

## EXPLANATORY STATEMENT

### PAID PARENTAL LEAVE AMENDMENT RULES 2012 (No. 2)

#### Summary

The *Paid Parental Leave Amendment Rules 2012 (No. 2)* (the Amendment Rules) amend the *Paid Parental Leave Rules 2010* (the PPL Rules) which were made under section 298 of the *Paid Parental Leave Act 2010* (the PPL Act).

The Minister may, by legislative instrument, make rules required or permitted by the PPL Act to be provided or necessary or convenient to be provided in order to carry out or give effect to the Act.

Section 298 of the Act provides that the PPL Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### Background

Amendments to the PPL Act by the *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* provide for an extension of the Paid Parental Leave scheme to include dad and partner pay, a two-week payment for eligible working fathers or partners of the birth mother or adoptive parents of the child, who are caring for a child born or adopted after 1 January 2013.

The PPL Act provides for the PPL Rules to include arrangements for families with less common circumstances to be able to claim or to remain eligible for dad and partner pay.

#### Purpose

The Amendment Rules:

- prescribe certain circumstances in which dad and partner pay can be paid to a second person for the same child;
- prescribe certain circumstances where a person can still receive dad and partner pay, despite no longer meeting eligibility criteria in the PPL Act;
- prescribe circumstances in which a DAPP claimant is taken to be 'not working' to allow for DAPP claimants to remain eligible where they receive a top up payment or workers compensation;
- prescribe less common circumstances in which a claim for dad and partner pay for a child can be made under the PPL Rules;
- prescribe the information that the Secretary must give a person who has been paid dad and partner pay; and
- make minor technical amendments to update definitions and references.

### *Determinations about whether dad and partner pay is already payable to a person*

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

The Amendment Rules prescribe circumstances in which dad and partner pay can be paid to a second person for the same child. For example, over a period of time, both the biological father of a child and an adoptive parent of the child could claim dad and partner pay for the same child, while the child is in their care.

The rationale for dad and partner pay being paid a second time in certain 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.

### *Eligibility for dad and partner pay*

Under subsection 115CB(4) of the PPL Act, a DAPP claimant is eligible for dad and partner pay 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 PPL Rules.

The Amendment Rules maintain eligibility for dad and partner pay in certain circumstances. If the person is caring for a child and has a temporary inability to care for the child for reasons such as hospitalisation or dealing with an emergency, the person may remain eligible for dad and partner pay. If the person loses care of the child due to an event that occurs without the person's consent such as the abduction of a child, the person may remain eligible for dad and partner pay. Loss of care does not include where a child is removed from the parents as a result of a child protection decision.

Additionally, eligibility for dad and partner pay is maintained if a person is working in the following circumstances: if a person is recalled to duty as the person is a defence force member or a law enforcement officer, or the person has to comply with the requirements of a summons or other compulsory process.

These exemptions mirror those already in place under the PPL Rules for parental leave pay.

### *'Not working'*

One of the eligibility requirements under paragraph 115CB(2)(e) of the PPL Act for a DAPP claimant is that they are 'not working' during their DAPP period (section 115CM). Under subsection 115CM(2), the PPL Rules may prescribe circumstances in which a DAPP claimant is taken to be 'not working'.

The Amendment Rules provide that a person is taken to be 'not working' if the person is on unpaid leave and the person receives workers' or accident compensation payments, or the person receives a 'top-up payment' from their employer during, or in relation to, their DAPP period. This means that in these circumstances, the person does not lose their dad and partner pay.

### *Claims for dad and partner pay in prescribed circumstances*

Section 115DD of the PPL Act provides that the following people can make a claim for dad and partner pay 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 PPL Rules.

The Amendment Rules allow the following people to also make a claim for dad and partner pay, provided other eligibility criteria are met): the partner of a child's primary carer (in special circumstances); the same-sex partner of the biological father of the child (where the birth mother is not providing primary care); the partner of an adoptive parent of the child and a person caring for a child born of a surrogacy arrangement.

### *Information that the Secretary must give to a person who has been paid dad and partner pay*

Section 115EE of the PPL Act provides that if the Secretary pays dad and partner pay to or in relation to a person, in particular circumstances, the Secretary must give the person the information prescribed by the PPL Rules in relation to dad and partner pay paid in those circumstances.

The Amendment Rules prescribe the information that the Secretary must give a person in their record of payment, when the person has been paid dad and partner pay.

### *Technical amendments*

The Amendment Rules also makes minor technical amendments to update definitions and references in the PPL Rules.

## **Explanation of the Provisions**

### **Rule 1      Name of Rules**

Rule 1 states the name of these rules, which is the *Paid Parental Leave Amendment Rules 2012 (No. 2)* (the Amendment Rules).

### **Rule 2      Commencement**

Rule 2 provides that Schedule 1 of the Amendment Rules (which contains the substantive amendments) commences on 1 January 2013.

### **Rule 3      Amendment of *Paid Parental Leave Rules 2010***

Rule 3 provides that Schedule 1 amends the *Paid Parental Leave Rules 2010* (the PPL Rules).

#### **Schedule 1 Amendments**

**Clause 1** amends subrule 2.31(1) by omitting 'For subparagraphs 2.28(2)(b)(ii) and 2.29(2)(c)(ii),' and substituting 'For subparagraphs 2.28(2)(b)(ii), 2.29(2)(c)(ii) and 3A.11(3)(b)(ii),'. This amendment clarifies that the meaning of 'unreasonableness' in subrule 2.31(1) also applies to new rule 3A.11.

**Clause 2** amends subrule 2.31(2) by omitting 'For subparagraphs 2.28(2)(b)(iii) and 2.29(2)(c)(iii),' and substituting 'For subparagraphs 2.28(2)(b)(iii), 2.29(2)(c)(iii) and 3A.14(3)(b)(iii),'. This amendment clarifies that the meaning of 'interests of the child' in subrule 2.31(2) also applies to new rule 3A.11.

**Clause 3** inserts the following new parts to the PPL Rules, which apply to dad and partner pay:

- Part 3A-2 (Determinations about whether dad and partner pay is payable to a person);
- Part 3A-3 (Eligibility for dad and partner pay);
- Part 3A-4 (Claims for dad and partner pay); and
- Part 3-4 (Payment of dad and partner pay by Secretary).

#### **Part 3A-2 Determinations about whether dad and partner pay is payable to a person**

This Part prescribes circumstances in which dad and partner pay can be paid to a second person in respect of the same child.

Subrule 3A.1(1) provides that new Division 3A.2.1 is made for the purposes of subsection 115BF(2) of the PPL Act and prescribes the circumstances in which a payability determination that dad and partner pay is payable to a person for a child may be made in respect of a different claim made by a second person for the child.

Subrule (2) provides that a person who satisfies the circumstances in Division 3A.2.1 may be paid dad and partner pay, despite a first person already having received the payment. This means dad and partner pay may be paid twice in respect of a child to two different people, if the circumstances in subrule (3) are satisfied.

Subrule (3) sets out the circumstances that a person must meet to satisfy this rule:

- the person is an adoptive parent of the child; or
- 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 (rule 3A.13); or
- the person is the partner of a 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 (rule 3A.11); or
- the person has care of the child and the birth mother has relinquished care of the child because of a surrogacy arrangement (rule 3A.14).

The rationale for dad and partner pay 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 parental leave pay or baby bonus, where payments have already been made to a birth mother or her partner for the child.

For example, over a period of time, both the biological father of a child and an adoptive parent of the child could claim dad and partner pay for the same child, while the child is in their care. Another example is the rare and unfortunate 'special circumstance' where the birth mother and her partner become incapable of caring for the child (e.g. die in a car accident). In this situation, if the child's aunt and uncle were to be the long-term carers for the child, the child's uncle would be able to claim dad and partner pay provided all other eligibility requirements were satisfied, even if dad and partner pay had already been paid to the birth mother's partner.

### **Part 3A-3 Eligibility for dad and partner pay**

This Part prescribes circumstances where a DAPP claimant may remain eligible for dad and partner pay for a child under the PPL Rules, despite no longer meeting eligibility criteria in the PPL Act.

**Rule 3A.2** provides that new Subdivision 3A.3.1.1 is made for the purposes of paragraph 115CB(4)(d) of the PPL Act, and prescribes the conditions that a person who is a DAPP claimant must satisfy to be eligible for dad and partner pay for a child.

The note under new rule 3A.2 provides clarification that under subsection 115CB(4) of the PPL Act, a DAPP claimant must still satisfy the work test, the income test and the Australian residency test in addition to the conditions prescribed by this Subdivision to be eligible for dad and partner pay.

**Rule 3A.3** sets out the conditions that a person must meet to satisfy this Subdivision. Subrule 3A.3(1) provides that the conditions are:

- the person is caring for the child; or
- satisfies the requirements of rule 3A.4 or rule 3A.5; and
- subject to subrule (1A), the person is not working.

One of the eligibility criteria for dad and partner pay under the PPL Act is that the person must 'not be working' (Division 7 of Part 3A-3 of the PPL Act). However, subrule 3A.3(1A) provides that for the purposes of subparagraph 3A.3(1)(b), a person's work can be disregarded if the following circumstances are satisfied:

- if the person has been recalled to duty and satisfies rule 3A.6 - a person working on a day that the person has been compulsorily recalled to duty is to be disregarded;
- if the person has to comply with the requirements of a summons or compulsory process and satisfies rule 3A.7 - a person working on a day the person has to comply with the requirements of a summons or other compulsory process is to be disregarded.

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

**Rule 3A.4** provides for circumstances where there is a temporary inability of the person to care for the child. The requirements (for the purposes of subparagraph 3A.3(1)(a)(ii)) are that the person will be, or previously was caring for the child and is temporarily unable to care for the child due to circumstances beyond the person's control. However, this 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. The period of temporary inability must be likely to be less than two weeks.

Additionally, there must not be a determination in force under the PPL Act that dad and partner pay 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 caring for the child except for the person's temporary inability to be the child's carer.

For example, the child's carer may require hospitalisation, or need to travel unexpectedly or deal with an emergency in the period they had nominated to receive dad and partner pay.

**Rule 3A.5** provides for circumstances where there is loss of care for the child, without the person's consent. The requirements (for the purposes of subparagraph 3A.3(1)(a)(ii)) are that the person previously was caring for the child and an event occurs in relation to the child without the person's consent that prevents the child being in the person's care. To remain eligible for dad and partner pay, the person must take reasonable steps to have the child again in the person's care. The person, or their partner, must be the child's legal parent or be otherwise legally responsible for the child. If the child is in the care of another legal 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 dad and partner pay.

Additionally, there must not be a determination in force under the PPL Act that dad and partner pay is payable for the child to another person for the same day. If the above requirements are met, the Secretary is to disregard a person working under subrule 3A.3(1A).

For example, the child's carer may lose care of the child as a result of the other parent failing to return the child after a visit, or the child is abducted, during the period when the carer is taking dad and partner pay.

**Rule 3A.6** sets out the requirements that a person must satisfy for the purposes of disregarding the person's work under paragraph 3A.3(1A)(a). If a person is working, this is to be disregarded if the person is a defence force member or a law enforcement officer who has performed paid work on a day because the person has been compulsorily recalled to duty.

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 dad and partner pay under this rule, provided that all other eligibility requirements are met.

**Rule 3A.7** sets out the requirements that a person must satisfy for the purposes of disregarding a person working under paragraph 3A.3(1A)(b). If a person is working, this is to be disregarded if a person has performed paid work on a day because the person has to comply with the requirements of a summons or other compulsory process to appear to give evidence or information or to produce documents or other things.

'Summons or other compulsory process' would include compulsory processes of courts, tribunals and other bodies such as commissions, including 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.

**Rule 3A.8** outlines the purpose of new Subdivision 3A.3.2.1, which is to prescribe the circumstances in which a DAPP claimant is taken to be 'not working', for the purposes of subsection 115CM(2) of the PPL Act.

One of the eligibility requirements for dad and partner pay is that a person is not working (Division 7 of Part 3A-3 of the PPL Act). However, **rule 3A.9** outlines what is taken to be 'not working' for the purposes of dad and partner pay.

Paragraph 3A.9(1)(a) provides that a person is taken to be 'not working' if the person is on unpaid leave from their employer and during the period of unpaid leave, the person receives workers' compensation payments or accident compensation payments from another body in relation to the person's employment with their employer. This would ensure that receipt of workers' compensation or accident compensation payments by a person would not make that person ineligible for dad and partner pay.

Paragraph 3A.9(1)(b) provides that a person is taken to be 'not working' if the person receives a top-up payment from their employer during or in relation to their DAPP period.

Subrule (2) provides that for the purposes of paragraph 3A.9(1)(b), a 'top-up payment' means a payment made by an employer to an employee that supplements a person's dad and partner pay during their DAPP period. For example, some employers may choose to pay top-up payments to DAPP claimants to the level of part or full income replacement for an employee. The purpose of this paragraph is to ensure that receipt of a top-up payment by a person from their employer would not make that person ineligible for dad and partner pay.

The note under rule 3A.9 provides clarification that a 'top-up payment' may be an adjustment to partial or full income replacement.

### **Part 3A-4 Claims for dad and partner pay**

This Part prescribes less common circumstances in which a claim for dad and partner pay can be made under the PPL Rules.

**Rule 3A.10** prescribes circumstances in which a person can make a claim for dad and partner pay. Subrule 3A.10(1) provides that Subdivision 3A.4.1.1 is made for paragraph 115DD(d) of the Act and prescribes the circumstances in which a claim for dad and partner pay for a child can be made. Under subrule 3A.10(2), a person who satisfies the circumstances prescribed by this Subdivision can make a claim for dad and partner pay.

**Rule 3A.11** provides for prescribed circumstances in which a person who is the partner of a child's primary carer can make a claim for dad and partner pay.

Subrule 3A.11(1) provides that this rule applies to a person who is the partner of a child's primary carer. For example, the partner of a primary carer could include the partner of the child's grandmother, 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 rule reflects the policy stance for exceptional circumstances for parental leave pay, where a person can claim parental leave pay 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.

**Partner** is defined in section 6 of the PPL Act as having the same meaning as in the *Social Security Act 1991*. Subsection 4(1) of the *Social Security Act* provides that 'partner', in relation to a person who is a member of a couple, means the other member of a couple. A partner in relation to a person who is a member of a couple is the other member of the couple, whether legally married or otherwise. This includes couples of the same sex or a different sex. However, this definition excludes former partners, whether legally married or otherwise, who have separated from the person.

A person is the **primary carer** of a child on a day in the person's reference period if the child is in the person's care in that period and the person meets the child's physical needs more than anyone else in that period (subsection 47(1) PPL Act).

Subrule 3A.11(2) sets out the circumstances in which a person who is the partner of a child's primary carer, can make a claim for dad and partner pay. Those circumstances are that the person:

- has, and is likely to continue to have, care of the child for at least 26 weeks; and
- became or will become a carer of the child before the child's first birthday, or for an adopted child, before the first anniversary of the day of placement of the child.

Additionally, one of the following conditions in subrule (3) must be satisfied.

First, the birth mother and their partner, or if applicable, the adoptive parent and their partner, is incapable of caring for the child, and will be incapable, or is likely to be incapable of caring for the child for at least 26 weeks. 'Incapable of caring for a child' is defined in rule 1.4 of the PPL Rules.

A person is **incapable of caring for a child** on a day if, on that day: there is a parenting order in force resulting in the person not providing care for the child; or the person is deceased; or the person is in prison or otherwise institutionalised; or the person's whereabouts are unknown; or the person suffers from a medical condition that makes the person incapable of providing care for the child; or the Secretary is satisfied that the person is, for a reason outside the control of the person, incapable of providing care for the child.

Second, the Secretary is satisfied on reasonable grounds that the person became the carer of the child in special circumstances, it would be unreasonable for the birth mother and their partner, or the adoptive parent and their partner, to care for the child, and it is in the interests of the child for the person to care for the child. Rule 2.31 defines when it is 'unreasonable' for the birth mother and her partner or the adoptive parent and their partner to care for the child and when it is in 'the interests of the child' for the person to care for the child.

It is **unreasonable** for a person to care for the child if the Secretary is satisfied that there has been extreme family breakdown, or similar circumstances, in relation to the child's family situation, or there is a serious risk to the child's physical or mental wellbeing from violence, neglect or sexual abuse in the child's family situation. (subrule 2.31(1)).

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 (subrule 2.31(2)).

Third, the child must not have been entrusted to the care of the person, or to the care of the person's partner, under a decision by a State or Territory child protection agency under legislation dealing with child protection in the State or Territory.

For example, a single birth mother dies in childbirth and the child's aunt takes on the primary care of the child for 26 or more weeks. In this situation, the uncle (or aunt's partner) could claim dad and partner pay, and be eligible, provided all other eligibility requirements were satisfied.

The note under subrule (3) provides guidance that rule 1.4 provides for the meaning of 'incapable of caring for a child' and rule 2.31 provides for the meaning of what is 'unreasonable' and 'in the interests of the child'.

Subrule (4) clarifies that rule 3A.11 does not apply to circumstances in relation to surrogacy arrangements (rule 3A.14).

**Rule 3A.12** provides for prescribed circumstances in which the partner of the biological father of the child can make a claim for dad and partner pay.

Subrule (1) provides that this rule applies to a person who is the partner of the biological father of the child. For example, a same-sex partner of the biological father of the child can make a claim for dad and partner pay under this rule.

Subrule (2) sets out the circumstances in which the partner of the biological father of the child can make a claim for dad and partner pay: the birth mother is no longer caring for the child (for at least 26 weeks); and the person has and is likely to continue to have care of the child for at least 26 weeks.

Subrule (3) provides that for the purposes of subrule (2), **no longer caring** means that the birth mother is not caring for the child for at least 26 weeks.

For example, a single birth mother may decide to return to work after the birth of her child and makes an arrangement with the biological father for him to take on care of the child for a year. In this circumstance, as dad and partner pay has not yet been claimed for the child, the biological father's partner could claim dad and partner pay and be paid, provided s/he satisfied all other eligibility requirements.

**Rule 3A.13** provides for prescribed circumstances in which the partner of an adoptive parent of the child can make a claim for dad and partner pay. This rule is intended to apply in the situation when 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 dad and partner pay under the PPL Act.

Subrule (1) provides that this rule applies to a person who is the partner of an adoptive parent of the child. Subrule (2) sets out the circumstances in which the partner of an adoptive parent of the child can make a claim for dad and partner pay. The circumstances are: 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.

For example, only one member of a couple may be listed as the adoptive parent on the adoption order. Their partner would be able to claim dad and partner pay, and be eligible, provided they satisfied all other eligibility requirements, including caring for the child.

**Rule 3A.14** provides for prescribed circumstances in which a person can make a claim for dad and partner pay, when there is a surrogacy arrangement.

Subrule (1) provides that this rule applies to a person who is caring for a child born of a surrogacy arrangement. Subrule (2) sets out the prescribed circumstances for a person who is caring for a child born of a surrogacy arrangement. The circumstances are: the person has, and is likely to continue to have, care of the child for at least 26 weeks; and the person became or will become, the child's carer before the child's first birthday. Additionally, the person must satisfy the circumstances in subrule (3). A person satisfies subrule (3), if the Secretary is satisfied on reasonable grounds that the person is caring for a child born of a surrogacy arrangement and that it is in the interests of the child for the person to care for the child.

In considering what is in the interests of the child, subrule (4) provides that the Secretary is to consider: whether the person intended to be the long-term carer of the child; whether the surrogate birth mother has relinquished care of the child and any other matter that the Secretary considers relevant to a proper consideration of what is in the interests of the child.

This rule mirrors the rule for claims for parental leave pay where there is a surrogacy arrangement.

### **Part 3-4 - Payment of dad and partner pay by Secretary**

Subrule 3A.15(1) provides that **rule 3A.15** is made for section 115EE of the Act and prescribes the information that the Secretary must give a person who has been paid dad and partner pay.

Subrule (2) provides that the Secretary must give the person a record of payment in relation to their dad and partner pay payment, which contains the following information:

- information that the payment is paid by the Secretary and is a dad and partner pay payment;
- the name of the person to whom the dad and partner pay payment is paid;
- the period to which the dad and partner pay payment applies;
- the date on which the dad and partner pay payment is paid;
- the gross amount of the dad and partner pay payment;
- the net amount of the dad and partner payment; and
- the total amount of income tax withheld from the gross amount of the dad and partner pay amount.

Subrule (3) provides that the information above in subrule (2) is required to be given to the person only once and at the time the dad and partner pay payment is given to the person (which is usually on the commencement of the DAPP period) or as soon as possible after that date.

**Clause 4** repeals the definition of **Centrelink** and inserts a definition of **Human Services Department** in subrule 4.2(1). This change to terminology is a result of amendments made by the *Human Services Legislation Amendment Act 2011*, which provided for the functions of Centrelink and Medicare to be integrated into the Human Services Department.

**Clause 5** repeals the definition of **Family Assistance Office** in subrule 4.2(1). As a result of the changes made by the *Human Services Legislation Amendment Act 2011*, the Family Assistance Office has been integrated into the Human Services Department.

**Clause 6** repeals the definition of **Minister** and substitutes a new definition in subrule 4.2(1). The new definition of Minister reflects the changes made by the *Human Services Legislation Amendment Act 2011* to the titles of the *Human Services (Centrelink) Act 1997* and the *Human Services (Medicare) Act 1973*.

**Clause 7** amends subparagraph 4.6(1)(b)(iv) by omitting the reference to 'Family Assistance Office' and substituting 'Human Services Department'. This amendment is consequential to **clauses 4 and 5**.

**Clause 8** amends paragraph 4.8(d) by omitting the reference to 'Family Assistance Office' and substituting 'Human Services Department.' This amendment is consequential to **clauses 4 and 5**.

## **Consultation**

The Human Services Department, the Department of Education, Employment and Workplace Relations and the Paid Parental Leave Implementation Group have been consulted in the development of the Amendment Rules.

## **Regulatory Impact Analysis**

A Regulation Impact Statement was provided as part of the Explanatory Memorandum for the *Paid Parental Leave Bill 2010*, canvassing in detail the likely impact of the Paid Parental Leave scheme.

The Amendment Rules extend what has been covered in the PPL Rules, and have an impact and effect to the extent that they prescribe matters for the purposes of the PPL Act.

The impact of the Amendment Rules is beneficial for claimants and does not have an adverse impact on employers and other stakeholders. The Amendment Rules do not have a regulatory impact on employers as dad and partner pay is paid directly by the Human Services Department to claimants as a one-off payment.

## **Statement of Compatibility with Human Rights**

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

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## **Overview of the Legislative Instrument**

The *Paid Parental Leave Act 2010* (the PPL Act) provides for the Paid Parental Leave scheme (the PPL scheme), a national Government-funded payment to complement the entitlement to unpaid leave under the National Employment Standards in the *Fair Work Act 2009*. The PPL scheme provides eligible birth mothers and adoptive parents with up to 18 weeks of parental leave pay at the rate of the National Minimum Wage. From 1 January 2013, the PPL scheme is being expanded to include a new payment for dads and partners. Dad and partner pay will provide eligible working dads or partners with two weeks of Government-funded pay at the rate of the National Minimum Wage.

The current *Paid Parental Leave Rules 2010* (the PPL Rules) complement the PPL Act by making provision for certain people in less usual or exceptional circumstances to be eligible for parental leave pay when they would not otherwise have entitlement under the PPL Act.

The *Paid Parental Leave Amendment Rules 2012 (No. 2)* (the Amendment Rules) extend the PPL Rules to include dad and partner pay. The Amendment Rules:

- prescribe certain circumstances in which dad and partner pay can be paid to a second person for the same child;
- prescribe certain circumstances where a person can still receive dad and partner pay, despite no longer meeting eligibility criteria in the PPL Act;
- prescribe circumstances in which a dad and partner pay claimant is taken to be 'not working' to allow for DAPP claimants to remain eligible where they receive a top-up payment or workers compensation;
- prescribe less common circumstances in which a claim for dad and partner pay for a child can be made under the PPL Rules;
- prescribe the information that the Secretary must give a person who has been paid dad and partner pay; and
- make minor technical amendments to update definitions and references.

The Amendment Rules advance the protection of human rights by facilitating both parents' participation in caring responsibilities.

### ***Human rights implications***

The Amendment Rules are likely to engage rights to work contained in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the rights of parents and children contained in article 18 of the CRC and article 26 of the Convention on the Rights of the Child (CRC), as well as the right to social security contained in article 9 of the ICESCR.

#### **Rights to work**

Article 6(1) of 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.'

Paragraph 115CB(2)(e) of the PPL Act prescribes that to be eligible for payment, dad and partner pay claimants must not be working, or on paid leave, during their dad and partner pay period. The policy intention behind this is to ensure that claimants take time off work to support the birth mother and bond with their child. However, subsection 115CM(2) provides some flexibility with this rule and states that the Amendment Rules may prescribe circumstances in which dad and partner pay claimants can remain eligible for the payment if they undertake paid work or are on paid leave.

The Amendment Rules also protect the right to work for defence force members and law enforcement members, allowing them to remain eligible for dad and partner pay where they return to work because they have been compulsorily recalled to duty during their dad and partner pay period. Similarly, the Amendment Rules allow a person to work during their dad and partner pay period in order to comply with the requirements of a summons or other compulsory process in courts, tribunals and other bodies.

The Amendment Rules provide that a person who is on unpaid leave but receives workers' compensation payments or accident compensation payments in relation to their employment with their employer during their dad and partner pay period is taken to be 'not working' and can thus remain eligible for dad and partner pay. The Amendment Rules also state that a person who receives a 'top-up' payment from their employer during or in relation to their DAPP period can remain eligible. This provision does not impose any requirement on employers in relation to 'top-up' payments, but is designed to protect the eligibility of dad and partner claimants by stating that a person on unpaid leave is still taken to be 'not working' where their employer chooses to top-up their dad and partner pay to full or partial income replacement. The Amendment Rules protect the right to work through both of these provisions, by ensuring that receipt of compensation or a top-up payment from an employer would not make a claimant ineligible for dad and partner pay.

#### Rights of parents and children

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

The Amendment Rules provide that certain people can claim dad and partner pay, including the partner of the biological father, the partner of adoptive parents, a person who is caring for a child born of a surrogacy arrangement and the partner of the primary carer of the child where care arrangements change. By extending eligibility for dad and partner pay to these claimants, the Amendment Rules promote the principle that assistance should be given to both parents reflecting their dual role in raising a child. This includes parents in de facto and same-sex relationships, as well as both parents in adoption, surrogacy and other circumstances where care arrangements change. The amendments promote the understanding that both parents have an important role to play in raising a child and support working parents to fulfil those roles, in line with Australia's obligations under the CRC.

By prescribing circumstances where dad and partner pay can be paid to a second person in respect of a child, and by specifying conditions for maintaining eligibility where a claimant's circumstances would otherwise make them ineligible, the Amendment Rules promote article 18 of the CRC by providing additional assistance for the performance of child-rearing responsibilities. The provisions in the Amendment Rules that maintain eligibility in certain circumstances broadly mirror provisions already contained in the PPL Rules for parental leave pay, thus recognising the principle that both parents have common responsibilities for the upbringing and development of the child.

### 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, including social insurance'. That right requires a country to, within its maximum available resources, provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the Convention on the Rights of the Child (CRC) ensures that right to 'every child' and requires that 'the benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child'. The financial assistance provided by the Amendment Rules builds on support for the right to social security provided by the existing PPL scheme.

Providing dad and partner pay for people in circumstances where a claimant is temporarily unable to care for the child due to circumstances beyond their control, where they lose care for the child without their consent, where they are compulsorily recalled to duty, where they are required to work under a summons or other compulsory process, promotes the right to social security by extending eligibility for dad and partner pay in situations where they would not otherwise have entitlement under the primary legislation.

The Amendment Rules specify the criteria that a person who is caring for a child born of a surrogacy arrangement needs to satisfy to make a claim for dad and partner pay, including the requirement that dad and partner pay will only be paid when the Secretary is satisfied on reasonable grounds that it is in the interests of the child for the person to care for the child. The amendments promote the right to social security as the Secretary is to consider matters which are relevant to a proper consideration of what is in the interests of the child which encompass the circumstances of the child as well as the persons having responsibility for the maintenance of the child.



The right to social security is also advanced in the Amendment Rules by the provisions allowing for dad and partner pay to be payable to a second person in respect of a child. This means that dad and partner pay may be paid twice in respect of one child to two different people. Under the Amendment Rules, dad and partner pay can be paid a second time to an adoptive parent of the child, the partner of an adoptive parent of the child, the partner of a child's primary carer or a person caring for a child born of a surrogacy arrangement, provided the claimant meets eligibility criteria including caring for the child. These provisions promote the right to social security by taking into account the particular resources and the circumstances of the child and the persons having responsibility for the maintenance of the child, and ensuring that persons in the above circumstances have access to assistance.

### ***Conclusion***

This Legislative Instrument is compatible with human rights as it advances the protection of human rights.