

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Paid Parental Leave Act 2010

*Paid Parental Leave Amendment (Improvements for Families and Gender Equality)
Rules 2023*

Purpose

The Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Rules 2023 (**Amendment Rules**) amend the Paid Parental Leave Rules 2021 (**Rules**), to support the changes made by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023 (Amendment Act)* to the *Paid Parental Leave Act 2010 (Act)*. The changes made by the Amendment Rules include:

- Removing references to ‘primary’, ‘secondary’ and ‘tertiary’ claimants and claims, and replacing these references with ‘PPL’ and ‘special PPL’ claimants and claims.
- Prescribing exceptional circumstances in which a PPL claim or special PPL claim can be made.
- Prescribing conditions a person must satisfy to be eligible for parental leave pay (**PLP**) on a flexible PPL day for a child, where the person is not caring for the child or is performing more than one hour of paid work on that day.
- Prescribing circumstances in which a partnered claimant is not subject to the reserved ‘use it or lose it’ period in subsection 31AB(3) of the Act, where the claimant’s partner is unable to care for the child, including where the partner is deceased or in prison. In these circumstances, it is appropriate to treat such claimants similarly to claimants who are not partnered at the time of their first effective claim, and allow them access to the maximum amount of 100 flexible PPL days for the child. Additional circumstances are prescribed, for example where the claimant is experiencing family and domestic violence or where the child is stillborn or has died. These circumstances acknowledge that in some cases it would be inappropriate to apply the ‘use it or lose it’ policy.
- Prescribing circumstances in which a flexible PPL day for a child does not count towards the total limit of 10 flexible PPL days for which PLP is payable to more than one person. This will allow parents to benefit from additional time off work together to assist the health and development of birth parents and children.
- Reflecting the extension of PLP from 18 weeks to 20 weeks, and that paid parental leave consists only of flexible PPL days.

- Removing references to dad and partner pay.

Background

Changes to the Paid Parental Leave scheme

The Amendment Act amended the Act to make the paid parental leave scheme more accessible, more flexible and gender-neutral. For children born or adopted on or after 1 July 2023, the changes made by the Amendment Act include:

- Extending PLP from 18 weeks to 20 weeks, with 2 weeks reserved on a ‘use it or lose it’ basis for each claimant. This extension is a result of combining the current maximum of 18 weeks of PLP with the current 2 weeks of dad and partner pay. Dad and partner pay will be abolished.
- Removing the notion of ‘primary’, ‘secondary’ and ‘tertiary’ claimants and the requirement that the primary claimants of PLP must be the birth parent, allowing families to decide who will claim first and how they will share the entitlement.
- Making PLP consist only of flexible PPL days, allowing claimants to take the payment in multiple blocks, as small as a day at a time, within two years of the birth or adoption.
- Expanding eligibility to allow an eligible father or partner to receive PLP regardless of whether the birth parent meets the income test, residency requirements or is serving a newly arrived resident’s waiting period.

Paid Parental Leave Rules

The Rules are made under section 298 of the Act for a number of purposes required or permitted by the Act. Among other things, the Rules:

- Prescribe additional categories of eligibility for PLP;
- Prescribe exceptional circumstances in which claims for PLP may be made; and
- Prescribe the process for determining a claim to have different flexible PPL days.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power is 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.

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*. The Amendment Rules are disallowable.

Eligibility for parental leave pay

A person is eligible for PLP on a flexible PPL day for a child if the person is eligible under section 31AA of the Act. Eligibility on a flexible PPL day under section 31AA generally requires the person satisfies the work test, the income test and the residency test, is caring for the child on that day, and is performing no more than one hour of paid work on that day.

Subsection 31AA(4) of the Act provides an alternative set of criteria a person may satisfy to be eligible. A person must:

- Satisfy the residency test on the day the child was born and the flexible PPL day;
- Satisfy the work test and the income test on the flexible PPL day, if the person has not previously satisfied these tests in relation to the child;
- If the person is subject to the newly arrived resident's waiting period, be exempt from the newly arrived resident's waiting period under subsection 31A(7) or 31A(7A) on the day the child was born; and
- Satisfy the conditions prescribed by the Rules.

The conditions prescribed in 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 parent, and has relinquished the child's care as part of a process of adoption, surrogacy or similar.

The Rules also prescribe conditions 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.

Claims in exceptional circumstances

The Rules prescribe various exceptional circumstances in which persons may make a PPL claim or special PPL claim. Generally, these circumstances are those in which the child's birth parent 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 parent, adoptive parent, or a partner of such a person to care for the child, and it is in the child's interests to be cared for by their current carer.

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 PPL and special PPL claimants.

Reserved 'use it or lose it' period

Subsections 31AB(2) to (4) of the Act specify the maximum number of flexible PPL days a claimant who is not a PPL claimant in exceptional circumstances may be eligible for in relation to the child.

Subsection 31AB(3) applies to a claimant who is partnered at the time of their first effective claim. Such claimants will not be eligible for PLP when they make their first effective claim for parental leave pay in relation to more than 90 flexible PPL days for the child: Act, paragraph 31AB(3)(a). This reserves 10 flexible PPL days for another claimant or claimants, generally expected to be their partner. This is known as the reserved 'use it or lose it' period.

However, paragraph 31AB(3)(a) only applies if the relevant claimant does not satisfy the circumstances prescribed by the Rules under subparagraph 31AB(3)(a)(iii).

Subsection 31AB(4) provides that, in any case, including for a claimant who is partnered, any person may not be eligible for PLP for the child if one or more payability determinations that PLP is payable to a person are in force in relation to 100 flexible PPL days for the child. The total number of flexible PPL days that may be payable in respect of the child is limited to 100 flexible PPL days.

The circumstances prescribed in the Rules under subparagraph 31AB(3)(a)(iii) allow a partnered claimant to access PLP for a maximum amount of 100 flexible PPL days for the child.

Paid Parental Leave consisting only of flexible PPL days

To allow claimants to use their PLP entitlements in a way that works best for them, paid parental leave will consist only of flexible PPL days. This means parents can take PLP in blocks as small as a day at a time, with periods of work in between, during the period starting the day the child is born and ending on the day before the child's second birthday or anniversary of care.

Generally, PLP will not be payable to more than one person for the same flexible PPL day for the child for more than 10 flexible PPL days: Act, subsection 21(1). However, subsection 21(2) of the Act allows the Rules to prescribe circumstances in which a flexible PPL day does not count towards the total of 10 flexible PPL days.

Gender-neutral claiming

The Amendment Act removes the distinction between primary, secondary and tertiary claims and claimants, to allow fathers and partners to claim PLP without requiring the birth parent to make a claim.

To reflect this change, the terms 'primary claim', 'primary claimant', 'secondary claim', 'secondary claimant', 'tertiary claim' and 'tertiary claimant' in the Act are replaced by the terms 'PPL claim', 'PPL claimant', 'special PPL claim' and 'special PPL claimant'. The Amendment Rules update these terms in the Rules to ensure consistency with the new claim categories.

Extending parental leave pay

Prior to 1 July 2023, a person could claim an initial period of up to 12 weeks (60 payable days), called the PPL period. The person may forfeit any remaining PPL period entitlement if they return to work between the child's date of birth and the end of the PPL period. Additionally, the person could claim 6 weeks (30 payable days) of flexible paid parental leave. Flexible PPL days may be claimed on an ad hoc basis as days of care for the child are identified.

Eligible fathers, partners of the birth parent and adoptive parents of the child could claim dad and partner pay. Dad and partner pay consists of 2 weeks of the minimum wage equivalent.

The Amendment Act combines the 2 weeks of dad and partner pay with the current maximum 18 weeks (90 payable days), extending PLP to a maximum 20 weeks (100 payable days) in relation to the child. The Amendment Rules reflect this change to the maximum entitlement to PLP for a child in the Rules.

Fully flexible PPL days

A claim for PLP for one or more flexible PPL days for a child must specify each of those days: Act, section 57A. In certain limited circumstances, however, the Secretary may determine that one or more days specified in a person's claim as flexible PPL days for a child may be taken to be one or more other days. These circumstances are dealt with in section 30 of the Rules.

The Amendment Act makes PLP consist only of flexible PPL days, allowing claimants to take PLP in multiple blocks as small as a day at a time, within two years of the birth or adoption of the child. The Amendment Rules reflect this change in determining a claim to have different flexible PPL days.

Commencement

The Amendment Rules commence on the day after they are registered on the Federal Register of Legislation.

Application

The Amendment Rules will apply to claims for PLP made on or after 26 March 2023 for a child who is born on or after 1 July 2023.

Read together with the Act, the Amendment Rules will effectively operate from the day the child is born – that is, on or after 1 July 2023.

The Secretary cannot exercise a power under the Amendment Rules until the child is born. This is because the Secretary may only make a determination that PLP is payable to a person for a flexible PPL day for the child under the Act; see sections 13 and 14 of the Act. A 'flexible PPL day' for a child is a day that occurs in the period starting on the day the child is born and ends on the day before the child's second birthday: section 11D of the Act.

The Secretary also cannot make a determination that PLP is payable to a person for a flexible PPL day for the child unless a PPL claimant has verified the child's birth: section 18 of the Act. This is so even if a person has made an early claim for PLP

under section 60 of the Act. Section 13 of the Act deals with determinations on a PPL claim, and section 14 provides for determinations on a special PPL claim.

'PPL claim' and 'special PPL claim' are defined in subsections 53(2) and (3) respectively. 'PPL claimant' is defined in section 6 of the Act.

To the extent the Amendment Rules apply retrospectively, the Amendment Rules would not affect the person's rights so as to disadvantage them.

Subsection 12(2) of the *Legislation Act 2003* provides that a legislative instrument, or a provision of such an instrument, that commences before the instrument is registered does apply in relation to a person to the extent that it would affect the person's rights so as to disadvantage them.

The retrospective application of the Amendment Rules to claims made on or after 26 March 2023 is designed to align with the operation of the Amendment Act. The application of the Amendment Rules and the Amendment Act to claims made on or after 26 March 2023 reflects the ability for a person to make a claim for PLP 97 days before the child's expected date of birth: see section 60 of the Act. This means the earliest date on which a person may make a claim for PLP for a child whose expected date of birth is 1 July 2023 is 26 March 2023. Aligning the application of the Amendment Rules and Amendment Act to claims for PLP will support affected claimants. It is intended to ensure claimants in exceptional circumstances will also be able to make early claims and have them assessed similarly to claimants in ordinary circumstances.

Consultation

Consultation was undertaken with Services Australia, the Office of Parliamentary Counsel and Australian Government Solicitor in relation to the Amendment Rules.

The broader changes to the paid parental leave scheme included in the Amendment Act and supported by the Amendment Rules were informed by a variety of sources, including:

- ministerial correspondence,
- media articles,
- pre-budget submissions from stakeholders,
- petitions from members of the public (including those formally presented to parliament),
- feedback from industry groups, and
- feedback from research bodies and think tanks,
- calls for the Government to reform the PPL scheme following the 2022-23 March Budget announcement, and
- the September 2022 Jobs and Skills Summit.

Consultation on the specific changes was undertaken as part of the Senate Community Affairs Legislation Committee Inquiry into the Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022 through a public submission and hearing process. No significant concerns with the amendments were raised.

Regulation Impact Statement (RIS)

A RIS was completed in consultation with the Office of Best Practice Regulation (OBPR) in relation to the 2022-23 October Budget measure, Boosting Parental Leave to Enhance Economic Security, Support and Flexibility for Australia's Families, which included the changes contained in the Amendment Act – OBPR22 – 02029.

Availability of independent review

References to the Act include the Rules under section 6 of the Act. Decisions made under or informed by the Amendment Rules are reviewable decisions. These decisions are subject to internal and external merits review under Chapter 5 of the Act.

Explanation of the provisions

Section 1 states that the name of the instrument is the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Rules 2023*.

Section 2 specifies that the Amendment Rules commence on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that the Amendment Rules are made under the *Paid Parental Leave Act 2010*.

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned.

Schedule 1 to the Amendment Rules contains the amendments to the Rules.

Item 1 omits “and dad and partner pay” from the paragraph beginning “This instrument” in the simplified outline in section 5. This reflects the abolition of dad and partner pay by the Amendment Act.

Item 2 inserts a new paragraph after the paragraph beginning “This instrument” in the simplified outline in section 5. This new paragraph provides that Part 1A of the Rules provides for matters relating to determinations about whether PLP is payable to a person.

Item 3 repeals the paragraph beginning “Parts 5 to 8” in the simplified outline in section 5. This paragraph refers to matters relating to dad and partner pay. This amendment reflects the abolition of dad and partner pay.

Item 4 repeals paragraphs (a) to (f) of the note to the heading of section 6, and substitutes various expressions used in the Rules that are defined in the Act.

Item 5 inserts new Part 1A after Part 1 of the Rules. Part 1A provides for matters relating to determinations about whether PLP is payable to a person.

New section 7A contains a simplified outline of Part 1A.

New section 7B deals with the limit on the number of flexible PPL days for which PLP is payable to more than one person.

Generally, PLP will not be payable to more than one person for the same flexible PPL day for the child for more than 10 flexible PPL days under section 21 of the Act. However, subsection 21(2) of the Act provides that the Rules may prescribe circumstances in which a flexible PPL day (the **relevant day**) does not count towards the total of 10 flexible PPL days.

The circumstances prescribed for the purposes of subsection 21(2) of the Act are outlined in new subsections 7B(2) to (5).

New subsection 7B(2) states that a circumstance is that, as a result of any of the following situations applying, it would be unreasonable to count the relevant day towards the total of 10 flexible PPL days:

- The child's birth parent underwent caesarean delivery in relation to the child, or the child's birth parent developed a complication or medical condition in connection with the child's birth: new paragraph 7B(2)(a).
- The child is required to remain in hospital after the child's birth, or is hospitalised immediately after the child's birth; and has been or is likely to remain in hospital for a period of at least 14 days: new paragraph 7B(2)(b).
- The child has developed a complication or contracted an illness during the period of gestation, at birth or immediately following the birth; and, because of the complication or illness, the child has higher care needs and requires an extended period of medical care or treatment: new paragraph 7B(2)(c).
- The person is suffering from a severe medical condition on or before the relevant day: new paragraph 7B(2)(d).

New subsection 7B(3) states that a circumstance is that the child is stillborn or has died on or before the relevant day.

New subsection 7B(4) provides that a circumstance is that the child and another child were born during the same multiple birth.

New subsection 7B(5) states that a circumstance is that the Secretary is satisfied that there is any other reason that makes it unreasonable to count the relevant day towards the total of 10 flexible PPL days. This broad discretion recognises there are a wide variety of circumstances that are difficult to anticipate that may otherwise warrant being prescribed for the purposes of subsection 21(2) of the Act. It is intended to avoid inequitable outcomes for families in these circumstances who would otherwise be disadvantaged by counting the relevant day towards the total of 10 flexible PPL days.

Item 6 amends the simplified outline of Part 2 in section 8. Part 2 of the Rules covers matters relating to eligibility for PLP. This item omits the two paragraphs beginning "Division 2", and substitutes it with a new paragraph that provides that Division 2 prescribes conditions that certain claimants must satisfy to be eligible for PLP on a

flexible PPL day for a child. This amendment removes references to “primary”, “secondary” and “tertiary” claimants, and days that are not flexible PPL days for a child.

Item 7 repeals sections 9 to 12 of the Rules, and substitutes new sections 9 and 10

New section 9 outlines the prescribed conditions for PPL claimants and their partners for the purposes of paragraph 31AA(4)(e) of the Act to be eligible for PLP on a flexible PPL day.

Under new subsection 9(1), the prescribed conditions are that:

- The person is a PPL claimant or a special PPL claimant covered by paragraph 54(2)(a) of the Act; and
- The person satisfies subsections 9(2) and (3) on the flexible PPL day.

The expressions ‘PPL claimant’ and ‘special PPL claimant’ are defined in section 6 of the Act.

A person satisfies new subsection 9(2) on a day if the person is caring for the child on that day, or satisfies the requirements of section 13 (birth mother relinquishing child), section 16 (temporary inability to care), or section 17 (loss of care for child) for the child on that day.

A person satisfies new subsection 9(3) on a day if the person is performing no more than one hour of paid work on that day, or satisfies the requirements of section 13 (birth mother relinquishing child) for the reason set out in paragraph 13(2)(b), section 14 (child in hospital following birth), section 17 (loss of care for child), section 18 (recall to duty), section 19 (summons or other compulsory process), or section 20 (State, Territory or national emergency) for the child on that day.

Paragraph 13(2)(b) provides that a reason a person is not caring for the child on a day is that the child is stillborn or has died before that day, and the person would have relinquished care of the child for a reason in paragraph 13(2)(a) had the child not been stillborn or died.

New section 10 lists the prescribed conditions for other special PPL claimants for the purposes of paragraph 31AA(5)(b) of the Act to be eligible for PLP on a flexible PPL day.

Under new subsection 10(1), the prescribed conditions are that:

- The person is a special PPL claimant covered by paragraph 54(2)(b) of the Act;
- The person satisfies the Australian residency test on the flexible PPL day; and
- The person satisfies subsections 10(2) and (3) on the flexible PPL day.

A person satisfies new subsection 10(2) on a day if the person is caring for the child on that day, or satisfies the requirements of section 16 (temporary inability to care) or section 17 (loss of care for child) for the child on that day.

A person satisfies new subsection 10(3) on a day if the person is performing no more than one hour of paid work on that day, or satisfies the requirements of section 17 (loss of care for child), section 18 (recall to duty), section 19 (summons or other compulsory process), or section 20 (State, Territory or national emergency) for the child on that day.

Item 8 omits “18 weeks” from paragraph 13(1)(b) and substitutes “20 weeks”. This reflects the increase to the maximum entitlement to PLP for a child from 18 weeks to 20 weeks.

Item 9 repeals paragraph 14(a) and substitutes a new paragraph listing the persons to whom section 14 applies. Relevantly, this amendment removes the terms “primary claimant” and “secondary claimant” to reflect the removal of these terms from the Act. Section 14 now applies to a person who is the child’s birth mother, a person who is a parent of the child and is not the child’s birth mother, or a partner of either of these people.

Item 10 omits “a primary claimant” from paragraph 14(d) and substitutes “the birth mother of the child”. This amendment reflects the removal of the term “primary claimant” from the Act. It also ensures consistency with subparagraph 14(a)(i), which provides that section 14 applies to the birth mother of the child.

Item 11 repeals section 15. Section 15 allows continued eligibility for the purpose of a PPL period when care of a child is transitioning from primary claimant to a secondary claimant, or from a secondary claimant to a tertiary claimant. This section is no longer required because PLP is now fully flexible.

Items 12, 13, 14, 15, 17 and 18 amend references to “primary carer” of the child to substitute references to “care”, “care for” and “caring for” the child in subparagraphs 16(a)(i) and (ii), and paragraphs 16(b), (c) and (e). These amendments reflect the ability for more than one person to take flexible PPL days concurrently under the changes made by the Amendment Act.

Section 16 will now apply where the person has previously been caring for the child, or they are expected to be caring for the child in the future, and they are temporarily unable to care for the child due to circumstances beyond the person’s control. The period of temporary inability must be likely to be less than 26 weeks which starts on or before the day that the person stops caring for the child. 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.

Item 16 repeals paragraph 16(d), which requires 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 ensures that multiple claimants can take flexible PPL days concurrently.

Item 19 omits “the primary carer” from paragraph 17(a) to substitute “caring”. This amendment reflects the ability for multiple claimants to take flexible PPL days concurrently.

Similarly, **item 21** repeals paragraph 17(f), which requires 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. **Item 20** omits “and” from paragraph 17(e) as a result.

Item 22 repeals Subdivision C of Division 2 to Part 2 and substitutes new Subdivision C. The current Subdivision C describes the exemption to the newly arrived resident’s waiting period for the purposes of subsection 31A(6) of the Act. Subsection 31A(6) of the Act was repealed by the Amendment Act because it related only to the application of the newly arrived resident’s waiting period for a person with a PPL period.

New Subdivision C provides for when a person is not eligible for PLP.

New section 21 lists the prescribed circumstances for claimants for the purposes of subparagraph 31AB(3)(a)(iii) of the Act.

Subsections 31AB(2) to (4) of the Act address the maximum number of flexible PPL days a claimant who is not a PPL claimant in exceptional circumstances may claim for a child. A PPL claimant in exceptional circumstances is defined in paragraph 54(1)(g) of the Act.

Subsection 31AB(3) applies to a claimant who is partnered at the time of their first effective claim. Such claimants will not be eligible for PLP when they make their first effective claim for parental leave pay in relation to more than 90 flexible PPL days for the child: Act, paragraph 31AB(3)(a). This reserves 10 flexible PPL days for another claimant or claimants, generally expected to be their partner. However, paragraph 31AB(3)(a) only applies if the relevant claimant does not satisfy the circumstances prescribed by the Rules for the purposes of subparagraph 31AB(3)(a)(iii).

Subsection 31AB(4) of the Act provides that, in any case, including for a claimant who is partnered, any person may not be eligible for parental leave pay for the child if one or more payability determinations that parental leave pay is payable to a person are in force in relation to 100 flexible PPL days for the child. The total number of flexible PPL days that may be payable in respect of the child is limited to 100 flexible PPL days.

New subsection 21(1) specifies that, for the purposes of subparagraph 31AB(3)(a)(iii) of the Act, the prescribed circumstances are that the relevant claimant satisfies any of new subsections 21(2) to (7).

The relevant claimant satisfies new subsection 21(2) if the partner of the relevant claimant referred to in subparagraph 31AB(3)(a)(i) of the Act 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. The meaning of ‘incapable of caring’ for a child is contained in section 7 of the Rules.

The relevant claimant satisfies new subsection 21(3) if the child is stillborn or has died.

The relevant claimant satisfies new subsection 21(4) if they are experiencing family and domestic violence, or is dealing with the impacts of family and domestic violence.

The relevant claimant satisfies new subsection 21(5) if the partner of the relevant claimant referred to in subparagraph 31AB(3)(a)(i) of the Act is deployed outside Australia as a defence force member, under conditions specified in a determination made under the *Defence Act 1903* that relates to such deployment, for all of the flexible PPL days for the child.

The relevant claimant satisfies new subsection 21(6) if either:

- The child was required to remain in hospital after the child's birth or was hospitalised immediately after the child's birth, and the child has been or is likely to remain in hospital for a period of at least 18 weeks; or
- The child developed a complication or contracted an illness during the period of gestation, at birth or immediately following the birth and, because of the complication or illness, the child has higher care needs and requires medical care or treatment for a period of at least 18 weeks.

The relevant claimant satisfies new subsection 21(7) if they satisfy section 13 (birth mother relinquishing child) for the child.

Item 23 substitutes the paragraph beginning "Under the Act" in the simplified outline in section 25. Section 25 provides the simplified outline of Part 3 of the Rules, which relates to claims for PLP. This amendment reflects the new claim categories in the Act, removing references to the terms 'primary claim', 'primary claimant', 'secondary claim', 'secondary claimant', 'tertiary claim' and 'tertiary claimant' and replacing them with the terms 'PPL claim' and 'special PPL claim'.

Item 24 omits "primary claimants" from the heading to section 26, and substitutes "PPL claims". **Item 26** makes a similar change in the heading to section 27. Section 26 covers the general exceptional circumstances for PPL claimants. Section 27 deals with the exceptional circumstances for PPL claimants where the child is born because of a surrogacy arrangement.

Item 25 omits "paragraph 54(1)(c) of the Act, the exceptional circumstances in which a primary claim" from subsection 26(2), and substitutes "paragraph 54(1)(g) of the Act, the exceptional circumstances in which a PPL claim". **Item 27** makes a similar change to subsection 27(2). These references have been updated for consistency with the updates to the categories of persons who may make a claim in section 54 of the Act.

Item 28 makes a technical amendment to add "and" to the end of subparagraph 27(2)(a)(ii).

Item 29 repeals sections 28 and 29 and substitutes new section 28. Sections 28 and 29 describe the exceptional circumstances for secondary and tertiary claimants respectively. These claim categories were removed by the Amendment Act.

New section 28 deals with the exceptional circumstances for special PPL claims for the purposes of paragraph 54(2)(b) of the Act. Paragraph 54(2)(b) of the Act enables a person to make a special PPL claim for a child if they satisfy the exceptional circumstances prescribed by the Rules.

A person must satisfy the exceptional circumstances prescribed by new subsections 28(2), (3), (6) or (7) to make a special PPL claim in exceptional circumstances.

New subsection 28(2) prescribes exceptional circumstances for certain partners and other parents. This new subsection applies to a person (the **relevant person**) who is the partner of the child's birth parent, an adoptive parent of the child, a person who is a parent of the child and is not the child's birth mother, or the partner of such a person. The relevant person satisfies new subsection 28(2) if:

- The child is in the care of the relevant person and has been, or is likely to be, in that care for a continuous period of at least 26 weeks.
- The relevant person became, or is likely to become, the child's primary carer before the child's first birthday or, for an adopted child, before the first anniversary of the child's placement.
- On the day the child came into the care of the relevant person, the child 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.
- The birth parent 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 if the relevant person is:
 - The partner of the child's birth mother;
 - A person who is a parent of the child and is not the child's birth mother; or
 - The partner of the other parent of the child who is not the child's birth mother.
- The adoptive parent, or each of the adoptive parents, 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 if the relevant person is a partner of an adoptive parent.

New subsection 28(3) prescribes exceptional circumstances for other persons. A person (the **relevant person**) may make a special PPL claim in exceptional circumstances under new subsection 28(3) if:

- The child is in the care of the relevant person and has been, or is likely to be, in that care for a continuous period of at least 26 weeks.
- The relevant person became, or is likely to become, the child's primary carer before the child's first birthday or, for an adopted child, before the first anniversary of the child's placement.
- On the day the child came into the care of the relevant person, the child 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.
- The relevant person is covered by new subsections 28(4) or (5).

The relevant person is covered by new subsection 28(4) if one of the following persons 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:

- The child's birth parent and their partner (if any);
- For an adopted child – the adoptive parent of the child and the adoptive parent's partner (if any), or each of the adoptive parents of the child and their respective partners (if any);
- The PPL claimant (if any), for the child, who is:
 - Covered by paragraph 54(1)(g) of the Act; and
 - The child's primary carer immediately before the relevant person becomes the child's primary carer.

The relevant person is covered by new subsection 28(5) if the Secretary is satisfied on reasonable grounds that:

- The relevant person became the primary carer of the child in special circumstances.
- It would be unreasonable for the following persons to care for the child:
 - The child's birth parent and their partner (if any);
 - For an adopted child – the adoptive parent of the child and the adoptive parent's partner (if any), or each of the adoptive parents of the child and their respective partners (if any);
 - The PPL claimant (if any), for the child, who is:
 - Covered by paragraph 54(1)(g) of the Act; and
 - The child's primary carer immediately before the relevant person becomes the child's primary carer.

- Taking into account the arrangements for the child's care with the relevant person in comparison with those in the child's previous family situation, it is in the interests of the child for the relevant person to care for the child.

A note to new subsection 28(5) provides that when it is **unreasonable** for a person to care for a child is defined in section 6 of the Rules. Under section 6, it would be unreasonable for a person to care for a child if there has been extreme family breakdown, or similar circumstances, in relation to the family situation in which the person has cared, or would care, for the child. Alternatively, it would be unreasonable for a person to care for a child if there is a serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the family situation in which the person has cared, or would care, for the child.

New subsection 28(6) prescribes exceptional circumstances for previous PPL claimants. This new subsection applies to a person (the **relevant person**) who has previously been a PPL claimant for the child. The relevant satisfies new subsection 28(6) if:

- The child is in the care of the relevant person and has been, or is likely to be, in that care for a continuous period of at least 26 weeks.
- The relevant person became, or is likely to become, the child's primary carer before the child's first birthday or, for an adopted child, before the first anniversary of the child's placement.
- On the day the child came into the care of the relevant person, the child 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.
- Another person, who was a PPL claimant or special PPL claimant for the child subsequent to the relevant person being a PPL claimant for the child, had care of the child in exceptional circumstances and those circumstances have ceased to apply, or 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.

New subsection 28(7) prescribes exceptional circumstances for if there is a previous special PPL claimants. A person (the **relevant person**) may make a special PPL claim in exceptional circumstances under new subsection 28(7) if:

- The child is in the care of the relevant person and has been, or is likely to be, in that care for a continuous period of at least 26 weeks.
- The relevant person became, or is likely to become, the child's primary carer before the child's first birthday or, for an adopted child, before the first anniversary of the child's placement.
- On the day the child came into the care of the relevant person, the child 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.

- The relevant person is covered by new subsection 28(8).

The relevant person is covered by new subsection 28(8) if:

- A special PPL claimant, for the child, who is covered by paragraph 54(2)(b) of the Act is incapable of caring for the child and has been, or is likely to be, in that care for a continuous period of at least 26 weeks.
- The Secretary is satisfied on reasonable grounds that:
 - The relevant person became the primary carer of the child in special circumstances.
 - It would be unreasonable for a special PPL claimant covered by paragraph 54(2)(b) to care for the child.
 - It is in the interests of the child for the relevant person to care for the child, taking into account the arrangements of the child's care with the relevant person in comparison with those in the child's previous family situation.

A note to new subsection 28(8) provides that when it is **unreasonable** for a person to care for a child is defined in section 6 of the Rules.

Item 30 repeals section 30 and substitutes new section 30. Section 30 contains a method for determining a claim to have different flexible PPL days for the purposes of subsection 57A(4) 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.

New section 30 will be relevant to a person who submits a claim for PLP prior to the birth of the child and is eligible for at least 5 consecutive week days from the child's expected date of birth. If the child's actual date of birth is later found to be different from the child's expected date of birth, the Secretary will be empowered to adjust the person's claim for their flexible PPL days so that the person still claims the same number of consecutive flexible PPL days. These flexible PPL days will be determined by reference to the child's actual date of birth.

Item 31 repeals paragraph 33(4)(b), as it requires employers to make and keep records in relation to each PPL funding amount received by an employer for a person for any PPL days for which the amount was paid.

Item 32 omits "(if any)" from paragraph 33(4)(c), as paid parental leave only consists of flexible PPL days.

Item 34 repeals paragraphs 34(2)(j) and (k) which refer to a final PPL payment, and further PPL payments respectively. These terms are no longer relevant as PLP is a fully flexible payment. As a result, **item 33** makes a technical amendment to paragraph 34(2)(i) to omit “deduction;” and substitute “deduction.”.

Item 35 repeals Parts 5 to 8 of the Rules, which relate to dad and partner pay. Parts 5 to 8 are no longer required because of the abolition of dad and partner pay by the Amendment Act.

Item 36 repeals subparagraph 70(2)(b)(ii) to remove reference to dad and partner pay as one of the matters of relevance for which a public interest certificate may be given for the disclosure of information under the Act.

Item 37 inserts new Division 3 in Part 12 of the Rules, relating to the application of the amendments made by the Amendment Rules.

New Division 3 provides that the amendments made by the Amendment Rules apply in relation to a claim for PLP made on or after 26 March 2023 for a child who is born on or after 1 July 2023.

Statement of Compatibility with Human Rights

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

Paid Parental Leave Amendment (Improvement for Families and Gender Equality) Rules 2023

The Paid Parental Leave Amendment (Improvement for Families and Gender Equality) Rules 2023 (**Amendment Rules**) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The Amendment Rules amend the Paid Parental Leave Rules 2021 (**Rules**), to support the changes to the *Paid Parental Leave Act 2010* (**the Act**) made by the *Paid Parental Leave Amendment (Improvement for Families and Gender Equality) Act 2023* (**Amendment Act**).

The Act provides for the Paid Parental Leave (**PPL**) scheme, which is a Government-funded scheme designed to provide financial support to parents to take time off work after the birth or adoption of a child.

The Rules are a legislative instrument made by the Minister under section 298 of the Act. The Rules complement the Act by making provisions for certain people in exceptional circumstances to be able to make a claim or be eligible when they would not otherwise be entitled under the Act.

The Amendment Act amended the PPL scheme to make it more accessible, flexible and gender neutral. The changes made by the Amendment Act include:

- Combining the 2 weeks of dad and partner pay (**DaPP**) with the 18 weeks of parental leave pay (**PLP**) to create a single 20 week payment.
- Reserving 2 weeks of the PLP entitlement on a reserved ‘use it or lose it basis’ for partnered claimants.
- Allowing up to 10 days of the entitlement to be taken by claimants concurrently.
- Replacing the terms ‘primary’, ‘secondary’ and ‘tertiary’ claimants with ‘PPL claimant’ and ‘special PPL claimant’, and removing the requirement that the initial claimants of PLP must be the birth parent, allowing families to decide who will claim first.
- Making PLP consist only of flexible PPL days, allowing claimants to take the payment in multiple blocks, as small as a day at a time, within 2 years of the birth or adoption, and increasing flexibility in how families can share the entitlement.

- Expanding eligibility to allow an eligible father or partner to receive PLP regardless of whether the birth parent meets the income test, residency requirements or is serving a newly arrived resident's waiting period.

Consistent with the changes made by the Amendment Act, the Amendment Rules:

- Removes references to 'primary,' and 'secondary' and tertiary' claimants and claims, and replacing these references with 'PPL' and 'special PPL' claimants and claims.
- Prescribes exceptional circumstances in which a 'PPL claim' and a 'special PPL' claim can be made.
- Prescribes circumstances in which a partnered claimant is not subject to the reserved 'use it or lose it' period. These circumstances include where the claimant's partner is deceased or in prison, and where the claimant is experiencing family and domestic violence.
- Prescribes circumstances in which more than 10 days of the PLP entitlement can be taken by claimants concurrently. This will allow parents to benefit from additional time off work together to assist the health and development of birth mothers and children.
- Reflects the extension of PLP from 18 weeks to 20 weeks, and that PLP consists only of flexible PPL days.
- Removes references to DaPP.

The changes to the PPL scheme made by the Amendment Rules are beneficial and promote human rights. The changes support the implementation of the Amendment Act, which provides greater flexibility in how families can use their PLP entitlement, encourages fathers and partners to take time off work after a birth or adoption, and expand access to the scheme, including for families where the birth parent is the higher earner, and for residentially qualified fathers and partners.

Human rights implications

The Amendment Rules engage the following rights:

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

The right to social security

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

The Amendment Rules engages and promotes these rights. It ensures that the changes to the PPL scheme made by the Amendment Act are reflected in the eligibility and claim provisions for claimants in exceptional circumstances under the Rules. Under these changes, more people will be eligible for PLP, extending the benefits provided by the PPL scheme to more families and more children.

The right to protection and assistance for families

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

The Amendment Rules maintain the ability for birth parents to continue to access payment under the PPL scheme in exceptional circumstances under the improved parameters introduced by the Amendment Act. Eligible birth parents will continue to have access to up to 18 weeks of PLP under the scheme if they are partnered at the time of their first effective claim, reserving 2 weeks of PLP for their partner to claim. This is known as the reserved period. Eligible birth parents who are not partnered at the time of their first effective claim may access up to 20 weeks of PLP.

The exceptions to the reserved period prescribed in the Amendment Rules will allow partnered birth parents and other claimants to access up to 20 weeks of PLP where appropriate, including where their partner is unable to care for the child because they are deceased or in prison.

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

The Amendment Rules support the changes to make the PPL scheme more gender neutral by reflecting the changes to the claimant types made by the Amendment Act in the Rules. Removing the requirement that the birth parent must claim first, and moving to gender-neutral claimant types, will make it easier for fathers to access payment under the PPL scheme.

Additionally, changes to increase the flexibility of PLP will make it easier for the entitlement to be shared between parents and will support parents to better balance work and care responsibilities following a birth or adoption, according to their own needs.

The changes made by the Amendment Rules will also support families to use more than 10 days of their PLP entitlement at the same time in certain circumstances. This will increase flexibility in the way the entitlement can be used in circumstances where parents would benefit from additional time off work together to enhance the health and development of birth parents and children.

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'.

Under the changes, birth parents who are partnered at the time of their first effective claim will be able to receive up to 18 weeks of payment, consistent with the current PLP entitlement. Birth parents who are not partnered will be able to receive up to 20 weeks of payment, an expansion of 2 weeks.

In addition, more women will be able to access PLP under the PPL scheme with the introduction of the family income limit in the Act. Although changes to the claim provisions will allow fathers and partners to claim first, the maternal health and development objectives of the scheme will be supported by requiring birth parents to give permission for this.

The right to equal treatment

Article 3 of the ICESCR recognises ensuring the equal right of men and women to the enjoyment of all economic, social and cultural rights.

The Amendment Rules engage this right by implementing changes to support gender-neutral claiming under the PPL scheme by introducing the new claimant types. Under the new claims structure, the father of a child can claim PLP first, removing a barrier to take up of PLP by men.

Additionally, the changes to make PLP more flexible will make it easier for parents to share the PLP entitlement, making it easier for men to access payment under the scheme.

These changes better support both men and women to access payment under the PPL scheme, which will allow families to make decisions on which parent works and/or cares for the child, regardless of the parent's gender.

Conclusion

The Rules are compatible with and promote human rights because they engage the rights to social security, protection and assistance for families, maternity leave and equal treatment, in a beneficial manner.

The Hon Amanda Rishworth, Minister for Social Services