The International Labour Organisation and Maternity Rights: Evaluating the Potential for Progress

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Abstract

This paper analyses the International Labour Organisation's recent review of its Maternity Protection Convention (No. 103) and Recommendation (No. 95) from a feminist perspective, arguing the need for more comprehensive provisions in a revised convention. It also evaluates the provision of maternity rights in Australia, the Australian government's position in relation to the ILO convention, and the capacity for international standards to extend maternity rights in this country. It argues that federal law reform is necessary to strengthen women's maternity rights at work, and notes the importance of ratification of ILO 103 to such an agenda. However, the author is somewhat pessimistic about the immediate prospects both for the extension of standards in ILO provisions, and for substantial progress on maternity rights in Australia.

* Women's Legal Centre, ACT and Region, (to July 1999). This paper draws on research conducted by the author for the National Women's Justice Coalition's submission to the International Labour Conference's 87th session, 1999. In writing that submission I was particularly grateful for comments and assistance from Ruth Jost (Equal Pay Watch), Caroline Alcorso, Alex Heron, Joanna Longley, Deb Brennan (Department of Government, University of Sydney), Dell Horey (Maternity Alliance), Therese MacDermott (Faculty of Law, University of Sydney), Julie Greig (Nursing Mothers Association), Helen Glezer (Australian Institute of Family Studies), Susan Biggs (Families At Work). I would like to thank Gillian Whitehouse for her invaluable assistance in preparing this article for publication.

The fifth item on the agenda of the International Labour Conference at its 87th session held in Geneva in 1999 was the issue of maternity protection at work. The decision to reconsider the *Maternity Protection Convention (Revised)* 1952 (No. 103) and *Recommendation*, 1952 (No. 95) had been taken by the Governing Body of the International Labour Organisation (ILO) in 1997. The report *Maternity Protection at Work* (ILO, 1997) was circulated to member states along with a questionnaire seeking views on the proposal to revise the convention. In line with International Labour Conference standing orders, member states were required to consult with key representatives of employers' and workers' organisations in preparing their responses. These responses are summarised and discussed in a further report (ILO, 1999).

Maternity protection in employment had been one of the earliest issues considered by the ILO. The *Maternity Protection Convention* (No. 3) was adopted at the first session of the International Labour Conference in 1919. This Convention was subsequently revised in 1952 in response to widespread changes in social security provisions among member states (ILO, 1997, 1). The decision to reconsider the provisions in the late 1990s was in part a response to dramatic changes in female labour force participation over the second half of the century. This has entailed not simply a growing proportion of women in paid employment, but, increasingly, their retention in the labour market during childbearing years (OECD, 1988; ILO, 1997, 5-7).

Under these circumstances, maternity protection is increasingly central to women's employment rights and a crucial instrument in the attempt to erode gender based employment inequality. However, reconsideration of the adequacy of current ILO provisions had to take place in a context in which ratification of existing conventions had been somewhat limited. As of June 1997, only 36 countries (out of 174) had ratified *Maternity Protection Convention* No 103 (ILO, 1997,1). In recognising the difficulty of producing an instrument widely acceptable to member states, the ILO has noted:

> A spirit of realism must therefore imbue the provisions of any new Convention ... A focus on commonly held principles, coupled with sufficient possibilities for governments and the social partners to work together to achieve goals in accordance with national conditions, may prove an effective means of ensuring safe motherhood and equitable employment conditions for working women. (1997, 113)

The inevitable tension between advancement of standards and the need for a cooperative approach which recognises differences within and be-

tween nations is inherent in all ILO negotiations. It arises not just from the organisation's international focus but also its tripartite structure. Tripartism gives ILO decisions an authority derived from inclusion and consensus that would be lacking if only government representatives were involved. However, '[i]t also implies that compromises must be made to accommodate the interests of all groups, as well as taking into account ideological or regional differences' (de la Cruz et al, 1996, 10). Inevitably, employer and employee organisations bring different perspectives. Moreover, governments are unlikely to support standards that exceed their own provisions. These pressures mean that ILO standards are likely to be conservative, reflecting existing basic provisions rather than major advances.

This paper seeks to illustrate some of these tensions with reference to the revision of maternity protection in the context of what would be appropriate maternity rights standards for the twenty-first century. It is particularly concerned with the Australian case, and the potential to enhance maternity rights in this country. The following section considers the case for revision of ILO standards, and the likelihood of progress. Attention is then turned to Australia, its current maternity rights provisions and resistance to international standards on this issue. The Australian government wants a revised Convention to be 'flexible' and 'facilitative' rather than prescriptive. However, even if the review process produces a conservative outcome, it is by no means certain that the Government will proceed with ratification in the near future. Nevertheless, it is argued that maternity rights in this country would best be advanced by ratification of the Convention and implementation of its provisions by federal legislation.

ILO maternity rights standards and the case for revision

Although provisions on maternity protection have been revised previously, there has been little substantive change since the original convention adopted in 1919. The 1919 convention established basic rights including the right to leave, income replacement during leave ('sufficient for the full and healthy maintenance of mother and child'), prohibition on dismissal during leave, and access to medical benefits (ILO, 1997, 111). Revision in 1952 elaborated rather than changed these basic rights. In 1999, a main concern was to modify the Convention to facilitate broader ratification, for example by replacing some of the 'extreme detail' in the existing version with statements of agreed principles (ILC, 1999, 2).

Nevertheless, there was clearly potential for a progressive review of standards, not only in response to women's changed labour force participa-

tion patterns, but also in recognition of developments in employment protection in many countries, in medical understanding of pregnancy, in health and safety at work standards, and contemporary international standards and goals on issues such as breastfeeding, childcare and parenting. The review also emphasised that maternity protection measures must now also be understood as a necessary condition for equality in employment and a vital means of reducing discrimination against women. A further possibility in the late 1990s was to build on the experience of other international instruments relevant to maternity protection such as the *European Pregnant Workers Directive* which was adopted in 1992 (Council Directive 92/85). Overall, there was an impressive response from ILO members on the issue, reporting on developments in their jurisdiction and expressing a strong interest in establishing appropriate minimum standards (ILO,1999, 8).

Balancing this progressive potential, however, were the conservative pressures noted above, and for many of the participants the revision process was seen as 'an opportunity to adopt new standards which, while ensuring protection, would provide greater flexibility in defining and implementing particular measures' (ILC, 1999, 1). Some of the main issues raised in the review are discussed below in light of contemporary feminist arguments on these points, and support for these issues at the conference is indicated. (For a more extensive coverage of the issues raised in the review, see NWJC, 1999.)

The scope and coverage of maternity rights

The ILO raised the question of whether maternity protection laws should cover all employed women or should be restricted to certain groups. The existing convention allows for some categories of workers to be excluded from protection, and it is clear that in many countries this is the case. Part-time workers, homeworkers, domestic workers, casual, contract and temporary workers are particularly likely to be denied legal protection (ILO, 1997, 28). Raising this issue for debate was therefore crucial to an effective review of minimum standards. While many member states supported the principle of broad coverage, with limited scope for exclusion (ILO, 1999, 28), there were also pressures from some (including Australia) for a more flexible approach that permitted more exclusions. Clearly, it is not consistent with the welfare, equity and social justice goals of maternity protection to exclude certain groups, whether this be on the basis of employment status, length of service or any other attribute or factor. The danger is that if excluded categories of workers are permitted, there will be attempts by some governments and employing bodies to define women workers as

belonging to those categories so as to minimise their obligations. In its resolution on equal opportunities and equal treatment for men and women in employment at its 71st session in 1985 the International Labour Conference emphasised that maternity protection should be extended to all women workers without exception (ILO, 1997, 29).

Maternity leave

The importance of maternity leave is recognised in the ILO's report which asks how equality for women and men can be achieved unless women's 'right to interrupt their paid work for the birth of a child and return to work afterwards' is guaranteed (ILO, 1997, 46). The importance of this right is emphasised by the fact that maternity leave provided by the Convention is not subject to a length of service requirement. This is also the case with the entitlement to paid maternity leave under the European Pregnant Workers Directive.

The length of leave, currently set at 12 weeks in Convention 103, was a topic of the review, but there was no specific proposal from the ILO to extend this minimum period. This appeared to be based on the rationale that beyond a limited period the leave should be parental, rather than available only to mothers. The ILO argued that maternity leave itself should be kept to a minimum, on the basis that 'the constraints associated with the biological role ... should be differentiated from the tasks of raising and caring for children which can be shared by men and women' (ILO, 1997, 39). However, as it is still overwhelmingly women who care for children, especially in the first 12 months, this may only create an illusion of gender equity. Whilst in theory, in a two parent household the mother could return to work after 12 weeks maternity leave and the father could then take parental leave, the reality is that few men take extensive parental leave (Baker, 1997, 55; Baker, 1995).

It is also extremely questionable that the period of leave specifically required to ensure the health and welfare of mother and baby is as little as 12 weeks, to cover before and after birth, especially given the current focus on breastfeeding. Breastfeeding exclusive of other foods is recognised and promoted worldwide as the preferred method of feeding for infants up to 4-6 months (16-26 weeks) of age, and beyond this period, breastfeeding is regarded as a necessary complement to other foods (UNICEF, 1990). In Australia, the National Health and Medical Research Council (NHMRC) recommended as far back as 1984 that adequate maternity leave should be provided for lactating women, as well as amenities for women to breastfeed close to their place of work (NHMRC, 1984).

A maternity leave period of 12 weeks will in most cases expire when the infant is 6-8 weeks old, as a woman will usually have commenced her leave some weeks before the baby is due, and births can be late. Often it takes 6-8 weeks to establish successful and comfortable breastfeeding. A more realistic period of paid leave is thus necessary to ensure that all mothers have the opportunity to breastfeed their babies for the recommended period. In addition, provision of workplace facilities and time off to breastfeed or express milk would support the combination of breastfeeding and paid employment. Such entitlements and provisions need not be costly in the long run as research has shown that women who combine breastfeeding and working take less time off work to care for sick children (Jones and Matheny, 1993). An entitlement to 6 months or 26 weeks would be consistent with facilitating breastfeeding as argued above, provide a more realistic period for recovery from childbirth, and enhance the likelihood that the mother will return to work.

Extension of the 12-week minimum is not unrealistic given other international standards. The European Union *Pregnant Workers Directive* specifies a minimum period of 14 weeks maternity leave, which was a political compromise as the original draft proposed 16 weeks. In many European countries, and many ILO member states, there is already legislation providing more than this (see Earnshaw, this volume). Survey data certainly suggest that most women seek maternity leave longer than 12 weeks. In an Australian survey, for example, only 15 per cent of women taking maternity leave requested 12 weeks or less and most women wanted 52 weeks leave (Glezer, 1988, 51; NWCC, 1993, 29). This accords with unpaid parental leave entitlements in Australia (see below).

Many ILO members expressed the view that 12 weeks should be an absolute minimum, indeed most of them already provide for a longer period of leave (ILO, 1999, 47). However, while there was pressure for an extension of the leave period (in particular from workers' organisations), overall support was for a milder provision requiring member states that ratify the Convention to periodically review and if possible extend this period.

Maternity Pay

The review also raised the issue of paid leave. Although the Convention provides for a minimum of 12 weeks maternity pay, this is not necessarily full income replacement. There was therefore some scope to reconsider minimum standards and to raise associated issues. Submissions included

the recommendation that working women should be guaranteed full earnings replacement during their period of maternity leave, with retention of superannuation entitlements (see, for example, NWJC, 1999). This was justified by noting that unless paid maternity leave with entitlement to superannuation benefits becomes the norm, giving birth incurs loss of future security as well as current income (MacDermott, 1997, 282). The European Directive provides for 14 weeks paid leave. In fact most ILO member countries expressed support for earnings-related maternity pay. The ILO report notes that there was broad agreement with 'the principle that a woman should not suffer financial loss due to lack of income during maternity leave' (ILO, 1999; 147). The Australian government delegation was in the tiny minority of dissenters who preferred a flat rate benefit – on the perverse basis that earnings related payments would be inequitable between women (ILO, 1999; 143)! Overall, support at the conference tended to be for allowing individual countries 'to determine the approach most suitable to their national circumstances' (ILC, 1999, 2).

Sick leave

Another issue central to the review was access to sick leave in addition to maternity leave in the event that women suffer adverse health consequences as a result of pregnancy or giving birth. The European *Pregnant Workers Directive* allows a woman to postpone her return to work for up to four weeks after the end of her maternity leave if she is ill. There have been several important decisions by the European Court of Justice which confirm that failure to allow a woman to take sick leave because her sickness is pregnancy-related is unlawful sex discrimination (*Dekker v Stichting VJV Centrum (1991) IRLR 27, ECJ; Herz v Aldi Marked etc (1991) IRLR 31, ECJ; Webb v EMO Air Cargo Ltd (1994) IRLR 482, ECJ; Brown v Rentokil Ltd (1998), IRLR 446).* The policy objective here should be to ensure that maternity and parental leave are kept separate from sick leave, so that women who do suffer medical or health problems as a result of their pregnancy or giving birth have adequate protection against dismissal and other forms of discriminatory treatment. Ensuring adequate additional leave for pregnancy or childbirth related medical problems is becoming increasingly necessary as many women are deferring childbirth. As the age at which women give birth rises, so too do the attendant health risks, and maternity protection standards require some extension to reflect this. Although contentious, the revised draft of the Convention does require the provision of additional leave in the event of illness (ILC, 1999, 70).

Other issues

While it is not possible in this paper to canvass all the issues raised in the review, those discussed above (coverage of provisions, length of leave, payment, and additional sick leave entitlements) are among the matters most central to any extension of minimum standards. Other issues raised in submissions included the need for information provision and supportive forms of leave, such as the right to paid time off for ante-natal care. The evidence in Australia is that many women, particularly those employed in the private sector, do not know what their maternity entitlements are, or the extent of employment protection that applies to them, and have never been given any information about this (Glezer, 1988; HREOC, 1999). Recommendations included an obligation on employers to keep their own employees informed, as well as a broad-based government-funded community education campaign to ensure that women know their rights and can use them (NWJC, 1999). Extension of the Convention to include a right to return to work part-time after maternity leave was also recommended as necessary to ensure that women do not experience continuing discriminatory outcomes as a result of maternity (NWJC, 1999).

Unfortunately, looking at the review process as a whole, few of these sorts of arguments for extension of standards and more detailed prescription appear to have had an impact thus far. This may be due partly to the aforementioned tripartite structure, which tends to produce conflicting proposals and means that women's organisations can only be indirectly represented. In the Australian case, lack of consultation with women's groups hindered even this indirect representation. However it was also a product of widespread pressure from many government delegations for a 'looser' and less prescriptive convention. Were a less prescriptive convention to be adopted, reduced standards may be balanced by an increased number of ratifications, but the overall implications of such a trade-off for maternity rights would be mixed. On the one hand, an increase in ratifications would bring more members into the reporting process, which would encourage improvements in maternity protection. On the other hand, a less prescriptive Convention may allow too much latitude to be effective as a lever to raise standards of protection in particular national contexts like Australia.

Maternity rights in Australia

It is impossible to predict at this stage, while the Convention is still in the process of negotiation, whether there will be any move in Australia towards

https://doi.org/10.1177/103530469901000204 Published online by Cambridge University Press

ratification. Australia has not ratified any of the Maternity Protection conventions and its maternity provisions are still inconsistent with the earliest convention with regards to paid leave. The ILO has drawn attention to this situation, noting that Australia is one of a very few industrialised nations that do not guarantee paid maternity leave (ILO Press Release, 16/2/1998).

The issue of payment during maternity leave was canvassed earlier and, for Australia, this constitutes one of the most important limitations of maternity rights, as the law does not guarantee all working women access to paid maternity leave. Commonwealth public servants are entitled after 12 months continuous service to 12 weeks maternity leave on full pay (*Maternity Leave (Commonwealth Employees) Act 1973*), and in some States and Territories a similar entitlement exists for those State/Territory public servants. Women in the private sector are dependent on what is in their award or agreement, or delivered as company policy. Although there are notable exceptions, especially among larger companies, there is very little access to paid maternity leave in the private sector and indications are that the position is not improving significantly. Data from the Australian Workplace Industrial Relations Survey (AWIRS) indicates that only 59 per cent of public sector workplaces and 23 per cent of private sector workplaces offer paid maternity or parental leave (Morehead et al, 1997, 115 and 451; see also Glezer, 1988; HREOC, 1999, 116).

The one concerted attempt to introduce paid maternity leave in Australia took place in 1994, when the previous Federal Labor Government and the Australian Council of Trade Unions (ACTU) negotiated an agreement under the Accord Mark VII that would give all working women 12 weeks paid maternity leave. However, the proposal subsequently mutated into a means-tested lump sum payment that was dubbed the 'baby bonus'. This Maternity Allowance was announced in the May 1995 Federal Budget, and was widely regarded as a betrayal of working women. Initially supposed to be in recognition of women workers' loss of income in having children, it had become a welfare payment to mothers, whether working or not. It drew critical responses from both the ACTU and the Women's Electoral Lobby who pointed out that it would not be acceptable to allow means testing of recreation leave or long-service leave (see NWJC, 1999).

While the Maternity Allowance is a welcome and valuable contribution towards the costs of having a baby for those families who receive it, it cannot substitute for paid maternity leave. Paid maternity leave, properly understood, is income replacement during a period of absence from the paid workforce to have a baby. The average weekly wage in 1997 was $605 for

women in full-time work, and $264 for those in part-time work (ABS, Catalogue no. 6310.0, August 1997). The Maternity Allowance is a lump sum payment of $950 (1997/8), an amount equivalent to 6 weeks of Parenting Allowance. It is means tested on family income so families with a combined income of approximately $64,000 or more are not eligible for the payment. Some women miss out because there is a 26-week time limit for lodging a claim. The Maternity Allowance does not depend on employment status nor does the rate of payment correlate in any way with income forgone by a period of leave. It does not facilitate continuous employment nor promote on-going attachment to the paid workforce. Maternity pay from an employer does not preclude a person claiming Maternity Allowance but the amount received must be included as income for the purposes of the means test. The reality is that the Maternity Allowance is a social security payment designed to offset some of the costs associated with the birth of a child (MacDermott, 1996). Also, in 1997 the Government made receipt of 25 per cent of the Maternity Allowance payment dependant on proof of having completed the baby's immunisation, in an attempt to increase Australia's low immunisation rates. So it is now also serving as an immunisation incentive.

Lack of paid parental leave persists in spite of high levels of female participation in the paid workforce and a relatively high political profile for 'work and family' support. Female participation increased from 42 per cent in 1973 to 54 per cent in 1997, while the proportion of women in the workforce increased from 40 to 44 per cent over the decade from 1987 to 1997 (ABS, Catalogue no. 6203.0, 1973, 1987, 1997). Over this time period, the female labour force has grown by much more than the male labour force, and the greatest growth has been in part-time and casual work. Moreover increasing numbers of women with dependent children are going out to work. In 1997, 63 per cent of married women with dependent children, and 49 per cent of those with a child under 5, were in the workforce (ABS, Catalogue no. 6224.0, 1997).

Within this context, integrating work and family has been a continuing theme of Australian social policy, and there is in principle commitment to 'family friendly' employment policies. This has included recognition of the importance of breastfeeding, as exemplified by the 1998 publication of a guide entitled *Combining Breastfeeding and Employment,* distributed by the Work and Family Unit of the federal Department of Workplace Relations and Small Business. Launching it, the Minister for Health and Family Services, and the Minister for Workplace Relations and Small Business issued a joint statement in which they declared: 'Such is the importance of

encouraging our nation's mothers to breastfeed their infants, that Australia has adopted a target for the year 2000 to have 80 per cent of babies at least partially breastfed up to six months of age'. In 1999 the Work and Family Unit also produced a report on the extent of family friendly provisions in Australian workplaces, which suggested that family supportive flexibility provisions were relatively widespread in industrial agreements (Work and Family Unit, 1999).

Contrary to these policy statements and government data, there is research evidence that few Australian workplaces provide non-statutory family friendly measures (ACIRRT, 1998; see also Whitehouse and Zetlin, this volume). Moreover, the present government has also significantly reduced support for childcare facilities that would assist in balancing work and family commitments. Recent policy changes include: abolition of operational subsidies for community-based long day care centres and outside school hours care services; a more restrictive formula for calculating entitlement to childcare assistance; and limiting fee relief to 50 hours per week for work-related care and 20 hours per week for non work-related care. These changes have had a major impact on community based childcare, and evidence thus far suggests that many parents had withdrawn their children from formal care or reduced their own hours of paid work (National Association of Community Based Children's Services, 1997). The higher cost of childcare is likely to have particularly severe consequences for families who require care for two or more children, sole parents in part-time low-paid work and couples where the hourly earnings of the secondary earner are low (Tasker and Siemon, 1998; see also Brennan, 1998).

In conjunction with the continued failure to provide adequate paid maternity and parental leave under successive governments, these policy directions illustrate the double standards about 'the family' that prevail in many English-speaking countries (Bittman and Pixley, 1997, 253). These contradictions exist alongside evidence that Australia's fertility rate is at a historical low of 1.8 births per woman and falling. Surveys show that women would like to have more children but are constrained by economic and social circumstances. Commenting on this situation, McDonald emphasises that an appropriate response is not restriction of women's labour force participation, but provisions '... to institute conditions under which women and men can participate in paid employment and have the number of children that they say they want to have' (McDonald, 1998, 11).

Examination of other aspects of maternity rights provided at federal level shows that while some aspects of current leave provisions are adequate, there are several crucial limitations. At present Australian law

provides an entitlement to 52 weeks unpaid maternity or parental leave (instituted in the *Industrial Relations Reform Act* 1993, and now incorporated into the *Workplace Relations Act 1996 s 170KB*) which is certainly welcome. However, a substantial proportion of working women are not eligible for this maternity leave, either because they are classified as 'casuals' or because they have less than 12 months continuous service.

In the late 1990s nearly one third of women workers in Australia are likely to be ineligible for maternity leave on the basis of their employment status. This is because casual and seasonal workers, who make up some 30 per cent of the female paid workforce, are totally excluded from the parental leave provisions of the federal *Workplace Relations Act 1996 (Schedule 14(2)*) and most state industrial legislation. Thus some of the most vulnerable groups of women workers are denied maternity rights. This is not consistent with the approach taken in relation to unfair dismissal for example where 'regular' casuals can be entitled to protection against dismissal (*Workplace Relations Regulations, Reg 30B(1)(d)*). Trends towards, and policies supporting, casualisation and 'flexibility' mean that the proportion of women workers in these 'excluded' categories will increase. The recent extension of unpaid maternity leave to casual workers in Queensland, and the announcement by the New South Wales government that it will do the same, are welcome developments although it is disappointing that only 'long term casuals' will benefit (*Industrial Relations Act 1999 Queensland*).

The precarious position of many pregnant workers is illustrated by a case in which a woman employee with less than 12 months service was dismissed because she intended to take a few days off to give birth to her baby. She won her case of unfair dismissal and the Full Bench of the NSW Industrial Relations Commission upheld this on appeal but made the point that while the dismissal was unfair in the circumstances employers are *not* generally obliged to provide employees with less than 12 months service, or casuals, with maternity leave or the right to return to work after any time off (*Henderson and Rural Lands Protection Board, (1998) 43 AILR 5-149*).

The statutory right to unpaid maternity and parental leave is subject to a 12 month continuous service requirement (*Workplace Relations Act, Schedule 14*). Data show that 24 per cent of women currently employed have been in their job for less than 12 months (ABS, Catalogue no. 6209.0 (110), 1994). Figures provided by the ILO also indicate that women have higher job turnover than men and that in 1991 some 22 per cent of women in the OECD had been in their job for less than 12 months (ILO, 1997, 102). Making maternity leave conditional on 12 months service with the same

employer thus significantly limits its coverage, and may also erect some barriers to promotion. Changing jobs at the wrong moment can put at risk this important entitlement. It is inconsistent with the increasing emphasis on 'flexibility' to penalise employees for job mobility. Restrictions on eligibility in the form of a length of service requirement are clearly not essential – for example, the European Council *Directive on Pregnant Workers* (92/85) does not impose such a restriction. They may also constitute unlawful indirect sex discrimination (*Seymour Smith and Perez (1999), European Court of Justice, C-167/97*).

In spite of the significant limitations outlined so far, Australian provisions are not without positive aspects. As noted earlier, the length of leave (52 weeks) is optimal, and this is parental, not simply maternity, leave. There has also been some attempt to provide access to part-time work for parents, although in practice this has been of limited application. Essentially the provisions, which originate from the Parental Leave Test Case 1990 and are incorporated into some State legislation and some awards, allow employees to work part-time from after the birth until the child's second birthday, providing the employer agrees (see for example *Industrial Relations Act 1996 (NSW) s76*). While industrial awards may set pay and conditions for regular part-time workers, only a few federal industrial awards contain part-time provisions which are explicitly associated with returning to work after maternity leave. Moreover, relatively few women workers are covered by these provisions, and the requirement for employer agreement has proved an obstacle to those who are eligible. The current *Workplace Relations Act* encourages the provision of regular part-time work but does not confer a right to return to work part-time after childbirth, let alone a guarantee of returning part-time to their previous position with the same pro-rata remuneration and benefits. Agencies such as the Working Women's Centres continue to receive reports of women who are offered part-time work on return from maternity leave only at a lower level in status and pay than the position they previously occupied.

Many women who are not given the choice of returning to work in a part-time capacity after maternity leave have little option but to resign, sacrificing their long-term financial security. This imposes a considerable cost not only on women workers in terms of their careers and personal and financial well-being, but also on their employers in terms of loss of knowledge and experience and recruitment costs. It can also expose employers to costly discrimination claims. The Human Rights and Equal Opportunity Commission recently found in favour of a woman who brought a sex discrimination claim against the law firm with which she worked, for

refusing to allow her to work part-time after her maternity leave. The Commission found that the requirement to work full-time was one with which substantially more men than women can comply because of family responsibilities (*Hickie v Hunt and Hunt, (1998) EOC 92-910)*. This may spur other employers here to change their practices but in the absence of a universal statutory right to return part-time, women will often give up the attempt. Anti-discrimination laws, particularly the indirect sex discrimination provisions, have so far been under-utilised as a mechanism for establishing the right to part-time work and family-friendly working hours (Hunter, 1996, 222; see also Palmer, 1998).

One area in which Australia has made some advances is in the provision of family leave. As with maternity leave, this has originated in the industrial relations system in response to test cases run by the ACTU but has since been adopted as government policy, being specified as an 'allowable matter' in awards under the *Workplace Relations Act*. Many Australian workers are now eligible for at least three days of personal or carer's leave each year. These are paid leave days either additional to, or part of, personal sick leave entitlements. They are intended to be used by workers who hold primary responsibility for caring for their families when illness or other problems arise. The Australian Industrial Relations Commission noted, in awarding family leave, that they were doing so in accordance with ILO Convention 156 on Workers with Family Responsibilities (*Family Leave Test Case Decision, November 1994*). In most cases, however, this has been a cost neutral exercise, merely allowing employees to access existing leave provisions for family related purposes. Despite this, there has not been as extensive a flow on of the test-case standard into awards as might have been expected.

In sum, while there have been some moves towards provision of family leave and an initial attempt to recognise the importance of access to part-time work, maternity rights in Australia fall far short of existing ILO standards, particularly with respect to the important issue of paid leave. Compared with conditions prevailing for working women in many European countries, Australian women are relatively disadvantaged. While entitlements are still being developed and litigated over by women in Europe, adoption by the European Community of *Council Directive 92/85 EC on Pregnant Workers* means that all women employees in the member states are guaranteed at least 14 weeks paid maternity leave. In many cases this is enhanced by national legislation (see Earnshaw, this volume).

Australia and the ILO: the potential for progress

Ratification of ILO conventions has an important role in facilitating the extension of employment rights in Australia, by providing a constitutional basis for legislation in a federation with limited powers at national level. However, as noted earlier, governments are reluctant to ratify unless or until they consider they are already in compliance. Notwithstanding this conundrum, there is evidence that once incorporated into industrial relations legislation, they can provide a useful basis for action in the pursuit of employment equity and social justice (Ruskin and Smith, 1998; Whitehouse and Zetlin, 1999). However, in the case of maternity rights, international obligations have explicitly been avoided. Australia has never ratified ILO Convention no 103 and successive governments have failed to comply with the standards of protection that it sets. Australia has also maintained a reservation to the paid maternity leave provisions in the United Nations' Committee for the Elimination of Discrimination Against Women (CEDAW). Australia is a signatory to the CEDAW but entered a reservation to Article 11(2)(b), and is one of only six CEDAW member nations that do not guarantee paid maternity leave. The recent report of the national Inquiry into Pregnancy and Work recommends that the reservation be removed (HREOC, 1999, 227).

Resistance to international standards on the issue of paid maternity leave is partly driven by the concern that Australia lacks a comprehensive form of social insurance through which paid maternity leave could be funded, meaning that the impost could fall directly on employers. This is not permitted by the existing Maternity Protection Convention, which provides that 'in no case shall the employer be individually liable for the cost of the benefit' (ILO 103 Art.4(8)). At the Conference, it was proposed to revise the Convention to delete this sub-clause as it 'posed an obstacle to ratification for many countries without developed social security systems' (ILO, 1999,164). This is therefore an area where increased flexibility in the terms of the Convention may indeed be helpful. However, it is hard to understand why this was an obstacle to Australia's ratification as the Convention already allows for paid maternity leave to be funded 'by means of compulsory social insurance *or* by means of public funds' (ILO 103 Art 4(4)). It was suggested some time ago here that 'the Government could establish by legislation a national paid maternity leave scheme to pay benefits at wage rates from general revenue to eligible employed women' (NWCC, 1993, 52).

The Australian government's submission to the ILO on the review of Convention 103 reflected some reluctance to endorse specific standards and

provisions. Its central concerns were to emphasise the positive aspects of maternity rights in Australia (such as length of leave, and health benefits), and to justify the lack of provision for paid maternity leave on the basis that in Australia there is 'no compulsory social insurance system'. Pressure on this issue continues to mount, and the recent HREOC inquiry recommended that the Sex Discrimination Commissioner be funded to undertake modelling and analysis of paid maternity leave options (HREOC, 1999, rec. 46, 229). What is needed is broad and informed community debate on the options, with a view to developing a scheme that ensures equitable outcomes for pregnant working women and equitable sharing of the responsibility for funding the scheme. Such debate was not invited or encouraged by either the Government or the ACTU in the lead up to the ILO conference. There is still time to have such a debate, and non-government women's organisations have a key role to play at the national level even if they are excluded from formal ILO negotiations.

To conclude, it appears essential that minimum maternity entitlements are guaranteed by law, especially in countries like Australia where the emphasis is increasingly on negotiating individual agreements at work and women are acknowledged to be in a disadvantaged bargaining position. At the moment access to paid maternity leave is extremely arbitrary. Justice, equity and efficiency demand that there be national uniform provision. The only way to ensure this is for the Commonwealth to legislate. If Australia ratified the revised ILO Convention 103, it would provide the constitutional basis to proceed (Ruskin and Smith, 1998; see also HREOC, 1999, rec. 45, 229). Thus far, however, there is little evidence that the government will move in this direction. Furthermore, there is authority to the effect that in implementing or giving effect to international instruments the Parliament must introduce legislation that closely reflects the precise terms of the instrument (Ruskin and Smith, 1998, 319). To benefit women in Australia, it is important that the Convention contains clear and adequate entitlements. That is, to be effective in setting standards, it needs to be reasonably prescriptive. Along with others, the Australian Government is applying pressure to make it less prescriptive.

While there is future potential that ILO 103 will provide the basis for legislation on maternity rights in Australia, it seems unlikely that this will occur under the current government even if standards are lowered in a less prescriptive convention. Meanwhile, a positive feature of the ILO review process at this stage is that it has raised the profile of maternity rights and helped to highlight the oddity of Australia's lack of paid leave provisions.

These issues will remain on the agenda at least until the ILO has agreed on a revised Convention at its session in June 2000.

References

ABS, *The Labour Force, Australia*, Catalogue no. 6203.0 (various years)

ABS, *The Labour Force Status Survey*, Catalogue no. 6224.0 (June 1997)

ABS, *Weekly Earnings of Employees*, Catalogue no. 6310.0 (August 1997)

ABS, *Labour Mobility*, Catalogue no 6209.0 (110), (February 1994)

ACIRRT (1998), *Agreements Database and Monitor, Report No. 16*, Australian Centre for Industrial Relations Research and Training, Sydney.

Baker, M. (1997), 'Parental Benefit Policies and the Gendered Division of Labour', *Social Science Review,* 11 (1), March, pp. 51-71.

Baker, M. (1995), *Canadian Family Policies: Cross National Comparisons*, University of Toronto Press, Toronto.

Bittman, M. and J. Pixley (1997), *The Double Life of the Family*, Allen and Unwin, Sydney.

Brennan, D. (1998), *The Politics of Australian Childcare*, 2nd edition, Cambridge University Press, Melbourne.

de la Cruz, H.G.B., G. von Potobsky and L. Swepston (1996), *The International Labor Organization: the International Standards System and Basic Rights*, Westview Press, Boulder (Colorado) and Oxford.

Glezer, H. (1988), *Maternity Leave in Australia, Employee and Employer Experiences*, Australian Institute of Family Studies Monograph No. 7, Melbourne.

HREOC (1999), *Pregnant and Productive: It's a right not a privilege to work while pregnant,* Report of the National Pregnancy and Work Inquiry, Human Rights and Equal Opportunities Commission, Sydney.

Hunter, R. (1996), 'Part-time work and indirect discrimination', *Alternative Law Journal,* 21 (5), pp. 220-222.

ILC (1999), *Report of the Committee on Maternity Protection,* International Labour Conference 87th Session, Geneva.

ILO (1999), *Maternity Protection at Work*, Report V(2), International Labour Office, Geneva.

ILO (16/2/1998), Press Release, International Labour Office, Geneva.

ILO (1997), *Maternity Protection at Work*, Report V(1), International Labour Office, Geneva.

Jones E.G. and Matheny R.J. (1993), 'Relationship between infant feeding and exclusion rate from childcare because of illness', *Journal of the American Diet Association,* 93 (7), pp. 809-811.

MacDermott, T. (1997), 'Linking Gender and Superannuation', *International Journal of Discrimination and the Law*, 1997, 2, pp. 271-297.

MacDermott, T. (1996), 'Who's rocking the cradle', *Alternative Law Journal,* 21 (5), pp. 207- 212.

McDonald, P. (1998), 'Contemporary fertility patterns in Australia', *People and Place*, 6 (1), pp.1-13.

Morehead, A., M. Steele, M. Alexander, K. Stephen and L. Duffin (1997), *Changes at Work: the 1995 Australian Workplace Industrial Relations Survey*, Addison Wesley Longman, South Melbourne.

National Association of Community Based Children's Services (1997), *Cost versus Quality,* NACBS, Canberra.

NHRMC (1984), *Guidelines to Promote Breastfeeding and Implement WHO International Code of Marketing of Breastmilk Substitutes*, National Health and Medical Research Council, Canberra.

NWCC (1993), *Paid Maternity Leave, A Discussion Paper on Paid Maternity Leave in Australia*, National Women's Consultative Council, Australian Government Publishing Service, Canberra.

NWJC (1999), *Submission to the International Labour Conference 87th Session*, National Women's Justice Coalition, Canberra.

OECD (1988), *Employment Outlook*, Organisation for Economic Cooperation and Development, Paris.

Palmer, C. (1998), *Legal rights to child friendly working hours*, Legal Action Group, London.

Ruskin, N. and Smith, L. (1988), 'The Role and Impact of International Labour Organisation Standards in the Australian Workplace', *Journal of Industrial Relations,* Vol 40 (2), pp. 314-325.

Tasker, G. and D. Siemon (1998), *Is Child Care Affordable? Pressures on Families and their use of Formal Long Day Care*, Brotherhood of St Laurence and Community Child Care, Melbourne.

UNICEF (1990), *Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding*, United Nations Children's Fund, New York.

Whitehouse, G. and D. Zetlin (1999), 'Globalization and the Pursuit of Pay Equity: Contradictory Pressures in the Australian Case', in P. Edwards and T. Elger (eds), *The Global Economy, National States and the Regulation of Labour*, Mansell, London & New York.

Work and Family Unit (1999), *Work and Family State of Play*, Department of Employment, Workplace Relations and Small Business, Canberra.