

EXPLANATORY STATEMENT

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

Paid Parental Leave Act 2010

Paid Parental Leave Rules 2021

Purpose

The Paid Parental Leave Rules 2021 (the Rules) are made under section 298 of the *Paid Parental Leave Act 2010* (the Act).

This Instrument replaces the Paid Parental Leave Rules 2010 (the 2010 Rules) which are due to sunset on 1 April 2021.

The Rules are made for a number of purposes required or permitted by the Act. The Rules:

- prescribe additional categories of eligibility for Parental Leave Pay (PLP);
- prescribe exceptional circumstances in which claims for PLP may be made;
- prescribe what is paid leave or paid work for the purposes of the work test;
- prescribe the process for determining a claim to have different flexible Paid Parental Leave (PPL) days;
- prescribe circumstances in which claims can be made for Dad and Partner Pay (DaPP);
- prescribe the information to be provided by an employer to their employee and by the Secretary to a claimant in relation to PLP and the records to be kept by the employer;
- prescribe guidelines for the exercise of the Secretary's power to give certificates for the disclosure of information;
- prescribe a settlement interest rate; and
- extend the operation of the employer role under the Act to include persons who are in a relationship that is similar to the relationship between an employer and an employee, including state law enforcement officers, Australian Federal Police officers and defence force members.

Background

The Rules substantially replicate the 2010 Rules in their operation; however, structural changes have been made to optimise readability and usability. Where a provision has been amended to change its operation, this has been highlighted in the Explanation of the Provisions below.

The Act provides for the Rules to make provision for certain people in less usual or exceptional circumstances to bring them within the PPL scheme when they would not otherwise have entitlement under the primary legislation. The Rules also enable minor administrative matters to be addressed to complete the PPL scheme.

Eligibility for PLP

In order to qualify for a PPL period, a claimant generally must be eligible for PLP on every day between the date of birth of the child and the last day of their PPL period. Eligibility for PLP on a day other than a flexible PPL day under section 31 of the Act generally requires that the person satisfies the work test, the income test and the Australian residency test, is the primary carer of the child and has not returned to work.

Subsection 31(4) of the Act provides an alternative set of criteria that a person may satisfy and be eligible. If the person is a primary claimant, they must satisfy the work test, the income test, the Australian residency test and the conditions prescribed by the Rules. If the person is a secondary or tertiary claimant, they must satisfy the conditions prescribed by the Rules. Under this subsection, there is scope for the Rules to substitute the requirements that the person is the primary carer of the child, and has not returned to work.

For PLP on a flexible PPL day, similar eligibility rules apply as for the PPL period. However, claimants will not lose eligibility for PLP in the flexible PPL period if they cease to meet these eligibility requirements 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 concept of flexible PPL days was introduced by the *Paid Parental Leave Amendment (Flexibility Measures) Act 2020*, and consequential amendments were made to the 2010 Rules by the Paid Parental Leave Amendment (Flexibility Measures) Rules 2020. These provisions continue to operate in the same manner as when they were introduced.

Eligibility for PLP on a flexible PPL day under section 31AA of the Act generally requires that the person satisfies the work test, the income test and the Australian residency test, is the primary carer of the child and is performing no more than one hour of paid work or is performing work for a permissible purpose.

Subsections 31AA(4) and 31AA(5) of the Act provide alternative sets of criteria that a person may satisfy and be eligible. If the person is a primary claimant, under subsection 31AA(4) they must satisfy the work test, the income test, the Australian residency test and the conditions prescribed by the Rules. If the person is a secondary or tertiary claimant, under subsection 31AA(5) they must satisfy the conditions prescribed by the Rules. Under these subsections, there is scope for the Rules

to substitute the requirements that the person is the primary carer of the child and that the person is performing no more than one hour of paid work, or is performing work for a permissible purpose.

The Rules maintain a person's eligibility for PLP where the person is temporarily unable to provide care for the child for reasons beyond their control, the person loses care of the child in disputed circumstances, or the person is the birth mother, and has relinquished the child's care as part of a process of adoption, surrogacy or similar.

The Rules provide for situations in which a return to work should be disregarded for eligibility for a PPL period and in which paid work of more than one hour on a flexible PPL day should be disregarded for eligibility on a flexible PPL day.

A person will remain eligible for PLP on a day if they have returned to work because they were recalled to duty as a defence force member or law enforcement officer; were complying with a summons or other compulsory process; or performed work in response to a state, territory or national emergency.

The Rules also prescribe for subsection 31A(6) of the Act, circumstances in which subsection 31A(1) of the Act (in relation to a newly arrived resident's waiting period) does not apply to a person.

Claims in exceptional circumstances

The Rules also provide for a range of exceptional circumstances in which individuals may make a primary, secondary or tertiary claim for PLP. Such circumstances are generally those in which the child's birth mother or adoptive parent becomes incapable of caring for the child during the child's first year, such that another individual must step in to provide that care. Alternatively, the Secretary must be satisfied that it is unreasonable for the birth mother, or adoptive parent to care for the child, and it is in the child's interests to be cared for by their current carer. Formal foster care situations are not included.

Generally, fewer criteria need to be established by a claimant in exceptional circumstances in order to be eligible for PLP. The Rules deal separately with the eligibility in exceptional circumstances of primary, secondary and tertiary claimants.

When it would be *unreasonable* for a person to care for a child is defined in section 6 of the Rules. For it to be unreasonable for a person to care for a child, there must be a situation where there has been extreme family break down, or serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child. The risk does not necessarily have to come from the person for whom it is unreasonable to care for the child, but may be a result of risks arising where the child would be spending time in that person's care. The reference to a 'family situation' is intended to be broad, and cover a wide range of living and care situations, for example, where a person caring for the child has a new partner or housemate who poses a risk to the child.

Surrogacy arrangements

The Rules regulate eligibility for PLP and DaPP in relation to a child born because of a surrogacy arrangement.

In Australia, surrogacy is regulated under various state and territory legislation. Each state and territory (apart from the Northern Territory) has separate legislation to regulate surrogacy arrangements, for example, the *Surrogacy Act 2010 (Qld)*, *Assisted Reproductive Treatment Act 2008 (Vic)*, *Family Relationships Act 1975*

(SA), and the *Parentage Act 2004 (ACT)*. In the Northern Territory, there is no legislation regulating surrogacy arrangements.

Different terminology is used in each state and territory when referring to surrogacy arrangements. For example, the Queensland legislation refers to 'surrogacy arrangements', whereas the Australian Capital Territory legislation refers to 'substitute parent agreements'.

The Rules clarify the matters the Secretary must take into account when considering whether a child was born because of a surrogacy arrangement. In particular, the Secretary will consider whether the surrogacy arrangement is, or would be, recognised by the relevant state or territory legislation, and whether a decision by a court has been made in relation to the parentage of the child. This change will promote consistency and predictability, while allowing surrogacy arrangements in all jurisdictions to be recognised under the Rules.

The work test

The work test for PLP and DaPP involves establishing that a person has performed paid work, or taken paid leave. The Rules extend (without limiting) the concept of paid leave to include periods receiving workers' compensation or accident compensation payments even though this is unpaid leave in formal terms. The Rules clarify that certain activities are not paid work, including work undertaken as a condition of receipt of a social security payment, e.g. 'work for the dole', work in prison otherwise than in a formal prisoner employment program or volunteer work or the receipt of passive income such as interest on investments.

Giving and keeping information relating to the payment of PLP

The Rules provide for the information that an employer is required to give a person after paying the person an instalment of PLP. The Rules also specify the information that an employer is required to keep in relation to each person for whom an employer determination comes into force. The Rules prescribe the information that the Secretary is required to give a person in those circumstances where the Secretary is required to pay a person an instalment of PLP.

Public interest certificate guidelines

The Act allows the Secretary to disclose information acquired by an officer under the Act to such persons and for such purposes as determined, if the Secretary certifies that it is necessary to do so in the public interest. The Rules prescribe guidelines to assist the Secretary in the exercise of the Secretary's power to give public interest certificates for the disclosure of information. The Secretary must act in accordance with those guidelines in giving public interest certificates.

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

The Rules slightly amend the 2010 Rules to provide additional purposes for which a public interest certificate may be issued. These amendments are in response to recommendations made by the Productivity Commission in relation to data availability and use in the public sector, and advice from the Attorney-General's Department that the public interest certificate guidelines should more appropriately reflect current international crime cooperation frameworks.

Penalty interest rate and guidelines

Previous Part 4-3 of the 2010 Rules provided guidelines in relation to debt recovery, including penalty interest guidelines. However, the *Budget Savings (Omnibus) Act 2016* introduced new interest charge arrangements in relation to PLP and DaPP.

The new arrangements were announced as part of the 2015-16 Mid-Year Economic and Fiscal Outlook measure, *Applying a general interest charge to the debts of recipients of Social Security and Family Assistance Payments*. From 1 January 2017, sections 174 to 180 of the Act were repealed and substituted with sections that outlined the revised arrangements. The key purpose of the revised arrangements is to incentivise responsible self-management of debts and encourage debtors to repay their debts in a timely manner, where they have the financial capacity to do so.

As a result, most of the matters that were addressed in Part 4-3 of the 2010 Rules are now addressed in the Act, and therefore have been removed from the Rules. Previous rule 4.22 of the 2010 Rules (now section 73 of the Rules) which provides the definition of *settlement interest* for the purposes of subsection 198(6) of the Act has been retained because it is still required by the Act.

Employer determinations for persons who are not employees and employers

The Act provides for employer determinations to be made for an employer and an employee in certain circumstances, and if an employer determination is in force, the employer is required to pay instalments of PLP to the employee. The Act allows for the Rules to provide for employer determinations to be made for persons in a relationship similar to that of an employer and employee.

The Rules provide for employer determinations to be made for the following:

- The Commissioner of Police and law enforcement officers of a state or territory (other than Queensland or the Australian Capital Territory).
- The Crown and a person who is a law enforcement officer of Queensland.
- The Australian Federal Police (AFP) Commissioner and a person who is an AFP officer.
- The Chief of the Defence Force and a person who is a defence force member.

For example, if an employer determination is made and is in force in relation to a person who is a law enforcement officer of Victoria, the Commissioner of Police (Victoria) would be required to pay instalments of PLP to the person.

Repeal

This instrument repeals the 2010 Rules which would otherwise sunset on 1 April 2010.

Authority

The Rules are made under section 298 of the Act. Section 298 of the Act provides that the Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This instrument is disallowable.

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 these Rules, the Minister is relying upon this subsection in conjunction with the instrument-making power in the sections from the *Social Security Act* above.

Commencement

The Rules commence on 1 April 2021.

Consultation

A formal consultation process was conducted between 2 February 2021 and 26 February 2021 with key government departments and external stakeholders. The Attorney-General's Department, the Department of Prime Minister and Cabinet and Services Australia were invited to provide feedback on the Rules. As a result of feedback from the Attorney-General's Department, section 14 of the Rules was drafted to retain consistency with section 78A of the *Fair Work Act 2009* (which relates to unpaid parental leave). As a result of feedback from Services Australia on sections 34 and 51, the subsections were re-ordered to clarify that the net amount of payment excludes any deductions made as well as any tax withheld.

In addition, relevant external stakeholders were provided with an opportunity to provide feedback on the Rules. Australian Industry Group and Australian Chamber of Commerce and Industry were selected based on their representation of employer groups; the Australian Council of Trade Unions was selected for their representation of union groups; and Economic Justice Australia and Australian Council of Social Services were selected as experts in social policy. None of these organisations chose to provide feedback on the Rules.

Part 9

Feedback was provided by the Information Law Unit of Attorney-General's Department and the Office of the Australian Information Commissioner on Part 9 of the Rules. As a result of this feedback, paragraph 55(1)(c) was inserted to provide that the Secretary must be satisfied that a purpose for disclosing information could not be achieved by disclosing de-identified information, before a disclosure of information that is not de-identified is made.

The Office of the Australian Information Commissioner recommended that consideration be given as to whether the covered disclosures in Subdivision B of Part 9 are reasonable, necessary and proportionate in the circumstances. The Office of the Australian Information Commissioner and the Information Law Unit

recommended giving consideration to narrowing the scope of the covered disclosures, in particular section 70.

The Department of Social Services has formed the view that the proposed measures are reasonable, necessary and proportionate to achieving a legitimate public policy objective, taking into account that:

- the Department of Social Services and Services Australia have data protections in place that safeguard the use of data; and
- it is desirable for the scope of the provisions to align with equivalent disclosure provisions in other related public interest certificate processes, such as those in the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 and the Family Assistance (Public Interest Certificate Guidelines) Determination 2015.

The Information Law Unit recommended that the application provisions in section 86 should be amended so that personal information could only be disclosed if it was collected after commencement. This recommendation was not implemented, as retrospective operation of the Rules in relation to covered disclosures is justified on the basis that, overall, the 2010 Rules have applied to allow disclosures on essentially the same basis as those which will be allowed under the Rules. While sections 58, 70 and 71 do provide for the disclosure of new types of information, the retrospective application permitted under section 86 will allow for the most efficient and effective administration of the Rules, and the work of the Department of Social Services and Services Australia.

Regulation Impact Statement

A Regulation Impact Statement is not required for the Rules as it has a minor regulatory impact (OBPR Ref: 43404).

Availability of independent review

Decisions made applying the Rules are reviewable under Chapter 5 of the Act to the same extent as decisions made under the Act, because references to 'this Act' include the Rules (see section 6 of the Act). This includes internal review and external review.

Explanation of the provisions

Part 1 - Preliminary

Section 1 provides that the name of the instrument is the *Paid Parental Leave Rules 2021*.

Section 2 provides that the instrument commences on 1 April 2021.

Section 3 provides that the instrument is made under 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 any other item in a Schedule to the instrument has effect according to its terms.

Section 5 provides a simplified outline of the instrument to aid in usability and navigating the instrument to understand the context of provisions. Simplified outlines are provided throughout the instrument for this purpose.

Section 6 contains definitions of certain terms used in the instrument, including:

Act is defined to mean the *Paid Parental Leave Act 2010*.

incapable of caring for a child has the meaning given by section 7.

PPL payment has the meaning given by subsection 32(2) or paragraph 34(1)(a).

unreasonable is defined and is discussed in the context of the relevant provisions that call on this definition below.

The definition of *test day* has been removed, and the previous concept of the test day is now set out in the relevant provisions for readability. For example, for a primary claimant on a day other than a flexible PPL day, section 9 provides, for the purposes of subparagraph 31(4)(a)(iv) of the Act, the conditions that must be satisfied on a particular day. The removal of the definition of *test day* does not have a practical effect on the administration of the Rules, rather, it eliminates confusion between the day referred to in section 31 and 31AA of the Act.

Other definitions are discussed in the explanation of the provisions that utilise them below.

Section 7 provides for the meaning of *incapable of caring for a child* for the purposes of sections 26, 28 and 29. Section 6 provides that the term *incapable of caring for a child* has the meaning given by this section, and is discussed further in the explanation of the relevant provisions below.

Part 2 – Eligibility for Parental Leave Pay

Division 1 – Simplified outline of this Part

Section 8 provides a simplified outline to aid in navigation of this Part.

In broad terms, this Part prescribes particular conditions that claimants must meet in order to be eligible for PLP in circumstances in addition to those already covered by the Act. These provisions generally prescribe circumstances in which the person is permissibly not providing care for the child, or has returned to work.

Division 2 – Matters relating to when a person is eligible for Parental Leave Pay

Subdivision A – Prescribed conditions for claimants

Subdivision A sets out the conditions that must be met for a claimant to be eligible for PLP.

Section 9 sets out the criteria that a person who is a primary claimant must satisfy on a particular day to be eligible for PLP.

The expressions ‘primary claimant’ and ‘primary claim’ are defined (respectively) in section 6 and subsection 53(2) of the Act.

Subsections 9(1) to 9(3) provide that, on a day that is not a flexible PPL day for that the child, the primary claimant is either the primary carer of the child or satisfies the requirements of sections 13 (birth mother relinquishing child), 16 (temporary inability to care) or 17 (loss of care for child) for the child. The primary claimant must also not have returned to work on or before that day, unless they satisfy one of the exceptions set out in subparagraphs 9(3)(b)(i) to 9(3)(b)(vi).

Subsections 9(4) to 9(6) set out the eligibility criteria that a person who is a primary claimant must satisfy on a particular day that is a flexible PPL day to be eligible for PLP. These provisions provide similar criteria by comparison to a day that is not a flexible PPL day, however in relation to work: the person must be performing no more than one hour of paid work, or be performing work for a permissible purpose, or must satisfy one or more of the requirements set out in subparagraphs 9(6)(c)(i) to 9(6)(c)(vi).

Section 10 sets out the conditions a secondary claimant in general circumstances must meet in order to be eligible for PLP in circumstances in addition to those covered in the Act. The expressions ‘secondary claimant’ and ‘secondary claim’ are defined (respectively) in section 6 and subsection 53(3) of the Act. These conditions are in general very similar to those for primary claimants. However, they are set out independently in order to make it easier for claimants in each category to know what eligibility conditions apply to them.

Subparagraphs 10(1)(a)(i) to (iii) provide that, for a day other than a flexible PPL day, the person must satisfy the following conditions on the day:

- the work test (see Division 3 of Part 2-3 of Chapter 2 of the Act);
- the income test (see Division 4 of Part 2-3 of Chapter 2 of the Act); and
- the Australian residency test (see Division 5 of Part 2-3 of Chapter 2 of the Act).

Subsection 10(2) provides that the person must be the primary carer of the child on the day or satisfy section 16 (temporary inability to care) or section 17 (loss of care for the child) for the child.

Subsection 10(3) provides that the person must not have returned to work on or before that day, or must satisfy section 14 (child in hospital following birth), 17 (loss of care for child), 18 (recall to duty), 19 (summons or other compulsory process) or 20 (state, territory or national emergency) for the child on that day.

Subsections 10(4) to 10(6) provide eligibility criteria that a person who is a secondary claimant must satisfy in general circumstances for the purposes of paragraph 31AA(5)(b) of the Act for a day that is a flexible PPL day.

Similar to a day that is not a flexible PPL day, the claimant must have satisfied the work test and income test (if not previously satisfied by that claimant, for example, for a PPL period that is not a flexible PPL day), as well as the Australian residency test.

Subsection 10(5) provides that the claimant must be either the primary carer of the child or satisfy the requirements of sections 16 (temporary inability to care) or 17 (loss of care) for the child. Subsection 10(6) provides that the claimant must also be performing no more than one hour of paid work on that day, or performing work for a permissible purpose, or must satisfy one or more of the exceptions provided in subparagraphs 10(6)(c)(i) to 10(6)(c)(v).

Section 11 sets out the eligibility criteria for secondary claimants who claim PLP in exceptional circumstances.

Subsections 11(1) to (3) set out the requirements for a secondary claimant in exceptional circumstances for a day other than a flexible PPL day for the purposes of paragraph 31(4)(b) of the Act.

The work test and income test do not apply. However, under subsection 11(1), a secondary claimant must satisfy the Australian residency test (see Division 5 of Part 2-3 of Chapter 2 of the Act) on the day.

Further, the person must be the primary carer of the child or satisfy section 16 (temporary inability to care) or 17 (loss of care) for the child. The claimant must also have not returned to work on or before that day, or must satisfy one or more of the exceptions provided in subparagraphs 11(3)(b)(i) to 11(3)(b)(v).

Subsections 11(4) to 11(6) set out the eligibility criteria for a flexible PPL day for a secondary claimant in exceptional circumstances for the purposes of paragraph 31AA(5)(b) of the Act.

Subsection 11(4) provides that the secondary claimant must satisfy the Australian residency test. However, the work test and income test do not apply.

Further, the claimant must be either the primary carer of the child or satisfy section 16 (temporary inability to care) or 17 (loss of care for child) for the child. The claimant must also be performing no more than one hour of paid work or performing work for a permissible purpose, or must satisfy one of the exceptions provided in subparagraph 11(6)(c)(i) to 11(6)(c)(v).

Section 12 sets out the test for 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 Act.

Tertiary claims can only be made in exceptional circumstances, and section 12 sets out the conditions the person must satisfy to establish eligibility.

Subsections 12(1) to (3) set out the eligibility criteria that a person who is a tertiary claimant must satisfy on a day other than a flexible PPL day for the purposes of paragraph 31(4)(b) of the Act.

The work test and income test do not apply. However, the tertiary claimant must satisfy the Australian residency test. The claimant must also be the primary carer of the child or satisfy section 16 (temporary inability to care) or 17 (loss of care) for the child.

Subsection 12(3) then provides that the claimant must not have returned to work on or before that day, or must satisfy one or more of the exceptions in paragraphs 12(3)(b)(i) to 12(3)(b)(v).

Subsections 12(4) to (6) set out the eligibility criteria that a person who is a tertiary claimant must satisfy on a flexible PPL day for the purposes of paragraph 31AA(5)(b) of the Act.

As with a day other than a flexible PPL day, the claimant must satisfy the Australian residency test (but not the work test or income test).

Subsection 12(5) then provides that the claimant must be the primary carer of the child, or satisfy sections 16 (temporary inability to care) or 17 (loss of care of a child) for the child.

Subsection 12(6) then provides that the claimant must be performing no more than one hour of paid work or is performing work for a permissible purpose or must satisfy one or more of the exceptions in paragraphs 12(6)(c)(i) to 12(6)(c)(v).

Subdivision B – Criteria relating to prescribed conditions

Sections 13, 16 and 17 set out circumstances in which the fact the person is not the child's primary carer will not prevent the person from being eligible for PLP. **Sections 14, 15 and 17 to 20** set out circumstances in which a return to work or paid work performed on a day will not prevent the person from being eligible for PLP.

Section 13 sets out one of the circumstances in which not being the primary carer of a child on a day will not prevent eligibility for PLP.

This provision 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 and is not caring for the child for one of the following reasons (outlined in subsection 13(2)):

- as part of the process for adoption of the child; or
- due to the child being born because of a surrogacy arrangement; or
- due to the child being removed from the person's care by a state or territory child protection agency or in accordance with a decision of a court in relation to the child's protection; or
- the child is stillborn or has died before that day and the person would have relinquished care of the child for one of the above reasons had the child not been stillborn or died.

This provision promotes one of the Act's objects, to enhance the health and development of birth mothers and children, by allowing maternal recovery in some circumstances where the birth mother is not the primary carer of their child.

Child protection agency is defined in section 6 of the Rules, and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

Subsection 13(3) clarifies matters to consider when working out whether a child is born because of a surrogacy arrangement. In general, surrogacy arrangements that are or would be recognised by a law of a state or territory may ground eligibility for PLP.

Matters to consider include:

- whether the arrangement (however described) meets the requirements of the law of the relevant state or territory (even if no formal declaration has been made); and
- whether a court has made an order under a law of a state or territory prescribed under section 60HB of the *Family Law Act 1975* relating to who is the parent of the child.

Section 60HB of the *Family Law Act 1975* refers to surrogacy arrangements made in accordance with a law of a state or territory. Prescribed laws of a state or territory that deal with surrogacy for the purposes of section 60HB are:

- *The Parentage Act 2004* in the Australian Capital Territory;
- *The Surrogacy Act 2010* in New South Wales;

- *The Surrogacy Act 2010* in Queensland;
- *The Family Relationships Act 1975* in South Australia;
- *The Surrogacy Act 2012* in Tasmania;
- *Status of Children Act 1974* in Victoria; and
- *Surrogacy Act 2008* in Western Australia.

The Northern Territory, at the time of drafting, does not have any prescribed surrogacy laws.

Section 14 specifies a set of circumstances in which a return to work or paid work on a day can be disregarded. It will apply to a primary claimant where the person is the birth mother of the child, or a secondary claimant where the person is the father of the child, or the partner of the birth mother or partner of a father of the child. This provision is intended to address the circumstance of a child being required to remain in hospital after birth, or being hospitalised immediately after birth if born elsewhere, because of premature birth, or complications or illness that are associated with their birth or gestation period, or contracted or developed following their birth. *Immediately* means as soon as possible in the circumstances, and should be immediately after birth, not immediately after the reason for hospitalisation arises.

For a child born in hospital, this section can be satisfied on a day that the child remains in hospital (including the day the child is born) and the day the child is being discharged after that stay in hospital. For a child born elsewhere and hospitalised immediately after birth, this section can be satisfied on the day the child is hospitalised immediately after birth, on a day that the child remains in hospital after that hospitalisation and the day the child is being discharged after that stay in hospital.

For a primary claimant, 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 2022, the first day to which this exemption from the work requirements would apply for a primary claimant would be 15 January 2022 (that is, the 14th day after the day the child was born).

For example, a child is born at the birth mother's home in a homebirth on 1 December 2021, but is born with breathing difficulties and immediately an ambulance is called to transport the child to hospital for treatment. If the birth mother were to claim PLP as a primary claimant, she could return to work without losing eligibility for PLP from 15 December 2021 until the day the child is discharged from hospital (inclusive). If the father of the child were to claim PLP as a secondary claimant, he could return to work without losing eligibility for PLP from 1 December 2021 until the day the child is discharged from hospital (inclusive).

Section 15 provides an exception to the requirement that a claimant not have returned to work or performed paid work in situations where a person unexpectedly becomes the primary carer of a child, and requires a reasonable amount of time to make appropriate work and care arrangements for the child.

This provision recognises that a secondary or tertiary claimant in exceptional circumstances may have taken on the primary care of the child unexpectedly, such

that the person could not immediately arrange to stop work to care for the child, and hence would not meet the eligibility requirement that they not return to work.

This provision maintains the person's eligibility despite the fact they continue to work, provided this work occurs during the period commencing immediately after the primary claimant stopped caring for the child and ending when care arrangements for the child and work arrangements were settled. These arrangements must have been settled within a reasonable time after the primary claimant stopped caring for the child. What is a reasonable time will depend on the specific facts of the case. Settling care arrangements for the child would also involve the person who is taking on primary care of the child settling their work arrangements to allow them to be not working in order to provide care for the child.

For example, the primary claimant birth mother receives two weeks of PLP then goes into a coma. The father becomes the primary carer of the child and claims PLP as a secondary claimant in exceptional circumstances. The father runs his own business so he continues working for two weeks after he becomes primary carer of the child, in order to keep his business running until he can hire someone to take over for him. That period of work may be disregarded if it is considered that two weeks was a reasonable amount of time in the circumstances to allow those arrangements to be made.

Section 16 provides a substitute requirement that can be met when the person is not the primary carer of the child. It applies where the person has previously been the child's primary carer, or they are expected to be the child's primary carer in the future, and they are temporarily unable to be the primary carer of the child due to circumstances (other than an event relevant to paragraph 17(c) discussed below) beyond the person's control. Examples of circumstances intended to be covered by this section are serious illness of the child's primary carer, or where the primary carer has to travel overseas for medical treatment.

The period of temporary inability must be likely to be less than 26 weeks which starts on or before the day that the person is not the primary carer. 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 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.

Section 17 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 claimant satisfies this section for a child on a day if:

- any time before that day, the claimant was the primary carer of the child; and
- on that day, the claimant, or the claimant's partner;
 - is the child's parent; or
 - is otherwise legally responsible for the child; and
- an event occurs in relation to the child without the claimant's (or their partner's) consent that prevents the child being in the claimant's care on that day; and
- in the case where the child is in the care of another parent of the child on that day—the claimant, or the claimant's partner, has a court order or a parenting plan to the effect that the child is to live with the claimant or the claimant's partner on that day; and
- the claimant or the claimant's partner takes reasonable steps on or before that day to have the child again in the claimant's care sometime 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 section 6 of the Rules as having the meaning given by the *Family Law Act 1975*.

Section 18 will apply to a person if on that day the person is a defence force member or a law enforcement officer, and they are performing paid work because they have been compulsorily recalled to duty.

Law enforcement officer is defined in section 6 of the Act.

Section 19 will apply to a person if on that day the person is performing paid work because they have to comply with the requirements of a summons or other compulsory process to give evidence or information, or produce documents or other things.

'Summons or other compulsory process' includes compulsory processes of courts, tribunals and other bodies such as commissions. This includes subpoenas, summonses and notices, under which a person is required to appear to give evidence or information, for examination under oath or affirmation, or to answer questions, or to produce documents, writings, records or other things.

Section 20 will apply to a person if they are a health professional, emergency services worker or other essential worker, and they are performing paid work because the person has returned to work in response to a state, territory or national

emergency. This includes emergencies such as the coronavirus known as COVID-19 or a bushfire crisis.

Subsection 20(2) provides a broad definition for *essential worker* for the purposes of this section, and includes a person with specific skills or who is involved in the production or delivery of goods or services that are essential in responding to an emergency.

Subdivision C – Exemption to newly arrived resident’s waiting period

Section 21 is made for the purposes of subsection 31A(6) of the Act, and sets out certain circumstances in which a person will be exempt from the newly arrived resident’s waiting period set out in subsection 31A(1) of the Act.

Subsection 21(1) provides that the person must be a primary claimant or secondary claimant for a child in relation to whom paragraphs 15(1)(a), (b) and (c) of the Act apply. This means the exemption in section 21 only applies to a person if that person is a primary claimant or secondary claimant in circumstances where a full transfer of PLP in relation to the maximum PPL period 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 a PPL period to the secondary claimant or a tertiary claimant.

Subsection 21(2) sets out the circumstances for primary claimants. Paragraph 21(2)(a) provides that if the secondary claimant’s PPL period would start on the day the child was born, then subsection (4) must apply to the primary claimant on the day the child was born.

Paragraph 21(2)(b) provides that if paragraph 15(4)(a) of the Act would apply in making a determination for PLP for the child, then subsection (4) must apply to the primary claimant each day during the period referred to in that paragraph of the Act.

Paragraph 21(2)(c) provides that if paragraph 15(4)(b) of the Act would apply in relation to a determination under that section for PLP for the child, then subsection (4) must apply to the primary claimant on the day the child was born.

Paragraph 21(2)(d) provides that if paragraph 15(4)(c) of the Act would apply in relation to a determination under that section for PLP for the child, then subsection (4) must apply to the primary claimant on each day during the first part of the period as referred to in subparagraph 15(4)(c)(i) of the Act.

Subsection 21(3) sets out the circumstances for secondary claimants. Paragraph 21(3)(a) provides that if the secondary claimant’s PPL period would start on the day the child was born, then subsection (4) must apply to the secondary claimant on the day before the child was born.

Paragraph 21(3)(b) provides that if paragraph 15(4)(a) of the Act would apply in making a determination for PLP for the child, then subsection (4) must apply to the secondary claimant on the day before the secondary claimant’s PPL period would start.

Paragraph 21(3)(c) provides that if paragraph 15(4)(b) of the Act would apply in relation to a determination under that section for PLP for the child, then subsection (4) must apply to the secondary claimant each day during the period referred to in that paragraph of the Act.

Paragraph 21(3)(d) provides that if paragraph 15(4)(c) of the Act would apply in relation to a determination under that section for PLP for the child, then subsection (4) must apply to the secondary claimant on each day during the last part of the period as referred to in subparagraph 15(4)(c)(ii) of the Act.

Paragraph 15(4)(c) of the Act applies if the primary claimant was or will be eligible for PLP 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.

Paragraphs 15(4)(a), (b) and (c) of the Act, and therefore, paragraphs 21(2)(b), (c) and (d) and paragraphs 21(3)(b), (c) and (d) of the Rules only operate where the secondary claimant's PPL period would begin after the day the child was born.

Subsection 21(4) provides that this subsection applies to a person on a day if the person is receiving either a social security pension, a social security benefit, or farm household allowance. Social security pension and social security benefit have the same meaning as in the *Social Security Act 1991*. Farm household allowance has the same meaning as in the *Farm Household Support Act 2014*.

Division 3 – Matters relating to the work test

Section 22 expands on what is taken to be paid leave for the purposes of paragraph 34(1)(b) of the Act, however is not intended to limit this definition. This section provides that where the person takes unpaid leave from their employer on a day that person receives workers' compensation payments or accident compensation payments for that day in relation to that employment, this is taken to be paid leave. This is the case even though the payments are received from a body other than an employer. This recognises that compensation payments are generally intended as a form of income replacement.

Section 23 is made for the purposes of subsection 35(5) of the Act and sets out certain activities that are taken not to be paid work for a person. Paid work is defined broadly in section 35 of the Act and, for present purposes, includes a person who performs work (whether as an employee, a contractor or otherwise and whether or not in Australia) for another entity for remuneration or other financial benefit. This section provides for a range of activities which are not intended to be included as paid work and cannot count as qualifying work under the Act.

Activities that are not paid work include:

- an activity required to be performed by a person as a condition of receiving a social security payment (within the meaning of the *Social Security Act 1991*);
- work performed by a prisoner, other than under a formal prisoner employment program. This is intended to exclude prison-based work, for which the

prisoner receives a small amount of money and none of the other usual employment--related benefits;

- volunteer work, whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity;
- receipt of interest, rents, dividends or non-share dividends, or any other income that is not obtained as a result of, or derived from, the personal exertion of the person.

Subsection 23(2) provides that interest received because the person's principal business consists of money lending, or received in relation to a debt due to the person for goods supplied or services rendered by the person in the course of the person's business are considered paid work. Where money is received as a result of personal exertion or as part of a person's principal business, this is considered paid work.

Section 24 prescribes a method for determining the number of hours of work a person is taken to have performed on a day in a JobKeeper payment period for the purposes of subsection 35B(1) of the Act. A *JobKeeper payment period* for a person is a period for which an employer of the person is entitled to one or more JobKeeper payments for the person or the person themselves is entitled to one or more JobKeeper payments (as defined in subsection 34(3) of the Act).

Subsection 24(2) provides the basic rule that for a day in a JobKeeper payment period for the person, where no other work is performed, the person is taken to have performed 7.6 hours of work on a weekday, and no hours of work if the day is a Saturday or a Sunday.

Subsection 24(3) provides that if a person performs at least one hour of paid work on a day, and the day is also in a JobKeeper payment period for the person, the person is taken to have performed the greater of:

- 7.6 hours of work on a weekday, or no hours of work if the day is a Saturday or Sunday, or
- the number of hours of paid work performed by the person on that day.

Subsection 24(4) provides that if a person takes a period of paid leave of at least one hour on a day, and the day is in a JobKeeper payment period, the person is taken to have performed the greater of:

- 7.6 hours of work on a weekday, or no hours of work if it's a Saturday or Sunday, or
- the number of hours of paid leave taken by the person on that day.

Part 3 – Claims for Parental Leave Pay

Division 1 – Simplified outline of this part

Section 25 provides a simplified outline to aid in navigation of this Part.

Division 2 – Claims for Parental Leave Pay

Division 2 deals with claims for PLP made in exceptional circumstances.

Sections 26 and **27** prescribe exceptional circumstances in which a person can make a primary claim for the purposes of paragraph 54(1)(c) of the Act.

Under the Act, a primary claim may generally only be made by the child's birth mother or an adoptive parent of the child (see subsection 54(1) of the Act). In prescribed exceptional circumstances, a primary carer of a child who is not the birth mother or adoptive parent of a child may make a primary claim for PLP for the child.

Section 26 sets out exceptional circumstances for primary claimants for the purposes of paragraph 54(1)(c) of the Act, apart from where section 27 (which deals with surrogacy arrangements) applies.

Subsection 26(2) provides that a primary claim can be made where:

- the child is in the care of the person and has been or is likely to be in the care of that person for a continuous period of at least 26 weeks; and
- the person became, or is likely to become, the child's primary carer before the child's first birthday (or in the case of an adopted child, before the first anniversary of the placement of the child).

In addition, one of the following must be satisfied:

- the birth mother, or adoptive parents, are incapable of caring for the child and have been or are likely to be incapable of caring for the child for a continuous period of at least 26 weeks; or
- the Secretary is satisfied on reasonable grounds that the person became the primary carer in special circumstances, it would be unreasonable for the birth mother or adoptive parents to care for the child, and it is in the interest of the child to be cared for by the person rather than the child's previous family.

For a primary claimant to be able to make a claim for PLP under this provision, the child must have been in or is likely to be in the care of that person for a continuous period of at least 26 weeks. This period includes weekends and can be 26 consecutive weeks into the past or future. For example, a child is born to a mother with a serious drug addiction, and six months after the birth of the child, the child enters into the care of the father, who does not reside with the mother. The father has primary care of the child for 12 consecutive weeks before making a claim on the basis that he is likely to continue to have care of the child for at least a further 14 weeks, on the basis that the birth mother has not taken any steps to improve her capability to care for the child. Whether a decision-maker is satisfied that the father will in fact continue to have care for the further 14 weeks will depend on the facts of each matter.

When it is unreasonable for a person to care for a child is defined in section 6 of the Rules. For it to be unreasonable for a person to care for a child, there must be a situation where there has been extreme family break down, or serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child. The risk does not necessarily have to relate to the person who has care of the child, but may result where the child would be spending time in that person's care. The reference to a 'family situation' is intended to be broad, and cover a wide range of living and care situations, for example, where a person caring for the child has a new partner or housemate who poses a risk to the child.

Incapable of caring for the child is defined in section 7 of the Rules, and provides a number of situations where a person is incapable of caring for a child, including where there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined as having the meaning given by the *Family Law Act 1975*. The parenting order will generally provide for persons other than the person to provide the care for the child, and as a result exclude the person from caring for the child, making them a person to whom section 7 applies. A person is also incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown after all reasonable efforts have been made to locate them, they suffer from a medical condition (physical or mental) that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child.

Subsection 7(2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subsection gives an example of a person deciding to travel overseas on a holiday or to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives e.g. aged parents.

Where there is a reference to "the child's first birthday" as in paragraph 26(2)(b) and section 27 (discussed below), this phrase should take its ordinary meaning and refer to the day 12 months after the child is born. Paragraph 276(d) of the Act, which modifies the operation of the Act in relation to a claim made in exceptional circumstances, provides that a reference to a child's first birthday should refer to the date 12 months after the person became the child's primary carer. However, paragraph 276(d) of the Act applies only where a claim has already been made. By comparison, section 26 of the Rules precedes (or prevents) the making of a claim.

If the person is not the parent or a partner of the parent of the child, the person must satisfy the additional circumstances in subsection 26(3), which are:

- the partner of the birth mother or of the adoptive parent is incapable of caring for the child; and
- on the day the child came into the care of the person, the child was not entrusted to their care under a decision made by a state or territory child protection agency or a court, under a law dealing with child protection; and
- the Secretary is satisfied on reasonable grounds that the person became the primary carer in special circumstances, it would be unreasonable for the

partner of the birth mother or adoptive parents to care for the child, and it is in the interests of the child to be cared for by the person taking in account arrangements between the two situations.

Child protection agency is defined in section 6 and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

A person will only be prevented from claiming PLP if the child was placed in their care under a decision made by a state or territory child protection agency or a court *at the time* the person started caring for the child. A person is not prevented from claiming PLP if the child is informally entrusted to their care and at a later date the child is formally placed into their care under such a decision.

For example, a grandmother may claim PLP in exceptional circumstances where she has commenced caring for her grandchild informally, even if the child is later entrusted to her care under a permanent care order.

Section 27 provides for when a person can claim PLP for the purposes of paragraph 54(1)(c) of the Act where the exceptional circumstances involve a surrogacy arrangement.

Subsection 27(2) provides that a primary claim can be made under this provision if:

- the child is in the care of the person and has been, or is likely to be, in that persons' care for a continuous period of at least 26 weeks;
- the person became, or is likely to become, the child's primary carer before their first birthday; and
- the Secretary is satisfied on reasonable grounds that it is in the interests of the child to be cared for by the person taking into account whether the person intends to be the long-term primary carer of the child, whether the child's birth mother has relinquished the child, and any other matter the Secretary considers relevant.

The 26 week period required by paragraph 27(2)(a)(ii) operates in the same way as the period required by section 26 discussed above, includes weekends and can be 26 consecutive weeks into the past or future.

Subsection 27(3) mirrors subsection 13(3) above, and sets out matters to consider when working out whether a child was born of a surrogacy arrangement, and includes:

- whether the arrangement (however described) meets the requirements of the law of the relevant state or territory (even if no formal declaration has been made); and

- whether a court has made an order under a law of a state or territory prescribed under section 60HB of the *Family Law Act 1975* relating to who is the parent of the child.

Section 60HB of the *Family Law Act 1975* refers to surrogacy arrangements made in accordance with a law of a state or territory. Prescribed laws of a state or territory that deal with surrogacy for the purposes of section 60HB are:

- *The Parentage Act 2004* in the Australian Capital Territory;
- *The Surrogacy Act 2010* in New South Wales;
- *The Surrogacy Act 2010* in Queensland;
- *The Family Relationships Act 1975* in South Australia;
- *The Surrogacy Act 2012* in Tasmania;
- *Status of Children Act 1974* in Victoria; and
- *Surrogacy Act 2008* in Western Australia.

The Northern Territory, at time of drafting, does not have any prescribed surrogacy laws.

Section 28 prescribes exceptional circumstances in which a person can make a secondary claim for the purposes of paragraph 54(2)(d) of the Act.

Under the Act, a secondary claim may generally only be made by the partner of a primary claimant, a person who is a parent of the child and is not the primary claimant, or the partner of such a person. The exceptional circumstances prescribed by the Rules in which a secondary claimant may claim PLP to a large extent duplicate those applying to primary claimants who claim in exceptional circumstances.

Paragraphs 28(1)(a) and (b) provide that a secondary claim may be made in exceptional circumstances in which the child:

- is in the care of the person, and has been or is likely to be in the care of the person for at least 26 weeks; and
- on the day they came into the care of the person, was not entrusted to the care of the person, or to the care of the person's partner because of a decision by a state or territory child protection agency or a court under legislation dealing with child protection in the state or territory.

Child protection agency is defined in section 6 and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

A person will only be prevented from claiming PLP if the child was placed in their care under a decision made by a state or territory child protection agency or a court *at the time* the person started caring for the child. A person is not prevented from claiming PLP if the child is informally entrusted to their care and at a later date the child is formally placed into their care under such a decision.

For example, a grandmother may claim PLP in exceptional circumstances where she has commenced caring for her grandchild informally, even if the child is later entrusted to her care under a permanent care order.

Paragraphs 28(1)(c) and (d) impose different conditions depending whether or not the individual is the partner of the primary claimant for the child.

If the person is the partner of the primary claimant for the child, the condition is that the primary claimant is incapable of caring for the child, and has been, or is likely to be incapable of caring for the child for at least 26 weeks (see paragraph 28(1)(c)).

However, if the person is not the partner of the primary claimant, then the person must be covered by one of the following (see paragraph 28(1)(d) and subsection 28(2)):

- First, the primary claimant and the primary claimant's partner (if any) are incapable of caring for the child, and will be incapable, or are likely to be incapable of caring for the child for a continuous period of at least 26 weeks; or
- Second, the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the primary claimant or the primary claimant's partner to care for the child, and it is in the interests of the child for the person to care for the child, taking into account the arrangements of the child's care with the person in comparison with those in the child's previous family situation.

A note to section 28 provides that when it is *unreasonable* for a person to care for a child is defined in section 6 of the Rules. For it to be unreasonable for a person to care for a child, there must be a situation where there has been extreme family break down, and serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child. The risk does not necessarily have to come from the person who has care of the child, but is a result of where the child will be spending time when in that person's care. The reference to a 'family situation' is intended to be broad, and cover a wide range of living and care situations. For example, where a person caring for the child has a new partner or housemate who poses a risk to the child.

Incapable of caring for the child is defined in section 7 of the Rules, and provides a number of situations where a person is incapable of caring for a child, including if

there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined as having the meaning given by the *Family Law Act 1975*. The parenting order will generally provide for persons other than the person to provide the care for the child, and as a result exclude the person from caring for the child, making them a person to whom section 7 applies. A person is also incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown after all reasonable efforts have been made to locate them, they suffer from a medical condition (physical or mental) that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child.

Subsection 7(2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subsection gives an example of a person deciding to travel overseas on a holiday or to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives e.g. aged parents.

Section 29 prescribes exceptional circumstances in which a person can make a tertiary claim for the purposes of subsection 54(3) of the Act.

A tertiary claim represents a situation in which a child has had a second change in primary care, and so it is anticipated to be relatively rare. The tertiary claimant may be the original primary claimant resuming care after a period, or may be a new primary carer.

Section 29 is similar to section 28 (in respect of secondary claimants). The exceptional circumstances prescribed in section 29 are that the child is, and is likely to continue to be in the care of the person for a continuous period of at least 26 weeks.

Additionally, the child must not have been entrusted to the care of the person or the person's partner because of a decision by a child protection agency, or a court of a state or territory, under a law of that state or territory dealing with child protection.

Child protection agency is defined in section 6 and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

A person will only be prevented from claiming PLP if the child was placed in their care under a decision made by a state or territory child protection agency or a court *at the time* the person started caring for the child. A person is not prevented from claiming PLP if the child is informally entrusted to their care and at a later date the child is formally placed into their care under such a decision.

For example, a grandmother may claim PLP in exceptional circumstances where she has commenced caring for her grandchild informally, even if the child is later entrusted to her care under a permanent care order.

Paragraphs 29(1)(c) and (d) provide that there are different conditions depending upon whether the person was previously the primary claimant in respect of the child.

If the person previously was the primary claimant, the person must have resumed, or will resume primary care of the child because either:-

- the secondary claimant had care of the child in exceptional circumstances and those circumstances have ceased to apply; or
- the secondary claimant is incapable of caring for the child and has been, or is likely to be incapable of caring for the child for a continuous period of at least 26 weeks.

However, if the person has not previously been the primary claimant for the child, one of the following circumstances must apply (see paragraph 29(1)(d) and subsection 29(2)).

- first, both the primary claimant and the secondary claimant are incapable of caring for the child, and have been, or are likely to be incapable of caring for the child for a continuous period of at least 26 weeks; or
- second, the Secretary is satisfied on reasonable grounds that the person became the primary carer of the child in special circumstances, it would be unreasonable for the primary claimant and secondary claimant to care for the child, and it is in the interests of the child for the person to care for the child.

A note to section 29 provides that when it is *unreasonable* for a person to care for a child is defined in section 6 of the Rules. For it to be unreasonable for a person to care for a child, there must be a situation where there has been extreme family break down, or serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child. The risk does not necessarily have to come from the person who has care of the child, but is a result of where the child will be spending time when in that person's care. The reference to a 'family situation' is intended to be broad, and cover a wide range of living and care situations. For example, where a person caring for the child has a new partner or housemate who poses a risk to the child.

Incapable of caring for the child is defined in section 7 of the Rules, and provides a number of situations where a person is incapable of caring for a child, including if there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined as having the meaning given by the *Family Law Act 1975*. The parenting order will generally provide for persons other than the person to provide the care for the child, and as a result exclude the person from caring for the child, making them a person to whom section 7 applies. A person is also incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown after all reasonable efforts have been made to locate them, they suffer from a medical condition (physical or mental)

that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child.

Subsection 7(2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subsection gives an example of a person deciding to travel overseas on a holiday or to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives e.g. aged parents.

Division 3 – Determining a claim to have different flexible PPL days

Section 30 provides a method for determining a claim to have different flexible PPL days for the purposes of paragraph 57A(4)(b) of the Act.

Subsection 57A(4) of the Act empowers the Secretary to change the specified days of 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.

Section 30 will be relevant to a person who has a continuous PPL period in accordance with subsection 6A(3) of the 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. Section 30 applies whether that election is made before or after the birth of the child.

Section 30 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 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 section 30 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).

Section 30 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.

Part 4 – Payment of Parental Leave Pay

The purpose of this Part is to provide for the information that an employer is required to give a person under section 80 of the Act, after paying the person one or more instalments of PLP on a particular day, as well as the form in which this information is to be given. This Part also sets out the information that an employer is required to make and keep in relation to each person for whom an employer determination for the employer comes into force, for the purposes of section 81 of the Act. It also provides for the form in which this information is required to be kept. This Part also sets out the information the Secretary is required to give a person under section 89 of the Act.

Section 31 provides a simplified outline to aid in navigation of this Part.

Section 32 outlines the information an employer is required to give a person after paying the person one or more instalments of PLP. Section 32 introduces the concept of 'PPL payment,' which is also used in section 34 in relation to the payment of instalments by the Secretary (discussed below), and the information the Secretary is required to give a person. The 'PPL payment' is one or more instalments. An instalment is defined in the Act as an instalment of PLP. Under the Act, an instalment is payable to a person if one or more days (the PPL days) of an instalment period fall within the person's PPL period; or if one or more flexible PPL days fall within an instalment period for the person and are payable to the person. If an instalment is to be paid by a person's employer, the instalment period is the regular period for which the person would usually be paid in relation to the performance of work, and the payday for the instalment is the day on which the person would usually be paid for the performance of work. An instalment becomes payable on the payday for the instalment. A person will only be paid for those days in the instalment period that fall within the person's PPL period, and for flexible PPL days that fall within the instalment period and are payable to the person.

Section 32 uses the concept of PPL payment because, under the Act, more than one instalment may be paid to a person on a particular day. An employer may be required to pay an earlier instalment on the payday for a later instalment. This could occur, for example, where an employer becomes required to pay an instalment to a person after the start of the person's PPL period, and neither the Secretary nor the employer was required to pay an earlier instalment, but would have been, if one or more instalments had been payable from the start of the person's PPL period. Provided the employer has been paid enough by way of PPL funding amounts for the earlier instalments, the employer is required to pay those instalments on the payday for the later instalment. If more than one instalment is paid on a particular day, the employer will not be required to give the person the information required by section 32 in relation to each of those instalments, separately. Rather, the information the employer is required to give a person will relate to the total of the instalments paid on a day. Therefore, section 32 sets out the information the

employer is required to give a person after paying one or more instalments (i.e. the PPL payment) to the person on a day.

Paragraphs 32(2)(a) and (b) require the employer to give the person the employer's name, their ABN, and the name of the person to whom the payment is made.

Paragraph 32(2)(c) requires the employer to notify the person as to the period to which the PPL payment relates. For example, if the PPL payment is more than one instalment, then the period would be the total of all of the instalment periods to which the PPL payment relates. For example, a person's PPL period starts on 10 May 2021, however, the employer determination for the person and their employer comes into force on 25 May 2021. The person's instalment period is a fortnight, commencing on a Thursday and ending on a Wednesday a fortnight later (e.g. 6-19 May 2021, and each such period after that); and the payday for the instalment period is the next day after the end of the instalment period (e.g. 20 May 2021). An instalment is payable to the person on 20 May 2021, and another on 3 June 2021. Subsection 72(2) requires the employer to pay the earlier instalment on the payday for the later instalment.

The period that the employer must specify in the information the employer gives, as required by paragraph (d), is the period 10 May to 2 June for the PPL payment paid on 3 June.

Paragraph 32(2)(d) requires the employer to specify the date on which the PPL payment is paid.

Paragraph 32(2)(e) requires the employer to specify the gross amount of the PPL payment excluding any deductions that have been made by the Secretary under Part 3-1 of the Act, and a statement identifying that amount as PLP. In this situation the employer will likely not be aware of the actual amounts deducted by the Secretary.

Paragraphs 32(2)(f) and (g) distinguish between two situations: where the PPL payment is the only payment made by the employer to the person on that day for the period; and where other payments, in addition to the PPL payment, are made to the person on that day for the period. Other payments could include, for example, employer-provided paid maternity leave, or annual leave. If the PPL payment is the only payment made to the person for the period, the employer is required to give the person the following information: the net amount of the PPL payment; and the amount of tax withheld from the PPL payment. If, however, other payments are made in the period in addition to the PPL payment, the employer is required to give the person the following information: the total net amount paid to the person for the period; and the total amount of income tax withheld for the period.

The reason for this distinction is that, if a PPL payment is paid with other payments in the same period, PAYG withholdings would be made from the total of the PPL payment and other payments, e.g. salary or wages. Therefore, in this situation, an employer is only required to specify the total amount of the income tax withheld, rather than income tax withheld from the PPL payment separately. Similarly, the net amount would be the total net amount of the combined amount of the PPL payment

and other payment. In a case where only a PPL payment is made for a period, then it will be clear that the net amount and income tax withheld will relate only to the PPL payment. In any case, the employer is required to give the person information as to the gross amount of the PPL payment, and identify that particular payment as PLP.

Under sections 67 and 69 of the Act, an employer may deduct an amount from an instalment payable to a person, if the deduction is authorised by the person and principally for their benefit; or if the employer is required to deduct an amount under sections 46 or 72A of the *Child Support (Registration and Collection) Act 1988*. Therefore, paragraph 32(h) requires that, if the employer makes a deduction from the PPL payment under section 67 or 69 of the Act, the employer must give the person the following information: the amount of each deduction; the name of the entity to whom the deduction is paid (if any); and if applicable, the details of the bank account into which the amount deducted was paid.

Subsection 32(3) provides the prescribed form in which information under subsection (2) must be given. Employers may notify employees of the payment of PLP using existing salary and wages systems. Section 32(3) requires that the information must be in the form of a payslip (which is generally given in respect of salary or wages) or separate written advice; and either in electronic form or a hard copy.

Section 33 sets out that, where an employer determination is made (and comes into force) for an employer, then that employer must make and keep certain information in relation to each employee to whom an employer determination relates, for the purposes of subsection 81(1) of the Act. Subsection 33(1) prescribes the kind of record that must be kept, and includes the PPL funding amounts received by the employer, and the instalment amounts paid by the employer.

Subsection 33(2) specifies the prescribed form in which the information must be kept, is in the English language, legible and readily accessible by a person exercising powers under Part 4-2 of the Act.

Subsections 33(3) to 33(5) set out the prescribed information that must be kept for the purposes of paragraph 81(2)(b) of the Act, and prescribes:

- for each funding amount received, the amount of PLP received, and any PPL days and flexible PPL days for which the amount was paid;
- for each PPL payment paid:
 - the date paid and the period or periods to which the payment relates;
 - the gross amount of the payment as determined before any deductions by the Secretary under Part 3-1 of the Act and a statement identifying that amount as PLP;
 - if no other payments are made for the period or periods by the employer, the net amount of the PPL payment and the amount of tax withheld;
 - if other payments were made by the employer, the total net amount paid to the person, and the total amount of income tax withheld; and
 - the total amount of any deductions made under section 67 or 69 of the Act.

Section 34 sets out the information that the Secretary is required to give a person for the purposes of section 89 of the Act. Section 89 requires the Secretary to give a person the information prescribed by the Rules if the Secretary pays an instalment or part of an instalment to, or in relation to a person in particular circumstances, in relation to instalments paid in those circumstances. The Secretary is required to pay a person instalments in the circumstances set out in section 84 of the Act. Broadly, these circumstances relate to:

- where an employer determination for a person and their employer is never made;
- instalments relating to certain flexible PPL days;
- the employer has applied for review of the employer determination, and the employer determination has not come into force by the 28th day after the start of the person's PPL period;
- an employer determination for the person and their employer has been revoked; or
- a matter relating to a contravention by the employer of section 70, 72 or 74 of the Act has been referred to the Fair Work Ombudsman.

The Secretary may be required to pay instalments that relate to particular instalment periods in these circumstances.

The Secretary may also be required to pay the person arrears of instalments of PLP, in the circumstances mentioned in sections 85 to 87 of the Act. This could include, for example, circumstances where the Secretary is required to pay an instalment to a person under subsection 84(3) of the Act (which deals with the payment of instalments where an employer determination is reviewed). The Secretary may also be required to pay instalments taken to have become payable to the person under section 91 of the Act (which deals with when the Secretary or an employer becomes required to pay instalments after the start of a person's PPL period) (i.e. for earlier instalments that are payable to the person), on the payday for the first instalment payable under subsection 84(3) of the Act.

Subsection 34(1) provides that section 34 applies if the Secretary pays one or more instalments ('the PPL payment') to, or in relation to a person on a day, and the Secretary has not paid a PPL payment to or in relation to the person before that day for that child.

More than one instalment may be payable on a particular day, and the Secretary may be required to pay an earlier instalment on the payday for a later instalment. This could occur, for example, where an instalment is payable to a person under subsection 84(3) of the Act, and arrears of instalments (i.e. for earlier instalment periods) are also payable under section 85 of the Act, on the payday for the first instalment the Secretary is required to pay under subsection 84(3) of the Act. Therefore, similarly to section 32 discussed above, the concept of 'PPL payment' (i.e. one or more instalments), is also used in section 34 for the information the Secretary is required to give a person where the Secretary is required to make a PPL payment to a person, in the circumstances in subsections 84 to 87 of the Act. In the example described above, therefore, the 'PPL payment' would be the first instalment payable under subsection 84(3) of the Act as well as the

arrears of instalments which are also payable on that day under section 85 of the Act.

Subsection 34(2) sets out the information that, for section 89 of the Act, the Secretary is required to give a person in connection with the PPL payment, which includes a statement that the PPL payment is PLP paid by the Secretary; the name of the person, and the period or periods to which the PPL payment relates; and the date on which the PPL payment is made.

Paragraph 34(2)(e) requires the Secretary to inform the person of the gross amount of the PPL payment.

Paragraph 34(2)(f) requires the Secretary to inform the person of the amount withheld from the PPL payment under section 12-110 in Schedule 1 to the *Taxation Administration Act 1953*, which requires an entity to withhold an amount from a payment it makes to an individual if the payment is PLP or DaPP.

Paragraph 34(2)(g) requires the Secretary to inform the person of the net amount of the PPL payment, i.e. the amount after all deductions have been made. The deductions may be an amount withheld pursuant to paragraph 34(f) and any amounts deducted by the Secretary under section 67, 69, 69A or 69B of the Act.

Paragraph 34(2)(h) requires the Secretary, where the Secretary has made a deduction under section 67 or 69 of the Act, to inform the person of the amount of the deduction, and, if the amount is or will be paid to an entity, the name and account details of that entity. This has been broadened from previous rule 3.5 of the Rules, which referred to a “bank account” to recognise that deductions could be paid to a superannuation account or other account that is not necessarily a bank account.

Paragraph 34(2)(i) requires the Secretary to inform the person of the amount of any deductions made under section 69A or 69B of the Act, which refers to deductions made to avoid overpayment of an income support payment, and deductions relating to a debt owed to the Commonwealth, respectively.

Paragraph 34(2)(j) and 34(2)(k) require the Secretary to inform a person of the period for which a final PPL payment is expected to be made, and the frequency with which further PPL payments will be made.

Part 5 – Determinations about whether Dad and Partner Pay is payable to a person

A person cannot be paid DaPP unless there is a ‘payability determination’ that the person is eligible. Under paragraph 115BF(1)(b) of the Act, a payability determination cannot be made for a person if there is already a payability determination in place for someone else in relation to the same child. This restricts DaPP to being paid once for each child. However, subsection 115BF(2) provides that this criteria does not apply to a claim that is made in circumstances prescribed by the Rules.

Section 35 provides a simplified outline to aid in navigation of this Part.

Section 36 prescribes circumstances in which DaPP can be paid to a second person in respect of the same child for the purposes of subsection 115BF(2) of the Act.

. The prescribed circumstances are that:

- the claim is made by an adoptive parent of the child; or
- the claim is made in the circumstances mentioned in:
 - section 46, where the person is the partner of the child's primary carer, and the birth mother and their partner, or the adoptive parent and their partner, are incapable of caring for the child for at least 26 weeks, and the person is likely to have care of the child for at least 26 weeks; or
 - section 48, where the person is the partner of an adoptive parent of the child, and the birth mother has relinquished care of the child and the person has, and is likely to continue to have, care of the child for at least 26 weeks; or
 - section 49, where the person has care of the child and the birth mother has relinquished care of the child because of a surrogacy arrangement.

The rationale for DaPP being paid a second time in these situations is to allow the new caregivers of a child, where there has been a long-term change in caregiving arrangements, to be able to take time off work to help care for and bond with the child. This is similar to the arrangements for adoptive parents claiming PLP, despite payments having already been made to a birth mother or her partner for the child.

For example, both the biological father of a child and an adoptive parent of the child could claim DaPP for the same child, for the respective periods during which the child is in their care. This section applies to rare and unfortunate special circumstances where the birth mother and her partner become incapable of caring for the child because, for example, they die in a car accident. In this situation, if the child's aunt and her partner were to be the long-term carers for the child, the aunt's partner would be able to claim DaPP provided all other eligibility requirements were satisfied, even if DaPP had already been paid to the birth mother's partner.

Incapable of caring for the child is defined in section 7 of the Rules, and sets out a number of situations where a person is incapable of caring for a child. A person is incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown after all reasonable efforts have been made to locate them, they suffer from a medical condition (physical or mental) that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child. A person is also incapable of caring for a child if there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined as having the meaning given by the *Family Law Act 1975*. If the parenting order sets out that persons other than the DaPP claimant are to provide care for the child, section 7 will apply to the DaPP claimant.

Subsection 7(2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subsection gives an example of a person deciding to travel overseas on a holiday or

to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives, for example, aged parents.

Part 6 – Eligibility for Dad and Partner Pay

Division 1 – Simplified outline of this Part

Section 37 provides a simplified outline to aid in navigation of this Part.

Under subsection 115CB(4) of the Act, a DaPP claimant is eligible for DaPP for a child on a day if, on that day, the person satisfies the work test, the income test, the Australian residency test, and the conditions prescribed by the Rules.

This Part prescribes circumstances where a DaPP claimant may be eligible for DaPP for a child under the Rules. The prescribed circumstances mirror those in place under the Rules for PLP.

Division 2 – Matters relating to when a DaPP claimant is eligible for Dad and Partner Pay

Section 38 provides that, for the purposes of paragraph 115CB(4)(d) of the Act, the conditions set out in subsection 38(2) and (3) are prescribed in relation to a DaPP claimant.

Generally, to be eligible for DaPP under the Act a person must be ‘caring for the child’ (Division 6 of Part 3A-3 of the Act). Alternatively, a person may satisfy section 39 (temporary inability to care) or section 40 (loss of care for child) of the Rules.

Generally, to be eligible for DaPP under the Act there is also a requirement that the person is ‘not working’ during their DaPP period (Division 7 of Part 3A-3 of the Act). However, pursuant to paragraph 38(3)(b) of the Rules, a person can be working and still remain eligible for DaPP on a day if the following circumstances are satisfied:

- the person has been recalled to duty and satisfies section 41; or
- the person has to comply with the requirements of a summons or compulsory process and satisfies section 42; or
- the person has returned to work in response to a state, territory or national emergency and satisfies section 43.

These eligibility conditions mirror those that are already in place for PLP, and allow DaPP recipients to remain eligible for the payment in these circumstances, when they would otherwise be ineligible under the legislation.

Section 39 provides a substitute requirement that can be met when the person is not caring for the child, where they expect to be caring for the child within two weeks, or have previously been caring for the child, and is temporarily unable to care for the child due to circumstances beyond the person’s control.

The period of temporary inability to care for the child must be likely to be less than two weeks.

For example, the person caring for the child may require hospitalisation, or need to travel unexpectedly or deal with an emergency in the period they had nominated to receive DaPP. However, this section does not include an event which occurs in relation to the child without the person's consent that prevents the child being in the person's care (a situation that should be considered with reference to loss of care in section 41).

Additionally, there must not be a determination in force under the Act that DaPP 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. Further, the Secretary must be satisfied that the person would have been caring for the child if not for the person's temporary inability to do so.

Section 40 provides a substitute requirement that can be met where there is a loss of care for the child without the person's consent. The requirements are that the person previously was caring for the child and an event occurs in relation to the child without the person's or the person's partner's consent that prevents the child being in the person's care. The person, or their partner, must be the child's parent or otherwise legally responsible for the child. To remain eligible for DaPP, the person or their partner must have taken reasonable steps to have the child again in the person's care.

If the child is in the care of another parent, the person or the person's partner must have a court order or a parenting plan to the effect that the child is to live with the person or the person's partner to remain eligible for DaPP. *Parenting plan* is defined in section 6 of the Rules as having the meaning given by the *Family Law Act 1975*.

Additionally, there must not be a determination in force under the Act that DaPP is payable for the child to another person for the same day.

An example of where this section applies is where the person caring for the child loses care of the child as a result of the other parent failing to return the child after a visit, or the child being abducted, during the period when the person had nominated to receive DaPP.

Section 41 will apply to a person if on that day the person is a defence force member or a law enforcement officer, and they are performing paid work because they have been compulsorily recalled to duty.

Law enforcement officer is defined in section 6 of the Act.

For example, a Reserves Forces member may be 'called out' during their DaPP period, requiring the person to work. In this situation, the person would remain eligible for DaPP, provided that all other eligibility requirements are met.

Section 42 will apply to a person if on that day the person is performing paid work because they have to comply with the requirements of a summons or other

compulsory process to give evidence or information, or produce documents or things.

‘Summons or other compulsory process’ includes compulsory processes of courts, tribunals and other bodies such as commissions. This includes subpoenas, summonses and notices, under which a person is required to appear to give evidence or information, for examination under oath or affirmation, or to answer questions, or to produce documents, writings, records or other things.

Section 43 provides for a substituted requirement that can be met where a person has returned to work in response to a state, territory or national emergency. A person may be eligible for DaPP even if they are working, if the person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency. This includes emergencies such as the coronavirus known as COVID-19 and a bushfire crisis.

Subsection 43(2) defines *essential worker* broadly for the purposes of the section as a person who 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.

Division 3 – Circumstances that are taken to be not working

Section 44 prescribes circumstances in which a DaPP claimant is taken to be not working even though paragraph 115CM(1)(a) or (b) of the Act apply to the claimant. Paragraph 115CM(1)(a) of the Act applies if a DaPP claimant performs one hour or more of paid work, other than for a permissible purpose, under subsection 49(2) of the Act. Paragraph 115CM(1)(b) of the Act applies if a DaPP claimant is on paid leave.

Paid work is defined broadly in section 35 of the Act and, for present purposes, includes a person who performs work (whether as an employee, a contractor or otherwise and whether or not in Australia) for another entity for remuneration or other financial benefit. This definition includes a range of activities which are not intended to be included as paid work and result in a person being eligible under the Act.

Paragraph 44(2)(a) provides that a person is taken to be ‘not working’ if the person is on unpaid leave from their employer, and the person receives workers’ compensation payments or accident compensation payments from another entity in relation to the person’s employment with their employer for that day. The purpose of this paragraph is to ensure that receipt of workers’ compensation or accident compensation payments by a person would not make that person ineligible for DaPP.

Paragraph 44(2)(b) provides that a person is taken to be 'not working' if the person receives a payment from their employer that supplements their DaPP for that day. For example, some employers may choose to pay supplementary payments to DaPP claimants to the level of full, or part, income replacement for an employee. The purpose of this paragraph is to ensure that receipt of a supplementary payment by a person from their employer would not make that person ineligible for DaPP.

The note under section 44 provides clarification that a supplementary payment may be an adjustment to partial or full income replacement.

Part 7 – Claims for Dad and Partner Pay

Section 45 provides a simplified outline to aid in navigation of this Part.

Section 115DD of the Act provides that the following people can make a claim for DaPP for a child: the biological father of the child; the partner of the child's birth mother; an adoptive parent of the child; or a person who satisfies circumstances prescribed by the Rules.

This Part prescribes the circumstances in which a claim for DaPP can be made under the Rules.

Section 46 prescribes circumstances in which a person who is the partner of a child's primary carer can make a claim for DaPP for the purposes of paragraph 115DD(d) of the Act.

Subsection 46(1) provides that this section applies if the person is the partner of the child's primary carer, the child's primary carer is not the biological father or an adoptive parent of the child and section 49 of the Rules (which deals with surrogacy arrangements) does not apply in relation to the child.

For example, the partner of a primary carer could include the partner of the child's grandmother, in circumstances where the child's parents died in a car accident shortly after the child's birth and the grandmother has taken on the long-term primary care of the child.

This provision reflects the policy stance for exceptional circumstances for PLP, where a person can claim PLP if the birth mother and her partner are incapable of caring for the child long-term and the person takes on primary care of the child long-term.

Subsection 46(2) sets out the circumstances in which a person who is the partner of a child's primary carer, can make a claim for DaPP. The circumstances are that:

- the child is in the care of the person, and has been, or is likely to be in the care of the person for a continuous period of at least 26 weeks;
- the child came into the care of the person before the child's first birthday or, for an adopted child – before the first anniversary of the placement of the child;

- the birth mother and their partner, or if applicable, the adoptive parent and their partner, are incapable of caring for the child, and will be incapable, or are likely to be incapable of caring for the child for at least 26 weeks;
- the Secretary is satisfied on reasonable grounds that the person became the primary carer in special circumstances, it would be unreasonable for the birth mother and her partner or the adoptive parents and their partners to care for the child, and it is in the interest of the child to be cared for by the person rather than the child's previous family; and
- the child was not entrusted to the care of the person the or person's partner under a decision made by a state or territory child protection agency, or a court of a state or territory, under a law of that state or territory dealing with child protection.

Child protection agency is defined in section 6 and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

A person will only be prevented from claiming DaPP if the child was placed in their care under a decision made by a state or territory child protection agency or a court *at the time* the person started caring for the child. A person is not prevented from claiming DaPP if the child is informally entrusted to their care and at a later date the child is formally placed into their care under such a decision.

For example, the partner of the child's grandmother may claim DaPP in exceptional circumstances where she has commenced caring for the child informally, even if the child is later entrusted to his care under a permanent care order.

Note 1 to section 46 provides that *incapable of caring for the child* is defined in section 7 of the Rules, and sets out a number of situations where a person is incapable of caring for a child. A person is incapable of caring for a child if they are deceased, in prison or otherwise institutionalised, their whereabouts are unknown after all reasonable efforts have been made to locate them, they suffer from a medical condition (physical or mental) that makes them incapable of providing care for the child, or the Secretary is satisfied that for a reason outside the control of the person, the person is incapable of providing care for the child. A person is also incapable of caring for a child if there is a parenting order in force resulting in the person not providing any care for the child. *Parenting order* is defined as having the meaning given by the *Family Law Act 1975*. If the parenting order sets out that persons other than the DaPP claimant are to provide care for the child, section 7 will apply to the DaPP claimant.

Subsection 7(2) makes it clear that a person is not incapable of caring for a child if the person voluntarily chooses not to provide care for the child. A note to the subsection gives an example of a person deciding to travel overseas on a holiday or

to visit relatives or friends, or ceasing to provide care as the result of deciding to look after other relatives e.g. aged parents.

Note 2 to section 46 provides that '*unreasonable* for a person to care for a child' is defined in section 6 of the Rules. For it to be unreasonable for a person to care for a child, there must be a situation where there has been extreme family break down, or serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child. The risk does not necessarily have to come from the person who has care of the child, but is a result of where the child will be spending time when in that person's care. The reference to a 'family situation' is intended to be broad, and cover a wide range of living and care situations. For example, where a person caring for the child has a new partner or housemate who poses a risk to the child it may be unreasonable for the person to care for the child.

In considering what is in the 'interests of the child', the Secretary is to consider the arrangements for the child's care with the person in comparison with the arrangements for the child's care in the child's previous family situation, whether the person intends to care for the child for the long-term and any other matters the Secretary considers relevant.

For example, where a birth mother dies in childbirth and the child's aunt takes on the primary care of the child for 26 or more weeks, the aunt's partner could claim DaPP.

Section 47 prescribes circumstances in which the partner of the biological father of the child can make a claim for DaPP.

Paragraph 47(a) provides that the child must be in the care of the partner of the biological father of the child and be likely to be in that person's care for a continuous period of at least 26 weeks, and paragraph 47(b) provides that the child is not in the care of the birth mother, and is unlikely to be in the care of the child's birth mother (for a continuous period of at least 26 weeks).

Section 48 prescribes circumstances in which the partner of an adoptive parent of the child can make a claim for DaPP. This section is intended to apply in the situation where the partner of an adoptive parent is not formally part of an adoption, that is, the person is not an 'adoptive parent' of the child and would not be able to make a claim for DaPP under the Act.

Paragraph 48(a) provides that the birth mother must have relinquished care of the child and paragraph 48(b) provides that the child must be in the care of the partner of the adoptive parent and be likely to be in that person's care for a continuous period of at least 26 weeks.

Section 49 prescribes circumstances in which a person can make a claim for DaPP, when there is a child born because of a surrogacy arrangement.

Subsection 49(1) provides that this section applies in relation to a child born of a surrogacy arrangement.

Subsection 49(2) sets out the matters to consider when working out whether the child was born because of a surrogacy arrangement. In general, surrogacy arrangements that are or would be recognised by a law of a state or territory may ground eligibility for PLP.

Matters to consider include:

- whether the arrangement (however described) meets the requirements of the law of the relevant state or territory (even if no formal declaration has been made); and
- whether a court has made an order under a law of a state or territory prescribed under section 60HB of the *Family Law Act 1975* relating to who is the parent of the child.

Section 60HB of the *Family Law Act 1975* refers to surrogacy arrangements made in accordance with a law of a state or territory. Prescribed laws of a state or territory that deal with surrogacy for the purposes of section 60HB are:

- *The Parentage Act 2004* in the Australian Capital Territory;
- *The Surrogacy Act 2010* in New South Wales;
- *The Surrogacy Act 2010* in Queensland;
- *The Family Relationships Act 1975* in South Australia;
- *The Surrogacy Act 2012* in Tasmania;
- *Status of Children Act 1974* in Victoria; and
- *Surrogacy Act 2008* in Western Australia.

The Northern Territory, at the time of drafting, does not have any prescribed surrogacy laws.

The matters to consider when working out whether the child was born because of a surrogacy arrangement mirror the matters to consider for claims for PLP where there is a surrogacy arrangement.

Subsection 49(3) sets out the prescribed circumstances in which a claim can be made under this section. The child must be in the care of the person and be likely to be in that person's care for a continuous period of at least 26 weeks and the child must have come into the care of the person before the child's first birthday. Additionally, the Secretary must be satisfied on reasonable grounds that it is in the interest of the child for the person to care for the child, taking into account whether the person intends to care for the child long-term, whether the child's birth mother has relinquished care of the child and any other matter the Secretary considers relevant.

Part 8 – Payment of Dad and Partner Pay by Secretary

Section 50 provides a simplified outline to aid in navigation of this Part.

Section 51 is made for the purposes of section 115EE of the Act and prescribes the information that the Secretary must give a person who has been paid DaPP.

Subsection 51(1) provides that this section applies if the Secretary pays DaPP to or in relation to a person for a child and has not previously paid DaPP to or in relation to a person for that child.

Subsection 51(2) prescribes the following information:

- a statement that the payment is a DaPP payment paid by the Secretary;
- the name of the person to whom the payment is paid;
- the period to which the payment relates;
- the date on which the payment is paid;
- the gross amount of the payment;
- the total amount of income tax withheld from the payment; and
- the net amount of the payment (i.e. the amount of the payment excluding any amount of income tax withheld and any amounts deducted by the Secretary under section 115E1 of the Act).

Part 9 – Disclosing information

Division 1 – Simplified outline of this Part

Section 52 provides a simplified outline to aid in navigation of this Part.

Division 2 – Guidelines for disclosing information

Subdivision A - General

Section 53 sets out that the purpose of this Division is to provide guidelines for the purposes of subsection 128(4) of the Act for the exercise of the Secretary's power under paragraph 128(1)(a) of the Act, to give a certification that allows for the disclosure of information in the public interest. The Secretary is required to act in accordance with these guidelines in giving certificates for the purposes of paragraph 128(1)(a) of the Act. Generally, the rules in Part 9 mirror already existing guidelines, namely the Family Assistance (Public Interest Certificate Guidelines) Determination 2015, and the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015.

Section 54 provides that the Secretary must have regard to certain matters in giving a public interest certificate. The Secretary must have regard to whether a person (to whom the information relates, and on the information available to the Secretary) is, or may be, in a situation in which they are subject to physical, psychological or emotional abuse. The Secretary must also have regard to whether the person may be unable to give notice of his or her circumstances (whether they are related to the abuse or not) because of age, disability or social, cultural, family or other reasons. Section 54 is intended to emphasise the consideration of factors in favour of or against the release of protected information where individuals are not in a position to release that information themselves. The information that is being disclosed may be unrelated to the abuse.

Section 55 provides that, for the purposes of paragraph 128(1)(a) of the Act, the Secretary may certify that a disclosure of information is necessary in the public interest if, pursuant to sub-paragraphs 55(1)(a) – (d), the Secretary is satisfied that:

- the information cannot reasonably be obtained from another source;
- that disclosure is covered by a section in Subdivision B, which is discussed below;
- if the information is not de-identified – whether the purpose of the disclosure could not be achieved by disclosing de-identified information; and
- the disclosure is to a person who has genuine and legitimate interest in the information, or is a Minister covered by subsection (2).

Subsection 55(2) specifies which Ministers will be relevant for the purposes of subparagraph 56(1)(d)(i), including the Prime Minister, and various Ministers administering various Acts specified.

Subsection 55(3) provides that, for the purposes of this section information is *de-identified* if the information is no longer about an identifiable individual or an individual who is reasonably identifiable.

Subdivision B – Covered disclosures for public interest certificates

Subdivision B sets out a number of permissible reasons for disclosure for public interests certificates for the purposes of paragraph 55(1)(b).

Section 56 covers a disclosure necessary to prevent, or lessen, a serious threat to the life, health or safety of an individual.

Section 57 covers a disclosure if the disclosure is necessary for: enforcing a criminal law that relates to an indictable offence punishable by imprisonment for a period of two years or more, or a law imposing a pecuniary penalty equivalent to at least 40 penalty units; or preventing an act that may have a significant adverse effect on the public revenue; or extraditing one or more persons to or from Australia; or assisting the Attorney-General or an officer of the Department administered by the Attorney-General with, including obtaining assistance in, international criminal matters.

Penalty unit is defined in section 2B of the *Acts Interpretation Act 1901* which applies to this instrument by virtue of section 13 of the *Legislation Act 2003*.

Section 58 covers a disclosure for the purposes of investigating, prosecuting or preventing an offence or threatened offence against an officer or employee, or property, of the Commonwealth, or on premises of the Department or of the Human Services Department (meaning Services Australia under the definition in section 6 of the Act).

Section 59 covers a disclosure to a Commonwealth, state or territory law enforcement officer necessary for making, or proposing to make, an order in relation to proceeds of crime, or supporting or enforcing such an order.

Subsection 59(2) sets out the orders that are covered by the section, and includes proceeds of crime orders made under the *Proceeds of Crime Act 1987* or *Proceeds of Crime Act 2002* or related law of a state or territory, the *Customs Act 1901*, the *Mutual Assistance in Criminal Matters Act 1987* or a court order under a law of a state or territory that relates to unexplained wealth.

Section 59 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, section 59 will ensure that law enforcement bodies and other relevant entities have access to the information they need to make, support or enforce the order.

The inclusion of 'supporting' in paragraph 59(1)(b) broadens this provision, and is intended to cover information being required to support making an order where an order is being sought.

Section 60 covers a disclosure to correct a mistake of fact in relation to the administration of a program of the relevant department, where either the integrity of the program is at risk if the mistake of fact is not corrected or the mistake of fact relates to a matter that has been, or will be, published.

Section 61 covers a disclosure if the disclosure is necessary to inform a Minister covered by subsection 55(2) (above) in relation to a matter. Such disclosure is covered by this provision if it is necessary for the Minister to consider complaints and respond to a person, for a meeting or forum that the Minister is to attend, so that the Minister can correct mistakes of fact, perception or impression, or a misleading statement raised publicly or proposed to be raised publicly.

Disclosure is also covered by this provision if it is to inform a Minister about an error or delay on the part of the Human Services Department (or Services Australia under the definition in section 6 of the Act) or the Fair Work Ombudsman, or about an instance of an anomalous or unusual operation of the Act or the Fair Work Act.

The Fair Work Ombudsman will have a role in compliance with various employer obligations in Act, and can exercise compliance powers under the *Fair Work Act 2009*, for the purpose of determining whether various provisions in the Act are being, or have been, complied with.

Section 62 covers a disclosure which is necessary to assist a court, coronial enquiry, Royal Commission, department or any other authority of the Commonwealth or a state or territory in relation to the whereabouts of a reported missing person or to locate a missing person. However, disclosure will only be possible if there is no reasonable ground to believe that the missing person would not want the information disclosed.

A reported missing person would include a person who has a missing person's report filed with the police.

Section 63 covers a disclosure to establish the death of a person or the place where the death of a person is registered.

Section 64 covers a disclosure about a deceased person if the disclosure is necessary to help:

- a court, coronial enquiry, Royal Commission, Department or other authority of the Commonwealth or a state or territory, in relation to the death of the person; or
- a person locate a relative or beneficiary of the deceased person; or
- an individual or authority responsible for the administration of the estate of the deceased person in relation to the administration of that estate.

However, disclosure is only permissible where there is a no reasonable ground to believe that the deceased person would not have wanted the information disclosed.

Section 65 covers a disclosure that is necessary for research purposes, including evaluation, monitoring and reporting, or statistical analysis, or policy development in relation to any matter that is relevant to any Department administering any part of the Act, the family assistance law or the social security law.

Section 66 covers a disclosure where it is necessary for the purpose of assisting the Queensland Family Responsibilities Commission in the performance of its functions or exercise of its powers.

This section is aimed at supporting the Family Responsibilities Commission which has been established by the *Family Responsibilities Commission Act 2008 (Qld)*. This statutory body underpins the Cape York Welfare Reform Trials.

A note to section 66 alerts the reader that the Family Responsibilities Commission is defined in section 6 of these Rules, and means the Commission established under the *Family Responsibilities Commission Act 2008 (Qld)*.

Section 67 covers a disclosure to a Department or authority of a state, territory or the Commonwealth government for the purpose of contacting a person in respect of compensation or other forms of recompense in a reparation process.

Section 68 covers a disclosure to a child protection agency of a state or territory, if the disclosure is necessary for the purposes of seeking to contact a parent or relative in relation to a child. For example, section 68 may apply when a child protection agency is seeking to contact a parent to assist in a court case.

Child protection agency is defined in section 6 of the Rules, and means an agency of a state or territory which has functions, powers or duties in relation to the care, protection or welfare of children.

Section 69 covers a disclosure to a Department or authority of a state or territory, or an agent or contracted service provider of a Department or authority of a state or territory, if the information relates to a person involved in public housing or other state or territory managed housing, and subsection 69(2) applies.

Subsection 69(2) sets out the grounds on which the disclosure must be necessary, and includes:

- facilitating rent calculation or deduction;
- facilitating the administration of an income confirmation service to avoid mistakes, underpayments and overpayments of rent, pensions, benefits and allowances;
- investigating or take enforcement action in relation to a public housing or state or territory managed housing, including assistance with investigations into misreporting of income by tenants, or unauthorised occupation of public housing by any person.

Section 70 covers a disclosure if the disclosure is necessary for the purpose of facilitating the progress or resolution of matters of relevance to a Department that administers any part of the social security law or the Act. Subsection 70(2) provides guidance to the interpretation of “a matter of relevance” to subsection 70(1), and includes matters that relates to a program administered or an activity undertaken by the Department if the program or activity provides assistance or services to people receiving PLP, DaPP or payments or entitlements under the social security law.

The 2010 Rules do not cover a disclosure necessary for matters of relevance to a Department. However, equivalent section 70 disclosure provisions are included in:

- section 18 of the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015;
- section 14A of the Family Assistance (Public Interest Certificate Guidelines) Determination 2015; and
- section 19 of the Student Assistance (Public Interest Certificate Guidelines) Determination 2015.

Section 70 has been inserted so that disclosure provisions in relation to the PPL scheme remain consistent with these other elements of Department portfolio legislation.

Section 71 covers a disclosure if the disclosure is necessary for investigating or making a decision regarding suspected breaches of the APS Code of Conduct. This section was included because, although disclosure of such information and subsequent use is for the purposes of the Act, no provision of the 2010 Rules would allow a public interest certificate to be issued for disclosure (and subsequent use) for the purposes of investigating and making decisions in relation to suspected breaches of the APS Code of Conduct.

This section may assist investigation of circumstances where a person who has access to PPL or DaPP payment information, inappropriately uses that information for a financial benefit (for themselves or others) in breach of the *Public Service Act 1999*.

APS Code of Conduct is defined in section 6 of the Rules, and means the rules in section 13 of the *Public Service Act 1999*.

Part 10 – Debt recovery

Section 72 provides a simplified outline to aid in navigation of this Part.

Section 73 provides that for the definition of *settlement interest* in subsection 198(6) of the Act, the prescribed annual rate of interest is 5%. This figure assists in calculating the present value of an unpaid amount (debt) where settlement in a civil action for less than the full sum is being contemplated.

Part 11 – Extension of Act to persons who are not employees and employers

Division 1 – Simplified outline of this part

Section 74 provides a simplified outline to aid in navigation of this Part.

Part 3-5 of the Act provides for employer determinations to be made for an employer and an employee. If an employer determination is in force, the employer is required to pay instalments of PLP to the employee. Subsection 299(1) of the Act allows for the Rules to provide for employer determinations to be made for persons in a relationship similar to that of an employer and employee. Subsection 299(2) allows the Rules to modify any provision of the Act in relation to those persons.

Part 11 empowers the Secretary to make employer determinations in relation to the Police Commissioner and law enforcement officers of states other than Queensland or the Australian Capital Territory, the Crown in right of Queensland and Queensland law enforcement officers, the AFP Commissioner and an AFP officer, and the Chief of the Defence Force and a person who is a defence force member.

Law enforcement officer is defined in section 6 of the Act.

Commissioner of Police of a state or territory is defined in section 6 of the Rules and means the person holding the office of Commissioner of Police, however described, in relation to the police force or police service of that state or territory.

AFP Commissioner and *AFP officer* are defined in section 6 of the Rules.

The Rules extend the function of the Fair Work Ombudsman to include investigation into matters where the Secretary has reason to believe that a Police Commissioner (as an employer where an employer determination is in force) has not complied with an obligation under section 70 (which deals with unauthorised deductions from instalments) or Part 3-2 (which deals with payment of instalments by an employer) of the Act. Similarly, it is intended that the powers of the Fair Work Inspector would be extended to include the exercise of its compliance powers (within the meaning of the *Fair Work Act 2009*) for the purposes of determining whether a Police Commissioner has complied with obligations under section 70 and Part 3-2 of the Act.

In relation to defence force members, the Defence Force Ombudsman will have the powers and functions in place of the Fair Work Ombudsman, to enable investigations into matters where the Secretary has reason to believe that the Chief of the Defence Force has not complied with an obligation under section 70 or Part 3-2 of the Act.

The Defence Force Ombudsman would also have the compliance powers of the Fair Work Inspector for the purposes of determining whether the Chief of the Defence Force has complied with obligations under section 70 and Part 3-2 of the Act.

Chief of the Defence Force is defined in section 6 of the Rules and has the same meaning as in the *Defence Act 1903*.

Division 2 – Extension of Act to law enforcement officers of certain States and Territories

Division 2 provides for the extension of the Act to law enforcement officers in States and Territories other than Queensland or the Australian Capital Territory.

Section 75 provides that, for the purposes of subsection 299(1) of the Act, the Secretary may make an employer determination for the Commissioner of Police of New South Wales, Victoria, Western Australia, South Australia, Tasmania and the Northern Territory and a person who is a law enforcement officer of that state or territory (but not where the law enforcement officer is the Commissioner of Police).

Section 76 provides that, for the purposes of subsection 299(2) of the Act, for a law enforcement officer of a state or territory other than Queensland or the Australian Capital Territory (other than the Commissioner of Police), the Act is modified as follows:

- the Commissioner of Police of that state or territory (however described) is taken to be the employer of the law enforcement officer;
- the law enforcement officer is taken to be an employee of the Commissioner of Police of that state or territory (otherwise than for the purposes of the use of 'permissible purpose' in paragraph 49(1)(a) of the Act);
- a reference to the employment or engagement of the law enforcement officer is taken to be a reference to that officer's role, functions or duties, however described, as a law enforcement officer; and
- there is no requirement for the Commissioner of Police of that state or territory to have an ABN.

Division 3 – Extension of Act to Queensland law enforcement officers

Division 3 provides for the extension of the Act to the Crown in right of the State of Queensland and law enforcement officers of Queensland.

Section 77 provides that, for the purposes of subsection 299(1) of the Act, the Secretary may make an employer determination under Part 3-5 of the Act for the Crown in right of Queensland and a person who is a law enforcement officer of Queensland.

This recognises that, in accordance with section 5.15 of the *Police Service Administration Act 1990 (Qld)*, an officer is taken to be an employee of the crown.

Section 78 provides that, for the purposes of subsection 299(2) of the Act, for a law enforcement officer of Queensland, the Act is modified as follows:

- the Crown is taken to be the law enforcement officer's employer;
- the law enforcement officer is taken to be an employee of the Crown (other than for the purposes of paragraph 49(1)(a) of the Act relating to permissible purpose for paid work);
- a reference to the employment or engagement of the law enforcement officer is taken to be a reference to that officer's role, functions or duties, however described, as a law enforcement officer; and
- there is no requirement for the Crown to have an ABN.

Division 4 – Extension of Act to Australian Federal Police

Division 4 provides for the extension of the Act to the AFP Commissioner and AFP officers.

Section 79 provides that, for the purposes of subsection 299(1) of the Act, the Secretary may make an employer determination under Part 3-5 of the Act for the AFP Commissioner and a person who is an AFP officer (but not where the AFP officer is the AFP Commissioner).

AFP Commissioner is defined in section 6 of the Rules as the Commissioner within the meaning of the *Australian Federal Police Act 1979*.

AFP officer is defined in section 6 of the Rules as a member of the Australian Federal Police, a person appointed to a position for the purpose of being trained as a member of the Australian Federal Police or a person who has the powers and duties of a member of the Australian Federal Police. This includes (but is not limited to) a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

Section 80 provides that, for the purposes of subsection 299(2) of the Act, for an AFP officer (other than the AFP Commissioner), the Act is modified as follows:

- the AFP Commissioner is taken to be the AFP officer's employer;
- the AFP officer is taken to be an employee of the AFP Commissioner (otherwise than for the purposes of permissible excuse for paid work in subsection 49(1)(a) of the Act);
- a reference to the employment or engagement of the AFP officer is taken to be a reference to that officer's role, functions or duties, however described, as an AFP officer; and
- there is no requirement for the AFP Commissioner to have an ABN.

Division 5 – Extension of Act to defence force members

Division 5 provides for the extension of the Act to the Chief of the Defence Force and defence force members.

Defence force member is defined in section 6 of the Act, and means a member of the Australian Defence Force. A 'member' of the 'Australian Defence Force' has the meaning given by the *Defence Act 1903*. The term defence force member includes any officer, sailor, soldier and airman of the Royal Australian Navy, the Australian

Army and the Royal Australian Air Force. It includes both members of the permanent forces and reserves.

Section 81 provides that, for the purposes of subsection 299(1) of the Act, the Secretary may make an employer determination for the Chief of the Defence Force and a person who is a defence force member (but not where the defence force member is the Chief of the Defence Force).

Section 82 provides that, for the purposes of subsection 299(2) of the Act, for a defence force member (other than the Chief of the Defence Force), the Act is modified as follows:

- the Chief of the Defence Force is taken to be the employer of the defence force member;
- a defence force member is taken to be an employee of the Chief of Defence Force (which has the same meaning as in the Defence Act 1903) other than for the purposes of permissible purpose for paid work, for paragraph 49(1)(a));
- a reference to the employment or engagement of a defence force member is taken to be a reference to the service of a member of the defence force;
- a reference to the Fair Work Ombudsman or Fair Work Inspector is taken to be a reference to the Defence Force Ombudsman; and
- there is no requirement for the AFP Commissioner to have an ABN.

Part 12 – Application, saving and transitional provisions

Division 1 – Simplified outline of this Part

Section 83 provides a simplified outline to aid in navigation of this Part.

Division 2 – Paid Parental Leave Rules 2010

Section 84 provides that this instrument applies in relation to a claim for either PLP or DaPP made by a person on or after 1 April 2021.

Section 85 provides that despite the repeal of the 2010 Rules by Schedule 1 to the Rules, those rules continue to apply to claims for PLP or DaPP made by a person before 1 April 2021.

Section 86 provides that Part 9 of the Rules applies to disclosures of information on or after 1 April 2021, whether the information was obtained before, on or after that day.

Operation of the Rules on this basis is appropriate given that, overall, the 2010 Rules have applied to allow disclosures on essentially the same basis as those which will be allowed under the Rules. While sections 58, 70 and 71 do provide for the disclosure of new types of information, section 86 will allow for the most efficient and effective administration of the Rules, and the work of the Department of Social Services and Services Australia.

Section 87 applies in relation to an employer determination made under the Act, as applied by Part 6-3 of the 2010 Rules and in force immediately before 1 April 2021. Such a determination has effect from 1 April 2021 as if it were an employer determination under the Act as applied by Part 11 of the Rules.

Schedule 1

Item 1 repeals the Paid Parental Leave Rules 2010.

Statement of Compatibility with Human Rights

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

Paid Parental Leave Rules 2021

The Paid Parental Leave Rules 2021 (the 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 Rules are subordinate legislation made by the Minister for Families and Social Services under section 298 of the *Paid Parental Leave Act 2010* (the Act).

Under the *Legislation Act 2003*, legislative instruments sunset 10 years after commencement, and will be automatically repealed or cease to have effect after that date if no action is taken. The Rules are being remade as they are due to sunset on 1 April 2021.

The Act provides for the Paid Parental Leave (PPL) scheme which is a national Government-funded payment consisting of Parental Leave Pay (PLP) and Dad and Partner Pay (DaPP) and is designed to complement the entitlement to unpaid parental leave under the National Employment Standards (NES) in the *Fair Work Act 2009*. PLP is an 18-week payment (consisting of a 12-week PPL period and six weeks of flexible PPL) at the rate of the national minimum wage for eligible primary carers of newborn and recently adopted children. DAPP is a two-week payment at the rate of the national minimum wage for eligible fathers and partners caring for newborn or recently adopted children.

The Rules complement the Act by making provision for certain people in less usual or exceptional circumstances to be eligible when they would not otherwise have entitlement under the Act. The Rules add clarity and certainty to the scheme by specifying, in more detail, employer obligations, maintaining a person's eligibility in exceptional circumstances and allowing carers to claim PLP where the birth mother or adoptive parent is unable to care for the child. The Rules make it easier for employers and families to understand and participate in the PPL scheme.

For families, the Rules prescribe additional eligibility criteria to address exceptional circumstances such as illness, death, disputed care and surrogacy arrangements where parents are not able to care for their child or where there are changed circumstances in relation to providing care. The Rules enable a return to work to be disregarded for eligibility purposes in situations where a person is recalled to duty as a defence force member or law enforcement officer, was complying with a summons or other compulsory process or performed work in response to a state, territory or national emergency.

The Rules also prescribe exceptional circumstances in which a carer can claim PLP if the child's birth mother or adoptive parent becomes incapable of caring for the child. Such circumstances generally include those where there is serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person would care, or has cared, for the child.

For employers, the rules add detail to record keeping requirements and information that they are required to keep and provide to their employees when paying PLP. This will make it easier for employers to comply with their obligations and maintain appropriate records.

The Rules largely replicate the 2010 Rules in its operation, with some significant structural changes to bring the instrument in line with current drafting conventions. Some minor operational amendments have been made to clarify policy queries that have arisen during administration of the PPL scheme. A brief overview of these changes are provided below. The Rules:

- clarify the matters that must be considered when working out whether a child was born of a surrogacy arrangement to align with current departmental practices of considering whether an arrangement meets state or territory definitions of a surrogacy arrangement;
- broaden the provision that excludes a person from claiming PLP if the child was entrusted to their care by a state or territory child protection agency;
- clarify that a person will not be precluded from claiming PLP where a child has been entrusted to their care by a child protection agency, unless the child was entrusted on the day they came into the person's care;
- provide additional purposes for which a public interest certificate may be issued, in response to recommendations made by the Productivity Commission and advice from the Attorney-General's Department; and
- remove interest charge provisions, which have been redundant since new interest charge arrangements were included in the Act in 2016.

Human rights implications

This legislative instrument engages the following rights:

- the right to work;
- the right to social security;
- the right to protection and assistance for families; and
- the right to maternity leave.

The right to work

Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." That right requires a country to "take appropriate steps to safeguard this right."

The Rules promote the right to work by extending eligibility for PLP – which is intended to encourage women to participate on the workforce – to more people by allowing for eligibility in less usual or exceptional circumstances. The Rules also promote the right to work by allowing eligibility for PLP to be maintained where a claimant has returned to work in special circumstances.

The right to social security

Article 9 of the 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 Rules engage these rights by allowing more people to access the PPL scheme, particularly those who are not provided for under the Act. In making provision for parents in exceptional circumstances, the Rules recognise that children come into the care of adults in many ways considered ‘non-traditional’ (such as surrogacy arrangements and ‘blended’ families) and endeavours to provide support to these modern families

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 Rules engage these rights by continuing to allow more people to access the PPL scheme. This encourages women to take time off to care for themselves and their child, while the flexible PPL period encourages new mothers to gradually return to work after childbirth.

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 Rules endeavour to support the Act in reducing these constraints by providing economic support to new parents while caring for a newborn, and returning to work after their child is born.

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 Rules 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.

Conclusion

The Rules are compatible with human rights because they do not interfere with human rights and provide families with greater access to financial assistance and social security. In particular, the Rules allow for people in exceptional circumstances who would otherwise be unable to receive PPL to access this payment and support their families. The Rules support the operation of the Act and its aim to financially support new families while caring for newborns and returning to work.

Senator the Hon Anne Ruston, Minister for Families and Social Services

Services