

Paid Period Leave for Australian Women: A Prerogative Not a Pain

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Abstract

This article explores a contentious question: should Australian women be entitled to paid menstrual leave under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*')? It argues that women who menstruate are not necessarily 'ill' or 'injured' for the purpose of accessing personal/carer's leave under the *Fair Work Act*. Rather, menstruation is a natural part of being female. This article then outlines the benefits of a statutory leave provision allowing for paid menstrual leave, which is preferable to one implemented under a workplace policy. Arguments commonly raised concerning the potential impacts of a menstrual leave scheme on gender equality are assessed, as are approaches taken to menstrual leave internationally. Ultimately, it is recommended that a statutory paid menstrual leave scheme should be introduced in Australia, the impact of which will be to place those who menstruate on a level playing field in the workplace.

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I Introduction

This article explores a pertinent question for working women in Australia:¹ should there be a legislative entitlement to paid menstrual leave under the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*)? This question has become the subject of popular consideration for many Australian news outlets,² as well as more broadly, with a number of international jurisdictions having legislated in favour of an entitlement to paid menstrual leave.³ However, there is presently sparse academic commentary regarding the entitlement in the Australian context.⁴ Here, we seek to bridge that gap, investigating the merits of recognising a legislative entitlement to paid menstrual leave for women in Australia. Ultimately, our recommendation is that a legislative entitlement should be recognised in Australia. As to the precise form of that entitlement, we recommend introducing one day's (that is, 7.6 hours') paid menstrual leave per calendar month each year. This is a recommendation only; its length, coverage, method for implementation, and perspectives of other key stakeholders (particularly employers), would need to be the subject of more detailed consideration. That detail is beyond the scope of the present exercise, in which we are presenting a case for paid menstrual leave to be recognised as a statutory entitlement in Australia.

¹ In this article we refer to women who experience menstruation, including those who menstruate, but do not identify as female. For ease of reference, we use 'women' and 'female' throughout, acknowledging that menstruators will not necessarily identify as such. See further, Joan Chrisler, Jennifer Gorman, Jen Manion, Michael Murgo, Angela Barney, Alexis Adams-Clerk, Jessica Newton and Meaghan McGrath, 'Queer Periods: Attitudes toward and Experiences with Menstruation in the Masculine of Centre and Transgender Community' (2016) 18(11) *Culture, Health & Sexuality* 1238. We equally acknowledge that there are women who do not experience menstruation. Our aim is not to create a division between those who menstruate and those who do not; it is to place menstruators on an equal footing.

² See, eg, Bianca Farnakis, 'Should Period Leave Be on the Agenda?', *9Honey* (Web Page, 15 August 2020) <<https://honey.nine.com.au/latest/paid-period-leave-indian-company-zomato-introduces-should-australia/256bcc43-178e-45f8-9faa-c8724d095c5e>>; '40% of Women Are Taking Days Off. Should We Have Paid Period Leave?', *Triple J Hack* (online, 8 August 2018) <<https://www.abc.net.au/triplej/programs/hack/should-we-have-paid-period-leave/10090848>>; Caitlin Fitzsimmons, 'Menstrual Leave the New "Woke" Workplace Right', *The Sydney Morning Herald* (online, 18 August 2019) <<https://www.smh.com.au/business/workplace/menstrual-leave-the-new-woke-workplace-right-20190815-p52hlc.html>>; Jacqueline Howard, 'Employer's Paid Period Leave Policy in Australia Stirs World Debate', *CNN* (online, 4 October 2018) <<https://edition.cnn.com/2018/10/03/health/period-leave-australia-explainer-intl/index.html>>; Christina Cavaleri, 'A Number of Women Want Employers to Allow "Period Leave"', *Nova FM* (online, 30 May 2017) <<https://www.novafm.com.au/lifestyle/health-beauty/number-women-want-employers-allow-period-leave/>>; Ashleigh Davis, 'Women with Period Pain Should Have 12 Days of Paid Leave Every Year for Severe Cramps, Equality Group Argues', *Daily Mail* (online, 27 May 2017) <<https://www.dailymail.co.uk/news/article-4545448/Women-period-pain-paid-leave-argues-group.html>>.

³ See, eg, our later discussion as to international approaches in Part V.

⁴ Cf in the American context: Jessica Barnack-Tavlaris, Kristina Hansen, Rachel Levitt and Michelle Reno, 'Taking Leave to Bleed: Perceptions and Attitudes toward Menstrual Leave Policy' (2019) 40(12) *Health Care for Women International* 1355; in a general workplace context: Rachel B Levitt and Jessica L Barnack-Tavlaris, 'Addressing Menstruation in the Workplace: The Menstrual Leave Debate' in Chris Bobel, Inga Winkler, Breanne Fahs, Katie Hasson, Elizabeth Kissling and Tomi-Ann Roberts (eds) *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 561; Lara Owen, 'Menstruation and Humanistic Management at Work: The Development and Implementation of a Menstrual Workplace Policy' (2018) 25(4) *e-Organizations & People* 23.

While menstruation is a natural part of women's lives and signals good reproductive health, its broader impacts on workforces are significant. Those impacts are not just individual, but also societal. Worldwide studies spanning thousands of female participants demonstrate this impact. Recent research has shown that 90% of 21,573 women surveyed in Australia experienced debilitating pain from their periods, causing 40% of those women to take days off work or study to cope, or to hide symptoms while attending their workplace or university, making their experience even worse.⁵ In early 2019, Dutch researchers found that menstrual symptoms account for an average of nine days of lost productivity a year, primarily because of presenteeism (defined as 'productivity loss while present at work or school').⁶ That study, of 32,748 women in The Netherlands between 15 and 45 years of age, found that women took an average of one day of sick leave each year because of menstruation and were less productive for a further 23 days. Nevertheless, when women 'called in sick' because of menstrual symptoms, only one-in-five told their employer or school of the real reason for their absence.⁷ In England, a 2018 report by Public Health England showed women's concerns about period pains and periods are their third largest reproductive health concern (after avoiding unwanted pregnancies and their sex lives).⁸ The impacts of menstruation on the workforce are revisited later in Part II.

For now, with these impacts in mind, this article's central thesis is that women in Australia should be afforded a legislative entitlement of one day (that is, 7.6 hours) of paid menstrual leave per calendar month. Our reasons for this suggestion are manifold. Primarily, women experiencing the often-debilitating effects of menstruation are neither ill nor injured — as required by the *Fair Work Act* in order to access 10 days' paid personal/carer's leave in Australia.⁹ Menstruation is simply a part of being female, as opposed to an illness or injury. Critics may argue that recognising a legislative entitlement is a step away from achieving gender equality in the workplace;¹⁰ a point that we expand upon later in

⁵ Mike Armour, Kelly Parry, Narendar Manohar, Kathryn Holmes, Tania Ferfolja, Christina Curry, Freya MacMillan and Caroline A Smith, 'The Prevalence and Academic Impact of Dysmenorrhoea in 21,573 Young Women: A Systematic Review and Meta-Analysis' (2019) 28(8) *Journal of Women's Health* 1161 <<https://doi.org/10.1089/jwh.2018.7615>>.

⁶ Mark Schoep, Eddy Adang, Jacques Maas, Bianca De Bie, Johanna Aarts and Theodoor Neiboer, 'Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women' (2019) 9(6) *BMJ Open*, 1 <<https://doi.org/10.1136/bmjopen-2018-026186>>.

⁷ Ibid.

⁸ Public Health England, *What Do Women Say? Reproductive Health is a Public Health Issue* (2018) <<https://www.gov.uk/government/publications/reproductive-health-what-women-say>>.

⁹ *Fair Work Act 2009* (Cth) ss 12 ('definition of paid personal/carer's leave'), 96–7 ('*Fair Work Act*'). For an insight into this issue as it concerns women undergoing IVF treatment, see: Thomas Hvala, 'In Vital Need of Reform: Providing Certainty for Women Undergoing IVF Treatment' (2018) 41(3) *University of New South Wales Law Journal* 901.

¹⁰ It has been argued that menstrual leave policies brand all menstruating women as ill, thereby perpetuating sexism, potentially leading to an increase in the potential for bias in the hiring and promotion of women: see, eg, Peggy Maguire, Teresa Keating, Kristin Semancik and Vanessa Moore, *Policy Brief: Women and Menstruation in the EU* (European Institute of Women's Health, 2018) 3 <<https://eurohealth.ie/policy-brief-women-and-menstruation-in-the-eu/>>. See also, Kylie Lang, 'As a Working Woman in Australia I'm Insulted by this Crazy Plan', *Courier Mail* (online, 2 June 2017) <<https://www.couriermail.com.au/rendezview/as-a-working-woman-in-australia-im-insulted-by-this-crazy-plan/newsstory/4fedf54e5722d1e5812da901a9da10f7>>; Barkha Dutt, 'I'm a Feminist. Giving Women a Day Off for Their Period Is a Stupid Idea', *Washington Post* (online,

Part IV. Nevertheless, it is counterintuitive and contradictory to expect women to rely on a limited amount of paid personal/carer's leave to deal with symptoms that are part of a biological process. It is also inadequate for individual employers to decide whether or not it is appropriate to mandate an entitlement to such leave in a workplace policy or enterprise agreement. Women would stand to benefit from a clearly understood legislative framework, which they can rely on universally, if needed, without fear of judgment, discrimination or prejudice. With that requirement in mind, any legislative change must also be met with adequate cultural and social acceptance of the entitlement.

The following analysis focuses on the experiences of women with severe period pain,¹¹ heavy menstrual bleeding,¹² and endometriosis,¹³ as these conditions are synonymous with menstrual pain. We acknowledge that there may be other significant health considerations for women who menstruate.¹⁴ Indeed, these conditions may be so severe that they constitute a 'personal illness' or 'personal injury' for the purpose of accessing paid personal/carer's leave.¹⁵ The basis for our recommendation of a legislated day (that is, 7.6 hours) of menstrual leave per calendar month, which would be available to women regardless of whether their menstrual pain is attributable to a diagnosable condition, is not to diminish the health concerns associated with these conditions. The point is this: the allowance of one day of menstrual leave per calendar month would ease the heavy burden that women already experience simply because of being female.

In explaining our recommendation, this article discusses four important considerations. In Part II, we explore various reasons why women experiencing menstruation are not necessarily ill or injured for the purpose of accessing personal/carer's leave under the *Fair Work Act*, with the added suggestion that it would be inadequate to suggest that they are. Part III then considers the impact of amending the *Fair Work Act* to introduce a paid menstrual leave provision, including commentary regarding its potential impact and efficacy. We suggest that absent a legislative right, an allowance for menstrual leave in individual workplace policies is at least a progressive step in the right direction. In Part IV, we consider whether a

3 August 2017) <<https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/?noredirect=on>>; Priyanka Chaturvedi, 'Menstrual Leave Will Exclude Women Even More from Workplaces', *Indian Express* (online, 17 July 2017) <<https://indianexpress.com/article/opinion/menstrual-leave-will-exclude-women-even-more-from-workplaces/>>.

¹¹ This is also referred to as 'dysmenorrhea', which is the medical diagnosis for painful menstruation: *Macquarie Dictionary* (online at 13 September 2021) 'dysmenorrhea'.

¹² Heavy blood loss is defined as blood loss of more than 80 ml per menses: see, eg, Sioban Harlow and Sara Ephross, 'Epidemiology of Menstruation and Its Relevance to Women's Health' (1995) 17(2) *Epidemiologic Reviews* 265, 267, citing Leif Hallberg, Ann-Marie Högdahl, Lennart Nilsson and Göran Rybo, 'Menstrual Blood Loss — A Population Study: Variation at Different Ages and Attempts to Define Normality' (1966) 45(3) *Acta Obstetrica et Gynecologica Scandinavica* 320.

¹³ Endometriosis is defined as a chronic gynaecological condition of uncertain aetiology characterised by menstrual irregularities, in which tissue outside the uterus responds to hormones used during the menstrual cycle, typically causing bleeding and swelling: see, eg, Kate Seear, 'The Etiquette of Endometriosis: Stigmatisation, Menstrual Concealment and the Diagnostic Delay' (2009) 69(8) *Social Science & Medicine* 1220, 1220.

¹⁴ For example, premenstrual syndrome, adenomyosis, menorrhagia, premenstrual dysphoric disorder, chronic pelvic pain and polycystic ovary syndrome.

¹⁵ *Fair Work Act* (n 9) ss 96–7.

legislative paid menstrual leave scheme will undermine or help achieve gender equality for women in Australia. We discuss notions of substantive equality, with reference to Australia's human rights obligations. We acknowledge and accept that this is a vexed debate on which reasonable minds may differ. That said, placing women on an equal footing by adopting a substantive approach to achieving gender equality, coupled with education about the necessities and benefits of such a scheme, would help empower women and their experience in the workplace. Part V compares Australia's position with international jurisdictions that have introduced some form of menstrual leave. We use these comparisons to highlight the costs and benefits of such schemes as they exist elsewhere internationally. We finish with a series of conclusions and recommendations, suggesting that legislated paid menstrual leave in Australia ought to be a prerogative, not a pain.

II Not Ill or Injured: Why Sick Leave is Inadequate

Menstrual-related pain affects a large number of women in Australian workplaces. While not all women experience discomfort, the physical and psychological impacts of dysmenorrhea, heavy menstrual bleeding and endometriosis can be immense. Part II(A) explores those physical and psychological impacts. Part II(B) considers how menstrual-related pain impacts the ability to perform work. Part II(C) explains why existing personal leave provisions under the *Fair Work Act* are insufficient, and suggests that experiences of menstrual-related pain do not neatly fall within the 'illness' or 'injury' qualification for taking personal/carer's leave under s 97 of the *Fair Work Act*. Part II(D) emphasises that suggestions to the contrary undermine the hard-fought gains that feminism has achieved in respect of disassociating women's bodies from notions of physical inferiority. Parts II(E)–(F) consider the practical impacts of Australia's existing approach to leave associated with menstrual symptoms, including the non- and under-diagnosis of menstrual-related pain, as well as the difficulty of raising such issues at work, respectively.

A *Physical and Psychological Impacts of Menstrual-Related Pain*

Many women experience pain while menstruating. Menstrual-related pain is one of the most common causes of pain in women of reproductive age.¹⁶ Internationally, between 34% and 94% of women experience pain during menstruation.¹⁷ In Australia, 88% to 92% of women aged 18 to 25 experience dysmenorrhea¹⁸ and

¹⁶ See, eg, Michelle Gagnon and Randa Elgendy, 'Comorbid Pain Experiences in Young Women with Dysmenorrhea' (2020) 60(8) *Women & Health* 946, 946.

¹⁷ See, eg, Mark Schoep, Theodor Nieboer, Moniek van der Zanden, Didi Braat and Annemiek Nap, 'The Impact of Menstrual Symptoms on Everyday Life: A Survey Among 42,879 Women' (2019) *American Journal of Obstetrics & Gynecology* 569e1, 569e1, citing Denise Jamieson and John Steege, 'The Prevalence of Dysmenorrhea, Dyspareunia, Pelvic Pain, and Irritable Bowel Syndrome in Primary Care Practices' (1966) 87(1) *Obstetrics and Gynecology* 55; Vincenzo de Sanctis, Ashraf Soliman, Heba Elsedfy, Nada Soliman, Rania Soliman and Mohamed el Kholy, 'Dysmenorrhea in Adolescents and Young Adults: A Review in Different Countries' (2016) 87(3) *Acta Biomed* 233.

¹⁸ Armour et al (n 5) 11, citing Asvini Subasinghe, Lina Happo, Yasmin Jayasinghe, Suzanne Garland and John Wark, 'Prevalence and Severity of Dysmenorrhoea, and Management Options Reported by Young Australian Women' (2016) 45(11) *Australian Family Physician* 829.

22.5% of women experience heavy menstrual bleeding.¹⁹ It is estimated that up to 10% of women experience endometriosis worldwide.²⁰ Between 7% to 11% of women in Australia have a formal diagnosis of endometriosis,²¹ amounting to as many as 700,000 women.²² The main symptom of endometriosis is pain, which may occur throughout the menstrual cycle, during bowel and bladder movements, or during sexual intercourse.²³ Between 2016 and 2017, 34,200 women were hospitalised in Australia due to endometriosis, for which nearly 80% of hospitalisations were among females aged 15 to 44.²⁴

The physical symptoms of menstrual pain can be limiting. Physical symptoms arising from period pain, such as back pain and headaches, are experienced by one-in-two women.²⁵ In addition to lethargy and fatigue, women who experience heavy menstrual bleeding can also encounter problems with flooding, clots and soiling, being confined to bed, as well as mood changes.²⁶ These symptoms can be debilitating — over 38% of women complete fewer activities during menstruation, due to their menstrual symptoms.²⁷ For some women who experience both heavy bleeding and menstrual pain, their only option is to not make any plans during their menstrual period.²⁸

The psychological impacts of menstrual-related pain are similarly prohibitive. Women with endometriosis report feeling upset, angry, depressed, weak, powerless, helpless, hopeless and defeated, as well as disappointed, frustrated and exhausted.²⁹ Women who report severe menstrual pain are also more likely to feel depressed.³⁰ Women's psychological experience of menstruation is also contextual.³¹ Levitt and Barnack-Tavlaris note that the negative psychological

¹⁹ Edith Weisberg, Kevin McGeehan and Ian Fraser, 'Effects of Perceptions of Menstrual Blood Loss and Menstrual Pain on Women's Quality of Life' (2016) 21(6) *European Journal of Contraceptive & Reproductive Health Care* 431, 431.

²⁰ Jessica Fourquet, Lorna Báez, Michelle Figueroa, Ivan Iriarte and Idhaliz Flores, 'Quantification of the Impact of Endometriosis Symptoms on Health-related Quality of Life and Work Productivity' (2011) 96(1) *Fertility and Sterility* 107, 107.

²¹ Australian Institute of Health and Welfare, *Endometriosis in Australia: Prevalence and Hospitalisations* (Report, August 2019) 3 <<https://www.aihw.gov.au/getmedia/a4ba101d-cd6d-4567-a44f-f825047187b8/aihw-phe-247.pdf.aspx?inline=true>>; Susan Treloar, Daniel O'Connor, Vivienne O'Connor and Nicholas Martin, 'Genetic Influences on Endometriosis in an Australian Twin Sample' (1999) 71(4) *Fertility and Sterility* 701.

²² Department of Health (Cth), *What We're Doing About Endometriosis* (Web Page, 7 September 2021) <<https://www.health.gov.au/health-topics/chronic-conditions/what-were-doing-about-chronic-conditions/what-were-doing-about-endometriosis>>.

²³ See, eg, Seear (n 13) 1220, citing Robert Phillips and Glenda Motta, *Coping with Endometriosis: A Practical Guide* (Avery, 2000).

²⁴ Australian Institute of Health and Welfare (n 21) 6.

²⁵ Schoep et al (n 17) 569e4.

²⁶ See, eg, Weisberg, McGeehan and Fraser (n 19) 431, citing Mark Shapley, Kelvin Jordan and Peter Croft, 'Increased Vaginal Bleeding: The Reasons Women Give for Consulting Primary Care' (2003) 23(1) *Journal of Obstetrics and Gynaecology* 48.

²⁷ Schoep et al (n 17) 569e2.

²⁸ Weisberg, McGeehan and Fraser (n 19) 434.

²⁹ Maryam Moradi, Melissa Parker, Anne Sneddon, Violeta Lopez and David Ellwood, 'Impact of Endometriosis on Women's Lives: A Qualitative Study' (2014) 14(1) *BMC Women's Health* 123, 129.

³⁰ Weisberg, McGeehan and Fraser (n 19) 434.

³¹ See below nn 117–31 and accompanying text.

impacts arising from menstruation are compounded by society's perception of menstruation, which in-turn has physical symptoms.³²

B *How Menstrual-Related Pain Affects the Performance of Work*

The physical and psychological effects of menstrual-related pain can affect every aspect of women's lives, including work. While many women with endometriosis can realise long-term career aspirations by compensating for endometriosis-related difficulties,³³ some women are forced to work part-time and, in some instances, give up their job entirely.³⁴ Women with endometriosis also demonstrate a lower likelihood of working in their desired profession, as well as greater health-related limitations in career decision-making compared with women who do not have the condition.³⁵ These potential outcomes may also have financial repercussions. Women with menstrual-related issues report a loss of, or decrease in, income, due to working part-time, taking time off, or losing the opportunity to work because of scheduling laparoscopic surgery.³⁶

These impacts can disrupt workplace productivity, which carries an economic cost. For instance, Schoep and colleagues' analysis indicates that menstrual-related symptoms are a key cause of employee absenteeism.³⁷ Close to 14% of women report absenteeism during their menstrual periods.³⁸ The mean absenteeism due to a woman's menstrual cycle is 1.3 days per year.³⁹ When absent from work, only one-in-five women disclose the reason for taking leave.⁴⁰ Moreover, menstrual-related symptoms constitute 24% of total absenteeism for women working and studying.⁴¹

Statistics regarding presenteeism are similarly concerning. Over 80% of women report presenteeism and 23.2 days per year of decreased productivity because of their periods.⁴² Presenteeism relating to menstruation results in an average productivity loss of 33%, amounting to 8.9 days of total lost productivity per year.⁴³ Evidently, 'menstruation-related absenteeism, and to a greater extent, presenteeism, are widespread in the general female population'.⁴⁴ Unsurprisingly, in

³² Levitt and Barnack-Tavlaris (n 4) 561.

³³ Marita Lina Sperschneider, Michael Hengartner, Alexandra Kohl-Schwartz, Kirsten Geraedts, Martina Rauchfuss, Monika Woelfler, Felix Haeblerlin, Stephanie von Orelli, Markus Eberhard, Franziska Maurer, Bruno Imthurn, Patrick Imesch and Brigitte Leeners, 'Does Endometriosis Affect Professional Life? A Matched Case-control Study in Switzerland, Germany and Australia' (2019) 9(1) *BMJ Open* 1, 9.

³⁴ Jean A Gilmour, Annette Huntington and Helen V Wilson, 'The Impact of Endometriosis on Work and Social Participation' (2008) 14(6) *International Journal of Nursing Practice* 443, 445.

³⁵ Sperschneider et al (n 33) 6.

³⁶ Moradi et al (n 29) 130.

³⁷ Schoep et al (n 6).

³⁸ *Ibid* 1.

³⁹ *Ibid*.

⁴⁰ *Ibid* 8.

⁴¹ *Ibid* 6.

⁴² *Ibid* 1.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

Australia, the total economic cost of endometriosis and chronic pelvic pain in the reproductive aged population averages \$6.5 billion each year.⁴⁵

C *Why Existing Personal Leave Provisions are Insufficient*

Section 97 of the *Fair Work Act* permits an employee to take paid personal or carer's leave if the leave is necessary 'because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee'. There is minimal authoritative guidance on what may constitute an illness or injury for the purpose of this provision. However, the Fair Work Ombudsman notes that personal leave can be taken for stress and pregnancy-related illnesses.⁴⁶ In response to queries regarding whether menstruation-related pain is a valid reason for taking personal leave, Australia's Minister for Health, Greg Hunt, has clarified that '[w]hat we need to do is ensure that it is treated to the same level as any other condition which would force any person to miss time from school, to miss time from work'.⁴⁷ Although the symptoms and their impact on women's work may constitute an 'illness' or 'injury', menstrual-related pain does not necessarily constitute a valid reason for taking personal leave in accordance with the *Fair Work Act* for additional theoretical and practical reasons, which we expand on below.

D *Existing Personal Leave Provisions are Inadequate from a Feminist Perspective*

From an overarching feminist perspective,⁴⁸ it is dubious to characterise women's menstruation as an illness or injury. Such characterisations undermine the hard-fought achievements of feminism, which include disassociating women's reproductive and bodily functions from connotations of disease that have served to perpetuate idealised views of humanity based on men's bodies. Comparing menstruation to an illness 'can have problematic consequences by medicalising a common physiological feature of women's lives'.⁴⁹ Goldblatt and Steele observe that:

Medicalisation can also lead to protective responses that reinforce stereotypes of women as weak, incapable and deficient. While menstruation may co-exist with medical conditions such as endometriosis, in most cases period pain, heavy bleeding, tiredness and impact on mood are part of many women's

⁴⁵ Mike Armour, Kenny Lawson, Aidan Wood, Caroline Smith, Jason Abbott and Praveen Thumbikat, 'The Cost of Illness and Economic Burden of Endometriosis and Chronic Pelvic Pain in Australia: A National Online Survey' (2019) 14(10) *PLoS One* 1.

⁴⁶ Fair Work Ombudsman (Cth), *Paid Sick & Carer's Leave* (Web Page) <<https://www.fairwork.gov.au/leave/sick-and-carers-leave/paid-sick-and-carers-leave>>.

⁴⁷ *Triple J Hack* (n 2).

⁴⁸ An intersectional feminist perspective is relevant, but beyond the scope of this article: see further Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press, 2010). For further theoretical engagement in relation to the feminist debates about the question of whether menstrual leave will benefit women: see, eg, Marian Baird, Elizabeth Hill and Sydney Colussi, 'Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labour Entitlement to Reinforce, Remedy or Revolutionize Gender Equality at Work?' (2021) 42(1) *Comparative Labor Law and Policy Journal* (forthcoming).

⁴⁹ Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality Related to Menstruation — Considering the Role of Discrimination Law' (2019) 41(3) *Sydney Law Review* 293, 306.

normal experience of menstruation and should be recognised as a facet of female biology that needs to be accommodated by society.⁵⁰

As such, suggesting that women use personal leave for menstrual-related pain, at best, demonstrates a lack of understanding of the extent to which such symptoms affect women (as distinct from men). At worst, it tacitly reinforces stereotypes that women's issues are not worthy of proper consideration and that women have no choice but to conform to pre-existing frameworks ill-equipped to cater to their needs.

E *The Practical Difficulty of Undiagnosed Menstrual Conditions*

There are practical difficulties that also undermine the application of existing personal leave provisions to menstrual-related pain. The underlying causes of women's menstrual pain are routinely undiagnosed. Painful menstruation that is not attributable to a well-defined pathology occurs in 45% to 93% of females.⁵¹ Similarly, half of women who experience heavy menstrual bleeding have no evidence of underlying pathology.⁵² Thus, it is difficult to attribute menstrual pain to an illness or injury where no such medical diagnosis applies. Furthermore, even where a diagnosis or pathological explanation is available, diagnosis of menstrual-related conditions is often significantly delayed.⁵³

There are various reasons for non-diagnosis and delay in diagnosis, which further undermines any suggestion that menstrual pain should fall within the scope of personal leave. Women with dysmenorrhea may not seek help,⁵⁴ or refrain from consulting their doctor.⁵⁵ They may even perceive problematic menstrual symptoms as 'part and parcel' of female life and not a valid reason for obtaining medical advice, in which the 'legitimate' or 'virtuous' response to menstrual pain is to demonstrate

⁵⁰ Ibid citing Maguire et al (n 10).

⁵¹ See, eg, Gagnon and Elgendy (n 16) 946, citing Margaret Burnett, Viola Antao, Amanda Black, Kymm Feldman, Andrew Grenville, Robert Lea, Guylaine Lefebvre, Odette Pinsonneault and Magali Robert, 'Prevalence of Primary Dysmenorrhea in Canada' (2005) 27(8) *Journal of Obstetrics and Gynaecology Canada* 765; Vincenzo De Sanctis, Ashraf Soliman, Sergio Bernasconi, Luigi Bianchin, Gianni Bona, Mauro Bozzola, Fabio Buzi, Carlo De Sanctis, Giorgio Tonini, Franco Rigon and Egle Perissinotto, 'Primary Dysmenorrhea in Adolescents: Prevalence, Impact and Recent Knowledge' (2015) 13(2) *Pediatric Endocrinology Reviews* 512; Stella Iacovides, Ingrid Avidon and Fiona Baker, 'What We Know about Primary Dysmenorrhea Today: A Critical Review' (2015) 21(6) *Human Reproduction Update* 762.

⁵² Weisberg, McGeehan and Fraser (n 19) 431.

⁵³ For instance, the diagnostic delay of endometriosis is 6.7 years on average, but is often longer, including up to 24 years in some instances: Kelechi Nnoaham, Lone Hummelshoj, Premila Webster, Thomas d'Hooghe, Fiorenzo Nardone, Carlo Nardone, Crispin Jenkinson, Stephen Kennedy and Krina Zondervan, 'Impact of Endometriosis on Quality of Life and Work Productivity: A Multicenter Study across Ten Countries' (2011) 96(2) *Fertility and Sterility* 366, 370; Elaine Denny, 'Women's Experiences of Endometriosis' (2004) 46(6) *Journal of Advanced Nursing* 641, 644; Moradi et al (n 29) 126.

⁵⁴ Schoep et al (n 17) 569e1, citing Ann Hewison and Olga van den Akker, 'Dysmenorrhea, Menstrual Attitude and GP Consultation' (1996) 5(8) *British Journal of Nursing* 480; Symphorosa Chan, Ka Wah You, Pm Yuen and Daljit Sahota, 'Menstrual Problems and Health-seeking Behaviour in Hong Kong Chinese Girls' (2009) 15(1) *Hong Kong Medical Journal* 18; Chen, Kristine Kwekkeboom and Sandra Ward, 'Beliefs about Dysmenorrhea and their Relationship to Self-management' (2016) 39(4) *Research in Nursing and Health* 263.

⁵⁵ Seear (n 13) 1225.

stoicism.⁵⁶ It may be that women lack the requisite health information,⁵⁷ or experience difficulty distinguishing between normal and abnormal menstruation.⁵⁸ Women may also delay seeking medical advice due to social sanctioning processes associated with the disclosure of menstrual-related problems.⁵⁹ In addition, despite being described as ‘intense’ or ‘overwhelming’, severe menstrual pain has the potential to be trivialised or normalised by medical professionals.⁶⁰ As a result, women may not obtain a diagnosis because of moving between doctors or in and out of medical care.⁶¹ Women’s friends and families may also tell them that their pain and bleeding is ‘normal’.⁶² This multitude of factors may explain why some women may not obtain the requisite medical certificate to take personal leave for their menstrual pain pursuant to s 107 of the *Fair Work Act*, which is required if requested by an employer.

F *The Practical Difficulty at the Workplace Level*

Women may encounter various repercussions at the workplace level, even where personal leave is used for menstrual pain. Women experience difficulty managing full-time employment when unable to take personal leave for menstrual pain in workplace environments that do not accommodate their needs.⁶³ Women may be perceived as ‘malingerers’, as there are no readily observable signs of menstrual pain from co-workers’ perspectives: ‘there’s nothing to show there’s no scar, there’s no spots there’.⁶⁴ Women whose employers are not sympathetic to menstruation-related pain report more negative experiences, including threats of losing their jobs.⁶⁵ As Levitt and Barnack-Tavlaris state, ‘the social unacceptability of the discussion of menstrual symptoms can result in societal pressure to keep menstrual distress a secret from co-workers’.⁶⁶ Where using personal leave for menstrual-related health issues is permitted, given that personal leave is limited to 10 days each year, women risk using up their personal leave, to then use and exhaust their annual leave.⁶⁷ Moreover, whether because of exhausting leave or difficulty in taking leave itself, some women are forced to go to work despite severe symptoms.⁶⁸ Clearly, Australia’s existing personal leave provisions are inadequate. As Schoep and colleagues note, the prevalence of menstrual-related symptoms in the general

⁵⁶ Miriam Santer, Sally Wyke and Pam Warner, ‘Women’s Management of Menstrual Symptoms: Findings from a Postal Survey and Qualitative Interviews’ (2008) 66(2) *Social Science & Medicine* 276, 276.

⁵⁷ Moradi et al (n 29) 133.

⁵⁸ Seear (n 13) 1220.

⁵⁹ *Ibid* 1221.

⁶⁰ Denny (n 53) 641.

⁶¹ Lenore Manderson, Narelle Warren and Milica Markovic, ‘Circuit Breaking: Pathways of Treatment Seeking for Women with Endometriosis in Australia’ (2008) 18(4) *Qualitative Health Research* 522.

⁶² Moradi et al (n 29) 127.

⁶³ Gilmour, Huntington and Wilson (n 34) 447.

⁶⁴ *Ibid* 445 quoting a participant in their qualitative study.

⁶⁵ Moradi et al (n 29) 131.

⁶⁶ Levitt and Barnack-Tavlaris (n 4) 566, citing Ingrid Johnston-Robledo and Joan Chrisler, ‘The Menstrual Mark: Menstruation as Social Stigma’ (2013) 68(1–2) *Sex Roles* 9.

⁶⁷ Moradi et al (n 29) 130; Sperschneider et al (n 33) 8.

⁶⁸ Moradi et al (n 29) 131.

population, coupled with the number of women seeking a different approach, reflect the need for change.⁶⁹

III A Matter for Statute or Workplace Policy?

In terms of implementing substantive change, the strongest option would be for the Australian Parliament to create a uniform legislative standard allowing for the leave under the *Fair Work Act*. It is now commonplace to speak of an ‘age of statutes’, whereby ‘[i]t is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society’.⁷⁰ A regulatory approach that prioritises law reform is preferable for multiple reasons; namely, it provides certainty, applies universally, mandates compliance and is responsive to the high risk, impact and importance of women’s menstrual health.⁷¹ There is precedent in respect of legislative and policy reform. Australia already provides for statutory entitlements in respect of pregnancy and childbirth,⁷² as well as breastfeeding,⁷³ which are predominantly women’s issues. Menstrual leave is comparable, as it is also a gendered issue, but distinct, in that an overwhelming number of women remain disproportionately disadvantaged without it. We can learn from the initial struggles associated with implementing these other pre-existing entitlements.⁷⁴ As a dedicated legislative entitlement, ideally articulated in the National Employment Standards,⁷⁵ paid menstrual leave would become a universal entitlement, applying nationally, without inconsistencies based on where a female employee works. Such approaches are preferred in contrast to anti-discrimination law, which has a limited impact.⁷⁶ We recommend that the provision be paid in light of the gender-based inequality women experience — discussed in detail below in Part IV. Parliament also finds itself in the unique position of being able to conduct a broad survey of problems in the entire field of which they are a part.⁷⁷ For that reason, Parliament would be best placed to bring about change to employment law frameworks based on a whole-of-society approach, along with the rigour of subjecting the proposal to parliamentary debate.

⁶⁹ Schoep et al (n 6) 8.

⁷⁰ *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J).

⁷¹ Australian Government, *Best Practice Regulation Handbook* (2007) 67. For further discussion of best practice approaches to regulation: see, eg, Arie Freiberg, *Regulation in Australia* (Federation Press, 2017).

⁷² See generally *Fair Work Act* (n 9) pt 22, div 5 (parental leave and other related entitlements, contained under the National Employment Standards).

⁷³ Breastfeeding is a protected ground of discrimination under the *Sex Discrimination Act 1984* (Cth) s 7AA. Making an employee feel uncomfortable about breastfeeding, or not providing adequate facilities or breaks, may constitute discrimination, and may also be a breach of work health and safety laws relating to eliminating and minimising safety risks of psychological injury: Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, July 2014) 125.

⁷⁴ See generally Marian Baird, ‘The State, Work and Family in Australia’ (2011) 22(18) *The International Journal of Human Resource Management* 3742.

⁷⁵ Fair Work Ombudsman (Cth), *National Employment Standards* (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>>.

⁷⁶ Goldblatt and Steele (n 49).

⁷⁷ Paul Atiyah, ‘Common Law and Statute Law’ (1985) 48(1) *Modern Law Review* 1, 6.

Without diminishing that ultimate goal, we acknowledge that the legislative process may instead form a roadblock in achieving that aim. The litany of other potential bills that Parliament must consider, along with the potential for parliamentary debate to hinder progress rather than empower it, are not to be discounted. As Reiter has said, '[w]e have only a very limited knowledge of what demands are likely to be met with legislative responses'.⁷⁸

With that possibility in mind and given the often cumbersome pace of legislative reform, two options provide an immediate action point for companies already amenable to introducing a paid menstrual leave provision: workplace policies and enterprise agreements. Workplace policies are not necessarily blunt or merely aspirational instruments. They have the potential to give rise to contractual entitlements for employees,⁷⁹ which, if breached, could result in damages for breach of contract.⁸⁰ Alternatively, an employer may, with the agreement of its employees, include a menstrual leave scheme as a clause within its enterprise agreement, should one apply, the contravention of which could sound in a civil penalty for a breach of s 50 of the *Fair Work Act*. At the time of writing, only a limited number of enterprise agreements include a paid menstrual leave provision for women who require additional leave.⁸¹

In fact, an Australian employer, the Victorian Women's Trust, has implemented a paid menstrual leave policy, which we discuss further below.⁸² It goes without saying that the more common and accepted such policies become, the greater impetus there will be for other employers, even legislators at some later point, to follow suit. While there are arguments that such entitlements may generate an unconscious bias against hiring women, or that women may even take advantage of the policy,⁸³ the potential benefits of implementing such policies significantly outweigh those costs. That said, those potential benefits will only come to fruition

⁷⁸ Barry Reiter, 'The Control of Contract Power' (1981) 1(3) *Oxford Journal of Legal Studies* 347, 365.

⁷⁹ As to the interrelationship between workplace policies and employment contracts: see, eg, Anna Chapman, John Howe and Susan Ainsworth, 'Organisational Policies and Australian Employment Law: A Preliminary Study of Interaction' (Working Paper No 53, Centre for Employment and Labour Relations Law, University of Melbourne, 2015) 5–8; Mark Giancaspro, 'Do Workplace Policies Form Part of Employment Contracts? A Working Guide and Advice for Employers' (2016) 44(2) *Australian Business Law Review* 106.

⁸⁰ See the various circumstances presented in Giancaspro (n 79) in which a policy document is deemed to be contractual.

⁸¹ See *NT Working Women's Centre Enterprise Agreement* (2019) cl 27.2; *RMIT Student Union Enterprise Agreement* (2020) cl 5.3.12. See also *University of Western Sydney Students' Association* (2006) cl 6.10; *Southern Cross University Lismore Campus Student Representative Council Agreement* (2005) cl 6.2; and *Student Associations of the Australian National University Enterprise Agreement* (2020) cl 20.3.1, which provides for additional personal leave for menstruation.

⁸² Other Australian companies to recently introduce a paid menstrual leave policy at the time of writing include Future Super and Modibodi: Housnia Shams, 'Menstrual Leave Adopted by More Australian Businesses as Debate Grows Around Policy', *ABC News* (Web Page, 24 June 2021) <<https://www.abc.net.au/news/2021-06-24/menstrual-leave-australia-womens-health-employment-workplace/100235920>>. Beyond Australia, other organisations that have chosen to implement menstrual leave include Coexist (in the United Kingdom), Culture Machine and Gozoop (in India). For brief commentary on those policies: see, eg, Levitt and Barnack-Tavlaris (n 4) 562.

⁸³ Howard (n 2).

provided adequate education, accompanied by cultural shifts within workplaces and society more broadly, are prioritised.⁸⁴

As to the content of a menstrual leave policy at the workplace level, there is the attraction of its flexibility in respect of its terms, operation and implementation. An employer can select what it wishes to include and exclude in the policy document. That flexibility may also accommodate women experiencing the symptoms of menopause,⁸⁵ for example. It may even go further to grant a more generous entitlement, beyond one day per calendar month, or perhaps the ability to perform work from home,⁸⁶ or varying their workdays or hours if they have temporary debilitating pain or require rest. In essence, paid menstrual leave is one of the options available to women, but not the only one.

Various other practical considerations are worth noting here. Acknowledging the inherently gendered and private nature of menstruation, mechanisms for confidential disclosure are necessary. Such clauses may include an undertaking from the employer that ‘no adverse action will be taken against an employee if their attendance or performance at work suffers as a result of taking menstruation leave’, which is similar to domestic violence leave clauses that have been successfully implemented and used in Australia.⁸⁷ Flexible work arrangements that incorporate awareness into an employer’s organisational processes, training and other human resources structures are also recommended.⁸⁸ Further, it is important to acknowledge that women’s experiences of menstrual-related health conditions are diverse. For women with endometriosis, Denny highlights that ‘[a]s with other disabling and long-term illnesses, all aspects of a woman’s life, and of those around her, are affected by endometriosis, although experience is diverse and can range from minor irritation to a life totally overwhelmed [by] pain’.⁸⁹ Evidently, not all women experience menstrual pain consistently, nor are the symptoms or extent of menstrual-related pain experienced by all women in the same way. However articulated, we recommend a policy that is non-prescriptive in the way it defines menstrual-related pain and its symptoms.

Despite these potential benefits, the possibility that such policy-based entitlements could be curtailed at the discretion of the employer presents some risk.

⁸⁴ This suggestion aligns with what the Victorian Women’s Trust suggests contributed to the successful implementation of its menstrual leave policy: Casimira Melican and Grace Mountford, ‘Why We’ve Introduced a Menstrual Policy and You Should Too’, *Victorian Women’s Trust* (Blog Post, 23 May 2017) <<https://www.vwt.org.au/blog-menstrual-policy/>>.

⁸⁵ That is the approach taken in the Victorian Women’s Trust’s template policy: Victorian Women’s Trust, *Menstrual Policy: Policy Template* (Web Page) <<https://www.vwt.org.au/menstrual-policy-2/>>.

⁸⁶ Again, that is the approach taken in the Victorian Women’s Trust’s template policy: *ibid.*

⁸⁷ Levitt and Barnack-Tavlaris (n 4) 568. For instance, *Fair Work Act* (n 9) s 106C imposes confidentiality obligations on employers, in which employers must treat information, such as notice and evidence of, family violence confidential ‘as far as it is reasonably practicable to do so’. See further Alice de Jonge, ‘Corporate Social Responsibility through a Feminist Lens: Domestic Violence and the Workplace in the 21st Century’ (2018) 148(3) *Journal of Business Ethics* 471, 481; Jan Breckenridge, Jesse Cale, Shabnam Hameed, Luke McCaskie and Stacy Tzoumakis, *Implementation of Domestic Violence Clauses — An Employer’s Perspective* (Report, Gendered Violence Research Network, University of New South Wales, November 2015) 8, 12.

⁸⁸ de Jonge (n 87).

⁸⁹ Elaine Denny, ‘I Never Know from One Day to Another How I Will Feel: Pain and Uncertainty in Women with Endometriosis’ (2009) 19(7) *Qualitative Health Research* 985, 985–6.

In essence, the nature and content of any such policy, if implemented, will be at the whim of the employer, the actual benefit of which depends on the employer's prerogative.⁹⁰ The management of a workforce is dictated by the employer's capacity to create and implement workplace policies and require employees to adhere to such policies.⁹¹ As Levitt and Barnack-Tavlaris have described, there are no reliable methods of measuring a workplace menstrual leave policy's efficacy because 'there is often little public data and limited access to human resources policies and procedures which companies typically do not make publicly available'.⁹²

Despite these difficulties, if one takes the view that an employer-based menstrual policy may still have benefits even if, at first, only for a minority of women in Australia, it is helpful to consider what to include in it. The Victorian Women's Trust has developed a template, which introduced a menstrual leave scheme into its workforce in May 2016.⁹³ The impetus for the template policy came after the Trust conducted an online survey of 3,400 people across Australia and globally, as well as 22 discussion groups across the State of Victoria, regarding their experiences with menstruation and menopause. The results of that survey were published in a book titled *About Bloody Time: The Menstrual Revolution We Have To Have*.⁹⁴ One notable result was that 58% of respondents who menstruated said that a day off to rest would make their period a better experience every month.⁹⁵ 24% of those surveyed also said that being able to ask for what they need from their employer would make their period a better experience.⁹⁶ Apart from the option of taking a days' paid leave, the Trust's policy and corresponding template allow for the possibility of working from home, or the opportunity to stay in the workplace under circumstances that encourage the comfort of the employee (for example, resting in a quiet area).

With the successful implementation of this policy in mind, it is now opportune to consider a pertinent question that finds itself consistently at the centre of the menstrual leave debate: is gender equality undermined when women are afforded menstrual leave, or does it lead to women's empowerment?

⁹⁰ See further, *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, 46, where it was held that 'a balance has to be struck between an employer's interest in managing [its] business as [it] sees fit and the employee's interest is not being unfairly and improperly exploited' (Lord Steyn). See also Douglas Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30(1) *Industrial Law Journal* 84, 93, 99, in which the author agreed with this curtailing of the employer's managerial prerogative.

⁹¹ For further explanation of this concept: see, eg, Carolyn Sappideen, Paul O'Grady, Joellen Riley, Geoff Warburton and Belinda Smith, *Macken's Law of Employment* (Lawbook, 8th ed, 2016) 144–6 [4.480].

⁹² Levitt and Barnack-Tavlaris (n 4) 562.

⁹³ Melican and Mountford (n 84); Victorian Women's Trust (n 85).

⁹⁴ Karen Pickering and Jane Bennett, *About Bloody Time: The Menstrual Revolution We Have to Have* (Victorian Women's Trust, 2019).

⁹⁵ Melican and Mountford (n 84).

⁹⁶ *Ibid.*

IV Helping or Hindering Gender Equality?

The introduction of a statutory paid menstrual leave scheme can be rationalised in relation to contemporary understandings of gender equality. This Part considers:

- (A) Australia's approach to gender equality, which appears to be stagnating;
- (B) societal perceptions of menstruation as being inherently gendered;
- (C) why a paid menstrual leave statutory scheme may bring about gender inequality; and
- (D) compelling reasons why a paid statutory menstrual leave scheme constitutes an effective mechanism for achieving gender equality.

A *Australia's Stagnating Approach to Gender Equality*

Gender equality in the workplace is achieved 'when people of all genders have equal rights, responsibilities and opportunities'.⁹⁷ This aspiration has become widely accepted as a political goal over the last decades, and many countries and transnational institutions have committed themselves to this objective,⁹⁸ including Australia. For instance, the *Workplace Gender Equality Act 2012* (Cth) sets out to promote and improve gender equality, removing barriers to women's workforce participation by, among other things, implementing reporting requirements for Australian workplaces.⁹⁹ The *Fair Work Act* similarly seeks to achieve pay equity between men and women by allowing an individual or group of workers in the same sector to apply for an order from the Fair Work Commission providing them with equal remuneration for work of equal or comparable value.¹⁰⁰

Despite these frameworks, gender equality in Australia remains illusionary. The Australian Human Rights Commission notes that:

Women experience inequality in many areas of their lives. At work, women face a gender 'pay gap' and barriers to leadership roles. Many encounter reduced employment opportunities because of the time they give to family and caring responsibilities.¹⁰¹

As at September 2021, women in Australia took home on average \$261.50 less than their male counterparts each week, representing a 14.2% 'pay gap', which has remained largely stagnant for the past two decades.¹⁰² If anything, gender equality in Australia appears to be slipping backward. Once ranked 15th on a global index

⁹⁷ 'Gender Equality: What Is It and Why Do We Need It?', *Victorian Government* (Web Page, 30 March 2021) <<https://www.vic.gov.au/gender-equality-what-it-and-why-do-we-need-it>>.

⁹⁸ Emanuela Lombardo, Petra Meier and Mieke Verloo, 'Stretching and Bending Gender Equality: A Discursive Politics Approach' in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds), *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-making* (Routledge, 2009) 1.

⁹⁹ *Workplace Gender Equality Act 2012* (Cth) s 2A.

¹⁰⁰ *Fair Work Act* (n 9) pt 2-7.

¹⁰¹ 'Gender Equality', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/quick-guide/12038>>.

¹⁰² 'Australia's Gender Pay Gap Statistics', *Workplace Gender Equality Agency* (Web Page, 27 August 2021) <<https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>>.

measuring gender equality in 2006, Australia was ranked 50th in 2021.¹⁰³ Australia is ranked 70th globally for women's economic participation and opportunity.¹⁰⁴

The causes of gender inequality in Australia, particularly as it concerns women's participation in the workplace, are complex. Women are underrepresented in various male-dominated industries.¹⁰⁵ Women constitute a disproportionate number of part-time workers in low-paid industries and insecure work. For instance, 43% of working women are employed part-time compared to 16% of men.¹⁰⁶ Vulnerable workers, particularly casuals and those in the gig economy,¹⁰⁷ face ongoing challenges, of which women are clearly a part. Indeed, many menstruating workers undertaking precarious work will not have access to the proposed leave entitlement if implemented in the National Employment Standards. This vulnerability is beyond the scope of this article, but remains an issue for further consideration, particularly as women comprise a significant proportion of Australia's casual workforce.¹⁰⁸

In addition, women typically bear the brunt of unpaid domestic labour. In 2016, women spent, on average, between 5 and 14 hours each week completing unpaid domestic housework, whereas men spent less than 5 hours each week.¹⁰⁹ These inequalities appear to be deeply entrenched in Australian society. Baxter and Hewitt note that, in contrast to the United States, 'Australian men and women are more strongly tied to a traditional (male breadwinner, female homemaker) division of domestic labour that is both based on and determined by Australian women's disproportionate share of part-time employment'.¹¹⁰ Australian women also routinely experience workplace sexual harassment — almost two in every five women — which leads to financial, social, emotional, physical and psychological harm.¹¹¹

The imperative for improving gender equality in Australia has increased in light of the Coronavirus (COVID-19) pandemic, where preliminary analysis indicates that gender-based inequalities have increased because of the pandemic.

¹⁰³ World Economic Forum, *The Global Gender Gap Report 2021* (Report, 31 March 2021) 10.

¹⁰⁴ *Ibid* 18.

¹⁰⁵ Australian Human Rights Commission, *Women in Male-Dominated Industries: A Toolkit of Strategies* (Report, Australian Human Rights Commission, 21 May 2013); Workplace Gender Equality Agency (Cth), *Gender Segregation in Australia's Workforce* (Fact Sheet, April 2019) <<https://www.wgea.gov.au/publications/gender-segregation-in-australias-workforce>>.

¹⁰⁶ Australian Bureau of Statistics, *Gender Indicators, Australia* (Catalogue No 4125.0, 15 December 2020).

¹⁰⁷ For further commentary on the plight of vulnerable workers and the lack of access to entitlements: see, eg, Judy Fudge, 'Beyond Vulnerable Workers: Towards a New Standard Employment Relationship' (2005) 12 *Canadian Labour and Employment Law Journal* 151; Ian Campbell and Robin Price, 'Precarious Work and Precarious Workers: Towards an Improved Conceptualisation' (2016) 27(3) *Economic and Labour Relations Review* 314.

¹⁰⁸ See, eg, Geoff Gilfillan, *Characteristics and Use of Casual Employees in Australia* (Research Paper Series 2017–18, Parliamentary Library Statistical Snapshot, Department of Parliamentary Services (Cth), 19 January 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia#_Toc504135069>.

¹⁰⁹ Australian Bureau of Statistics, *Census National 2016* (Web Page) <<https://www.abs.gov.au/websitedbs/D3310114.nsf/home/2016+Census+National>>.

¹¹⁰ Janeen Baxter and Belinda Hewitt, 'Negotiating Domestic Labor Women's Earnings and Housework Time in Australia' (2013) 19(1) *Feminist Economics* 29, 48.

¹¹¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Australian Human Rights Commission, 5 March 2020) 10, 13.

Referred to as a ‘triple-whammy’, during the pandemic, women have been more likely to lose their jobs and experience disruption due to increased childcare and other responsibilities, but less likely to receive government support.¹¹² Furthermore, employers’ expectations regarding employees’ productivity levels have remained static despite increased care burdens.¹¹³ Women have also been exposed to greater infection risks and psychological stress during the pandemic, given that more women compared to men are employed in essential jobs.¹¹⁴ In a post-pandemic world, Craig and Churchill suggest that ‘without direct public policy attention and support to the care economy, both paid and unpaid, [Australia is] likely to see wider rather than narrower gender disparity’.¹¹⁵

Government action is needed in order to improve the position of women in Australian society. Inaction has economic consequences. The Australian Government’s Workplace Gender Equality Agency has observed that:

Modelling shows that in the most negative scenario, in which women experience disproportionate unemployment during COVID-19 and no action is taken to account for this, global GDP would be \$1 trillion (USD) lower in 2030 than if COVID-19 had the same effect on men’s and women’s employment.¹¹⁶

With this understanding of Australia’s status quo of gender inequality in mind, the following discussion considers societal perceptions of menstruation, which, in part, contribute to the current state of gender inequality in Australia.

B *Societal Perceptions of Menstruation are Inherently Gendered*

Society’s perception of, and attitude toward, menstruation is inherently gendered and, as with other reproductive health-related concerns, presents a barrier to gender equality and the empowerment of women. Bobel and Fahs note that ‘[m]enstruation is ... deeply gendered and coded as women’s experience and also expansive and transgressive in its gender politics’.¹¹⁷ Newton adds that the negative perception of menstruation by society has a historical basis:

One idea that can be found in many places and historical eras is that menstruating women have been seen, and are seen, to be both polluted and polluting, and their menstrual blood seen as dangerous. Menstrual blood was often marked down as needing to be expelled from the body because it would cause the woman harm if retained. It has also been viewed as a sign of women’s inherent sinfulness and subsequent subordination to men.¹¹⁸

¹¹² Danielle Wood, Kate Griffiths and Tom Crowley, *Women’s Work: The Impact of the COVID Crisis on Australian Women* (Research Report, Grattan Institute, 7 March 2021) 3. See also Linda Carli, ‘Women, Gender Equality and COVID-19’ (2020) 35 (7–8) *Gender in Management: An International Journal* 647.

¹¹³ Lyn Craig and Brendan Churchill, ‘Working and Caring at Home Gender Differences in the Effects of Covid-19 on Paid and Unpaid Labor in Australia’ (2020) 27(1–2) *Feminist Economics* 310.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* 3234.

¹¹⁶ Workplace Gender Equality Agency (Cth), *Gendered Impact of COVID-19* (Web Page, October 2020) <<https://www.wgea.gov.au/topics/gendered-impact-of-covid-19>>.

¹¹⁷ Chris Bobel and Breanne Fahs, ‘The Messy Politics of Menstrual Activism’ in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 1001, 1009.

¹¹⁸ Victoria Newton, *Everyday Discourses of Menstruation* (Palgrave Macmillan, 2016) 19.

Recourse to feminist theory is central to understanding society's perception of menstruation.¹¹⁹ Beauvoir's theory of the woman as 'Other' is particularly useful.¹²⁰ Speaking broadly, Beauvoir contends that '[h]umanity is male, and man defines woman, not in herself, but in relation to himself; she is not considered an autonomous being'.¹²¹ As explained by Kissling, '[t]he social construction of menstruation as a woman's curse is explicitly implicated in the evolution of woman as Other'.¹²² This subordination of women as a result of their menstruation is predominantly a cultural creation, regulated and maintained by law, customs, and institutions.¹²³ While no single theory presents a complete explanation for the positioning or treatment of any group in society, Beauvoir's work presents a useful framework for understanding how society's perception of menstruation continues to disadvantage women in contemporary contexts — particularly as 'contemporary expressions of women's experiences and attitudes appears to confirm that Beauvoir's is a common attitude that has changed little in the intervening half-century'.¹²⁴

The social stigma surrounding menstruation remains immense and requires women to navigate contradictory societal attitudes.¹²⁵ Young notes that '[o]n the one hand, for a culture of meritocratic achievement, menstruation is nothing other than a health biological process that should not be thought to distinguish women and men in our capacities and behavior'.¹²⁶ On the other hand, 'strong social pressures and our own internalized sense of decency tell us that we must vigilantly guard against revelation of our bleeding, especially in public and to strangers'.¹²⁷ The narratives women adopt regarding menstruation are 'overwhelmingly negative'.¹²⁸ Fahs explains that present schemas regarding menstruation are heavily skewed toward negative emotions.¹²⁹ As such, women often describe their menstruation in highly emotional terms, including embarrassment, shame, annoyance and irritation, or with highly distant and practical language.¹³⁰ Such perceptions of women are instilled in individuals from a young age.¹³¹

¹¹⁹ For a discussion of menstrual activism: see, eg, Chris Bobel and Breanne Fahs, 'From Bloodless Respectability to Radical Menstrual Embodiment: Shifting Menstrual Politics from Private to Public' (2020) 45(4) *Journal of Women in Culture and Society* 955.

¹²⁰ See also Sophie Laws, *Issues of Blood: The Politics of Menstruation*, ed Jo Campling (Palgrave Macmillan, 1990).

¹²¹ Simone de Beauvoir, *The Second Sex* (Vintage, 2011) 5.

¹²² Elizabeth Kissling, *Capitalizing on the Curse: The Business of Menstruation* (Lynne Rienner, 2006) 4.

¹²³ *Ibid.*

¹²⁴ Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (Oxford University Press, 2005) 100.

¹²⁵ Ingrid Johnston-Robledo and Joan Chrisler, 'The Menstrual Mark: Menstruation as Social Stigma' in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 181; Ingrid Johnston-Robledo, Kristin Sheffield, Jacqueline Voight and Jennifer Wilcox-Constantine, 'Reproductive Shame: Self-Objectification and Young Women's Attitudes toward Their Reproductive Functioning' (2007) 46(1) *Women & Health* 25.

¹²⁶ Young (n 124) 106.

¹²⁷ *Ibid.* 107.

¹²⁸ Breanne Fahs, 'There Will Be Blood: Women's Positive and Negative Experiences with Menstruation' (2020) 7(1) *Women's Reproductive Health* 1, 13.

¹²⁹ *Ibid.* 11.

¹³⁰ *Ibid.*

¹³¹ See, eg, Tomi-Ann Roberts, Jamie Goldenberg, Cathleen Power and Tom Pyszczynski, "'Feminine Protection': The Effects of Menstruation on Attitudes towards Women' (2002) 26(2) *Psychology of*

C *A Paid Menstrual Leave Statutory Scheme May Undermine Gender Equality*

The introduction of a paid menstrual leave statutory scheme carries the weight of such prejudices, which have the potential to hinder gender equality as much as help it. Such discussions are emblematic of broader feminist debates regarding sexual difference theory, in which questions of whether biological differences mandate the different treatment of women (and men) are contentious.¹³² Commenting specifically on the utility of a menstrual leave policy, Leahy speculates that '[t]his policy could be seen either as a positive recognition of the realities of everyday life as a menstruating woman, or as a regressive return to the dark days when women were discriminated against on the basis of biology'.¹³³

Leahy is not alone in this view; the potential for negative consequences arising from the introduction of a paid menstrual leave policy has been widely noted.¹³⁴ Such concerns are legitimate for both individual women and the status of women more generally. Women with endometriosis have found their illness disbelieved or trivialised by employers and peers, which, in turn, compounds related difficulties, particularly in workplaces where personal leave is limited to the statutory minimum.¹³⁵ As referenced in Part III, the disclosure of menstrual pain has, for Australian women, led to reprimand and accusations of seeking to 'get out of things'.¹³⁶ Consequently, the use of menstrual leave may elicit responses of objectification, sexism or discrimination, whether explicit or implicit, from women's supervisors or colleagues.¹³⁷

The discussion of menstruation in the workplace may enliven various prejudices, which potentially disadvantage women more generally and thus undermine gender equality movements. Women's absence from work fosters stereotypes that women are less worthy and reliable employees.¹³⁸ In addition, gender-based benefits create a perception that women are more expensive employees, which may reduce an individual woman's prospects of being hired.¹³⁹ As well as disadvantaging women, a menstrual leave entitlement may be perceived to disadvantage men.¹⁴⁰ Women may actively avoid using the leave in order to gain

Women Quarterly 131; Gordon Forbes, Leah Adams-Curtis, Kay White and Katie Holmgren, 'The Role of Hostile and Benevolent Sexism in Women's and Men's Perceptions of the Menstruating Woman' (2003) 27(1) *Psychology of Women Quarterly* 58.

¹³² See, eg, Bobel (n 48) 154–70.

¹³³ Carla Leahy, 'Does Gender Equality Suffer When Women Get Menstrual Leave?', *The Conversation* (online, 3 March 2016) <<https://theconversation.com/does-gender-equality-suffer-when-women-get-menstrual-leave-55710>>.

¹³⁴ See above n 10.

¹³⁵ See, eg, Denny (n 53) 646.

¹³⁶ Seear (n 13) 1224.

¹³⁷ Levitt and Barnack-Tavlaris (n 4) 568.

¹³⁸ Eric Patton and Gary Johns, 'Women's Absenteeism in the Popular Press: Evidence for a Gender-Specific Absence Culture' (2007) 60(11) *Human Relations* 1579.

¹³⁹ Annalisa Merelli, *Italy's Paid Menstrual-leave Bill Would Come with a Big Cost to Women* (Web Page, 30 March 2017) <<https://qz.com/944210/italys-paid-menstrual-leave-bill-would-come-with-a-big-cost-to-italian-women/>>.

¹⁴⁰ Levitt and Barnack-Tavlaris (n 4) 569.

workplace advancement.¹⁴¹ Conversely, using the leave provision may exacerbate misconceptions that women are less career-focused.¹⁴² Similar to perceptions of women using personal leave, the medicalisation of menstruation by virtue of introducing a paid leave provision ‘may perpetuate the idea that menstruation is “debilitating” for all or most women, and thus women are not capable of working (efficiently or at all) whilst menstruating’.¹⁴³ It is clear that ‘[e]nshrining menstrual leave as a normal part of organisational policy creates the impression that all women experience period pain so crippling that ordinary work functioning is impossible. But menstrual experiences are not uniform.’¹⁴⁴

While discouraging, the advent of any progressive reform necessitates negative speculation. Such concern is not insurmountable, as evidenced by the introduction of other gender-based legislative instruments in Australia, such as the *Sex Discrimination Act 1984* (Cth).¹⁴⁵

D *Why a Paid Menstrual Leave Statutory Scheme Will Assist Gender Equality*

While the abovementioned concerns demonstrate a need to proceed with caution, various considerations support the introduction of a paid menstrual leave statutory scheme. First, it is important to recognise that the ways in which a menstrual leave scheme may undermine women’s workplace participation is yet to be researched in an Australian context.¹⁴⁶ Further research is needed in order to understand if, and to what extent, women may be disadvantaged. Second, although imperfect, Australia’s existing anti-discrimination law frameworks prohibit discrimination on the basis of gender, including in relation to menstruation.¹⁴⁷ Third, regardless of negative effects, the introduction of a menstrual leave scheme will likely have as many, if not more, positive consequences. A paid menstrual leave statutory entitlement may provide women requisite time to cope with symptoms and improve overall wellbeing.¹⁴⁸ Regardless of how many women use the entitlement, such schemes can reduce stigma and encourage more open discussion about menstruation.¹⁴⁹ A paid menstrual leave statutory scheme may also normalise menstruation, thus destigmatising conversations regarding women’s menstruation and fertility more broadly.¹⁵⁰

Fourth, and most importantly, the introduction of a paid menstrual leave statutory scheme will improve the status of Australia’s gender equality movement.

¹⁴¹ Ibid, citing Rose Grose and Shelly Grabe, ‘Sociocultural Attitudes surrounding Menstruation and Alternative Menstrual Products: The Explanatory Role of Self-Objectification’ (2014) 35(6) *Healthcare for Women International* 677.

¹⁴² Merelli (n 139).

¹⁴³ Levitt and Barnack-Tavlaris (n 4) 570.

¹⁴⁴ Leahy (n 133).

¹⁴⁵ Margaret Thornton, ‘The Political Contingency of Sex Discrimination Legislation: The Case of Australia’ (2015) 4(3) *Laws* 314; Margaret Thornton and Trish Luker, ‘The *Sex Discrimination Act* and Its Rocky Rite of Passage’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25.

¹⁴⁶ Levitt and Barnack-Tavlaris (n 4) 561.

¹⁴⁷ Goldblatt and Steele (n 49).

¹⁴⁸ Levitt and Barnack-Tavlaris (n 4) 561.

¹⁴⁹ Ibid 567.

¹⁵⁰ Ibid.

The notion of gender equality, and how it might be achieved, is contentious, and has 'been expressed by many words and undergone various changes as a travelling concept in [a] global process'.¹⁵¹ Gender equality has a variety of meanings, relating to different political histories, contexts, struggles and debates.¹⁵² Formal gender equality, which treats men and women the same regardless of their gender, is limited in its ability to genuinely improve the position of women in Australian society. Put simply, '[i]n a social and employment context designed by men for men, treating women as if they were men cannot provide genuine equality'.¹⁵³ Fredman highlights that such approaches perpetuate 'powerful conformist pressures', in which the question of 'who are women equal to?' leads to the answer: 'equal to man'.¹⁵⁴ Speaking of this notion of 'sameness', MacKinnon observes that '[c]onced is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man. ... Gender neutrality is thus simply the male standard'.¹⁵⁵ Such concepts influence understandings of gender equality in Australia, particularly in its workplaces, which 'still operate on the assumption that the "normal" employee is a full-time worker with no caring responsibilities or that they have someone to fulfil those responsibilities for them'.¹⁵⁶ As a result, a nuanced understanding of gender equality requires a movement away from formal equality:

It must allow for a transformation of the existing gender order which offers opportunities for new and progressive ways of understanding the meaning of gendered identities and the organisation of work, family and intimate relationships.¹⁵⁷

By extension, the introduction of a paid menstrual leave statutory scheme would assist substantive gender equality by actively redressing the disadvantage women experience because of menstruation.¹⁵⁸ It would accommodate difference and achieve structural change,¹⁵⁹ as well as enhance women's voices and increase their participation in the workforce.¹⁶⁰ Although it is unclear whether a paid menstrual provision would reduce stigma, prejudice or gender-based stereotyping, it provides a more nuanced approach that, as opposed to the status quo, acknowledges broader social contexts in which women are systemically disadvantaged and discriminated against because of their gender.

¹⁵¹ Lombardo, Meier and Verloo (n 98) 1.

¹⁵² *Ibid* 7.

¹⁵³ Beth Gaze, 'The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 107, 115.

¹⁵⁴ Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 719.

¹⁵⁵ Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 34.

¹⁵⁶ Gaze (n 153) 121.

¹⁵⁷ Angelique Bletsas and Sara Charlesworth, 'Gender Equality and Decent Work in Australia' (2013) 48(1) *Australian Journal of Political Science* 44, 46, citing Vlasta Jalušić, 'Stretching and Bending the Meaning of Gender in Equality Policies' in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds), *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-making* (Routledge, 2009) 56.

¹⁵⁸ Fredman (n 154) 713.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

The introduction of domestic violence leave in Australia is a useful point of reference. Since its introduction in 2010, more than one million workers now have access to domestic violence leave entitlements,¹⁶¹ albeit by way of enterprise agreements. Menstrual leave and domestic violence leave are largely analogous: menstruation-related pain and domestic violence are gendered issues in that they both predominantly affect women and limit their workforce participation to Australia's economic detriment.¹⁶² While aspects of domestic violence leave developments can also be distinguished — such provisions apply to men, are unlikely to be used monthly, and impact a smaller number of Australian workers — the rationale used to support the introduction of domestic violence leave similarly applies to menstrual leave.¹⁶³

Characterising the introduction of a menstrual leave scheme as a gender equality priority has benefits for other stakeholders invested in women's workplace participation, including employers and the broader Australian public. As highlighted by the Workplace Gender Equality Agency, gender equality improves national productivity and economic growth.¹⁶⁴ From an employer's perspective, a menstrual leave provision increases organisational performance and enhances organisational reputation, in-turn improving companies' ability to attract and retain talent.¹⁶⁵ Employers who introduced domestic violence leave provisions have reported positive impacts in their workplaces, including a more positive and supportive work environment,¹⁶⁶ and increased awareness and recognition of domestic violence as a workplace and social issue.¹⁶⁷ Further research as to how a menstrual leave scheme will impact gender equality, coupled with the potential economic gains for all stakeholders, is needed.

The introduction of a paid menstrual leave statutory scheme, as it relates to substantive equality, is supported from a human rights perspective. The *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW') requires signatories, including Australia, to take:

all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.¹⁶⁸

Winkler and Roaf highlight that '[t]he framework of human rights and substantive equality requires guaranteeing women the exercise and enjoyment of

¹⁶¹ Marian Baird, Ludo McFerran and Ingrid Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56(2) *Journal of Industrial Relations* 190, 190.

¹⁶² de Jonge (n 87) 477, citing Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 2015) [2.3].

¹⁶³ de Jonge (n 87) 471.

¹⁶⁴ 'Workplace Gender Equality', *Workplace Gender Equality Agency* (Web Page) <<https://www.wgea.gov.au/about/workplace-gender-equality>>.

¹⁶⁵ *Ibid.*

¹⁶⁶ Breckenridge et al (n 87) 11–12.

¹⁶⁷ *Ibid.* 12.

¹⁶⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 3 ('CEDAW').

human rights on the basis of equality'.¹⁶⁹ This same commitment is also mandated by General Recommendation 25 of the Committee on the Elimination of Discrimination against Women:

It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.¹⁷⁰

Other international bodies, including the International Labour Organization, also adopt this approach.¹⁷¹ Consequently, the introduction of a menstrual leave provision will help to fulfil Australia's human rights obligations, furthering the aims of the *CEDAW* in respect of substantive equality. Apart from recognising a paid statutory menstrual leave scheme to meet Australia's international obligations under the *CEDAW*, Part V below explains that Australia is out-of-step with other jurisdictions that have already adopted menstrual leave schemes.

V Internationally Out-of-Step

Australia's current approach — or lack thereof — to paid menstrual leave is out-of-step with other countries, particularly in Asia, where such an entitlement has been recognised in statute in several jurisdictions. Notwithstanding its recognition in those jurisdictions, our research indicates that the level of uptake of the entitlement in its various iterations has been relatively low.¹⁷² Nevertheless, it is our view that with necessary societal and attitudinal shifts, Australia has great potential to move towards a widely accepted and unashamedly utilised paid menstrual leave statutory scheme.

Despite the stagnation of Australia's progress toward achieving gender equality highlighted above, societal attitudes regarding menstruation appear to be shifting. A primary example of this shift is that in late 2018, with effect from 1 January 2019, the Commonwealth, state and territory treasurers unanimously agreed to remove the Goods and Services Tax ('GST') that had applied to 'feminine hygiene products' since the GST's introduction in 2000.¹⁷³ This reflects an important attitudinal repositioning in the Australian context, whereby women are no longer effectively punished by having to pay GST for feminine hygiene products, arising

¹⁶⁹ Inga T Winkler and Virginia Roaf, 'Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2014) 21(1) *Cardozo Journal of Law & Gender* 1, 2, 37.

¹⁷⁰ Committee on the Elimination of Discrimination against Women, *General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN GAOR, 30th sess, UN Doc A/59/38 (2004) [8].

¹⁷¹ See, eg, International Labour Organization, *Gender Equality at the Heart of Decent Work* (Report, 2009) <<https://www.ilo.org/gender/Events/Campaign2008-2009/lang&ndash%3ben/lang--en/index.htm>>.

¹⁷² For a historical and global 'mapping' of menstrual leave legislation: see, eg, Baird, Hill and Colussi (n 48).

¹⁷³ *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 38–47; *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2018* (Cth) (including the corresponding Explanatory Statement to that Determination); Lauren Cook and Joseph Ayoub, 'Removing GST on Feminine Hygiene Products', *FlagPost* (Blog Post, 29 November 2018) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/November/Removing_GST_on_feminine_hygiene_products>.

out of the mere fact they menstruate. With this legislative reform as a starting point, reference to existing paid menstrual leave statutory schemes in other jurisdictions provides useful context for the implementation of a statutory scheme in Australia.

In 1947, Japan passed a law allowing for women with painful periods, or whose job might exacerbate period pain, to take time off.¹⁷⁴ This law was developed in response to a surge in women joining the Japanese workforce after World War II, coupled with American occupation forces advising the country to provide women with days off during menstruation.¹⁷⁵ Article 68 of the *Labour Standards Act 1947* (Japan) now provides that '[w]hen a woman for whom work during menstrual periods would be especially difficult has requested leave, the employer shall not have the said woman work on days of the menstrual period.'¹⁷⁶ Importantly, while this law requires that women who experience especially difficult menstruation be allowed to take leave, it does not mandate that companies must provide paid or unpaid leave, or extra pay for women who choose to work during menstruation.

Since its implementation, a 1986 study showed that the number of Japanese women making use of the entitlement declined from 20% in 1960 to 13% in 1981.¹⁷⁷ That study indicated that societal pressures drove the reason for this decline in uptake, with Japanese citizens disapproving its use.¹⁷⁸ Due to a lack of publicly available data, the present use of menstrual leave among Japan's menstruating population is unclear.¹⁷⁹

In Indonesia, under art 81 of the *Labour Act No 13 of 2003* (Indonesia), women are entitled to two days' paid menstrual leave per month. However, this entitlement has historically been poorly enforced, even since its inception.¹⁸⁰ Since 2001 in South Korea, women are entitled to paid menstrual leave under art 73 of the *Labour Standards Act* (South Korea), as well as a guarantee of additional pay if they do not take the menstrual leave to which they are entitled. However, this scheme has been heavily criticised by men who view it as a form of reverse discrimination.¹⁸¹ Uptake of the entitlement in South Korea is also falling. A 2013 survey showed that

¹⁷⁴ See, eg. Justin McCurry and Stewart Leavenworth, 'Period Policy in Asia: Time Off "May Be Seen as a Sign of Weakness"', *The Guardian* (online, 4 March 2016) <<https://www.theguardian.com/lifeandstyle/2016/mar/04/period-policy-asia-menstrual-leave-japan-women-work>>. See generally, Izumi Nakayama, *Periodic Struggles: Menstruation Leave in Modern Japan* (PhD Thesis, Harvard University, 2017).

¹⁷⁵ Alice Dan, 'The Law and Women's Bodies: The Case of Menstruation Leave in Japan' (1986) 7(1–2) *Health Care for Women International* 1, 8.

¹⁷⁶ *Ibid* 9.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* 9–11.

¹⁷⁹ Levitt and Barnack-Tavlaris (n 4) 562.

¹⁸⁰ Mari Pangestu and Medelina Hendytio, 'Survey Responses from Women Workers in Indonesia's Textile, Garment, and Footwear Industries' (Working Paper, World Bank, November 1999) <<https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-1755>>.

¹⁸¹ Jung Min-ho, Kim Bo-eun and Bahk Eun-ji, 'Menstrual Leave — An Entitlement Men Reject', *Korea Times* (online, 30 October 2012) <http://www.koreatimes.co.kr/www/news/culture/2014/04/399_123535.html>.

23.6% of South Korean women used the leave, but by 2017 that rate had fallen to 19.7%.¹⁸²

Taiwan has also embraced a similar type of paid menstrual leave. Women can take three days off a year — over and above the 30 days' half-pay sick leave that all workers are permitted to take. From 2002, art 14 of the *Gender Equality in Employment Act* (Taiwan) has provided women three days' menstrual leave per year. Those three days are not calculated toward the 30 days of the employee's 'common sick leave', in effect, providing women up to 33 days of 'health-related leave' per year. However, a 2011 study exposed flaws in Taiwan's paid menstrual leave scheme.¹⁸³ Many participants in the study reported that they did not understand the regulations around menstrual leave, including how to apply for it and how to use it. Participants also reported that they seldom used menstrual leave because: the regulations were not flexible; no one they knew had applied for it; there were other types of leave that might otherwise apply; nobody could cover their jobs while they took leave; and the organisation for which they worked needed medical certificates on application for menstrual leave.¹⁸⁴

In 2015, the Vietnamese Government issued a new decree to ensure greater rights for female employees. That regulatory change under *Decree No 85/2015/ND-CP* (Vietnam) came into effect on 15 November 2015.¹⁸⁵ Under those regulations, female employees now receive more health benefits, greater representation in unions and rights of unilateral termination of labour contracts. In particular, under art 7(2)(a) female employees are entitled to receive paid menstrual leave, which equates to 30 minutes per day and for a minimum of three days each month. Difficulties associated with the enforcement of this regulation present a major problem in Vietnam, where many women work in informal sector occupations and few resources are allocated for labour inspections.¹⁸⁶ With this monitoring largely lacking, the onus for compliance falls primarily on individual companies, which do not always meet their legal obligations.¹⁸⁷ Despite there being sparse research on this subject, the few available studies suggest that Vietnamese women working in large factories or offices cannot always be confident that their legal rights, including those with respect to paid menstrual leave, will be respected.¹⁸⁸

There are also now five Chinese provinces — Qinghai, Shanxi, Hubei, Anhui and Ningxia — allowing women to take leave for painful periods, with the threat

¹⁸² Julia Hollingsworth, 'Should Women Be Entitled to Period Leave? These Countries Think So', *CNN* (online, 21 November 2020) <<https://edition.cnn.com/2020/11/20/business/period-leave-asia-intl-hnk-dst/index.html>>.

¹⁸³ See generally Chueh Chang, Fen-Ling Chen, Chu-Hui Chang and Ching-Hui Hsu, 'A Preliminary Study on Menstrual Health and Menstrual Leave in the Workplace in Taiwan' (2011) 30(5) *Taiwan Journal of Public Health* 436.

¹⁸⁴ *Ibid.*

¹⁸⁵ Dezan Shira & Associates, 'Improved Rights for Female Employees in Vietnam: Decree 85', *Vietnam Briefing* (online, 21 December 2015) <<https://www.vietnam-briefing.com/news/improved-rights-female-employees-decree-85.html/>>.

¹⁸⁶ See, eg, Marian Baird and Michele Ford, 'International Standards on Women at Work: Vietnam', *Investing in Women* (Web Page, July 2017) <https://investinginwomen.asia/wp-content/uploads/2018/01/FS_IS-and-Vietnamese-legislation.pdf>.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

that employers will be penalised if they do not permit that time off.¹⁸⁹ Notwithstanding the recognition of the entitlement, coupled with the fact that Chinese labour laws prohibit gender discrimination in the hiring process,¹⁹⁰ a report published by Human Rights Watch in April 2018 indicated that discriminatory job advertisements based on gender in China are increasing, attempting to avoid hiring those who menstruate.¹⁹¹ For example, the Report found several advertisements that said ‘men only’, ‘men preferred’, or ‘suitable for men’. In other cases, the company preferred female applicants to be ‘married with children’.¹⁹²

Beyond Asia, since 2015 Zambia has had a statutory entitlement for all women to take a day off each month for menstrual leave, known as ‘Mother’s Day’ because discussing periods is taboo. Lawmakers have made it clear that Mother’s Day is only intended for those who are actually ill: ‘If you absent yourself yet you are found in a disco house, then it will not be taken as Mother’s Day’.¹⁹³ Critics of Zambia’s paid menstrual leave scheme have suggested that the ambit of ‘Mother’s Day’ is too broad; they say the legal definition is not precise enough, leaving women to take the day when they want without having to provide any medical justification.¹⁹⁴

In Mexico, only women working in the Federal Court are eligible for one day of menstrual leave if they experience physical complications. However, the policy does not state if this day is offered per year or per month.¹⁹⁵ Currently, the entitlement is not available to women more broadly. In Chile, a bill, which was introduced in 2017 but is yet to be enacted, proposes to allow women paid leave if they have been diagnosed with endometriosis and/or dysmenorrhea.¹⁹⁶

In Europe, there have been no successful implementations of any legislative schemes permitting paid menstrual leave. Attempts at such schemes were made in

¹⁸⁹ Kelsey Cheng, ‘Chinese Province Orders All Companies to Grant Women ‘Period Leave’ for Menstrual Pain’, *Daily Mail* (online, 9 April 2019) <<https://www.dailymail.co.uk/news/article-6899255/Chinese-province-orders-companies-grant-women-period-leave-menstrual-pain.html>>.

¹⁹⁰ Sadie Yang and Ao Li, ‘Legal Protection against Gender Discrimination in the Workplace in China’ (2009) 17(2) *Gender and Development* 295.

¹⁹¹ Brian Stauffer, ‘Only Men Need Apply’: *Gender Discrimination in Job Advertisements in China* (Report, Human Rights Watch, 23 April 2018) <<https://www.hrw.org/report/2018/04/23/only-men-need-apply/gender-discrimination-job-advertisements-china>>.

¹⁹² *Ibid.*

¹⁹³ Kennedy Gondwe, ‘Zambia Women’s “Day Off for Periods” Sparks Debate’ *BBC News* (online, 4 January 2017) <<https://www.bbc.com/news/world-africa-38490513>> quoting Zambia’s Labour Minister, Joyce Nonde-Simukoko.

¹⁹⁴ *Ibid.*

¹⁹⁵ ‘Mexico: Agreement on Menstrual Leave Policy for Public Servants in Mexico’, *MH Hub* (Web Page, 30 June 2017) <<https://mhhub.org/hive/policy/menstrual-leave/recMpMmKwVUJsgWWd/>>.

¹⁹⁶ ‘Menstrual Law in Chile’, *MH Hub* (Web Page, 31 August 2017) <<https://mhhub.org/hive/policy/menstrual-leave/recT8pla1LMHmAV6K/>>.

Russia in 2013,¹⁹⁷ and later in Italy in 2017.¹⁹⁸ However, both failed after being subject to substantial criticism. For example, in Russia, the proposed bill was the subject of commentary by Mikhail Degtyaryov, a member of the Liberal Democratic Party of Russia, who wrote on his website that ‘[t]he pain for the fair sex is often so intense that it is necessary to call an ambulance’, sparking outrage from Russian feminist groups,¹⁹⁹ and ultimately, disbandment of the bill.

Despite its failure in Italy, a positive outcome emerged from the Bill, which proposed to allow three days’ paid leave per month for Italian women experiencing debilitating symptoms while menstruating.²⁰⁰ An increased focus on the debilitating impacts of women’s menstruation in the European Union (‘EU’) evolved, leading to the preparation of the 2018 *Policy Brief: Women and Menstruation in the EU*.²⁰¹

While not directly related to paid menstrual leave, it is worthwhile mentioning here that Scotland has recently become the first country to make period products free. The *Period Products (Free Provision) (Scotland) Act 2021* (Scot) became an Act on 12 January 2021, imposing a legal duty on local authorities to ensure that free items, such as tampons and sanitary pads, are available to ‘everyone in Scotland who needs them’.²⁰² New Zealand has also acted to make period products free in all schools.²⁰³ Following suit, in 2020 Victoria became the first Australian state or territory to provide free pads and tampons in all government schools, installing dispensing machines for those products in each public school.²⁰⁴ South Australia has similarly passed the Statutes Amendment (Free Menstrual Hygiene Products Pilot Program) Bill 2020 (SA), which allows free access to pads and tampons for all female students in public schools who are in year five and above. The New South Wales Department of Education has also just announced that it will trial a program to hand out free pads and tampons in its public schools.²⁰⁵ Moreover, this year, Isobel Marshall was named the 2021 Young Australian of the Year in

¹⁹⁷ Damien Gayle, ‘Russian MP Accused of Sexism for Proposing Law Giving Women Two Paid Days off a Month When They Are on Their Period’, *Daily Mail* (online, 2 August 2013) <<https://www.dailymail.co.uk/news/article-2382637/Russian-MP-proposes-law-giving-women-period-2-paid-days-work.html>>. Curiously, post-World War I, some factories in Russia implemented some of the World’s first menstrual leave schemes. Those policies were only in use for five years during the 1920s when female workers requested that they be stopped because they were not necessary and resulted in employers favouring ‘cheaper’ and ‘more reliable’ male staff (sometimes even the termination of the female employees in order to replace them with men): see, eg, Melanie Ilic, ‘Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s’ (1994) 46(8) *Europe-Asia Studies* 1409.

¹⁹⁸ Anna Momigliano, ‘Italy Set to Offer ‘Menstrual Leave’ for Female Workers’, *The Independent* (online, 25 March 2017) <<https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html>>.

¹⁹⁹ Gayle (n 197).

²⁰⁰ Momigliano (n 198).

²⁰¹ Maguire et al (n 10).

²⁰² Explanatory Notes, *Period Products (Free Provision) (Scotland) Bill* (SP Bill 45) <<https://www.parliament.scot/bills-and-laws/bills/period-products-free-provision-scotland-bill>>, para 9. See also *Period Products (Free Provision) (Scotland) Act 2021* (Scot) s 1.

²⁰³ See, eg, ‘Free Period Products in Schools to Combat Poverty’, *New Zealand Government* (Web Page, 3 June 2020) <<https://www.beehive.govt.nz/release/free-period-products-schools-combat-poverty>>.

²⁰⁴ See, eg, ‘Free Pads and Tampons in All Government Schools’, *Premier of Victoria* (Web Page, 28 July 2020) <<https://www.premier.vic.gov.au/free-pads-and-tampons-all-government-schools>>.

²⁰⁵ See, eg, ‘Free Hygiene Products for School Students’, *NSW Government* (Web Page, 29 March 2021) <<https://education.nsw.gov.au/news/latest-news/free-hygiene-products-for-school-students>>.

recognition of her work to fight menstrual stigma and period poverty.²⁰⁶ Evidently, attitudes toward menstruation are starting to evolve in a positive direction, particularly in educational contexts, which has clear benefits for young adults in Australia.

VI Conclusion and Recommendations

Societal attitudes regarding menstruation are improving in Australia. Developments in the understanding and support of women and families encountering domestic violence provide a positive precedent for introducing a paid menstrual leave scheme, as does the removal of GST in respect of women's menstrual items, and the provision of free sanitary products to school-aged girls in a number of states. As such, we share a healthy level of optimism surrounding Australia's capability to achieve further progress, particularly as it relates to learning from international jurisdictions where statutory menstrual leave schemes exist, but are rarely used due to social stigma or for fear of negatively impacting a woman's position at work. Australia must learn from what has not been successful elsewhere, particularly as shame and stigma regarding paid menstrual leave remains one of the largest jigsaw pieces in the paid menstrual leave puzzle.

Our answer to the vexed question of whether there should be an entitlement to paid menstrual leave for Australian women in the workplace is a resounding 'yes'. That answer is, of course, coupled with the recommendation that if such a scheme were to be implemented in Australia, it must be supported by significant educational and cultural shifts, so as to facilitate women's access to the entitlement without discrimination or accompanying uncertainty at work. Such considerations sit within broader substantive gender equality debates in which, while ultimately beneficial to women, the introduction of a paid menstrual leave provision is not without considerable apprehension. It remains to be seen whether the Australian Government's renewed interest in the prevention of gender-based violence and improved status of women in the workplace, in response to allegations in 2021 of sexual assault and sexual harassment in the Australian Parliament, will be sustained.

To that end, in the words of Winkler, 'we must be very careful not to impose the burden of transforming societal norms on individuals alone who are often in the most [marginalised] or vulnerable situations. Such transformation requires us all to contribute to broader societal change'.²⁰⁷ People's negative perceptions of menstruation improve when people develop their knowledge about menstrual-related conditions.²⁰⁸ We conclude by extending Seear's recommendation for raising awareness regarding endometriosis to menstrual-related issues more broadly, including in relation to the introduction of a paid menstrual leave statutory scheme:

²⁰⁶ See, eg, 'Isobel Marshall: Social Entrepreneur — Young Australian of the Year 2021', *Australian of the Year Awards*, (Web Page, 2021) <<https://www.australianoftheyear.org.au/recipients/isobel-marshall/2276/>>.

²⁰⁷ Inga Winkler 'Introduction: Menstruation as Fundamental' in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 1, 12.

²⁰⁸ Gayoung Moon, Inkyung Kim, Habhin Kim, Suwan Choe, Soyeon Jeon, Jeonghun Cho, Sujeong Hong and Jisan Lee, 'How Can We Improve Knowledge and Perceptions of Menstruation? A Mix-Methods Research Study' (2020) 20(1) *BMC Women's Health* 214.

There needs to be a very well-resourced campaign in this respect, one that is not simply reliant upon the efforts of volunteers and advocates to generate awareness. A much more comprehensive strategy for raising the public profile of both menstrual pain and the condition could be devised, in consultation with government, social scientists, clinicians, patients, advocacy groups, health communicators and media strategists. There is an urgent need for a dedicated community ...²⁰⁹

²⁰⁹ Seear (n 13) 1226.

