

EXPLANATORY STATEMENT

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

Paid Parental Leave Act 2010

Paid Parental Leave Amendment (Flexibility Measures) Rules 2020

Background

The Paid Parental Leave Amendment (Flexibility Measures) Rules 2020 (the **Amendment Rules**) will amend the Paid Parental Leave Rules 2010 (the **Rules**) in response to the amendments made by the *Paid Parental Leave Amendment (Flexibility Measures) Act 2020* (the **Flexibility Measures Act**) which received Royal Assent on 16 June 2020 and will commence on 1 July 2020.

The Flexibility Measures Act amended the *Paid Parental Leave Act 2010* (the **PPL Act**) to implement new arrangements related to the Government's paid parental leave (**PPL**) scheme. The purpose of these amendments is to provide a wider range of options to families who seek to access parental leave pay (**PLP**) under the PPL scheme. The Flexibility Measures Act supports women's economic independence by allowing primary carers to access PLP more flexibly, particularly birth mothers and adoptive parents who are self-employed or small business owners. This builds on and adds to the amendments made by the *Paid Parental Leave Amendment (Work Test) Act 2019*, which changed the PPL work test to extend access to the PPL scheme.

Under the previous PPL scheme, eligible parents (and other claimants in limited circumstances) were only paid PLP in a single continuous block of up to 18 weeks, and had to claim within 12 months of the birth or adoption of their child. The Flexibility Measures Act introduced a more flexible PPL scheme that reduces the previous 18 week block to 12 weeks and allows the remaining six weeks to be taken flexibly before the child turns two. A person can still receive PLP over a continuous 18 week period if they elect to do so.

The Amendment Rules amend the Rules to set out the eligibility criteria for days in the person's initial continuous 12 week PPL period (explained further below) and for a person's flexible PPL days (explained further below). The existing care and work requirements (and the exemptions from these) have been adapted for the purposes of the new flexible PPL scheme that will commence on 1 July 2020.

The Amendment Rules also set out when the Secretary can shift certain flexible PPL days in a person's claim to align with the end of the person's initial 12 week PPL period. This applies where the person elects to take more than 12 weeks of PLP in a single block. The new rules aim to reduce the administrative burden on PLP recipients by preventing them from having to re-claim PLP for their flexible PPL days if their child's actual date of birth is different to the expected date of birth provided in a pre-birth claim. It also applies if the start date for their PPL period is different to that nominated in their claim, for example due to backdating rules.

The Amendment Rules also make minor changes to the information required by the Secretary from employers who pay PLP to their employees under an employer determination. It also amends the information the Secretary is required to provide PLP recipients in relation to an instalment of PLP.

How the PPL scheme has changed

Under the amendments made by the Flexibility Measures Act, parents (and other claimants in limited cases) are able to claim two types of PLP:

- The first type will be an initial period of 12 weeks called the **PPL period**. The rules relating to this block will be the same as currently apply to the existing 18 week period—except that the period will be reduced in length.
- The second type is new and will take place in the person's **flexible PPL period**. Days during this period are called **flexible PPL days**. Eligible parents (and other claimants in limited circumstances) will be able to claim PLP for a maximum of 30 days whenever they like during the flexible PPL period, which usually starts after the PPL period ends and finishes when the child turns two.
- So long as an effective claim for PLP in the PPL period has been made before the child turns one, a person can claim for PLP on any flexible PPL day until the child turns two.

How people access PLP in the new flexible PPL period will be up to them

Many claimants will simply elect to claim 30 flexible PPL weekdays straight after their PPL period ends, so that, functionally, they are taking 18 straight weeks of PLP. If they do so, then PLP will work in a very similar manner to how it has previously worked under the Act. For example, if an employer paid for all of the person's PLP under the previous scheme, then the employer would continue to pay for all 18 continuous weeks, even though that 18 week period is now made up of a 12 week PPL period plus 6 weeks of flexible PPL weekdays immediately after.

Alternatively, parents might decide that they want to use PLP in their flexible PPL period to support a gradual return to work. For example, Jane, who previously worked five days per week, has a child. She initially claims her PPL period of 12 weeks after the end of her employer paid maternity leave. Jane subsequently returns to work and enters into an agreement to work three days per week with her employer. Jane would be able to apply to be paid PLP on the two days per week that she is not working and has care of the child.

In this way, Jane is supported in trying to balance parental responsibilities with returning to work. There are many other ways to use the 30 days of PLP in the flexible PPL period. The Government expects that parents will use the flexible arrangements to support whatever approach works best for them.

Different eligibility rules for the flexible PPL period

Generally speaking the eligibility criteria for PLP on a flexible PPL day are the same as those for a day in the initial 12 week PPL period. To be eligible, on the day the person must:

- have met the work test and income test,
- be on leave or not working,
- be the primary carer of the child
- meet residency requirements, and
- not be in a Newly Arrived Residents Waiting Period (**NARWP**), or have an exemption from the NARWP.

In addition, primary claimants must not have been in a NARWP on the date of birth of the child, or have an exemption, and must meet the residency requirements on the date of birth.

However, unlike in the 12 week PPL period, parents and other limited claimants will not lose eligibility for PLP in the flexible PPL period if they cease to meet these eligibility criteria on days when they are not claiming payment, for example because they return to work, or because they stop being the primary carer of the child.

The Amendment Rules

The Amendment Rules amend Part 2-3 of the Rules to determine the eligibility criteria for those primary claimants, secondary claimants and tertiary claimants of PLP who rely upon the Rules to be eligible for PLP for a child (see subparagraph 31(4)(a)(iv) and paragraph 31AA(4)(e) of the PPL Act (for primary claimants) and paragraph 31(4)(b) and paragraph 31AA(5)(b) of the PPL Act (for secondary and tertiary claimants)).

These eligibility criteria will look at a person's circumstances on a day (the **test day**).

If the test day is not a flexible PPL day for the child (that is, if the test day is a day between the date of birth and the end of the 12 week period), these conditions will include that the person has not returned to work (as defined in section 48 of the PPL Act) on or before the test day. A person's return to work will be disregarded if the person satisfies one or more of the exemptions (described in further detail below) on the test day. The Amendment Rules also set out circumstances in which a person can be eligible for PLP in the PPL period despite not having primary care of the child on a day on which they are required to meet the eligibility criteria.

If the test day is a flexible PPL day, the condition will be that the person is performing no more than one hour of paid work (as defined in section 35 of the PPL Act) on the test day, other than for a permissible purpose (as defined in section 49 of the PPL Act). If the person performs paid work for more than one hour on the test day this will be disregarded if the person satisfies one or more of the exemptions (described in further detail below) on that day. The Amendment Rules also set out circumstances in which a person can be eligible for PLP despite not having primary care of the child on a flexible PPL day.

The provisions for the work and care requirements for assessing PLP eligibility are intended to adapt the existing provisions for the current 18 week PPL period and apply these to the new flexible PPL scheme. New drafting of the provisions ensures they are applicable to both the continuous 12 week PPL period and flexible PPL days that will exist from 1 July 2020. These amendments also restructure the eligibility provisions in Subdivisions 2.3.1.1 to 2.3.1.3 of the Rules (repealed by the Amendment Rules) to streamline the provisions and minimise duplication. New Subdivision 2.3.1.3A sets out common eligibility criteria that are applicable to primary, secondary and tertiary claimants of PLP and relevant when determining whether work and care requirements have been met.

The Amendment Rules also insert new Division 2.4.2 which provides a method for determining a claim for PLP to have different flexible PPL days for the purposes of paragraph 57A(4)(b) of the PPL Act. Subsection 57A(4) of the PPL Act empowers the Secretary to shift the person's claim for flexible PPL days in certain limited circumstances. If those circumstances exist, the Secretary will be able to treat the claim as having specified certain other flexible PPL days. Further details on these amendments and examples are provided later in this Explanatory Statement.

The Amendment Rules also amend rule 3.4 in Part 3-2 of the Rules, which relates to the kinds of record an employer must make and keep in relation to a person for whom an employer determination is made under the PPL Act. The Amendment Rules amend rule 3.4 to account for the commencement of the Flexibility Measures Act on 1 July 2020 and the implementation of the new flexible PPL arrangements discussed above.

The Amendment Rules also amend rule 3.5 in Part 3-3 of the Rules, which relates to the information the Secretary must provide to a person who receives an instalment of PLP. The Amendment Rules amend rule 3.5 to account for the commencement of the Flexibility Measures Act on 1 July 2020 and the introduction of flexible PPL days and the implementation of the new flexible PPL arrangements discussed above.

Commencement

The Amendment Rules commence on 1 July 2020.

The Rules prescribe matters relevant to the assessment and provision of PPL. Section 298 of the PPL Act provides that the Minister may, by legislative instrument, make rules from time to time, 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 the power to make a legislative instrument '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'. In making the Amendment Rules, the Minister is relying upon this subsection in conjunction with the instrument-making power in section 298 of the PPL Act.

This commencement date is chosen to align with the commencement of the Flexibility Measures Act. Section 4 of the *Acts Interpretation Act 1901* allows the

Minister to sign these Amendment Rules after Royal Assent of the Flexibility Measures Act but prior to the commencement of that Act on 1 July 2020.

Consultation

Consultation was not undertaken specifically on the Amendment Rules but the Flexibility Measures Act has been the subject of extensive public consultation, including an inquiry by the Senate Community Affairs Legislation Committee. The measures were also publically announced as part of the Women's Economic Security Statement on 20 November 2018.

The Amendment Rules adapt existing eligibility criteria to align these with the new flexible PPL arrangements introduced by the Flexibility Measures Act from 1 July 2020. The insertion of new rule 2.40 is intended to ensure that certain PLP claimants are not administratively inconvenienced and required to re-claim one or more flexible PPL days merely because their child is born earlier or later than expected, or because they verified the birth of their child later than 28 days after birth. The other changes made by the instrument are administrative in nature and are made as a consequence of the passage of the Flexibility Measures Act.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted and confirmed that the Amendment Regulations do not require a Regulatory Impact Statement (OBPR Reference: 24162).

Explanation of the provisions

Section 1 provides that the name of the Amendment Rules is the *Paid Parental Leave Amendment (Flexibility Measures) Rules 2020*.

Section 2 provides that the Amendment Rules commence on 1 July 2020.

Section 3 provides that the Amendment Rules are made under the PPL Act.

Section 4 provides that the instruments that are specified in a Schedule to the Amendment Rules are amended or repealed as set out in the applicable items of the Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1

Item 1 inserts a definition for **test day**, which has the meaning given by new rule 2.1 (for primary claimants), new rule 2.5 (for secondary claimants) or new rule 2.10 (for tertiary claimants). These rules are discussed below in item 2.

Item 2 repeals existing Subdivisions 2.3.1.1 to 2.3.1.3 and substitutes new Subdivisions 2.3.1.1 to 2.3.1.3A.

Subdivision 2.3.1.1 - When a Primary Claimant is Eligible for Parental Leave Pay

New Subdivision 2.3.1.1 sets out when a primary claimant is eligible for PLP. The expressions 'primary claimant' and 'primary claim' are defined (respectively) in section 6 and subsection 53(2) of the PPL Act.

New **rule 2.1** sets out the purpose of the Subdivision. This Subdivision prescribes, for the purposes of subparagraph 31(4)(a)(iv) and paragraph 31AA(4)(e) of the PPL Act, the conditions that a person who is a primary claimant must satisfy on a day (the **test day**) in order to be eligible for PLP for a child on that day.

New **rule 2.2** sets out the eligibility criteria that a person who is a primary claimant must satisfy on the test day.

New paragraph 2.2(1)(a) provides that on the test day the person must be a primary carer of the child (as defined in section 47 of the PPL Act) or satisfy one of the exceptions in rules 2.4.2.13 or 2.14 for the child (these rules are discussed further below).

New paragraph 2.2(1)(b) then provides that if the test day is not a flexible PPL day for the child, the person must not have returned to work on (or before) the test day.

New paragraph 2.2(1)(c) then provides that if the test day is a flexible PPL day for the child, the person must be performing no more than one hour of paid work on the test day. This means that where the person is not performing any paid work (or one hour or less of paid work) they would satisfy new paragraph 2.2(1)(c) on the test day.

New subrule 2.2(2) provides for when a return to work on or before a test day should be disregarded or when paid work performed on the test day should be disregarded.

New paragraph 2.2(2)(a) provides that a return to work on a day should be disregarded if:

- the person satisfies new rule 2.3, 2.14, 2.15, 2.16 or 2.17 for the child on the day (these rules are discussed further below); or
- the person satisfies new rule 2.4 for the child on the day because of the reason set out in new paragraph 2.4(2)(b) (rule 2.4 is discussed further below).

New paragraph 2.2(2)(b) provides that paid work performed on a test day should be disregarded if:

- the person is performing that work for a permissible purpose; or
- the person satisfies new rule 2.3, 2.14, 2.15, 2.16 or 2.17 for the child on the test day (these rules are discussed further below); or
- the person satisfies new rule 2.4 for the child on the test day because of the reason set out in new paragraph 2.4(2)(b) (new rule 2.4 is discussed further below).

New rule 2.2 is substantially the same as current rule 2.2 (which has been repealed by this item) and has been extended to set out equivalent eligibility criteria flexible PPL days and remove references to the baby bonus (which has ceased).

New **rule 2.3** sets out one of the circumstances in which a return to work or paid work performed on a day will be disregarded for the purposes of determining eligibility for PLP.

For the new rule to apply, the person must be the birth mother of the child on a day. Further, the person's child must be required to remain in hospital (or, in a case where the child is born elsewhere, is hospitalised immediately after their birth) for one or more of the following reasons:

- the child was born prematurely;
- the child developed a complication or contracted an illness during their period of gestation or at birth; or
- the child developed a complication or contracted an illness following their birth.

New rule 2.3 provides that the stay in hospital must be continuing or the child must be being discharged from that stay in hospital.

Further, new rule 2.3 provides that the day must be on or after the 14th day after the day the child is born. Applying item 6 of subsection 36(1) of the *Acts Interpretation Act 1901*, this would mean that, if the child was born on 1 January 2021, the first day to which this exemption from the work requirements would apply would be 15 January 2021 (that is, the 14th day after the day the child was born).

New rule 2.3 essentially replaces current paragraph 2.2(1A)(d) and current rule 2.5B of the Rules (which are repealed by this item).

New **rule 2.4** sets out one of the circumstances in which a loss of primary care of a child will be disregarded for the purposes of determining eligibility for PLP. New paragraph 2.4(2)(b) also applies in determining one of the circumstances in which a return to work or paid work performed on a day will be disregarded for the purposes of determining eligibility for PLP (see discussion of new paragraphs 2.2(2)(a) and 2.2(2)(b) above).

New rule 2.4 maintains the eligibility of a birth mother for 18 weeks after birth despite the fact she is not caring for her child because she has relinquished the child for one of the following reasons (outlined in new paragraph 2.4(2)(a)):

- the child was born of a surrogacy arrangement;
- as part of the process for the adoption of the child; or
- because the child has been removed from her care by a State or Territory child protection agency.

Under new paragraph 2.4(2)(b), eligibility will also be maintained where the child is stillborn or dies prior to being relinquished, where the mother would have otherwise relinquished the child in one of the three circumstances set out above in new paragraph 2.4(2)(a).

New rule 2.4 essentially replaces current rule 2.6 of the Rules (which is repealed by this instrument).

Subdivision 2.3.1.2 - When a Secondary Claimant is Eligible for Parental Leave Pay

New Subdivision 2.3.1.2 sets out when a secondary claimant is eligible for PLP. The expressions 'secondary claimant' and 'secondary claim' are defined (respectively) in section 6 and subsection 53(3) of the PPL Act.

New **rule 2.5** sets out the purpose of the Subdivision. This Subdivision prescribes, for the purposes of paragraph 31(4)(b) and paragraph 31AA(5)(b) of the PPL Act, the conditions that a person who is a secondary claimant must satisfy on a day (the **test day**) in order to be eligible for PLP for a child on that day.

A note to new rule 2.5 explains that new rule 2.6 (discussed below) sets out the PLP eligibility criteria for secondary claimants who claim PLP in normal circumstances (that is, a standard claim under paragraph 54(2)(a), (b) or (c) of the PPL Act). The note also explains that new rule 2.7 (discussed below) sets out the eligibility criteria for secondary claimants who claim PLP in exceptional circumstances (that is, a claim under paragraph 54(2)(d) of the PPL Act).

New **rule 2.6** sets out the PLP eligibility criteria for secondary claimants who claim PLP in normal circumstances.

New paragraphs 2.6(1)(a) to (c) provide that the person must satisfy the following requirements on the test day:

- the work test (see Division 3 of Part 2-3 of Chapter 2 of the PPL Act) – new paragraph 2.6(1)(a);

- the income test (see Division 4 of Part 2-3 of Chapter 2 of the PPL Act) – new paragraph 2.6(1)(b); and
- the Australian residency test (see Division 5 of Part 2-3 of Chapter 2 of the PPL Act) – new paragraph 2.6(1)(c).

New paragraph 2.6(1)(d) then provides that the person must be the primary carer of the child on the test day or satisfy new rule 2.13 or 2.14 (discussed below) for the child.

New paragraph 2.6(1)(e) then provides that if the test day is not a flexible PPL day for the child, the person must not have returned to work on (or before) the test day.

New paragraph 2.6(1)(f) then provides that if the test day is a flexible PPL day for the child, the person must not have performed more than one hour of paid work on the test day.

Paragraph 2.6(2)(a) provides that if the test day is a flexible PPL day for the child then new paragraphs 2.6(1)(a) and (b) (discussed above) only apply if the person has not previously satisfied the work and income tests in relation to the child.

Paragraph 2.6(2)(b) provides that a return to work on a day should be disregarded if the person satisfies new rule 2.8, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the day.

Paragraph 2.6(2)(c) provides that paid work performed on the test day should be disregarded if the person is performing that work for a permissible purpose or satisfies new rule 2.8, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the test day.

New rule 2.6 is substantially the same as current rule 2.8 (which has been repealed by this item) and has been extended to set out equivalent eligibility criteria for flexible PPL days and remove references to the baby bonus (which has ceased).

New **rule 2.7** sets out the PLP eligibility criteria for secondary claimants who claim PLP in exceptional circumstances.

New paragraph 2.7(1)(a) provides that the person must satisfy the Australian residency test (see Division 5 of Part 2-3 of Chapter 2 of the PPL Act) on the test day.

New paragraph 2.7(1)(b) then provides that the person must be the primary carer of the child on the test day or satisfy new rule 2.13 or 2.14 (discussed below) for the child.

New paragraph 2.7(1)(c) then provides that if the test day is not a flexible PPL day for the child, the person must not have returned to work on (or before) the test day.

New paragraph 2.7(1)(d) then provides that if the test day is a flexible PPL day for the child, the person must not have performed more than one hour of paid work on the test day.

Paragraph 2.7(2)(a) provides that a return to work on a day should be disregarded if the person satisfies new rule 2.9, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the day.

Paragraph 2.7(2)(b) provides that paid work performed the test day should be disregarded if the person is performing that work for a permissible purpose or satisfies new rule 2.9, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the test day.

New rule 2.7 is substantially the same as current rule 2.12 (which has been repealed by this item) and has been extended to set out equivalent eligibility requirements for a flexible PPL days and remove references to the baby bonus (which has ceased).

New **rule 2.8** sets out a circumstance in which a return to work or paid work performed on a day will be disregarded for the purposes of determining eligibility for PLP under new rule 2.6 (discussed above).

For the new rule to apply, the person must be the birth father, a partner of the birth mother or a partner of a father of the child on a day. Further, the person's child must be required to remain in hospital (or, in a case where the child is born elsewhere, is hospitalised immediately after their birth) for one or more of the following reasons:

- the child was born prematurely;
- the child developed a complication or contracted an illness during their period of gestation or at birth; or
- the child developed a complication or contracted an illness following their birth.

New rule 2.8 provides that the stay in hospital must have started, be continuing, or the child must be being discharged from that stay in hospital.

New rule 2.8 essentially replaces current paragraph 2.8(2A)(d) and rule 2.11B of the Rules (which is repealed by this item).

New **rule 2.9** sets out a circumstance in which a return to work or paid work performed on a day will be disregarded for the purposes of determining eligibility for PLP under new rule 2.7 (discussed above).

A person satisfies new rule 2.9 for a child on a day if that day is:

- during the period starting when the primary claimant stopped caring for the child and ending when the child's care arrangements were settled; and
- the child's care arrangements were settled within a reasonable time after the primary claimant stopped caring for the child.

New rule 2.9 essentially replaces current rule 2.16 of the Rules (which is repealed by this item).

Subdivision 2.3.1.3 - When a Tertiary Claimant is Eligible for Parental Leave Pay

New Subdivision 2.3.1.3 sets out when a tertiary claimant is eligible for PLP. The expressions 'tertiary claimant' and 'tertiary claim' are defined (respectively) in section 6 and subsection 53(4) of the PPL Act.

New **rule 2.10** sets out the purpose of the Subdivision. This Subdivision prescribes, for the purposes of paragraphs 31(4)(b) and 31AA(5)(b) of the PPL Act, the conditions that a person who is a tertiary claimant must satisfy on a day (the **test day**) in order to be eligible for PLP for a child on that day.

New **rule 2.11** sets out the eligibility criteria that a person who is a tertiary claimant must satisfy on the test day.

New paragraph 2.11(1)(a) provides that the person must satisfy the Australian residency test (see Division 5 of Part 2-3 of Chapter 2 of the PPL Act) on the test day.

New paragraph 2.11(1)(b) then provides that the person must be the primary carer of the child on the test day or satisfy new rule 2.13 or 2.14 (discussed below) for the child.

New paragraph 2.11(1)(c) then provides that if the test day is not a flexible PPL day for the child, the person must not have returned to work on (or before) the test day.

New paragraph 2.11(1)(d) then provides that if the test day is a flexible PPL day for the child, the person must not have performed more than one hour of paid work on the test day.

Paragraph 2.11(2)(a) provides that a return to work on a day should be disregarded if the person satisfies new rule 2.12, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the day.

Paragraph 2.11(2)(b) provides that paid work performed on the test day should be disregarded if the person is performing that work for a permissible purpose or satisfies new rule 2.12, 2.14, 2.15, 2.16 or 2.17 (these rules are discussed further below) for the child on the test day.

New rule 2.11 is substantially the same as current rule 2.18 (which has been repealed by this item) and has been extended to set out equivalent eligibility requirements for flexible PPL days and remove references to the baby bonus (which has ceased).

New **rule 2.12** sets out a circumstance in which a return to work or paid work performed on a day will be disregarded for the purposes of determining eligibility for PLP under new rule 2.11 (discussed above).

A person satisfies new rule 2.12 for a child on a day if that day is:

- during the period starting when the secondary claimant stopped caring for the child and ending when the child's care arrangements were settled; and
- the child's care arrangements were settled within a reasonable time after the secondary claimant stopped caring for the child.

New rule 2.12 essentially replaces current rule 2.22 of the Rules (which is repealed by this item).

Subdivision 2.3.1.3A - Common Requirements for Eligibility for Parental Leave Pay

New Subdivision 2.3.1.3A consolidates in one place a number of common requirements previously repeated throughout current Subdivisions 2.3.1.1 to 2.3.1.3 of Part 2-3 (repealed by this item). These requirements relate to the work and care eligibility criteria for primary, secondary and tertiary claimants of PLP.

New **rule 2.13** sets out one of the circumstances where a person can be eligible for PLP (as a primary, secondary or tertiary claimant) despite not being a primary carer for a child on a day.

New rule 2.13 applies if a person is not the primary carer of the child on a day but has previously been or will become the child's primary carer. The person must be temporarily unable to be the primary carer of the child due to circumstances beyond the person's control. Where the circumstance is that an event occurs in relation to the child without the person's consent that prevents the child being in the person's care, then rule 2.13 does not apply (new rule 2.14 may instead apply). Examples of circumstances intended to be covered by this rule are serious illness of the child's primary carer, or where the carer has to travel overseas for medical treatment.

The period of temporary inability must be likely to be less than 26 weeks. If the period is likely to be longer than 26 weeks, the inability should not be regarded as temporary, and another person who is providing care for the child may be in a position to claim PLP.

Additionally, there must not be a determination in force under the PPL Act that PLP is payable for the child to another person for the same day. This is to prevent payments being made on the same day to two different individuals for the same child in these particular circumstances.

The Secretary must be satisfied that the person would have been the child's primary carer except for the person's temporary inability to be the child's primary carer.

New **rule 2.14** sets out another circumstance where a person can be eligible for PLP (as a primary, secondary or tertiary claimant) despite not being a primary carer for a child on a day. It also sets out a circumstance in which a return to work or the performance of more than one hour of paid work on a day should be disregarded for the purposes of determining eligibility for PLP for primary, secondary and tertiary claimants

A person satisfies this rule for a child on a day if:

- sometime before that day, the person was the primary carer of the child; and
- an event occurs in relation to the child:
 - on or before that day; and
 - without the person's consent;

that prevents the child being in the person's care on that day; and

- the person takes reasonable steps on or before that day to have the child again in the person's care sometime after that day; and
- on that day, the person, or the person's partner:
 - is the child's legal parent; or
 - is otherwise legally responsible for the child; and
- in the case where the child is in the care of another legal parent of the child on that day—the person, or the person's partner, has a court order or a parenting plan to the effect that the child is to live with the person or the person's partner on or after that day; and
- there is no determination in force under the Act that PLP is payable for the child to another person for that day.

'Parenting plan' is defined in rule 1.3 of the Rules as having the meaning given by subsection 63C(1) of the *Family Law Act 1975*.

New **rule 2.15** sets out a circumstance in which a return to work or the performance of more than one hour of paid work on a day should be disregarded for the purposes of determining eligibility for PLP for primary, secondary and tertiary claimants.

A person satisfies this rule for a child on a day if, on that day, the person:

- is a defence force member or a law enforcement officer; and
- is performing paid work because the person has been compulsorily recalled to duty.

New **rule 2.16** sets out another circumstance in which a return to work or the performance of more than one hour of paid work on a day should be disregarded for the purposes of determining eligibility for PLP for primary, secondary and tertiary claimants.

A person satisfies this rule for a child on a day if, on that day, the person on that day, the person is performing paid work because the person has to comply with the requirements of a summons or other compulsory process to appear to:

- give evidence or information; or

- produce documents or other things.

New **rule 2.17** sets out another circumstance in which a return to work or the performance of more than one hour of paid work on a day should be disregarded for the purposes of determining eligibility for PLP for primary, secondary and tertiary claimants.

A person satisfies this rule for a child on a day if, on that day, the person:

- is a health professional, emergency services worker or other essential worker; and
- is performing paid work because the person has returned to work in response to a State, Territory or national emergency (including in response to the coronavirus known as COVID-19).

New subrule 2.17(2) provides that for the purposes of new rule 2.17, a person is an '*essential worker*' if the person has specific skills, or is involved in the production of goods or the delivery of services, where the skills, goods or services are essential in responding to an emergency.

Item 3 adds new Division 2.4.2 at the end of Part 2-4. This new Division contains new rule 2.40, which is made under section 57A of the PPL Act (inserted by the Flexibility Measures Act).

New rule 2.40 provides a method for determining a claim to have different flexible PPL days for the purposes of paragraph 57A(4)(b) of the PPL Act.

Subsection 57A(4) of the PPL Act empowers the Secretary to shift the person's claim for PLP on flexible PPL days in certain limited circumstances. If those circumstances exist, the Secretary will be able to treat the claim as having specified certain other flexible PPL days.

New rule 2.40 will be relevant to people who have a *continuous PPL period* in accordance with subsection 6A(3) of the PPL Act. A continuous PPL period is when a person elects to take one or more flexible PPL days which start on the first week day that occurs after the person's expected PPL period for the child ends, and only consists of consecutive flexible PPL days for the child that are week days. New rule 2.40 applies whether that election is made before or after the birth of the child.

New rule 2.40 will apply where a person has made a claim for PLP before the child is born and has a continuous PPL period for the child under subsection 6A(3) of the PPL Act. This can be relevant whether the person has elected to take one flexible PPL day immediately following the initial 12 week PPL period, or the full flexible PPL period they are entitled to. If the person's 12 week PPL period then ends on a different date to that which was expected (e.g. due to the child being born earlier or later than expected), the Secretary will be empowered to shift the person's claim for their flexible PPL days so that the person still claims the same number of consecutive flexible PPL days.

Another circumstance where rule 2.40 will be relevant will be the situation in which a person has made a claim before the child is born, but does not verify their child's

birth within 28 days of the birth. In that circumstance, the date the person's PPL period starts will be the day the person verifies the birth, which may cause any claim for flexible PPL days that specifies particular dates to overlap with days in the person's PPL period (with the result that flexible PPL cannot be claimed for those days). In this circumstance, the Secretary will also be empowered to 'shift' the dates that are claimed (to ensure they can be claimed), but only where the dates that are claimed form part of a continuous PPL period in which the person has claimed the 12 week PPL period and one or more consecutive flexible PPL days commencing on the first week day that occurs after the 12 week period (not including weekends).

New rule 2.40 also provides for the situation in which a claim for PLP is made after the child is born and similarly allows the Secretary to adjust the person's flexible PPL days to ensure these will be determined by reference to the end of the person's initial 12 week PPL period.

Item 4 repeals paragraph 3.4(1)(a) and substitutes a new paragraph. This new paragraph requires that an employer must keep a record of a PPL funding amount received by the employer for the person and the PPL days for which the PPL funding amount was paid, or the flexible PPL days for which the PPL funding amount was paid. This item updates rule 3.4 to account for the commencement of the Flexibility Measures Act on 1 July 2020.

Item 5 adds a new paragraph 3.5(2)(k) which requires the Secretary to provide a person with information including the amount of each deduction from a PPL payment if a deduction is made under section 69A or 69B of the PPL Act. This item updates rule 3.5 to account for the commencement of the Flexibility Measures Act on 1 July 2020.

Item 6 adds a new Part 7 at the end of the Rules which provides that the Amendment Rules apply only in relation to a claim for PLP for a child if the claim is made on or after 1 July 2020 and the child is born on or after 1 July 2020.

Statement of Compatibility with Human Rights

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

Paid Parental Leave Amendment (Flexibility Measures) Rules 2020

The 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 Amendment Rules

The *Paid Parental Leave Amendment (Flexibility Measures) Rules 2020* (Amendment Rules) amend the *Paid Parental Leave Rules 2010* (PPL Rules), which are made pursuant to section 298 of the *Paid Parental Leave Act 2010* (the PPL Act).

The Paid Parental Leave (PPL) scheme is a Government-funded payment consisting of Parental Leave Pay (PLP), an 18-week payment at the rate of the national minimum wage for eligible primary carers 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 fathers and partners caring for newborn or recently adopted children.

From 1 July 2020, the flexibility of PLP will be increased, under changes introduced by the *Paid Parental Leave Amendment (Flexibility Measures) Act 2020* (the Flexibility Measures Act). Eligible parents will be able to take a non-flexible PPL period of up to 12 weeks (60 week days), which must be taken in the 12 months following the birth or adoption of the child; and flexible PPL days of a maximum of six weeks (30 days), which can be taken any time after the initial period and within 24 months of the birth or adoption of the child.

The Amendment Rules make changes to the PPL Rules that are necessary to support this measure. The eligibility provisions for PLP will be updated so that they apply to flexible PPL days and the 12 week PPL period.

A new rule (new rule 2.40) will be inserted for the purposes of subsection 57A(4) of the PPL Act (which was inserted by the Flexibility Measures Act), to specify the circumstances that must be met for the Secretary to shift the person's claim for flexible PPL days. If those circumstances exist, the Secretary will be able to treat the claim as having specified certain other flexible PPL days (thus saving the person from having to make contact with Services Australia to adjust their claim). New rule 2.40 would, for example, apply where the person has made a claim before the child is born, has selected specific dates in a period of consecutive days immediately following the end of their expected PPL period and the person's PPL period ends on a different date to that which was expected. In these circumstances, the Secretary will be empowered to shift the person's claim for those particular flexible PPL days so that the person still claims the same number of consecutive flexible PPL days that

are week days immediately following their PPL period. If, for example, a person claims their full 18 weeks in a continuous block but their child is born a week later than expected, the Secretary would essentially start the person's six weeks' worth of flexible PPL a week later as their initial 12 week PPL period would have ended a week later. This prevents there being an overlap between the last week of the initial 12 week period and the first week of the person's six weeks' worth of flexible PPL. Under the PPL Act, a person cannot be paid more than one kind of PLP in respect of the same day.

The Amendment Rules also make minor changes to the provisions in the Rules regarding the information to be provided by employers who pay PLP to their employees under an employer determination and to the provisions in the Rules concerning the information the Secretary is required to provide in relation to an instalment of PLP.

The Amendment Rules engage the following human rights:

The right to social security

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to social security, and Article 26 of the *Convention on the Rights of Children* (recognises the right of every child to benefit from social security).

The Amendment Rules are necessary to update the PPL Rules to ensure they reflect the amendments made to the PPL Act by the Flexibility Measures Act. The Flexibility Measures Act provides greater flexibility in the way people can access PLP under the PPL Act and this supports the right to social security.

The right to protection and assistance for families

The right to protection and assistance to families (particularly mothers), during a reasonable period before and after childbirth in Article 10(2) of the ICESCR recognises protection should be accorded to mothers. During such a period, working mothers should be accorded paid leave or leave with adequate social security benefits.

The UN Committee on Economic, Social and Cultural Rights has commented that Article 7 of the ICESCR requires States Parties to take steps to 'reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.'

The Amendment Rules are necessary to update the PPL Rules to ensure they reflect the amendments made to the PPL Act by the Flexibility Measures Act. The Flexibility Measures Act provides greater flexibility in the way people can access PLP under the PPL Act and supports the right to protection and assistance to families (particularly mothers), during a reasonable period before and after childbirth.

The right to maternity leave

The right to maternity leave is contained within Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and Article 10(2) of the ICESCR. Article 11(2)(b) of the CEDAW requires States Parties 'to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances'.

The amendments do not interfere with the existing rights under the *Fair Work Act 2009*, including access to 12 months of unpaid parental leave, noting that Australia has a reservation in relation to Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women*. The Amendment Rules are necessary to update the PPL Rules to ensure they reflect the amendments made to the PPL Act by the Flexibility Measures Act. The Flexibility Measures Act provides greater flexibility in the way people can access PLP under the PPL Act and supports the right to maternity leave.

Conclusion

The Amendment Rules are compatible with human rights as they facilitate access to a more flexible PPL system. The Amendment Rules support the right to social security, the right to protection and assistance to families (particularly mothers) and the right to maternity leave.

**[Circulated by the authority of the Minister for Families and Social Services,
Senator the Hon Anne Ruston]**