1).

¹³⁴ Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), p.88.

overseas commercial surrogacy arrangements, and these arrangements may not fulfil the requirements for transfer of legal parentage under Australian state and territory law.¹³⁵

The legal status of altruistic surrogacy varies across states and territories, and whether a surrogacy arrangement complies with jurisdictional laws depends on the individual arrangement.¹³⁶ Given the legal complexity and lack of a uniform national legislative framework, most agency enterprise agreements do not provide parental leave for surrogate parents. This issue raises particular complexity in the context of developing a legislated entitlement to parental leave.

Surrogacy is an evolving legal and policy space, and the Review acknowledges the importance of parental leave entitlements being inclusive for all families. Further work is required to ensure any future provision of leave aimed at supporting surrogacy arrangements should consider issues such as compliance with state and territory laws, interaction of entitlements with formal Parentage Orders, and evidence requirements.

As introducing legislative leave provisions aimed at supporting surrogacy arrangements is not feasible at this stage, the Review recommends that agencies continue to accommodate parental leave needs through miscellaneous leave only where they are satisfied a surrogacy arrangement complies with relevant state and territory law. Agencies may consider seeking legal advice given the complexity of this issue.

Recommendation 5: Undertake research on extending *Parental Leave* entitlements to legal surrogacy arrangements

- 5.1 Research how *Parental Leave* could be extended to include the intended parents of a child born through a surrogacy arrangement that meets the requirements of applicable state or territory law, including the evidence that would be appropriate for such arrangements.
- 5.2 In approving leave applications, agencies to take steps to ensure the surrogacy arrangement is compliant with jurisdictional legislation, and may wish to seek legal advice given the complexity of this area.

Pregnancy loss

Stillbirth and neonatal death

Under the Act, the birth mother has access to all maternity leave entitlements (including paid leave) in the tragic event that their pregnancy ends from 20 weeks' gestation onwards¹³⁷, or their child dies while they are on maternity leave. Employees are also entitled to up to two days of paid compassionate leave under the Fair Work Act if a baby in their immediate family or household is stillborn or dies.¹³⁸ The Review considers that pregnant employees should continue to receive this important support when dealing with such tragic loss.

The Review received submissions from individuals sharing their experiences of pregnancy loss and notes that stillbirth and neonatal death are sensitive topics which have a profound impact on parents. Consistent with the intention of *Parental Leave*, the Review considers both parents should be entitled to *Parental Leave* in the event of stillbirth or neonatal death, recognising the impact of this loss on families. However, for the partner of a woman who has given birth to a stillborn child, the paid leave component should be for a lower period, such as 2 weeks.

¹³⁵ Department of Foreign Affairs and Trade (DFAT), [Going overseas for international surrogacy](#), DFAT website, 18 March 2022, accessed 24 March 2022.

¹³⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs (HRSCPLA), [Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements](#), HRSCPLA, Australian Government, 2016.

¹³⁷ *Maternity Leave (Commonwealth Employees) Act 1973*, section 3.

¹³⁸ *Fair Work Act 2009*, section 104.

Prior to any potential legislative change however, the Review encourages agencies to provide partners with equivalent entitlements under current enterprise agreements where a partner experiences a stillbirth. Some employees have been unable to access entitlements due to the way agency enterprise agreements are drafted.

“...the parenting leave provision [within enterprise agreement] state that “Within 12 months of the birth...an[d] employee who has or will have responsibility for the care of a child and who is otherwise ineligible for leave under the Act...is entitled to 20 days leave with pay...to care for the child.” I was precluded from claiming parenting leave due to the wording in the agreement because it was determined that there was no child to care for. This denial of access to parenting leave based on this distinction may signal a lack of understanding and potentially an oversight when the agreement was negotiated but it also contributes to the stigma that surrounds stillbirth.” – Individual submission¹³⁹

Additionally, the meaning of stillbirth within the Act does not currently capture the full definition that now applies in the Fair Work Act and Paid Parental Leave Act. In addition to the gestation period of at least 20 weeks, both Acts recognise stillbirth where a child weighs at least 400 grams at delivery.¹⁴⁰ The Review recommends the meaning of stillbirth be extended to align with the Fair Work Act and Paid Parental Leave Act.

Recommendation 6: Extend stillbirth entitlement to partners and broaden definition

- 6.1 Pregnant employees to retain entitlement to *Parental Leave* in the event of stillbirth.
- 6.2 Expand the Act’s current provisions allowing pregnant employees to retain full entitlement to *Parental Leave* if their pregnancy ends other than by a live birth from 20 weeks’ gestation, to include circumstances where a child weighs at least 400 grams at delivery (consistent with the Fair Work Act and Paid Parental Leave Act).
- 6.3 The partner of a woman who gives birth to a stillborn child remains entitled to *Parental Leave*, with the paid leave component to be limited to 2 weeks.

Miscarriage

While the Act provides full leave entitlements for pregnancy loss from 20 weeks’ gestation, it contains no entitlement for pregnancy loss before 20 weeks. Some agencies provide entitlements for compassionate leave and miscarriage in their enterprise agreements.

Parents may also access further entitlements under the Fair Work Act – a pregnant employee, or an employee’s spouse or de facto partner, who experiences a miscarriage may access two days of paid compassionate leave,¹⁴¹ and unpaid special maternity leave is available where an employee is not fit for work because of pregnancy loss after 12 weeks’ gestation.¹⁴²

The Review received submissions from individuals sharing personal experiences of miscarriage. The Review recognises that miscarriage is a sensitive and emotionally difficult topic that affects many employees across the APS. Submissions to the Review advocated for a revised Act to provide support for employees who experience both the physical and emotional challenges of pregnancy loss. Paid leave formally acknowledges a baby and their loss while providing parents with time to physically heal and emotionally process grief.¹⁴³

¹³⁹ Submission 209.

¹⁴⁰ *Fair Work Act 2009*, subsection 77A(2); *Paid Parental Leave Act 2010*, section 6.

¹⁴¹ *Fair Work Act 2009*, section 104.

¹⁴² *Fair Work Act 2009*, section 80.

¹⁴³ M Keep, S Payne and JE Carland, ‘Experiences of Australian women on returning to work after miscarriage’, *Community, Work & Family*, doi: 10.1080/13668803.2021.1993140, p.8.

“Having supported a staff member through the horrible misfortune of the miscarriage of her child, I was surprised that she was only entitled to use her sick leave despite the fact if the baby was an extra couple of weeks older, she would have been able to access her maternity leave. The mourning and healing that goes along with the loss of a baby felt diminished by the fact it wasn't recognised in our leave.” – Individual submission¹⁴⁴

The Review proposes that introducing one week of paid **Pregnancy Loss Leave** for pregnant employees and partners of women who experience pregnancy loss between 12 weeks' gestation and the end of 19 weeks' gestation will better support families who experience pregnancy loss. Where pregnancy loss occurs at less than 12 weeks' gestation, two days of paid compassionate leave is available for both parents under the Fair Work Act.

Recommendation 7: Provide paid *Pregnancy Loss Leave*

- 7.1 An employee who experiences pregnancy loss between 12 weeks' gestation and the end of 19 weeks' gestation that is not a still birth is to be entitled to one week (5 days) of paid *Pregnancy Loss Leave*.
- 7.2 *Pregnancy Loss Leave* is to be provided as a separate and equal entitlement to both parents.
- 7.3 *Pregnancy Loss Leave* must be taken in one continuous period and is in addition to entitlements to compassionate leave for miscarriage provided under the Fair Work Act.

Premature birth

The Review received feedback around providing additional support for parents of premature and hospitalised babies. A birth is considered premature if it occurs before 37 weeks' gestation.

As leave provided under the Act and enterprise agreements is generally provided in one continuous period, employees reported using all their paid leave entitlement while their baby was still in hospital. In contrast, under the Fair Work Act where a child is hospitalised after birth or there are gestational or birth-related complications, an employee may put their unpaid parental leave on hold for the duration of the child's hospitalisation.¹⁴⁵ The Paid Parental Leave Act also allows an employee to return to work for this period without losing their entitlement to Parental Leave Pay, provided this is no earlier than 14 days after birth.¹⁴⁶

“[M]y twin children arrived 15 weeks early. This was a shocking and traumatic experience for me and my husband. We were in shock emotionally as we had two critically ill children, I was recovering physically from birth, and we were now parents, which practically means spending many hours a day at hospital caring for the babies, making decisions about their health, and having our minds filled with thoughts for their care and wellbeing. I could not practically return to work, not least of all because of the physical effects of my birth experience. Because my babies arrived early, I was no longer eligible for paid maternity leave. I also could not work for an additional three months that I had anticipated working. The effect is that I lost six months of income, as a result of the gaps in the Maternity Leave Act.” – Individual submission¹⁴⁷

In the NSW public service, paid leave is available where an employee or their spouse gives birth before 37 weeks' gestation.¹⁴⁸ This leave may be taken from the child's date of birth up to the end of

¹⁴⁴ Submission 63.

¹⁴⁵ *Fair Work Act 2009*, section 78.

¹⁴⁶ *Paid Parental Leave Act 2010*, section 49.

¹⁴⁷ Submission 100.

¹⁴⁸ Department of Premier and Cabinet (DPC), [M2021-11 Paid Leave in the Event of a Miscarriage or Pre-Term Birth](#), DPC, NSW Government, 2021.

36 weeks' gestation, and the parent may then take the separate parental leave they would have been entitled to had the child been born at full term.

Providing paid leave in this way may also assist mothers in receiving support to express if they are breastfeeding, as well as providing care to the child through skin-to-skin contact and other means in hospital without financial pressure forcing them back to work.¹⁴⁹

The Council of Australian Governments Health Council *Australian National Breastfeeding Strategy: 2019 and Beyond* notes that premature and hospitalised children often have more complex health needs than other children and their mothers have high rates of depression and anxiety.¹⁵⁰

Additionally, preterm infants are at increased risk of necrotising enterocolitis (**NEC**), and human milk has been identified as providing protection against NEC for premature babies, with the mother's own milk preferable if available.¹⁵¹

"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." –union submission¹⁵²

The Review considers the introduction of paid **Premature Birth Leave** would provide appropriate support to pregnant employees from the date of birth up to the end of what would have been 36 weeks' gestation. Eligibility for the full entitlement of paid parental leave would commence from what would have been 37 weeks' gestation.

Partners of women who have given birth prematurely would also be eligible for *Premature Birth Leave* from the child's date of birth up to what would have been the end of 36 weeks' gestation. Eligibility for Parental Leave would commence on what would have been 37 weeks' gestation.

The ability to take *Parental Leave* flexibly would allow both parents the choice to take the paid leave at a time that best suits the family's circumstances. For example, taking a portion while the child is in hospital and the majority once the child is at home. To align with the intention of the Fair Work Act, employees who have given birth are not to return to work earlier than 14 days post birth where their child was hospitalised immediately after birth and remains in hospital.

Recommendation 8: Provide paid *Premature Birth Leave*

- 8.1 In circumstances of a live birth before 37 weeks' gestation, both parents are entitled to paid *Premature Birth Leave* from the date of the child's birth up to the end of what would have been 36 weeks' gestation. *Parental Leave* is then available from what would have been 37 weeks' gestation.

¹⁴⁹ Council of Australian Governments Health Council (COAG HC), [Australian National Breastfeeding Strategy: 2019 and Beyond](#), Department of Health, Australian Government, 2019, p.46.

¹⁵⁰ COAG HC, [Australian National Breastfeeding Strategy: 2019 and Beyond](#), p.53.

¹⁵¹ COAG HC, [Australian National Breastfeeding Strategy: 2019 and Beyond](#), p.46.

¹⁵² Australian Nursing & Midwifery Federation (ANMF), [Submission to the Australian Public Service Commissioner on Maternity Leave \(Commonwealth Employees\) Act 1973 \[PDF 248KB\]](#), ANMF, 2022, accessed 22 February 2022.

Chapter 5 – Other entitlements in Commonwealth employment

In addition to entitlements in the Maternity Leave Act, employees are able to access a range of other employee entitlements surrounding pregnancy, parental leave and returning to work. Throughout the Review, a number of issues with these entitlements arose, including how parents are made aware of these options, and how maternity leave in its current form can have undesired interactions with other entitlements.

This chapter examines these issues, with recommendations made to minimise the adverse impact parental-related leave may have on other entitlements, such as salary advancement. Recommendations are also made regarding actions agencies may take to ensure employees are aware of the full range of benefits available when taking parental-related leave.

Access to other paid leave on unpaid parental leave

The Act allows employees to access other forms of paid leave entitlements while on unpaid maternity leave.¹⁵³ Generally annual leave and long service leave will be granted where the employee has the necessary credits, however long service leave must still be used in accordance with requirements of the *Long Service Leave (Commonwealth Employees) Act 1976 (Long Service Leave Act)*. This includes needing to account for the long service leave taken in calendar days rather than working days. Access to personal/carer's leave is not automatically granted, but considered on a case-by-case basis, usually requiring evidence to prove eligibility for the leave.

The Review proposes that employees on unpaid *Parental Leave* should continue to be able to use their accrued paid leave.

Recommendation 9: Continued access to other accrued leave while on unpaid *Parental Leave*

9.1 Employees to continue to have the option to use their accrued paid leave entitlements while on unpaid *Parental Leave*.

Accrual of leave

The accrual of further annual leave, personal/carer's leave and long service leave occurs only while an employee is on paid leave under the Act, or on other paid leave. Paid leave under Act does not have the option for half pay. Agencies may allow employees to take the Act's 12 weeks' paid leave at half pay spread over 24 weeks as an administrative arrangement, however the leave will only count for service for the first 12 weeks of paid leave.¹⁵⁴ Most APS enterprise agreement terms provide for annual leave taken at half pay to count as service for credit accrual¹⁵⁵, as does long service leave under the Long Service Leave Act¹⁵⁶. Further discussion on half pay and related service periods is in Chapter 8.

Purchased leave

Purchased leave is available under most APS enterprise agreements and allows employees to fund additional paid leave for future use by reducing their fortnightly salary.¹⁵⁷ Rather than taking the immediate financial hit of leave without pay once other paid leave entitlements are exhausted, the cost of purchasing the additional leave is spread over a period of time, such as 12 months. Some

¹⁵³ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), subsection 6(7).

¹⁵⁴ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 7B.

¹⁵⁵ Internal APSC data as at February 2022.

¹⁵⁶ *Long Service Leave (Commonwealth Employees) Act 1976* (Cth), subsection 16(3), 19(2).

¹⁵⁷ Internal APSC data as at February 2022.

employees purchase leave in the year before a child is born as a way of having more paid leave available during the maternity or parental leave period.

Alternatively, the leave could be used to return to work on a full-time basis by topping up reduced working hours with paid leave. Different agency-level rules to access such leave, however, can make this option difficult in practice.

“Given [the agency’s] purchased leave policy, there are limitations in when you can apply and take the purchased leave, making it incredibly difficult to navigate in this situation. Furthermore, purchasing leave results in a drop in my fortnightly take-home wage. This is untenable when we also have to cover the costs associated with IVF, and plan for the unexpected costs that may arise.”
– Individual submission¹⁵⁸

Sabbatical leave

Sabbatical leave is another form of purchased leave that is available in some APS enterprise agreements which allows employees to accrue purchased leave over a number of years to then take a sabbatical.¹⁵⁹ Schemes like this demonstrate that it is possible for purchased leave to accrue over a number of years where the administrative infrastructure supports it.

Under the Department of Human Services Enterprise Agreement 2017-2020 (applicable to employees working in Services Australia), sabbatical leave can be purchased over four years to provide six to 12 months paid sabbatical leave in the fifth year.¹⁶⁰ This leave counts for service for the purposes of accruing annual and long service leave, and any withheld salary amount not accessed before ceasing employment with the agency is paid out, meaning an employee is not financially penalised for exiting the scheme early.

Agencies may consider using an existing purchased leave scheme for parental purposes.

Miscellaneous leave

The majority of agencies provide for paid and unpaid discretionary leave (variously known as Miscellaneous, Special or Discretionary leave) in enterprise agreements. Requests are usually considered on a case-by-case basis in line with the individual circumstances and supporting evidence. Discretionary leave is likely being used by agencies to offer leave for parental purposes as a work around to deal with deficiencies in the Act regarding eligibility.

While some agencies pay superannuation on unpaid maternity and parental leave (see Chapter 6), superannuation is not necessarily paid on unpaid Miscellaneous Leave for primary carer purposes, creating inequity between employees who are primary carers. Paid Parental leave for all parents, as discussed in Chapter 4, would address some of the reasons why agencies are providing Miscellaneous Leave for parental care purposes.

Other flexibilities available

Flexible Working Arrangements

Across Commonwealth employment, employees have access to a variety of working arrangements that provide the flexibility to manage their personal commitments while ensuring workplace operational requirements are met. Flexible working arrangements can be used throughout pregnancy and on return to work to balance health, caring responsibilities and work commitments.

¹⁵⁸ Submission 149.

¹⁵⁹ Internal APSC data as at February 2022.

¹⁶⁰ Department of Human Services, [Department of Human Services Enterprise Agreement 2017-2020](#), Fair Work Commission, Australian Government, 2020, p.58.

This can include flex time, time off in lieu, part-time work, working from home, purchased leave and job sharing. Most agencies have an enterprise agreement or policy that outlines the flexible working arrangements available within the agency.

Individual Flexibility Arrangements

Individual Flexibility Arrangements (IFAs) may be used for flexible working arrangements but can also provide other flexibility by varying conditions in the relevant agency's enterprise agreement or relevant award.¹⁶¹ The *State of the Service Report 2019-20* noted that 'to remain an employer of choice, and access new pools of talent, flexibility will remain an important component of the APS.'¹⁶² IFAs will continue to be available to provide flexibility that meets the genuine needs of the employer and the individual employee.

Salary on parental leave

Performance-based Salary Advancement

Agencies have different performance cycle periods and different minimum standards to be eligible for a performance-based pay progression within a salary range, otherwise known as increments. Most agencies require performance of a satisfactory level, demonstrated by producing work rather than based on a period of service.

When an employee is on parental leave they are not producing work. Paid leave generally counts as service for continuing to accrue other entitlements; however, once parental leave becomes unpaid it no longer counts as service. Depending on the timing of the leave within a performance cycle, or if the leave is over 12 months in duration, an employee may not be entitled to a performance-based salary increase.

Overwhelmingly, the vast majority of people who take parental leave for an extended period of time are women, creating an environment where women's pay progression is disproportionately affected.¹⁶³ In conjunction with this, the earlier in a career a break is taken from paid employment or work part-time, the larger the impact on the superannuation balance and retirement savings.¹⁶⁴

In some circumstances, it is the timing of the child's date of birth and subsequent leave within the performance cycle that can disentitle an employee to performance-based pay progression. For example, if a child is born at the beginning of a performance cycle and the mother takes over six months off work, they may not be eligible for a performance increment. However, if that child had been born a couple of months earlier and the leave was spread over two performance cycles, she would be eligible.

Women's economic equality is negatively impacted when women are delayed in receiving their performance-based salary progression. This is not only due to a stagnation of income, but also due to the cost of caring for a child, including child care. Delaying pay increases also compounds over time to significantly lessen women's superannuation balances at retirement age.

Evidence shows that men are less likely to take extended parental leave, such as more than a couple of weeks at the time of birth, if this will detrimentally impact their salary or career.¹⁶⁵ By changing how performance-based pay progression is calculated so all parents on parental leave could be eligible, more men may choose to take the parental leave available. This choice then has significant

¹⁶¹ *Fair Work Act 2009* (Cth), section 202.

¹⁶² Australian Public Service Commission (APSC), [State of the Service Report 2019-20](#), APSC, Australian Government, 2020.

¹⁶³ Crabb, 'Men at Work: Australia's Parenthood Trap'.

¹⁶⁴ The Treasury, [Retirement Income Review Final Report July 2020](#), The Treasury, Australian Government, 2020.

¹⁶⁵ Crabb, 'Men at Work: Australia's Parenthood Trap'.

flow-on benefits for children, family dynamics, and women's economic equality. For women, continued access to salary increments while on leave will make a positive contribution to addressing the gender pay gap in the APS.

Recommendation 10: *Pregnancy Leave and Parental Leave (paid and unpaid) to count towards salary progression*

- 10.1 All *Parental Leave* and pregnancy-related leave is to count towards the employee qualifying for their next salary increment, where the employee would otherwise be eligible for a salary increment.

Change to working hours before commencing maternity leave

The Review's consultation with stakeholders noted the growing trend of part-time employees to increase their working hours to full-time just prior to commencing maternity leave. This is presumably to receive paid maternity leave at a full-time rate of pay. It is noted there is no minimum full-time service period required to be eligible for full-time pay under the Act, as the rate of pay is what would be paid on full pay if the employee was granted leave on account of illness.¹⁶⁶

Changes in an employee's working hours – for any reason – is usually dealt with through agency-level policy, based on the agency's operational need and budget (including Average Staffing Level (ASL) limits) balanced with the personal needs of the employee through a flexible working arrangement request. Employees engaged on a part-time basis are likely to remain on part-time hours unless their job changes or they move to a different role. Most employees, however, are engaged on a full-time basis and can move between full-time and part-time hours through a flexible working arrangement.

Stakeholder feedback did not point to a consistent preferred approach for dealing with the issue. Many submissions commented on the issue, with suggestions ranging from not allowing pregnant employees to increase their working hours, to the maintenance of each agency's ability to retain flexibility to manage the issue, through to automatically moving all part-time employees on parental leave to full-time hours.

The Review does not recommend that part-time employees preparing to proceed on parental and pregnancy-related leave should routinely be able to convert to full-time duties simply for the duration of the leave. In that context, a full-time employee on an approved part-time arrangement should not be seeking an early cessation of the arrangement simply to access paid parental and pregnancy leave based on full-time hours.

In all other respects, agencies may continue to make a decision to change the ordinary hours in agreement with employees where there are reasonable business needs (balanced against the rights of employees to request flexible work arrangements under the NES), existing flexible work arrangements are expiring prior to the expected date of delivery, or other circumstances arise such that it is considered moving from part-time arrangements to full-time arrangements in appropriate circumstance.

Recommendation 11: *Support agencies to establish practices so part-time flexible work arrangements are not ceased early simply for leave to be paid based on full-time hours.*

- 11.1 Guidance or policy should support the intention that employees on a part-time flexible work arrangement about to commence parental and pregnancy-related leave do not seek to cease the arrangement early simply to access paid leave based on full-time hours.

¹⁶⁶ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 6(5).

- 11.2 Where there are reasonable business needs (balanced against the rights of employees to request flexible work arrangements under the NES), or an existing flexible work arrangement is expiring prior to the expected date of delivery, or other appropriate circumstance for moving from part-time to full-time hours prior to commencing leave, agencies may make a decision to change ordinary hours in agreement with an employee.

Future paid maternity leave

There is no requirement under the Act for an employee to return to work following a period of maternity leave in order to be eligible for a subsequent period of maternity leave.

When a pregnant employee commences paid maternity leave, they are paid at their rate of they would have received if granted leave on full pay on account of illness.¹⁶⁷ This means for employees who work part-time after returning from leave before commencing leave for a subsequent pregnancy, the rate of pay will be their part-time rate unless they change their working hours before commencing maternity leave.

Knowledge of entitlements

A number of submissions highlighted that employees are unaware of how taking parental leave can interact and affect the other leave and entitlements outlined above. Individuals who submitted to the Review expressed frustration at a lack of comprehensive information provided to them by their agency prior to commencing parental leave. Employees were often only made aware of the impact parental leave had on other entitlements after having returned from leave.

“I think the most difficult part I found when applying was around who to contact, what processes to follow and what resources were available to guide me through the process. I also received a lot of conflicting advice which was frustrating.” – Individual submission¹⁶⁸

Further to this, many submissions noted how applying for leave can be confusing in some agencies with no information provided on how other leave entitlements can be used to optimise the paid leave available to them.

Submissions also reported a misunderstanding of stillbirth entitlements under the Act or that the language of the Act was not clear on first reading that it applied to stillbirths. The Act currently provides full entitlements when a pregnancy ends from 20 weeks gestation onwards, including in cases of stillbirth.¹⁶⁹ Pregnancy loss is discussed in Chapter 4.

Significant improvements could be made in how agencies share information with future parents on their leave and entitlements. A number of submissions by individuals reported their agency provided incorrect information or they were required to follow up multiple times to be provided with relevant advice regarding parental leave.

“I have had incorrect information given to me on multiple occasions and it is quite frustrating when I am not in a position to attend the workplace and get the answers for myself.” – Individual submission¹⁷⁰

Submissions noted that employees on parental leave applying for loans sometimes had difficulties with seeking a letter of employment from their agency to confirm their ongoing employment. Parental leave is ‘job protected’ leave under both the Act and the Fair Work Act, and employees are entitled to their position, or a similar position in status and pay, on their return to work. The Review

¹⁶⁷ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 6(5).

¹⁶⁸ Submission 9.

¹⁶⁹ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), subsection 3(1).

¹⁷⁰ Submission 8.

considers agencies should be encouraged to develop a streamlined process for actioning such requests from employees who are on leave.

Recommendation 12: Improve agency communication to employees about *Parental Leave* policies

- 12.1 Agencies are to make available a policy guide that is comprehensive and easily accessible about the *Parental Leave* entitlements available in the agency, including how these interact with the Australian Government Paid Parental Leave scheme administered by Services Australia. Timely and accurate responses must be provided to *Parental Leave* queries from employees.
- 12.2 Agencies are to ensure managers understand their role in supporting employees who are pregnant or on *Parental Leave*, including with regard to transitioning to parental leave, keeping in touch days, transitioning back to work, flexible working arrangements on return, and support for breastfeeding.
- 12.3 Employees on *Parental Leave* are to be provided with employment verification or similar documents if requested, for example to confirm ongoing employment and salary to financial institutions.

Access to Fair Work Act entitlements

The Fair Work Act and Paid Parental Leave Act provide further entitlements to pregnant employees and those on parental leave which are available in addition to entitlements under the Act.

To reduce administrative burden and streamline entitlements with related legislation, stakeholder feedback supported clarifying that employees entitled to leave under the Act are eligible for all unpaid parental leave and related entitlements under the Fair Work Act.¹⁷¹ These can be claimed in conjunction with any paid entitlements under the Act or an agency's enterprise agreement.¹⁷²

The Act already contains a precedent, with section 8 clarifying that employees on unpaid leave are entitled to the return to work guarantee under the Fair Work Act.¹⁷³ A number of the entitlements which apply to employees eligible for unpaid parental leave under the Fair Work Act are discussed below.

- **Keeping in Touch Days:** available under the Fair Work Act and the Paid Parental Leave Act, Keeping in Touch days provide up to 10 days of paid work while on either unpaid parental leave or Parental Leave Pay (or both) without comprising eligibility to entitlements.¹⁷⁴
 - Current practice is to provide leave under the Act in one continuous block which generally cannot be paused. Submissions indicated this has limited employee access to Keeping in Touch Days while on paid leave.
 - It is unclear whether Keeping in Touch Days can be used during paid leave. A revised Act should clarify that employees are entitled to access these days, as this helps maintain connection with the workplace. This will also reduce administrative burden on agencies trying to manage entitlements under three sets of rules.
- **Unpaid Special Maternity Leave:** a pregnant employee may access unpaid special maternity leave if they are unfit for work due to a pregnancy-related illness, or because the pregnancy ends otherwise than by the birth of a living child after 12 weeks' gestation and before 20 weeks' gestation.¹⁷⁵

¹⁷¹ Fair Work Act 2009, part 2-2, division 5.

¹⁷² Fair Work Act 2009, section 97.

¹⁷³ Maternity Leave (Commonwealth Employees) Act 1973, section 8; Fair Work Act 2009, section 84.

¹⁷⁴ Paid Parental Leave Act 2010, section 50; Fair Work Act 2009, section 79A.

¹⁷⁵ Fair Work Act 2009, section 80.

- **Extending unpaid parental leave:** eligible employees on unpaid parental leave may request up to an additional 12 months' leave where that leave has not been used by their partner.¹⁷⁶

Flexibility in taking leave is discussed further in Chapter 7.

Recommendation 13: Employee access to Fair Work Act Parental Leave entitlements

- 13.1 Employees entitled to paid or unpaid leave under the Act are to have access to the Fair Work Act's Parental Leave-related entitlements, including Unpaid Special Maternity Leave, Keeping in Touch days, extending unpaid Parental Leave, Flexible Unpaid Parental Leave, paid No Safe Job leave, right to request a return to work when a child is hospitalised, and unpaid pre-adoption leave. This includes any future additions or adjustments made to the Fair Work Act or the National Employment Standards (NES).

Access to Paid Parental Leave Scheme entitlements

Claiming Parental Leave Pay

Under the Paid Parental Leave Act, generally once an employee returns to work they are no longer eligible to further payments under the scheme, except for Flexible Parental Leave Pay that has not yet been claimed. While there are exceptions to this, if an employee chooses to claim the payments it is important to consider the timing of this when planning parental leave.

While Parental Leave Pay can be taken at the same time as any form of employer paid leave, Dad and Partner Pay cannot be.¹⁷⁷ To be eligible for Dad and Partner Pay an employee must not be taking paid leave during the same period. It is therefore important agencies recognise that in addition to entitlements to paid leave, an employee may request up to two weeks of unpaid leave during their child's first year in order to claim Dad and Partner Pay, regardless of whether they have paid leave available.

Recommendation 14: Facilitate access to the Government's Paid Parental leave scheme for parents

- 14.1 Agencies should support employees who wish to make a claim under the Australian Government Paid Parental Leave Scheme administered by Services Australia, or to meet other future Scheme requirements.

¹⁷⁶ Fair Work Act 2009, section 76.

¹⁷⁷ Paid Parental Leave Act 2010, section 115CM, 115EM.

Chapter 6 - Superannuation

Superannuation entitlements and the chequered approach to payment of superannuation on maternity and parental leave across the APS was raised in close to half of the submissions received by the Review.

The nature of superannuation is complex but has a very real outcome on retirement savings for individuals and families. The superannuation gap in Australia between men and women exists at nearly every age group¹⁷⁸ and results in women having a balance of 42 per cent less than that of men's at retirement age¹⁷⁹, with unpaid superannuation on parental leave a contributing factor.¹⁸⁰

The superannuation gap has flow-on effects for the retirement gender pay gap and is detrimental to women's economic equality. While the APS pays superannuation at a higher rate than most employers in Australia, how it is paid can depend on fund type, payment calculation, and whether a person is on paid or unpaid parental leave.

This chapter outlines the research on the superannuation gender gap and explores current inconsistencies in superannuation payments across the APS on parental leave, with recommendations on how it could be amended to create a fairer system encouraging mobility and retention across the APS.

The superannuation gap

Superannuation is designed to provide financial support to people in their retirement. Generally this is through employers paying a guaranteed percentage of earnings into a designated account for accumulative superannuation funds.¹⁸¹

However, defined benefit schemes are still operating for some employees in the APS who joined before 2005 (the Commonwealth Superannuation Scheme and Public Sector Superannuation Scheme), which require a combination of employer and employee contributions. In these schemes, the amount received at retirement is not exclusively based on contributions and investment earnings.¹⁸²

For accumulative funds (e.g. the Public Sector Superannuation Accumulation Plan), contributions increase as an employee's income increases and, as the name suggests, accumulate over time. Typically, the accumulative model assumes a continuous paid work history for a sufficient level of savings to accrue.¹⁸³ Any time out of the workforce, and some unpaid leave, results in no employer paid contributions, which combined with lower earnings, results in a lower accumulated balance at retirement compared with an employee who worked full-time without career breaks.

"The current system ties superannuation to paid work and fails to account for women's workplace experience, including their likelihood of taking extended periods of unpaid leave to care for children, and their likelihood to work reduced hours and in precarious employment." – CPSU submission¹⁸⁴

¹⁷⁸ The Treasury, [Retirement Income Review Final Report July 2020](#), The Treasury, Australian Government, 2020.

¹⁷⁹ A Crabb, 'Men at Work: Australia's Parenthood Trap', *Quarterly Essay*, 2019, 75:1-73.

¹⁸⁰ KPMG, [The Gender Superannuation Gap- Addressing the options](#), KPMG, 2021.

¹⁸¹ *The Superannuation Guarantee (Administration) Act 1992* (Cth).

¹⁸² J Mace, [What are defined benefit super funds?](#), SuperGuide website, 2021, accessed 22 February 2022.

¹⁸³ Workplace Gender Equality Agency (WGEA), [Women's economic security in retirement: Insight paper](#), WGEA, Australian Government, 2020.

¹⁸⁴ Submission 203.

The Treasury Retirement Income Review found that the main driver of the superannuation gap at retirement was the gap between men and women’s working-life earnings, reflecting women’s accumulated economic disadvantages.¹⁸⁵ The gap between men and women’s working-life earnings occurs for a number of reasons, including work in lower paid roles and industries, increased likelihood of part-time or casual employment, taking career breaks to care for others, discrimination and harassment in the workforce, and family and domestic violence.¹⁸⁶ When a number of these factors occur throughout a working life, as they often do for women with children, the lower earnings from each accumulate to exacerbate the superannuation gap at retirement.¹⁸⁷

The current situation in the APS

APS agencies pay superannuation on the paid leave component of maternity leave including what is provided under the Act and any additional paid leave provided under enterprise agreements.¹⁸⁸ Under the Act, maternity leave is to be paid as if an employee was granted pay for illness and therefore includes the payment of superannuation contribution.¹⁸⁹ The exception is when an enterprise agreement provides an administrative arrangement for the Act’s 12 weeks’ leave on full pay to be spread over 24 weeks at half pay. In this circumstance, superannuation is only payable for the first 12 weeks. For paid parental leave provisions in enterprise agreements, APS agencies usually pay superannuation on the entire paid leave component, whether at full pay or half pay.¹⁹⁰

Agency policies regarding payment of superannuation on the unpaid component on maternity leave are inconsistent. Australian Public Service Commission (APSC) data indicates that a majority (79%) of APS enterprise agreements allow for payment of employer superannuation on unpaid maternity and parental leave.¹⁹¹ However, this may depend on the relevant superannuation scheme (defined benefit or accumulation type) and/or salary calculation method, i.e. fortnightly contribution salary (FCS)¹⁹² or ordinary time earnings (OTE)¹⁹³. Additionally, many of these agency enterprise agreements provide for payment of superannuation during a finite window of unpaid parental-related leave, for example up to 12 or 24 months.¹⁹⁴ It is noted that the Trust Deed for the Public Sector Superannuation Accumulation Plan requires employer contributions on a ‘pay day’ for FCS members for all periods of paid and unpaid maternity and parental leave.¹⁹⁵

“For the department, this issue [superannuation] is compounded during machinery of government (MoG) changes, where the inconsistent approaches cause issues and result in some staff receiving super and others not. This creates the need for the agency to navigate the unrealised expectations of staff whose conditions may have changed due to a MoG. Having a similar approach across the board would simplify this process and remove a great deal of angst for staff.” – Agency submission¹⁹⁶

A number of submissions to the Review raised the issue of inconsistent superannuation calculation methodologies and payment, and advocated for a uniform approach that does not disadvantage parents because of the fund they are in or the calculation method used by their agency or fund.

¹⁸⁵ The Treasury, [Retirement Income Review Final Report July 2020](#), p.257.

¹⁸⁶ The Treasury, [Retirement Income Review Final Report July 2020](#), p.258.

¹⁸⁷ KPMG, [The Gender Superannuation Gap- Addressing the options](#), KPMG, 2021.

¹⁸⁸ Internal APSC data as at February 2022.

¹⁸⁹ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 6(5); Internal APSC data as at February 2022.

¹⁹⁰ Internal APSC data as at February 2022.

¹⁹¹ Internal APSC data as at February 2022.

¹⁹² FSC is based on the birthday review of salary and relevant allowances.

¹⁹³ OTE is whatever salary-related payment is made that fortnight, excluding overtime and expense-related payments.

¹⁹⁴ Internal APSC data as at February 2022.

¹⁹⁵ *Superannuation (PSSAP) Trust Deed*, Rule 2.2.1 and definition of **pay day** in Rule 1.2.1

¹⁹⁶ Submission 227.

What can be done?

Diversity in the operation of different superannuation schemes creates confusion and can lead employees to making a decision to change superannuation fund that may be beneficial to them in terms of contributions while working full time, but could end up impacting their contributions during parental leave. It can also impact recruitment and retention for agencies that do not offer employer superannuation on unpaid parental leave under their enterprise agreement.

With the introduction of stapled superannuation funds in 2021, many future employees could join the APS with a stapled fund that is not administered by the Commonwealth Superannuation Corporation (**CSC**), with contributions likely to be calculated with OTE not FSC. This could create more inequity within agencies and across the APS as the number of employees whose entitlements are calculated with OTE rather than FSC increases over time.

The Review recommends that a future system of parental leave in the APS should ensure equity across the board in terms of contributions regardless of fund or contribution type. The Review notes this may be impacted by rules governing different funds and could require further work in the future to achieve, but it is a necessary step to ensure greater women's economic equality by contributing to reducing the gender pay gap, and improve recruitment and retention across the APS.

Recommendation 15: Superannuation be paid on all forms of *Parental Leave*

- 15.1 The employer component of superannuation is to be paid on all forms of paid or unpaid pregnancy and parental leave, regardless of superannuation scheme type or contribution method, to contribute to reducing the gender pay gap and improve women's long term economic equality.

Chapter 7 – Flexibility and ease of administration

This chapter examines how access to paid leave under the Act is inflexible, particularly when compared to flexibility provided in agencies' enterprise agreements for supplementary parental-related entitlements. Recommendations are made regarding the flexibilities a new Act could provide.

Current issues with administration

Over 80 submissions to the Review raised the issue of flexibility, particularly regarding who is entitled to leave, and when and how leave can be accessed.

Submissions generally observed that the Act is inflexible in its current form and limits employees' access to adequate leave to support their families. Agencies also noted the increased administrative burden resulting from this lack of flexibility. Agencies also have to help employees understand which entitlements are derived from the Act and are inflexible, and additional elements provided in agency enterprise agreements which may be more flexible but can differ between agencies.

"The Act's focus on prescription and process does not lend itself to good outcomes for employees or agencies. Most of the concern in application is on ensuring tick boxes are met, rather than focussing on the wellbeing of the individuals or how they wish to approach leave related to birth and child caring." – Agency submission¹⁹⁷

Timing of leave – other parents

As the Act does not provide paid leave for parents who are not pregnant, rules around when these parents may commence leave are determined by individual agency enterprise agreements.

While requirements vary between enterprise agreements, submissions to the Review indicated that some policies may be overly prescriptive on the timing of leave. Flexibility in timing is also critical in circumstances of premature birth or other neonatal health concerns. Policy restrictions may create further stress and financial burden in what is already a difficult time for families.

"My workplace policy dictated that my parental leave as secondary carer (usually the fathers) must commence from the date of birth of the child. However, given I only received four weeks, this was not as useful to me because for the entirety of that time, my baby was in hospital unable to be brought home...Were I given that choice, I would not have commenced my parental leave until my baby was discharged from hospital after birth." – Individual submission¹⁹⁸

How leave may be taken

Maternity leave is generally provided in a single block of 12 weeks, with no break in this period. Submissions to the Review indicated that this practice limits choice for families taking leave in a way that suits their needs or facilitates a gradual return to work.

The current approach does not align with flexibility existing under the Fair Work Act and the Paid Parental Leave scheme. The Fair Work Act allows for up to 30 flexible unpaid parental leave days which can be taken one day at a time or in blocks within 24 months of the birth or adoption of a child. Similarly, up to 30 flexible parental leave days are available under the Paid Parental Leave scheme. For further information see Figure 2.3 in Chapter 2.

Both the Fair Work Act and Paid Parental Leave scheme also provide for up to 10 paid Keeping in Touch days, allowing employees to remain involved with their workplace without losing parental

¹⁹⁷ Submission 227.

¹⁹⁸ Submission 52.

leave eligibility. However as discussed in Chapter 4, current practice in administering entitlements under the Act is that paid maternity leave generally cannot be paused, so employees cannot access Keeping in Touch days during this time.¹⁹⁹

Agency submissions illustrated the administrative complexity resulting from this inconsistency. The example below discusses a situation where an employee sought to attend a specialised training course that was rarely available, but was scheduled during the paid component of their maternity leave. As there is no provision within the Act to break up leave and attend work, a more complex solution was necessary.

“...instead, the agency ended the maternity leave to allow [employee] to attend the scheduled training and then provided paid miscellaneous leave for the remainder of what would have been the paid maternity leave period. The employee had technically then relinquished the rest of her maternity leave under the Act, so the agency provided miscellaneous leave without pay for the duration of her desired absence and provided written assurance of the right to return to her role after leave. Being able to break up the original maternity leave with keeping in touch days would have made this much simpler to process for the agency.” – Agency submission²⁰⁰

Flexible Parental leave

Submissions to the Review particularly supported flexibility in how leave entitlements may be used. They pointed to employers increasingly offering leave which may be accessed within an extended period, including in days or blocks, or to facilitate a part-time working arrangement. Submissions indicated that flexibility is a key element of a competitive parental leave policy, with flow-on effects for employee attraction and retention.

A more flexible approach would bring Commonwealth employment into line with existing practice in the private sector and other public sector jurisdictions. Best practice private sector employers are increasingly providing flexibility for parents in how and when leave can be taken.²⁰¹ As noted above, this may include using leave in single days, blocks, or in combination with paid working days to facilitate part-time work.

A 2020 study showed that leading practice organisations are also extending the period of time in which parental leave entitlements may be taken, generally from 12 months to approximately 18-24 months.²⁰² Deloitte has allowed leave to be taken flexibly within 3 years since 2019.²⁰³

Flexible parental leave also allows employees to use their leave to facilitate part-time working arrangements while earning a full time salary. This allows for a higher employer superannuation contribution than if an employee were simply working part-time, helping close the retirement superannuation gap in the future. This approach would also help incentivise men to take up part-time working hours upon return from parental leave.

Flexibility is also offered in other state and territory public service policies. In the NSW public service, parental leave may be taken flexibly within 12 months of the child's birth, adoption, or surrogacy to meet operational requirements and the needs of the employee's family, as agreed between the employer and employee.²⁰⁴ In the Victorian Public Service, parental leave does not need to be taken

¹⁹⁹ *Maternity Leave (Commonwealth Employees) Act 1973* (Cth), section 7A.

²⁰⁰ Submission 207.

²⁰¹ Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), p.87.

²⁰² Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#), p.87.

²⁰³ Deloitte, [A new era in parental leave for Deloitte employees](#) [media release], Deloitte, 3 March 2019, accessed 22 February 2022.

²⁰⁴ New South Wales Public Service Commission (NSW PSC), [Paid parental leave](#), NSW PSC website, n.d., accessed 4 March 2022.

in a single continuous period, and may be taken at any time within the first 52 weeks of the child's birth or adoption based on agreement between the employer and employee.²⁰⁵

The Review acknowledges that the introduction of flexible parental leave entitlements may present some initial challenges for agency operational requirements. However, in terms of ease of administration, several agency submissions supported increased flexibility to reduce current burden resulting from the prescriptive nature of the Act.

The Diversity Council of Australia notes that 'the best way to reduce unnecessary prescription, process and complexity is to create flexible parental leave policies. When a policy enables flexibility there is less need to be overly prescriptive about rules and anticipating every scenario that could arise.'²⁰⁶ Additionally, providing flexible work practices is linked to improved organisational productivity, enhanced employee attraction and retention, and improved employee wellbeing.²⁰⁷

"Flexibility to break up paid and unpaid portions of leave would be useful to facilitate an employee's ongoing access to workplace opportunities, keeping in touch and a graduated transition back to work, at no additional cost." – Agency submission²⁰⁸

Flexible parental leave policies also promote gender equality. One of the five priority areas in the Women's Economic Security Statement 2020 is greater choice and flexibility for families to manage work and care.²⁰⁹ In facilitating this, flexibility measures were introduced into the Paid Parental Leave scheme as detailed above.

Submissions to the Review indicated that increasing flexibility in how employees may use parental leave entitlements will bring the APS into step with other large employers, and better meet the needs of families.

Recommendation 16: Allow *Parental Leave* to be taken flexibly

- 16.1 *Parental Leave* may be used flexibly within 24 months after the date of birth or placement of the child, including in single days, blocks, or to facilitate a part-time working arrangement.
- 16.2 Parents may take *Parental Leave* concurrently or at separate times within this period.

Half pay option

The Act does not provide for maternity leave to be taken at half pay. Most agency enterprise agreements allow employees to elect for an administrative arrangement to spread the Act's 12 weeks' full pay over an equal period of unpaid maternity leave at a half their normal salary.²¹⁰ As this is an administrative arrangement only, the second period of leave is still treated as leave without pay and therefore does not count as service.

Whether any period beyond the first 12 weeks of leave counts for service depends on the agency's enterprise agreement term or policy, resulting in inconsistent outcomes for employees across the APS. In contrast, where agencies offer other types of leave at half pay such as annual leave, most count the full period of leave as service.²¹¹ Given the length of paid maternity leave, this inconsistency may significantly disadvantage mothers in accruing further leave entitlements.

²⁰⁵ VG, [Victorian Public Service Enterprise Agreement 2020](#), p.109.

²⁰⁶ Diversity Council Australia (DCA), [DCA Submission on the Maternity Leave \(Commonwealth Employees\) Act 1973 \[PDF 374KB\]](#), DCA, 8 February 2022, accessed 4 March 2022.

²⁰⁷ WGEA, [Flexible working is good for business: The Business Case](#), WGEA, Australian Government, 2019,

²⁰⁸ Submission 207.

²⁰⁹ AG, [Women's Economic Security Statement 2020](#).

²¹⁰ Internal APSC data as at February 2022.

²¹¹ Internal APSC data as at February 2022.

Submissions supported a revised Act providing for leave to be taken at half pay. This would recognise the full period of paid leave as service, provide consistency with how other leave types operate, and contribute to reducing the financial impact of taking Parental leave. Administration is also simplified by operating within a consistent approach.

Recommendation 17: *Parental Leave* may be taken at half pay

- 17.1 *Parental Leave* may be taken at half pay, on the basis that the leave period at half pay is twice as long. All *Parental Leave* taken at half pay is to count as service on the same basis as other paid leave.

Central ASL Pool

Employees absent on leave create gaps in the workplace. Managers generally work to a budgeted staffing limit, which includes the cost of their staff on leave. In the APS this budgeted limit is known as an Average Staffing Level (**ASL**). Managers find greater flexibility in being able to temporarily backfill the role of an employee on maternity leave where the agency manages the ASL impact via a central pool.

With the Review strongly encouraging all parents to have equal access to *Parental Leave*, the impact of more staff being absent could be managed if all *Parental Leave* ASL was held within a central pool. This would encourage managers to approve *Parental Leave* for fathers and other parents if they have greater flexibility to temporarily backfill the role during the absence. This approach will also assist with normalising the practice of fathers and all parents seeking to take *Parental Leave* and being supported to do so in the local workplace.

Recommendation 18: Agencies encouraged to manage their budgeted Average Staffing Level (ASL) in central pool for all employees on parental-related leave

- 18.1 To ease the budget impact on local work teams and allow for temporary backfilling of roles, agencies to consider pooling the ASL for all employees on parental and pregnancy-related leave if not already in place.

Chapter 8 – Coverage and qualifying service

This chapter examines the Act's complexities in defining agencies and office holders covered, with a recommendation made for a more simplified framework. The employment category of employees is also examined, as is the continued relevance of a 12 month qualifying service period to access paid leave.

Commonwealth agencies covered

The Act applies to Commonwealth employees where employed under the *Public Service Act 1999* (**PS Act**), as well as a number of additional agencies and some office holders as defined in the Act and the relevant regulations.²¹²

The Act does not apply to Members of Parliament, Ministers of State, and judges. Members of the Defence Force, employees engaged locally for employment outside of Australia only, and employees remunerated by fees, allowances or commission are also not covered.²¹³

Determining coverage under the Act can be complex and often time consuming. The relevant sections of the Act are difficult to interpret and require readers to consult criteria and lists in both the Act and the Regulations.²¹⁴

It is unclear why some Commonwealth agencies are captured and others are not. Employees in around 135 Commonwealth agencies are currently covered by the Act, as well as staff employed under the *Members of Parliament (Staff) Act 1984* (**MoPS Act**) and office holders where not remunerated by fees, allowances or commissions.

Table 8.1 – Coverage under the Act

| Maternity Leave (Commonwealth Employees) Act 1973 | Number of agencies |
|--|---|
| Paragraph 5(1)(a) – APS agencies | 111 |
| Paragraph 5(1)(b) - prescribed authorities* and those employed by the Commonwealth** <i>Note: under subsection 5(2) of the Act, AFP members and persons who are office holders are deemed to be employed by the Commonwealth for the purposes of the Act.</i> | 16 – bodies corporate 3 – unincorporated bodies MoPS Act AFP Office holders |
| Section 5A – Parliamentary Departments | 4 |

* specified in *Maternity Leave (Commonwealth Employees) Regulations 2017*, regulations 6-7

** specified in *Maternity Leave (Commonwealth Employees) Regulations 2017*, paragraph 9(d) and Schedule 1

Simplifying coverage under the Act will provide greater clarity for agencies and employees in understanding who the Act applies to.

²¹² *Maternity Leave (Commonwealth Employees) Act 1973*, subsection 3(1), 5; *Maternity Leave (Commonwealth Employees) Regulations 2017*, regulations 6-7.

²¹³ *Maternity Leave (Commonwealth Employees) Act 1973*, subsection 5(3).

²¹⁴ *Maternity Leave (Commonwealth Employees) Regulations 2017*.

Recommendation 19: Simplify coverage under the Act

- 19.1 Coverage under the Act should be simplified for clarity and ease of administration. The Act is to apply to:
- a. employees under the *Public Service Act 1999*;
 - b. employees under the *Parliamentary Service Act 1999*;
 - c. employees under the *Members of Parliament (Staff) Act 1984*;
 - d. Australian Federal Police (**AFP**) members and holders of a Commonwealth office where not remunerated by fees, allowances or commissions; and
 - e. employees of other Commonwealth corporate and non-corporate entities, as defined in the *Public Governance, Performance and Accountability Act 2013*, unless such entities choose to not be covered.
- 19.2 The Act would not apply to Commonwealth companies unless staffing is under the *Public Service Act 1999*.

Employment category

Employees in the Commonwealth are generally engaged on an ongoing (i.e. permanent), non-ongoing (i.e. temporary) or irregular/intermittent (i.e. casual) basis.

Ongoing employees

Ongoing employees are eligible for all entitlements under the Act, regardless of whether the hours worked are full-time or part-time. The qualifying service requirement applies for paid maternity leave.

Non-ongoing employees

Non-ongoing employees, other than casual employees, are eligible for all entitlements under the Act, until the date the employee's engagement ceases. The eligibility applies regardless of whether the hours worked are full-time or part-time. The qualifying service requirement applies for paid maternity leave.

Casual employees

The Act expressly states that it does not apply to employees who are not entitled to sick leave with pay.²¹⁵ Casual employees do not accrue paid sick leave, so are not covered by the Act. Casual employees are required to refer to the National Employment Standards (**NES**) for parental leave coverage.

Under the NES, it is noted casual employees are eligible for up to 12 months of unpaid parental leave with a right to request an additional 12 months of leave.

To access this leave, the casual employee must have worked for their employer on a regular and systematic basis for at least 12 months and have a reasonable expectation of continuing work with the employer on a regular and systematic basis.²¹⁶

Additionally, casual conversion arrangements in the Fair Work Act allow casual employees to convert to permanent employment in some circumstances.²¹⁷ Once in ongoing employment in the Commonwealth, the employee becomes eligible for all entitlements under the Act.

²¹⁵ *Maternity Leave (Commonwealth Employees) Act 1973*, subsection 5(3)(e).

²¹⁶ *Fair Work Act 2009* (Cth), subsection 67(2), section 76.

²¹⁷ Australian Public Service Commission (APSC), [Circular 2021/03: Fair Work Act changes to Casual employment](#), APSC website, 2021, accessed 4 March 2022.

The Review acknowledges the issue regarding casuals is evolving and may require further work in the future. At this point, the Review is not recommending the extension of coverage in the Act to casual employees in the Commonwealth given the availability of parental leave to casuals in the NES and the Fair Work Act's casual conversion provisions.

Qualifying service period

To be eligible for the paid component of maternity leave under the Act, an employee must have 12 months of continuous Commonwealth service. The first 12 weeks of maternity leave may count towards this qualifying period, but leave will only be paid on the balance of the 12 weeks from the date the employee reaches 12 months of service.²¹⁸

Service must be strictly continuous, with no breaks between ceasing and commencing any employment covered by the Act. Consequently, if an APS employee has a break in service of one week or even one working day before moving to another Commonwealth employer, any existing entitlement to paid maternity leave will be lost.

Prior service within state or territory government bodies is not recognised for the purposes of continuous service, with the exception of employment within the ACT public service or that of a territory other than the Northern Territory.²¹⁹

Calculating whether an employee has met the qualifying service period for paid maternity leave can be complex, creating further administrative burden and cost for agencies. Some submissions to the Review shared experiences of not being able to access paid maternity leave due to the operation of the qualifying service period, which caused stress and health risks including the financial pressure to work closer to the child's expected date of birth and return to work earlier than intended after giving birth because of the lack of access to paid leave.

Agency and individual submissions highlighted how this issue is exacerbated by lengthy recruitment and security vetting processes for new recruits to the APS. The 2019 *Independent Review of the Australian Public Service* notes a pilot study using a sample of advertised APS positions over two years indicated that the median time to start (from job advertisement to commencement) is 144 days, ranging from 37 to 235 days between agencies.²²⁰

"The recruitment which saw me join the public service ran for a period of 5 months in total, and by the time my offer was received, and commencement occurred, I was unexpectedly pregnant. I had 7 years' service with my private sector employer and for the first time in my adult life, became financially dependent on others and was required to have unpaid leave to bond with my child.

The lack of employer financial support was tough and made me question joining the public service - something that as a career I had aspired to, and continue to be inspired by every day. I faced significant mental health challenges directly due to the financial implications of the period of service requirements, and had a significant reduction in income (including superannuation) which had flow on effects for myself and my husband for years." – Individual submission²²¹

Submissions also raised the issue of service in the Australian Defence Force (ADF) not being recognised for the purposes of maternity leave qualifying service when members leave the ADF to take up employment with a Commonwealth entity. In contrast, previous ADF service is recognised for long service leave purposes under the Long Service Leave Act.

²¹⁸ *Maternity Leave (Commonwealth Employees) Act 1973*, subsection 6(4), 7B(2).

²¹⁹ *Maternity Leave (Commonwealth Employees) Act 1973*, subsection 5(1)(b), 6(4A).

²²⁰ Department of the Prime Minister and Cabinet (PM&C), ['Our Public Service, Our Future. Independent Review of the Australian Public Service'](#), PM&C, Australian Government, 2019, p.213-14.

²²¹ Submission 189.

Attracting talent

Submissions considered that the current 12 month qualifying service period may limit the ability of the APS and the Commonwealth more broadly to attract and recruit talent.

Best practice parental leave policies from private sector employers contain no minimum service period for permanent employees to access entitlements, or require only that employees have completed their probation period before taking paid parental leave.²²²

The 2022-24 eligibility criteria for the WGEA Employer of Choice for Gender Equality citation also requires that an employer's parental leave policy should not require an eligibility period for employees to access employer-funded paid parental leave.²²³

The current qualifying service period may discourage employees who are considering having children from joining the APS, particularly if their current employer offers paid parental leave. Reducing this service period is a way the APS can continue to attract and retain talent in a highly competitive labour market.

"The requirement for 12 months tenure before being eligible for paid parental leave works against the APS's interests, by discouraging top talent from moving to the APS if they are even considering having children." – Individual submission²²⁴

"This qualifying period might have a significant impact on the APS' ability to attract quality candidates to join and while it may serve as a way to retain staff for 12 months, it may well detract quality, motivated talent" – Agency submission²²⁵

"...for a worker in the private sector to enter the APS, there can be a significant period between applying for a position and commencing (perhaps owing to recruitment or security clearance processes). In combination with the 12 months of service that must be performed following commencement, there could be a period of 18 months or two years between a worker successfully applying for an APS position and being eligible for maternity leave. Consideration should be given to whether the qualifying period discourages participation in the APS from the private sector and else[where]." – Agency submission²²⁶

Women's economic equality

The issue of career mobility also has implications for women's economic equality. Women who may be considering having children may not pursue career opportunities in order to ensure they will qualify for parental leave.²²⁷

"The practice of requiring 12 months service before entitlements accrue has a very real impact on women of childbearing age, whether they are pregnant, contemplating pregnancy, or otherwise, from considering joining the public service, or taking offers made – or, if they do, places significant financial burden on them and their families. It slows women's career progression and prevents the Commonwealth from attracting a wider population of candidates." – Individual submission²²⁸

²²² Examples include Accenture, AustralianSuper, Bank of Queensland, Ernst & Young, King & Wood Mallesons, KPMG, Origin Energy, PwC, and Suncorp; Fitzsimmons et al., [Employer of Choice for Gender Equality: Leading practices in strategy, policy and implementation](#).

²²³ Workplace Gender Equality Agency (WGEA), [WGEA Employer of Choice for Gender Equality \(EOCHE\): 2022-24 Guide to EOCGE Citation](#), WGEA, Australian Government, 2022.

²²⁴ Submission 114.

²²⁵ Submission 207.

²²⁶ Submission 192.

²²⁷ WGEA, [Submission to the Review of the Maternity Leave \(Commonwealth Employees\) Act 1973 \[PDF 246KB\]](#), p.5.

²²⁸ Submission 189.

Additionally, while estimates vary, studies suggest that approximately one quarter of pregnancies in Australia are unplanned.²²⁹ Parents may also experience fertility challenges or other issues that reduce control of timing or options to plan pregnancy. These employees may be unable to access paid leave despite having the same health and caring needs arising from the pregnancy, and the current structure of entitlements means this financial impact disproportionately affects women.

State /territory public sector

Most state/territory public sectors also require a 12 month qualifying service period, however the Victorian public service only requires employees to have three months of continuous service.²³⁰ The NSW public service requires 40 weeks of continuous service at the time of the child's birth, adoption or surrogacy.²³¹

The interpretation of 'continuous service' under the Act is also inconsistent with the equivalent policy for long service leave eligibility. Periods of service in a state or territory government or authority may be recognised as prior service for the purposes of long service leave in the Commonwealth.²³² However, the same service does not count towards eligibility for paid maternity leave, creating a disincentive for talent to join the APS from other state or territory public sectors.

"I had only accrued seven months continuous service in my current role when I had my first baby. Therefore, I was not entitled to paid maternity leave under the Act even though I had previously been a Commonwealth employee for eight years and a NSW State government employee for three years. In contrast, my eligibility for long service leave was carried over from my State government service." – Individual submission²³³

The SA public sector currently calculates continuous service for the purposes of parental leave on the same basis as effective service for long service leave.²³⁴ Prior APS service may therefore be recognised when determining eligibility for parental leave in the SA public sector, but the equivalent service would not be recognised if an employee sought to move to the APS.

Removing the qualifying service period would strengthen the ability of the APS and the Commonwealth to attract talent from the private sector and other public service bodies. It would also improve ease of administration by dispensing with the need to gain evidence of prior service that may qualify or to performing calculations regarding any relevant service period. The need to maintain a list of prior service entities would also be removed, and would simplify interpretation of the Act.

Recommendation 20: Remove the qualifying service period to access paid leave

- 20.1 Remove the qualifying service period for employees to access any form of paid pregnancy or parental leave under the Act.

²²⁹ A Taft, M Shankar, K Black, D Mazza, S Hussalny and J Lucke, 'Unintended and unwanted pregnancy in Australia: a cross-sectional, national random telephone survey of prevalence and outcomes', *Medical Journal of Australia* 2018, 209(9), p.407-408.

²³⁰ VG, [Victorian Public Service Enterprise Agreement 2020](#), p.110.

²³¹ NSW PSC, [Paid parental leave](#).

²³² *Long Service Leave (Commonwealth Employees) Act 1976* (Cth), section 11.

²³³ Submission 177.

²³⁴ CPSE, [Determination 3.1: Employment conditions - Hours of work, overtime, and leave](#).

Chapter 9 – Language and drafting

Plain language

The Review considered how to draft legislative terms in plain, modern language. It also considered how to reduce unnecessary prescription, process, and complexity in the Act. This chapter considers how this goal may be best achieved.

Many submissions to the Review observed that the Act is overcomplicated and difficult to interpret. It contains long sections and legalistic language that does not align with plain language drafting principles.²³⁵ For example, section 6 of the Act covers five pages and includes 15 subsections. Some important aspects of entitlements, such as the 12-month qualifying period, are not clearly defined. A further area requiring clarity is how the Act interacts with the Fair Work Act, the Paid Parental Leave Act, and other legislation relating to long service leave and superannuation.

“The Act is difficult to interpret, unnecessarily prescriptive, and complex to administer, even for experienced HR practitioners” – Agency submission²³⁶

The Act’s current form makes it unnecessarily complex for agencies and employees to understand entitlements. This creates further stress for employees and increases administrative burden for agencies, who spend time interpreting the Act and dealing with queries relating to its application.

Simplifying the Act’s wording will enable agencies to more easily implement the Act’s provisions with fewer errors, while allowing employees to understand their entitlements more easily. Including an ‘objects’ section will also assist with interpreting the Act, in line with current legislative drafting practice.

Modern language

The Act uses outdated language that is both confusing and out of step with current practice.

For example, the Act uses the term ‘confinement’ to refer to ‘the birth of a child, or other termination of the pregnancy, that occurs not earlier than twenty weeks before the expected date of birth of the child’.²³⁷ Many submissions to the Review commented that this term is inappropriate and sought for its replacement with modern terminology.

Submissions also noted that the use of the word ‘termination’ to describe the end of a pregnancy does not recognise or align with commonly used terms for some of the many ways pregnancies may end, such as miscarriage, stillbirth, or neonatal death.

“[The Act] uses complex, archaic language that does not sensitively recognise pregnancy loss” – Individual submission²³⁸

Any revised Act should be written in a modern language that reflects the role of all employees in work and family life. It should be easy to read, interpret and apply.

“Revised parental leave legislation should incorporate objectives to reflect the legislation’s broad purpose, including to provide financial support and flexibility to all new parents regardless of gender” – CPSU submission²³⁹

²³⁵ Office of Parliamentary Counsel (OPC), ‘[Plain English Manual](#)’, OPC, Australian Government, 2013.

²³⁶ Submission 230.

²³⁷ *Maternity Leave (Commonwealth Employees) Act 1976*, section 3.

²³⁸ Submission 228.

²³⁹ Submission 203.

Recommendation 21: Draft the Act in plain language

- 21.1 The Act be drafted in clear language that allows readers to easily understand entitlements. The Act's wording may be supported by use of notes, tables, and references to other legislation that interacts with the Act.
- 21.2 Outdated terms such as 'confinement' be removed and replaced with modern language that reflects the sensitivities of pregnancy and pregnancy loss.
- 21.3 The Act include an 'objects' section to facilitate interpretation. Recommended objects may include to:
 - a. protect the health and development of pregnant employees and their children;
 - b. facilitate flexibility for parents in balancing caregiving with their work in the Commonwealth; and
 - c. promote inclusion and gender equality.

Inclusive language

The Review received feedback that the Act should support all parents who want and are otherwise eligible to take parental leave. Modern families all look different, and the current Act's assumptions about family structures are inconsistent with many families and households in the 21st century. The Review recommends that the Act's drafting should be inclusive for all families, ensuring entitlements can be accessed by those who need them and that workplace policies reflect community standards.

Australian employers are moving towards parental leave policies that use gender neutral language, recognising changing family structures and that all parents are responsible for the upbringing of children and associated domestic labour.²⁴⁰ Submissions to the Review overwhelmingly called for the Act to facilitate gender neutral parental leave.

Gender neutral language is important for inclusivity.²⁴¹ The *APS Workforce Strategy 2025* highlights that the APS is a diverse workforce and is continuing to build inclusive workplace cultures deep-rooted in respect for all people, including their rights and their gender.²⁴² It is important the Act recognises this diversity, including through the use of gender neutral language.

The *APS Gender Equality Strategy 2021-26* notes that gender identity is one of many identity dimensions that agencies should consider to reduce the impact of compounding disadvantage.²⁴³

The Act's reference to female employees was designed to facilitate maternity leave entitlements for working mothers in the APS. While any employee who is pregnant is eligible for all entitlements under the current Act regardless of their gender identity, a revised Act could make this clear by using more inclusive language.

A revised Act using gender neutral language will continue to provide protections for mothers, while at the same time better reflect the diversity of the APS and more effectively support the many ways in which families raise children.

²⁴⁰ WGEA, [Designing and supporting gender equitable parental leave](#).

²⁴¹ Australian Human Rights Commission (AHRC), [Terminology](#), AHRC website, n.d., accessed 22 February 2022.

²⁴² APSC, [Delivering Tomorrow: APS Workforce Strategy 2025](#), p.22.

²⁴³ Australian Public Service Commission (APSC), [Australian Public Service Gender Equality Strategy 2021-26: Realising the benefits for all](#), APSC, Australian Government 2021, p.20.

Gender equity and recognition of women

The Review acknowledges and recognises that there are varied perspectives and evolving discussions relating to gender neutral language, including whether this is sufficiently inclusive of women.²⁴⁴

The Review received submissions raising concerns that the use of gender neutral language may serve to reduce the visibility of women, and undermine accuracy and clarity of meaning in some publications, particularly relating to healthcare.

It is noted that the inequity resulting from raising children, unpaid caring and domestic work, and the gender and superannuation pay gap disproportionately affects women.²⁴⁵ As discussed in detail throughout this report, parental leave policies and legislation raise issues and have consequences that are inherently gendered.

The Review notes its role is to provide recommendations that deal with conditions of employment, and not healthcare or medical guidance. In this context, terms such as ‘employee’ and ‘pregnant employee’ make a necessary connection with the employment relationship.

Recommendation 22: Draft the Act in inclusive and gender neutral language

- 22.1 The Act be renamed the *Pregnancy and Parental Leave Act*.
- 22.2 The Act be drafted in language appropriate to employment conditions, and is inclusive and gender neutral as appropriate, including the terms:
 - a. *Pregnancy Leave*
 - b. *Parental Leave*
 - c. Pregnant employee
 - d. Parent
 - e. Adoptive parent.

²⁴⁴K Gribble, S Bewley, M Batrick, R Mathisen, S Walker, J Gamble, N Bergman, A Gupta, J Hocking and H Dahlen, ‘Effective Communication About Pregnancy, Birth, Lactation, Breastfeeding and Newborn Care: The Importance of Sexed Language’, *Frontiers in Global Women’s Health*, 2022, doi: 10.3389/fgwh.2022.818856.

²⁴⁵Workplace Gender Equality Agency (WGEA), [The Gender Pay Gap](#), WGEA website, n.d., accessed 22 February 2022.

Chapter 10 – Return to work

Returning to work after parental leave can be a challenging time for many new parents. The Review received numerous submissions citing the difficulties faced by parents returning to work and suggestions about what improvements could be made for the future. While returning to work is not strictly in the scope of the Act, the Review has considered these submissions as well as conducted research on what could be adopted by agencies to assist parents in this process.

“The return to work period is a time of transition for the individual as an employee to return to work, but also as a family to learn new routines.” – Individual submission²⁴⁶

This chapter will outline the key areas that were raised in submissions: breastfeeding; workplace and agency culture; flexible working arrangements; and, having conversations with managers. The recommendations in this chapter are based on best practice and agencies are encouraged to investigate whether they are already compliant and what further work should be considered to best support employee parents.

Breastfeeding

The WHO recommends babies be exclusively breastfed for the first six months of life, with breastfeeding continuing for up to two years or beyond for as long as the mother and child desire.²⁴⁷ In Australia it is unlawful to discriminate against women who are breastfeeding.²⁴⁸ This protection extends to the workplace, where employers that do not provide adequate facilities or breaks to breastfeed could be responsible for both discrimination and be in contravention of work health and safety duties.²⁴⁹

While the Fair Work Act does not contain specific provisions on breastfeeding in the workplace²⁵⁰, best practice employers support breastfeeding employees through providing suitable facilities, such as a private room, a fridge to store breastmilk and space to store a breast pump.²⁵¹ It is also estimated that the economic value of the 42 million litres of breastmilk produced in 2009-10 by Australian mothers was valued at over \$3 billion.²⁵² This unpaid labour equates to approximately 20 hours per week for the first six months of life²⁵³, so it is vital that birth parents returning to work are supported to breastfeed for as long as they choose, not just for the first six months.

“The success or failure of breastfeeding should not be seen solely as the responsibility of the woman. Her ability to breastfeed is very much shaped by the support and the environment in which she lives. There is a broader responsibility of governments and society to support women through policies and programmes in the community.” – Dr Nigel Rollins, endorsed by the Australian Breastfeeding Association²⁵⁴

The Australian Breastfeeding Association (ABA) provides information to employers and employees on managing a return to work while breastfeeding, and they offer accreditation to employers meeting best practice for providing three key elements of support to employees:

²⁴⁶ Submission 126.

²⁴⁷ COAG HC, [Australian National Breastfeeding Strategy: 2019 and Beyond](#), p.14.

²⁴⁸ *Sex Discrimination Act 1984* (Cth), section 7AA.

²⁴⁹ Fair Work Ombudsman (FWO), [Returning to work from parental leave](#), FWO website, n.d., accessed 23 February 2022.

²⁵⁰ COAG HC, [Australian National Breastfeeding Strategy: 2019 and Beyond](#), p.18.

²⁵¹ FWO, [Returning to work from parental leave](#).

²⁵² J P Smith, “‘Lost milk?’: Counting the economic value of breast milk in gross domestic product”, *Journal of Human Lactation : Official Journal of International Lactation Consultant Association*, 2013, 29(4), 537–546 pp540-2.

²⁵³ J P Smith and R Forrester, ‘Maternal time use and nurturing: Analysis of the association between breastfeeding practice and time spent interacting with baby’, *Breastfeeding Medicine*, 2017, 12(5), 269-278.

²⁵⁴ Submission 197.

- time during the working day to breastfeed or express;
- a private, comfortable space to breastfeed or express; and
- a supportive culture from the employer and colleagues.²⁵⁵

A number of submissions were received on breastfeeding in the workplace and the inadequate provision of facilities and support in some agencies, which is consistent with feedback during consultation on the *APS Gender Equality Strategy 2021-26*.²⁵⁶ Provision of facilities and lactation breaks improve job performance, employee retention and the rate of breastfeeding at little cost to the agency.²⁵⁷ The Strategy also encourages agencies to work in line with the *Australian National Breastfeeding Strategy: 2019 and Beyond*, including considering seeking accreditation from the ABA.

Recommendation 23: Paid lactation breaks and access to breastfeeding facilities

- 23.1 Agencies to provide appropriate and flexible paid lactation breaks to breastfeeding employees, with respect to the individual lactation needs of the employee.
- 23.2 Agencies to ensure employees have access to appropriate breastfeeding facilities, which includes appropriate facilities to express, in line with the *APS Gender Equality Strategy 2021-2026*.
- 23.3 Agencies encouraged to seek Breastfeeding Friendly Workplace Accreditation with the Australian Breastfeeding Association.

Workplace and agency culture

Submissions to the Review indicated that employee experiences returning to work after parental leave were influenced by their agency's culture and the culture of the team the employee was returning to. Gender also played a role in how an employee was treated returning to work after a period of parental leave, with men reporting they were not given the same respect and flexibilities as women returning from leave and that gender stereotypes were evident.

Case Study – non-APS Agency

One non-APS agency offers three coaching sessions provided by *Parents at Work* for each employee who accesses parental leave. This is a way of helping parents with the transition and has changed the culture of the workplace to be one where both parents are encouraged to access leave and work flexibly.

These sessions provide one-on-one coaching and can be used to prepare for parental leave, return to work planning, adjusting to parental leave and negotiating flexible work options. These sessions can be accessed before, during and after parental leave.

Agency culture is likely to influence parents before a child is born. Men and partners in submissions to the Review reported that their manager did not initiate a conversation about whether they will be working flexibly after their child is born, or what the workplace could do to support their transition into parenthood. Allowing Parental Leave to be used flexibly is one way managers and employees can understand that flexibility can be utilised by any parent to care for their child, regardless of whether or not they have given birth.

Agency communication with employees on parental leave is also important and was conveyed in a number of submissions. While some agencies provide regular communication about upcoming recruitment and job vacancies, others do not. By including employees on parental leave in these

²⁵⁵ Australian Breastfeeding Association (ABA), [Workplace](#), ABA website, n.d., accessed 23 February 2022.

²⁵⁶ APSC, [Australian Public Service Gender Equality Strategy 2021-26: Realising the benefits for all](#), p.12.

²⁵⁷ GBC, et al., [Breastfeeding and family-friendly policies](#), p.2.

communications, employees are able to make decisions on whether to apply for these opportunities rather than returning to work and discovering they missed out.

Keeping in Touch days, as discussed in Chapter 4, are another example of how agencies can continue to include employees who are on parental leave and ensure they are invited to training and planning opportunities. The Review was also made aware of agencies who had previously – prior to COVID-19 disruptions – held monthly playgroup-like sessions for employees on parental leave that were attended by senior executives as part of a ‘connected to the workplace’ strategy.

Recommendation 24: Improved communication with employees during *Parental Leave*

- 24.1 Agencies to ensure regular communication with employees on *Parental Leave* about upcoming recruitment and training opportunities, and other key agency developments.

Skilling managers

For many employees who return from parental leave, their lives look very different to the ones they had prior to commencing leave. A key theme that emerged through submissions was managers lacking information about their role in supporting employees on extended periods of leave, including supporting them return to work, including breastfeeding, consistent with consultations on the *APS Gender Equality Strategy 2021-26*.²⁵⁸

“More understanding that when you return to the workplace it is not easy to pick up where you left off. It is quite challenging to get into the rhythm again and the workload should be reflective of this and tailored to my needs and skills.” – Individual submission²⁵⁹

Submissions suggested that managers and supervisors need to be properly equipped to have conversations with returning staff on how best to manage their transition back to work and whether any adjustments are required. Employees who give birth often experience both physical and psychological injuries from birth with lasting impacts, and all parents can experience mental ill-health, as well as simply needing to adjust to being working parents.

Provision of this manner of support enables employees returning from leave to regain their confidence and skills, and takes pressure off parents to be immediately performing to the same standard they were pre-leave. Employee Assistance Programs can also be used to support parents on their return to work, and agencies are encouraged to provide these details to parents when they commence leave.

Recommendation 25: Improved return to work support

- 25.1 Agencies to ensure managers are equipped to discuss and plan with employees on *Parental Leave* their return to work, including any additional support or workplace adjustments they may require.

Flexible working arrangements for all parents

A number of submissions commented that for a mother returning from leave, requesting a flexible working arrangement was routine and straightforward for the work area to accommodate.

Conversely, fathers reported that requests for a flexible working arrangement were often met with resistance, highlighting an entrenched gender discrimination in the approach by some managers in considering such requests.

²⁵⁸ APSC, [Australian Public Service Gender Equality Strategy 2021-26: Realising the benefits for all](#), p.12.

²⁵⁹ Submission 8.

“Due to having childcare arrangements in place for only two days a week, dad requested flexible working arrangements with a return to the workplace starting part time two days a week. This request was met with resistance and while eventually accommodated, we were once again disappointed and surprised by the apparent gender discrimination in 2021. We did not expect to hear the phrase “could you see if your wife could maybe work part time instead?” uttered and we do not think that if roles had been reversed, the same person would have said “could you see if your husband could maybe work part time instead?” – Individual submission²⁶⁰

Research by Bain & Company found that while 60 per cent of Australian men wanted flexible working hours, men were twice as likely as women to have their requests for flexible working arrangements rejected.²⁶¹

The Review considers that if parents are to have an equal opportunity at caring for their children and the flexibility to arrange care in a way that suits their family, agencies need to consider requests for flexible working arrangements equally from either parent regardless of gender.

Recommendation 26: Ensure all parents have access to a flexible working arrangement

- 26.1 Agencies to ensure managers encourage and support all parents seeking a flexible working arrangement upon return to work from *Parental Leave*.

²⁶⁰ Submission 128.

²⁶¹ M Saunders, J Zeng, M Hellicar and K Fagg, [The Power of Flexibility: A Key Enabler to Boost Gender Parity and Employee Engagement](#), Bain & Company website, 2016, accessed 1 March 2022.

Chapter 11 - Conclusion

Bringing it all together

The Review recommends changes to the Act that facilitate leave entitlements to support employees through their pregnancy, as well as supporting all parents with *Parental Leave*. This is reflected in the recommended title for a revised Act, the *Pregnancy and Parental Leave Act*.

Changes to the Act are also required to ensure that there is continued support for pregnant employees in the final stages of their pregnancy, as well as greater support in times of premature birth, stillbirth and pregnancy loss.

Greater support to parents should also be provided by extending parental leave entitlements to all parents in an inclusive and gender neutral way, ensuring parents in diverse families will be given the support they need.

The Review further proposes remuneration-based reforms that will have a positive impact on women's economic equality by removing some financial penalties that are currently a consequence of taking parental leave. This includes reform to allow continuing eligibility for annual salary increments and superannuation contributions. Enhancing the period of paid *Parental Leave* will also have a significant and positive impact.

The Review acknowledges that an increase in parental leave entitlements is likely to incur additional cost to agencies covered by a revised Act, where not already provided by that agency. However, based on evidence gathered from extensive research, consultation and comparisons to other jurisdictions and the private sector the Review concludes that in the long term these additional costs are likely to be offset by increased attraction and retention, increased performance and satisfaction of employees, and reduced administrative costs.

Submissions from agencies overwhelmingly called for equal provisions for all parents, and increased flexibility in how parental leave can be used, in order to remain competitive in a tight labour market and enhance positive workplace culture.

A new Act

A new Act is required to deliver many of the Review's recommendations, such as to provide for *Parental Leave*, *Pregnancy Leave*, *Premature Birth Leave* and *Pregnancy Loss Leave*.

Drafting a new Act in plain English and with gender neutral language will assist understanding of the revised Act's entitlements and of the Commonwealth agencies it covers.

Other avenues may need to be explored to deliver other recommendations, such as superannuation. This may need to be undertaken progressively as opportunities arise.

Agencies can also play a direct role in implementing some recommendations. This includes providing more comprehensive guidance to employees and their managers in planning for *Parental Leave* and consequent return to work.

Issues for the future

It was not possible for the Review to provide recommendations on all aspects of the feedback received.

Kinship care still requires careful consultation with stakeholders to co-design entitlements that respect cultural sensitivities.

Legal support for surrogacy for intending parents is still evolving across Australian states/territories, so determining a standard for applicable leave entitlements across the Commonwealth is not possible at this point. Further work is required to establish whether something can be done now, or whether there is a need to wait for greater harmonisation of state and territory surrogacy laws.

Other community expectations are continuing to evolve as the composition of Australian families is become increasingly diverse. A new Act should be drafted in a way that it can move with the times as these expectations evolve, such as providing support to sole parents and grandparents. Delivering on all aspects of the Review is likely to continue into the future as opportunities arise.

Appendix A – Glossary

| | |
|-------------------------|---|
| ABA | Australian Breastfeeding Association |
| the Act | <i>Maternity Leave (Commonwealth Employees) Act 1973</i> |
| ADF | Australian Defence Force |
| AFP | Australian Federal Police |
| APS | Australian Public Service |
| APSC | Australian Public Service Commission |
| ASL | Average Staffing Level |
| CSC | Commonwealth Superannuation Corporation |
| Dad and Partner Pay | Dad and Partner Pay under the <i>Paid Parental Leave Act 2010</i> |
| Fair Work Act | <i>Fair Work Act 2009</i> |
| FCS | Fortnightly Contribution Salary |
| IFA | Individual Flexibility Arrangement |
| ILO | International Labour Organization |
| IVF | In-vitro fertilisation |
| Long Service Leave Act | <i>Long Service Leave (Commonwealth Employees) Act 1976</i> |
| MoPS Act | <i>Members of Parliament (Staff) Act 1984</i> |
| NEC | necrotising enterocolitis |
| NES | National Employment Standards |
| OTE | Ordinary Time Earnings |
| Paid Parental Leave Act | <i>Paid Parental Leave Act 2010</i> |
| PGPA Act | <i>Public Governance, Performance and Accountability Act 2013</i> |
| PLP | Parental Leave Pay under the <i>Paid Parental Leave Act 2010</i> |
| PS Act | <i>Public Service Act 1999</i> |
| TOIL | Time off in lieu |
| UNICEF | United Nations International Children's Fund |
| UPL | Unpaid Parental Leave |
| WGEA | Workplace Gender Equality Agency |
| WHO | World Health Organization |