

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

Paid Parental Leave Act 2010

Paid Parental Leave Amendment (Waiting Period Exemptions) Rules 2019

Authority

The *Paid Parental Leave Amendment (Waiting Period Exemptions) Rules 2019* (Amendment Rules) amend the *Paid Parental Leave Rules 2010* (PPL Rules) made under section 298 of the *Paid Parental Leave Act 2010* (PPL Act).

Section 298 of the PPL Act provides that the Minister may, by legislative instrument, make rules providing for matters:

- required or permitted by the PPL Act to be provided; or
- necessary or convenient to be provided in order to carry out or give effect to the PPL Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Background

The *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018* (Promoting Sustainable Welfare Act) amended the PPL Act to introduce a newly arrived resident's waiting period (NARWP) of 104 weeks for parental leave pay. The NARWP for parental leave pay commenced on 1 January 2019 but does not apply to a person for a child who is born or becomes entrusted to the care of that person before 1 July 2019.

The Promoting Sustainable Welfare Act also introduced a range of exemptions from the NARWP for parental leave pay in the PPL Act.

Purpose

The Amendment Rules are made for the purposes of subsection 31A(6) of the PPL Act and prescribe a further set of circumstances in which a person can be exempt from the NARWP. This exemption only applies where the primary claimant and secondary claimant have made effective claims for parental leave pay for a child at the same time, and the primary claimant has requested that the secondary claimant be paid the full amount of parental leave pay. This is a claim under section 15 of the PPL Act.

The exemption in the Amendment Rules ensures that primary and secondary claimants who would otherwise need to serve a NARWP for parental leave pay, but receive a relevant welfare payment on specified days, are exempt from the NARWP. The receipt of welfare on

these specified days indicates that the relevant claimant is in need of support, which should include parental leave pay if they are otherwise eligible for the payment.

Subsection 31A(5) of the PPL Act, which was inserted by the Promoting Sustainable Welfare Act, provides a similar exemption whereby a person who receives a relevant welfare payment on specified days is exempt from the NARWP. However, because of subsection 31A(6) of the PPL Act, this exemption does not apply where a primary claimant requests a full transfer of parental leave pay for a child to the secondary claimant under section 15 of the PPL Act. This reflects the different eligibility requirements for primary and secondary claimants where a full transfer of parental leave pay is requested, and separate exemption rules from the NARWP are therefore needed for this cohort.

The exemption introduced in the Amendment Rules therefore ensures that consistent and equitable outcomes are achieved where a full transfer of parental leave pay to the secondary claimant is requested.

Commencement

Sections 1 to 4 of the Amendment Rules commence on the day after the instrument is registered. Schedule 1 commences on 1 July 2019.

Consultation

Consultation on the Amendment Rules was undertaken with the Department of Human Services, the Office of Parliamentary Counsel and Attorney-General's Department.

Regulation Impact Statement (RIS)

This amendment to the existing PPL Rules determination is minor in nature. It is expected to have no impacts on business and community organisations and may have minor impacts on individuals. The Office of Best Practice Regulation has advised a Regulation Impact Statement is not required (OBPR ID23652).

Explanation of the provisions

Section 1 provides that the name of this instrument is the *Paid Parental Leave Amendment (Waiting Period Exemptions) Rules 2019*.

Section 2 provides that sections 1 to 4 of the Amendment Rules commence on the day after the instrument is registered on the Federal Register of Legislation, and Schedule 1 to the Amendment Rules commences on 1 July 2019. This reflects that the NARWP for parental leave pay does not apply to a person for a child who is born or becomes entrusted to the care of that person before 1 July 2019 under item 6 of Schedule 4 to the Promoting Sustainable Welfare Act.

Section 3 provides that the authority for making this instrument is the *Paid Parental Leave Act 2010*.

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1, item 1 inserts new Subdivision 2.3.1.4 in the PPL Rules, which sets out when a person is exempt from the NARWP. **New rule 2.22B** provides that Subdivision 2.3.1.4 is made for subsection 31A(6) of the PPL Act, and prescribes circumstances in which subsection 31A(1) of the PPL Act, which sets out when a person is subject to the NARWP, does not apply to a person.

New rule 2.22C sets out the prescribed circumstances that must be satisfied for a person to be exempt from the NARWP.

New paragraph 2.22C(1)(a) provides that the person must be a primary claimant or secondary claimant in relation to a child to whom paragraphs 15(1)(a), (b) and (c) of the PPL Act apply. This means the exemption in new rule 2.22C only applies to a person if that person is a primary claimant or secondary claimant in circumstances where a full transfer of parental leave pay for a child to the secondary claimant is requested. Therefore, this exemption does not apply where there is no transfer or only a partial transfer of parental leave pay to the secondary claimant or a tertiary claimant.

New paragraph 2.22C(1)(b) provides that if the secondary claimant's PPL period would start on the day the child was born, then subrule 2.22C(2) (discussed below) must apply to the primary claimant on the day the child was born and must apply to the secondary claimant on the day before the child was born.

New paragraph 2.22C(1)(c) provides that if paragraph 15(4)(a) of the PPL Act would apply in making a payability determination in relation to the child, then:

- subrule 2.22C(2) must apply to the primary claimant on each day during the period referred to in that paragraph; and
- subrule 2.22C(2) must apply to the secondary claimant on the day before the secondary claimant's PPL period would start.

Paragraph 15(4)(a) of the PPL Act applies if the primary claimant was or will be eligible for parental leave pay on each day in the period that:

- starts on the day the child was born; and
- ends on the day before the start of the secondary claimant's PPL period.

New paragraph 2.22C(1)(d) provides that if paragraph 15(4)(b) of the Act would apply in making a payability determination in relation to the child, then:

- subrule 2.22C(2) must apply to the secondary claimant on each day during the period referred to in that paragraph; and
- subrule 2.22C(2) must apply to the primary claimant on the day the child was born.

Paragraph 15(4)(b) of the PPL Act applies if the secondary claimant was or will be eligible for parental leave pay on each day in the period that:

- starts on the day the child was born; and
- ends on the day before the start of the secondary claimant's PPL period.

New paragraph 2.22C(1)(e) provides that if paragraph 15(4)(c) of the PPL Act would apply in making a payability determination in relation to the child, then:

- subrule 2.22C(2) must apply to the primary claimant on each day in the first part of the period referred to in subparagraph 15(4)(c)(i) of the Act; and
- subrule 2.22C(2) must apply to the secondary claimant on each day during the last part of the period referred to in subparagraph 15(4)(c)(ii) of the Act.

Paragraph 15(4)(c) of the PPL Act applies if the primary claimant was or will be eligible for parental leave pay on each day in the first part of the period to which that paragraph applies and the secondary claimant was or will be eligible on each day in the last part of the period to which that paragraph applies.

The period to which paragraph 15(4)(c) of the PPL Act applies:

- starts on the day the child was born; and
- ends on the day before the start of the secondary claimant's PPL period.

Paragraphs 15(4)(a), (b) and (c) of the PPL Act, and therefore, paragraphs 2.22C(1)(c), (d) and (e) of the Amendment Rules only operate where the secondary claimant's PPL period would begin after the day the child was born.

New subrule 2.22C(2) provides that this subrule applies to a person on a day if:

- the person is receiving either a social security pension (within the meaning of the Social Security Act 1991), or a social security benefit (within the meaning of that Act), or farm household allowance under the Farm Household Support Act 2014; or
- the day is in a newly arrived resident's waiting period the person is subject to under section 31A of the PPL Act and subsection 31A(7) or (7A) of the Act applies to the person on the day; or

- the person is not subject to a newly arrived resident's waiting period under section 31A of the Act on the day.

Subrule 2.22C(2) is relevant for determining whether a person satisfies the circumstances in paragraph 2.22C(1)(b), (c), (d) or (e), which are explained above. In conjunction with those paragraphs, subrule 2.22C(2) provides that a person who is exempt on specified days because of subsection 31A(7) or (7A) of the PPL Act, or is not subject to a newly arrived resident's waiting period, does not also need to receive a relevant welfare payment on specified days. A person is not subject to a newly arrived resident's waiting period if they were never subject to the waiting period or have already served their waiting period.

Statement of Compatibility with Human Rights

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

Paid Parental Leave Amendment (Waiting Period Exemptions) Rules 2019

The *Paid Parental Leave Amendment (Waiting Period Exemptions) Rules 2019* (Amendment Rules) 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 legislative instrument

The *Paid Parental Leave Act 2010* (PPL Act) provides for the Paid Parental Leave scheme, a Government-funded payment that complements the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*. The Paid Parental Leave scheme consists of parental leave pay, an 18-week payment at the rate of the national minimum wage for eligible primary carers (mostly birth mothers) of newborn and recently adopted children, and dad and partner pay, a two week payment at the rate of the national minimum wage for eligible dads or partners caring for newborn or recently adopted children.

The *Social Services and Other Legislation Amendment (Promoting Sustainable Welfare) Act 2018* (Promoting Sustainable Welfare Act) amended the PPL Act to introduce a newly arrived resident's waiting period (NARWP) for parental leave pay and dad and partner pay for holders of permanent visas or relevant temporary visas (such as temporary partner visas) granted on or after 1 January 2019. The NARWP does not apply to a person for a child who is born or becomes entrusted to the care of that person before 1 July 2019. A person is not eligible for parental leave pay or dad and partner pay if they are serving a NARWP, unless they qualify for an exemption from the NARWP.

The Amendment Rules prescribe a set of circumstances in which a person can be exempt from the NARWP for parental leave pay. The exemption applies where the primary claimant and secondary claimant have made effective claims for parental leave pay for a child, and the primary claimant has requested that the secondary claimant be paid the full amount of parental leave pay under section 15 of the PPL Act.

The exemption in the Amendment Rules ensures that primary and secondary claimants who would otherwise need to serve a NARWP for parental leave pay but receive a relevant welfare payment (ie. a social security pension, a social security benefit or farm household allowance) on specified days are exempt from the NARWP. The receipt of welfare on these specified days indicates that the relevant claimant is in need of support, which should include parental leave pay if they are otherwise eligible for the payment.

Subsection 31A(5) of the *Paid Parental Leave Act 2010* (PPL Act) provides a similar exemption whereby a person who receives a relevant welfare payment on specified days is exempt from the NARWP. However, because of subsection 31A(6) of the PPL Act, this exemption does not apply where a primary claimant requests a full transfer of parental leave pay to the secondary claimant under section 15 of that Act. This reflects the different eligibility requirements for primary and secondary claimants where a full transfer of parental

leave pay is requested, compared to where there is no transfer or only a partial transfer. Separate exemption rules from the NARWP are therefore needed for this cohort.

The exemption introduced in the Amendment Rules ensures that consistent and equitable outcomes are achieved where a full transfer of parental leave pay to the secondary claimant is requested.

Human rights implications

This legislative instrument engages the following rights:

- the right to maternity leave as contained within article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 11(2)(b) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)
- the right to social security as contained within article 9 under ICESCR
- the rights of parents and children as contained within article 18 of the Convention on the Rights of the Child.

Right to maternity leave

The right to maternity leave includes an entitlement for working mothers to paid leave or social security benefits during a reasonable period before and after childbirth. It also requires countries, as a measure of prevention of discrimination against women, to provide maternity leave with pay or with comparable social benefits without loss of former employment or seniority. The right to maternity leave is contained in article 10(2) of the ICESCR and article 11(2)(b) of the CEDAW.

The exemption introduced under the Amendment Rules promotes the right to maternity leave by supporting the operation of the Paid Parental Leave scheme. The exemption ensures people are not excluded from payment where it is the policy intent that they should qualify for payment.

Right to social security

The right to social security in article 9 of the ICESCR requires that a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme that provides 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. Article 26 of the Convention on the Rights of the Child (CRC) ensures that right to ‘every child’ and requires that the benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.

The Amendment Rules enact an exemption from the NARWP for people who are in receipt of a relevant welfare payment, preventing them from being disqualified from payment where they require support following the birth or adoption of their child.

This exemption is intended to reflect the fact that receipt of these payments indicates a need for support, which should include parental leave pay if the people are otherwise eligible for the payment.

Rights of parents and children

Article 18 of the CRC states that ‘States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child’. In guaranteeing and promoting those rights, ‘States Parties shall render appropriate assistance to the parents and legal guardians in the performance of their child-rearing responsibilities’.

The ability of a primary claimant for parental leave pay (usually the birth mother) to transfer the payment to her partner or the father of the child as a secondary claimant is intended to support choice for families when deciding who will be the primary carer of a child.

The Amendment Rules promote the rights of parents and children by ensuring claimants are not made subject to the NARWP when it is appropriate that they receive an exemption. The Amendment Rules support the operation of section 15 of the PPL Act, which allows parents to transfer Parental Leave Pay from primary claimants to the secondary claimants, supporting their ability to share responsibility for the upbringing and development of their child.

Conclusion

The Amendment Rules are compatible with human rights because they advance the protection of human rights.

The Hon Paul Fletcher MP, Minister for Families and Social Services