

EXPLANATORY STATEMENT

PAID PARENTAL LEAVE AMENDMENT RULES 2015

Summary

The *Paid Parental Leave Amendment Rules 2015* (the Amendment Rules) amend the *Paid Parental Leave Rules 2010* (the PPL Rules) made under section 298 of the *Paid Parental Leave Act 2010* (the PPL Act).

Section 298 of the PPL Act provides that the PPL Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Background

Under paragraph 128(1)(a) of the PPL Act the Secretary has the power to make certificates that allow for the disclosure of protected information in the public interest.

'Protected information' is defined in section 6 of the PPL Act as:

- (aa) information about a person that is or was held in the records of the Department or the Human Services Department; or
- (a) information about a person that was held in the records of the Commonwealth Services Delivery Agency (within the meaning of the *Commonwealth Services Delivery Agency Act 1997* as in force before 1 July 2011); or
- (b) information about a person obtained by an officer under this Act that was held in the records of Medicare Australia (within the meaning of the *Medicare Australia Act 1973* as in force before 1 July 2011); or
- (c) information to the effect that there is no information about a person held in the records of a PPL agency.

The Secretary is required to act in accordance with guidelines, contained in Part 4-1 of the PPL Rules when giving certificates for the purposes of paragraph 128(1)(a) of the PPL Act.

Personal information handled under the PPL Act is also protected by the *Privacy Act 1988*.

Purpose

The Amendment Rules:

- Amend subrule 4.2(1) to delete the definitions of 'family assistance payment', 'family member', 'one-off payment to families' and 'social security payment';

- Amend the definition of 'Department' to refer to the 'department that administers the Act';
- Amend paragraph 4.4(1)(c) to insert a reference to rule 4.6A;
- Insert rule 4.6A which allows the Secretary to make a public interest certificate for the release of protected information to a Commonwealth, State or Territory law enforcement agency for the purpose of this rule if the disclosure is necessary for:
 - the making, or proposed or possible making, of a proceeds of crime order; or
 - supporting or enforcing a proceeds of crime order.
- Insert a new rule 4.11 which largely reproduces the old rule 4.11 but has been redrafted and includes a new substantive ground (in paragraph 4.11(c)) for the disclosure of protected information that applies where disclosure is for policy development purposes;
- Insert a new rule 4.15 which largely reproduces the old rule 4.15 but has been redrafted and includes a new substantive ground for the release of protected information about a tenant of public housing. In the new rule 4.15 protected information may now be disclosed to public housing authorities where disclosure is necessary to investigate or take enforcement action in relation to public housing or State or Territory managed housing including to assist with an investigation into either:
 - the misreporting of income by tenants of public housing or State or Territory managed housing; or
 - the unauthorised occupation of public housing or State or Territory managed housing by any person.

Explanation of the Provisions of the Amendment Rules

Item 1 Name of Rules

Item 1 states the name of these rules, which is the *Paid Parental Leave Amendment Rules 2015* (the Amendment Rules).

Item 2 Commencement

Item 2 provides that the Amendment Rules commence on the day after they are registered.

Item 3 Amendment of *Paid Parental Leave Rules 2010*

Item 3 provides that Schedule 1 amends the *Paid Parental Leave Rules 2010*.

Schedule 1 Amendments

Clause 1 deletes the definitions of 'family assistance payment', 'family member', 'one-off payment to families' and 'social security payment' from rule 4.2.

Clause 2 amends the definition of 'Department' to refer to the 'department that administers the Act'.

Clause 3 amends paragraph 4.4(1)(c) to insert a reference to new rule 4.6A.

Clause 4 inserts rule 4.6A after rule 4.6. Rule 4.6A is intended to give the Secretary the power to make public interest certificates for the disclosure of protected information where the disclosure is necessary for:

- (a) the making, or proposed or possible making, of a proceeds of crime order; or
- (b) supporting or enforcing a proceeds of crime order.

Subrule 4.6A(2) provides a definition of 'proceeds of crime order' for the purposes of rule 4.6A.

Rule 4.6A of the PPL Rules is aimed at disrupting and combating serious and organised crime. The measure does this by assisting law enforcement agencies in their efforts to deprive individuals of the proceeds, instruments and benefits derived from unlawful activity.

Where a proceeds of crime order has been made or is being sought against an individual under a Commonwealth, State or Territory law, rule 4.6A will ensure that law enforcement bodies and other relevant entities have access to the information they need to make, support or enforce the order.

Rule 4.6A has been drafted based on section 355-70 in Schedule 1 to the *Taxation Administration Act 1953*. Rule 4.6A has been drafted consistently with the provisions in that Act relating to the disclosure of protected tax information for proceeds of crime purposes.

Clause 5 corrects two typographical errors in rule 4.9 by removing the two references to ‘coronial enquiry’ and replacing these with references to ‘coronial inquiry’.

Clause 6 corrects a typographical error in rule 4.10 by removing a reference to ‘coronial enquiry’ and replacing this with a reference to ‘coronial inquiry’.

Clause 7 deletes rule 4.11 and replaces this rule with a new rule 4.11. The new rule 4.11 largely reproduces the old rule 4.11 but includes a new ground (in paragraph 4.11(c)) for the disclosure of protected information that applies where the disclosure is for policy development purposes. The intention of this change is to more closely align the power to disclose protected information under rule 4.11 with powers available in relation to the disclosure of protected information collected under the social security law and family assistance law.

Clause 8 deletes rule 4.15 and replaces this rule with a new rule 4.15. Subject to a small number of substantive changes noted below, the new rule 4.15 operates in essentially the same way as the old rule 4.15.

The main substantive change to rule 4.15 is in paragraph 4.15(d).

Paragraph 4.15(d) provides that information may be disclosed where disclosure is necessary to investigate or take enforcement action in relation to public housing or State or Territory managed housing including to assist with an investigation into either:

- (a) the misreporting of income by tenants of public housing or State or Territory managed housing; or
- (b) the unauthorised occupation of public housing or State or Territory managed housing by any person.

A further substantive change to rule 4.15 is the extension of this provision to cover the disclosure of information regarding an ‘an applicant to become a tenant’. Further, rule 4.15 has been amended to expressly address situations in which public housing has been outsourced and is carried out by an agent or contracted service provider and protected information is to be disclosed to the agent or contracted service provider.

The intention of these two changes is to more closely align the drafting of rule 4.15 with equivalent provisions in the guidelines dealing with the disclosure of protected information collected under the social security law, family assistance law and *Student Assistance Act 1973*.

Consultation

The Human Services Department and the Attorney-General's Department were consulted in the development of the Amendment Rules.

Regulatory Impact Analysis

These Amendment Rules do not require a Regulatory Impact Statement and/or a Business Cost Calculator Figure. These Amendment Rules are not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact. It is not expected that any compliance costs will be incurred by business as a result of these Amendment Rules.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Paid Parental Leave Amendment Rules 2015

The *Paid Parental Leave Amendment Rules 2015* are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the protected information provisions

Under paragraph 128(1)(a) of the PPL Act the Secretary has the power to make certificates that allow for the disclosure of protected information in the public interest.

'Protected information' is defined in section 6 of the PPL Act as:

- (aa) information about a person that is or was held in the records of the Department or the Human Services Department; or
- (a) information about a person that was held in the records of the Commonwealth Services Delivery Agency (within the meaning of the *Commonwealth Services Delivery Agency Act 1997* as in force before 1 July 2011); or
- (b) information about a person obtained by an officer under this Act that was held in the records of Medicare Australia (within the meaning of the *Medicare Australia Act 1973* as in force before 1 July 2011); or
- (c) information to the effect that there is no information about a person held in the records of a PPL agency.

Under subsection 128(3) of the PPL Act, the Secretary is required to act in accordance with guidelines, contained in Part 4-1 of the PPL Rules when giving certificates for the purposes of paragraph 128(1)(a) of the PPL Act.

The Amendment Rules insert three new grounds for the giving of certificates under paragraph 128(1)(a):

- under rule 4.6A a certificate can be made for the disclosure of protected information where the disclosure is necessary for:
 - the making, or proposed or possible making, of a proceeds of crime order; or
 - supporting or enforcing a proceeds of crime order.

- under paragraph 4.11(c) a certificate can be made for the disclosure of protected information where the disclosure is necessary for the purposes of policy development.
- under paragraph 4.15(d) a certificate can be made for the disclosure of protected information where the disclosure is necessary to investigate or take enforcement action in relation to public housing or State or Territory managed housing including to assist with an investigation into either:
 - the misreporting of income by tenants of public housing or State or Territory managed housing; or
 - the unauthorised occupation of public housing or State or Territory managed housing by any person.

The Amendment Rules also make a number of minor changes including the amendment of and deletion of certain definitions. These changes are minor and do not have any human rights implications.

Human rights implications

Interference with privacy

The Amendment Rules engage the prohibition on interference with privacy, which impacts on changes to Commonwealth secrecy provisions relating to personal information. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person’s privacy. It also provides that persons have a right to the protection of the law against such interference.

The use of the term “arbitrary” in Article 17 means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in all the circumstances. It is recognised that limitations may be imposed on the general prohibition on interference with privacy, provided that such limitations are reasonable, necessary and proportionate.

Rule 4.6A – proceeds of crime orders

The new measure in rule 4.6A of the PPL Rules is reasonable, necessary and proportionate. The measure is reasonable in that it addresses a particular situation where a public benefit will flow from the disclosure of the information.

To the extent that the new measure affects the right to privacy, such limitation is aimed at disrupting and combating serious and organised crime. The measure does this by assisting law enforcement agencies in their efforts to deprive individuals of the proceeds, instruments and benefits derived from unlawful activity.

This new measure is necessary to achieve, and is reasonable in achieving, the aim of disrupting criminal activity and combating serious and organised crime.

The amendments are consistent with the right to privacy because the records or disclosures will be authorised by law and not arbitrary. The amendments provide a reasonable, necessary and proportionate means of achieving the legitimate objective of confiscating financial benefits gained through criminal activities.

Where a proceeds of crime order has been made or is being sought against an individual under a Commonwealth, State or Territory law, rule 4.6A will ensure that law enforcement bodies and other relevant entities have access to the information they need to make, support or enforce the order.

Rule 4.6A has been drafted based on section 355-70 in Schedule 1 to the *Taxation Administration Act 1953*. Rule 4.6A has been drafted consistently with the provisions in that Act relating to the disclosure of protected tax information for proceeds of crime purposes.

Paragraph 4.11(c) – policy development

The new measure in paragraph 4.11(c) of the PPL Rules is reasonable, necessary and proportionate to the right to privacy.

To the extent that this new measure affects the right to privacy, such limitation is aimed at facilitating the disclosure of protected information where this is necessary for the purposes of the policy development work of a department administering any part of the PPL Act, social security law or family assistance law.

The power to disclose under paragraph 4.11(c) is, like all other powers of disclosure in Part 4-1 of the PPL Rules, subject to the safeguards listed below.

Further, the intention of this change is to more closely align the power to disclose protected information under rule 4.11 with similar powers available in relation to the disclosure of protected information under the social security law and family assistance law.

Paragraph 4.15(d) – public housing administration

The new measure in paragraph 4.15(d) of the PPL Rules is reasonable, necessary and proportionate to the right to privacy.

To the extent that this new measure affects the right to privacy, such limitation is aimed at assisting public housing authorities with undertaking investigations or enforcement action in relation to public housing, including the misreporting of income and the unauthorised occupation of public housing.

The disclosure of protected information under paragraph 4.15(d) will assist the relevant public housing authorities to achieve a fairer and more equitable public housing system where public resources are directed to those who are most in need of assistance.

As well as engaging the right to privacy, the new measure in paragraph 4.15(d) of the PPL Rules engages the right to social security as recognised in Article 9 of the

International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The new measure in paragraph 4.15(d) of the PPL Rules promotes the right to social security. This measure promotes this right by enabling disclosures of information to assist public housing authorities to fairly and equitably distribute public housing assistance.

Safeguards concerning the disclosure of protected information

There are a number of safeguards in place in relation to the disclosure of information under the new measures, many of which apply (and have applied over time) in relation to public interest disclosures under other provisions in Part 4-1 of the PPL Rules. These include the following:

- As noted above, while the *Privacy Act 1988* continues to apply in relation to the management of social security information, the social security law imposes a higher level of protection to such information than is imposed under the *Privacy Act 1988*. For example, criminal sanctions apply for the unauthorised use or disclosure of information under the PPL Act (see sections 129-130 and 131-132 of the PPL Act);
- Public interest certificates made on the basis of the guidelines in Part 4-1 of the PPL Rules are made by experienced Commonwealth officers (usually in the Department of Human Services (DHS)) at appropriate levels, and are subject to administrative arrangements which recognise the significance of such decisions;
- In appropriate circumstances, the disclosure of information under the PPL Rules may be accompanied by additional measures to further protect the information (eg Deeds of confidentiality may be required for recipients of the information); and
- The PPL Act and PPL Rules provide that information provided to a person on the basis of a public interest certificate must be used for the purpose for which it was provided. It is not possible for that recipient to disclose the information to other parties unless the disclosure is for the same purpose or the disclosure is otherwise authorised by law.
- Disclosure of protected information is subject to the condition that information can only be disclosed if it cannot reasonably be obtained from a source other than a Department (which includes DSS and DHS), and that the person to whom the information will be disclosed has a “sufficient interest” in the information (see rule 4.4 of the Rules). The term “sufficient interest” is met if the Secretary is satisfied that the person to whom the information will be

disclosed has a genuine and legitimate interest in the information, or the person is a Minister (see subrule 4.4(2) of the Rules).

In relation to new rule 4.6A it should also be noted that the *Privacy Act 1988* currently provides Commonwealth agencies with the ability to use or disclose 'personal information' where the agency reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (see Australian Privacy Principle 6.2(e) in Schedule 1 to the *Privacy Act 1988*).

While Australian Privacy Principle 6.2(e) does not authorise the disclosure of 'protected information', it demonstrates a general acceptance in the law that Commonwealth agencies need to be able to provide information to law enforcement agencies to assist them with their enforcement activities (including proceeds of crime and unexplained wealth investigations).

Conclusion

This legislative instrument is compatible with human rights as it advances the protection of human rights. To the extent that the right to privacy is limited, those limitations are reasonable, necessary and proportionate, and appropriate safeguards are in place.