

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Under the *Legislation Act 2003*, legislative instruments sunset 10 years after commencement, and will be automatically repealed or cease to have effect after that date if no action is taken.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 privacy.

The right to privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides the right to protection against arbitrary and unlawful interferences with privacy, family and home. The use of the term "arbitrary" in Article 17 means that any interference with privacy must be in accordance with the law and must comply with the provisions, aims and objectives of the ICCPR. It is recognised that limitations may be imposed on the general prohibition on interference with privacy, provided such limitations are reasonable, necessary and proportionate.

The United Nations Human Rights Committee has interpreted 'reasonableness' in this context to mean that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'. The term unlawful means that no interference can take place except as authorised under domestic law.

Under the Act, it is an offence for a person to disclose protected information unless it is permitted under the Act. Section 128(1) of the Act permits disclosure of information acquired by an officer in the exercise of the officer's powers, or the performance of the officer's duties or functions to such persons and for such purposes as the Secretary determines, if the Secretary certifies that it is necessary in the public interest to do so. Part 9 of the Rules sets out guidelines for the exercise of this power.

Under the guidelines set out in the Rules, the Secretary may only certify that a disclosure of information is necessary in the public interest if:

- The information cannot reasonably be obtained from a source other than the Department of Social Services (DSS),
- If the information is not de-identified information – the purpose of disclosing the information could not be achieved by disclosing de-identified information,
- The person to whom the information will be disclosed has a genuine and legitimate interest in the information, and
- The disclosure is for a purpose specified in the Rules.

The purposes for which a disclosure can be made are outlined in Part 9, Division 2, Subdivision B of the Rules.

Most of the permitted purposes for which a public interest certificate can be made were also contained in the Paid Parental Leave Rules 2010, and have been in operation since commencement of the PPL scheme on 1 January 2011. Several additional purposes for which a public interest certificate may be issued are included in the Rules. They are discussed below.

Subsections 57(d), 57(e), and 57(f) of the Rules provide that a public interest certificate can be given for purposes of international law enforcement related activities, including extraditing one or more persons to or from Australia, and the provision of, or obtaining of, international assistance in criminal matters. The sharing of information with appropriate authorities, both local and abroad, serves a legitimate purpose of securing Australia's public welfare and reflects current international crime cooperation frameworks. It is necessary to provide and receive information to allow for the monitoring of intelligence gathering activities before deciding to undertake an enforcement activity and to support decisions regarding assistance payments.

Section 70 of the Rules provides that information can be shared for the purpose of facilitating the progress and resolution of a matter that is relevant to, and within the portfolio responsibilities of, a Department administering any part of the Act, the Rules or social security law. Section 71 of the Rules provides that information can be shared for the purpose of investigating a suspected breach in the APS Code of Conduct. There is a strong public interest in both investigating any misconduct by public servants thoroughly.

To the extent that these provisions limit the right to privacy by allowing the disclosure of information collected under the Act, the impact is reasonable and proportionate and can only be authorised for specified purposes that are recognised as necessary in the public interest. The guidelines outlined in the Rules will ensure the privacy impact of any disclosures are mitigated.

The information obtained under the is subject to the *Privacy Act 1988*. There are also data protections in place to safeguard the use of data within DSS and Services Australia.

Conclusion

The Rules are compatible with human rights because to the extent that they impact the right to privacy, the impact is reasonable, necessary and proportionate.

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

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