Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011

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Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011

Date introduced: 3 November 2011

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: The day after Royal Assent, except for Part 1 of Schedule 1 (commencement of the Paid Parental Leave Act 2010 on 1 October 2010); and Sections 1 to 3 (on Royal Assent).

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill makes minor amendments to two Acts.

Amendments to the Paid Parental Leave Act 2010 (PPL Act) refine the provisions which permit ‘keeping in touch days’ and clarify the operation of a number of provisions, including debt recovery provisions, notice provisions, and the provision relating to delegation of the Secretary’s powers under the Act.

The Bill amends the Fair Work Act 2009 (FW Act) to extend to employees on unpaid parental leave under the National Employment Standards access to 10 paid ‘keeping in touch’ days. Employees who take additional unpaid parental leave (for a second 12 months) may also access 10 additional keeping-in-touch days. Employees and employers may agree to unpaid parental leave commencing earlier than six weeks prior to the expected date of birth and parents will gain the right to return to their employment in the event of a stillbirth or infant death.

Background

Background to the Paid Parental Leave scheme can be found in the Parliamentary Library’s Bills Digest prepared for the Paid Parental Leave Bill 2010.¹ In essence, under the PPL statutory scheme, eligible working parents of newborn or newly adopted children may receive parental leave pay for

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up to 18 weeks at the rate of the national minimum wage ($589.40) funded by the Government. The statutory PPL scheme commenced from January 2011. According to the annual report of the Department of Families, Housing, Community Services and Indigenous Affairs, 42 975 parents received parental leave pay in 2010-11 at a cost of $604 million.²

However the operation of the scheme has attracted some criticism. Adam Bandt, MP has raised the requirements of the work test stipulated under the PPL Act to ensure claimant eligibility.³ He argues that by restricting eligibility to parents who have been at work for 10 of the last 13 months, the program excludes women who have returned to work for a period shorter than 10 months between pregnancies. He reported on a constituent who had been at her current workplace for five years, during which she had two children and worked part time between each pregnancy. At the time she was to take parental leave for the birth of her third child, she would have worked a great deal more than the required 330 hours but would not have met the requirement of having worked for 10 of the last 13 months. She would not be eligible for paid parental leave.

Also, the work test requires parents to ensure that there is at a minimum a 14-month break between children, as Mr Bandt put it:

With all the family planning in the world, this is not always possible.⁴

Labour lawyer, Professor Andrew Stewart, has also noted that by titling the PPL Act as an Act apparently authorising leave, confusion is likely since the PPL Act actually provides for a government payment, but does not authorise leave from work for an employee.⁵

As Stewart explains, an employee’s formal entitlement to unpaid leave from work is sourced from the FW Act’s National Employment Standards which requires 12 months’ continuous service with the same or related employer to claim the (unpaid) time off for having a baby.⁶ Expectant mothers might satisfy the PPL Act’s work test but may have not have worked for the required 12 months under the FW Act in order to take time off, in which case the employer would not be obliged to hold the employee’s job.

**Financial implications**

The Bill’s Explanatory Memorandum states that the Bill is part of the legislation for the Paid Parental Leave scheme and has no additional financial impact.

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⁴Ibid.

⁵‘IR guru warns parental leave an adverse action time bomb’, *Workforce*, no. 17965, 21 October 2011, p. 2.

⁶Ibid.

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Key provisions

Schedule 1—Paid Parental Leave Act 2010

This Schedule makes several minor changes to the Paid Parental Leave Act. These are briefly explained below.

Modification of the work test

To be eligible for Paid Parental Leave (PPL) a mother must meet the work test. Under the work test, a mother must have:

- worked for at least 10 of the 13 months prior to the birth or adoption of her child and
- worked for at least 330 hours in that 10 month period (just over one day a week) with no more than an eight week gap between two consecutive working days.

A working day is a day worked for at least one hour.\(^7\)

Subsection 31(4A) of the PPL Act allows mothers to become eligible for Paid Parental Leave in circumstances where they have not met the work test because the child was born prematurely or the mother could not perform paid work due to illness or other complications. The Bill extends this to other provisions in the PPL Act under which the Secretary may make determinations referring specifically to the work test (items 1, 2, 3, 4, 5, 6 and 7).

Definition of ‘vocational placement’

The PPL Act includes the following definition of ‘employee’:

\textit{employee} has its ordinary meaning and:

(a) includes a reference to a person who is usually such an employee; and

(b) does not include a person on a vocational placement.

However, the PPA Act does not include a definition of the term ‘vocational placement’. To clarify the definition of employee, the Bill at item 9 adds a definition of vocational placement to section 6 of the PPL Act.

Under the definition, a vocational placement will mean a placement that is:

- undertaken with an employer for which a person is not entitled to be paid any remuneration
- undertaken as a requirement of an education or training course, and

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• authorised under a law or an administrative arrangement of the Commonwealth, a state or a territory.

This definition is consistent with the definition of the term in the Fair Work Act. Note that this definition already exists in the Government’s Paid Parental Leave Guide. 8

Keeping in touch days

The PPL Act makes provision for keeping in touch days. According to the Government’s Paid Parental Leave Guide:

A keeping in touch day is a day that would otherwise be a day of leave in a period of leave granted by an entity, where the person performs paid work for the entity. This applies to people who are employees of an entity while they are on leave granted by that entity. It also applies to people who have been engaged by an entity as a defence force member or law enforcement officer, while they are on leave granted by that entity.

For people covered, a day of work is a keeping in touch day if the purpose of performing the work is to enable the person to keep in touch with his or her employment or engagement in order to facilitate a return to that employment or engagement after the period of leave. Activities such as training days, planning days and conferences would meet this requirement.

Additionally, both the person and the entity must have consented freely to the person performing work for the entity on that day, and the day must not be within 14 days after the day the child was born. 9

The Bill amends the PPL Act to extend the period of time in which an employer-requested keeping in touch day cannot occur from 14 to 42 days (from the birth) (item 10). According to the Government, the purpose of this is to:

... allow sufficient time after the birth of a child for the mother to recover physically and will enable an uninterrupted six-week period for the caring parent to bond with the child. This amendment is intended to support the primary objective of the scheme, which is to provide financial support to allow the primary carer to take time off work to care for their newborn or adopted child. 10

There will be an exception to this where the keeping in touch day has been requested by an employee. In such cases, the keeping in touch day must not be taken within 14 days of the birth.

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10. Explanatory Memorandum, p. 5.

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Commonwealth employees

The PPA Act currently treats employment by the Commonwealth Government as if the person was employed by the relevant Commonwealth agency, rather than the Commonwealth. This can have the effect of making a person ineligible for PPL if they were not employed by the same agency for at least 12 months before the birth or adoption of her child, even though they may have been employed elsewhere within the Commonwealth Government during that time.

The Bill changes this situation to provide that the employer in such situations is to be treated as the Commonwealth, rather than any particular agency (item 22). This means that the employee need not be employed by a particular Commonwealth agency (but rather the Commonwealth as a whole) for the specified period before the applicable date in order to be eligible for PPL.

Other changes

Other changes to the PPA Act are minor and technical in nature. They are explained in the Explanatory Memorandum.

Schedule 2—Fair Work Act 2009

This Schedule makes several minor changes to the parental leave provisions contained within the National Employment Standards of the Fair Work Act. These are briefly explained below.

Timing of unpaid parental leave

As the Bill’s Explanatory Memorandum notes, currently under the FW Act, a pregnant female employee may take unpaid parental leave up to six weeks before the expected date of birth of the child, but no later than the date of birth of the child.

Item 4 amends subsection 71(3) to provide that, for a pregnant female employee, unpaid parental leave may start earlier than six weeks before the expected date of birth of her child if the employee and employer agree, but otherwise may start up to six weeks before the expected date of birth and must not start later than the date of birth of the child.11

Item 6 amends subparagraph 72(3)(a)(i) to provide that, for a pregnant female employee, unpaid parental leave may start earlier than six weeks before the expected date of birth of the child, if the employer and employee so agree.12

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12. Ibid.

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Unpaid parental leave arrangements where there is a stillbirth or infant death

Under the FW Act, if the employer agrees, an employee whose period of unpaid parental leave has started may reduce the period of unpaid parental leave he or she takes (Section 77). Item 8 inserts new section 77A to provide that, where unpaid parental leave has started and there is a stillbirth or infant death, the employee is entitled to return to work within four weeks of notifying the employer that they wish to return to work. Further, the employer may, by giving notice to the employee, require the employee to return to work at least six weeks after that notice is given.13

Proposed Subsection 77A(1) provides that the new section applies to unpaid parental leave if the leave is birth-related and there is either a stillbirth or an infant death. Proposed subsections 77A(2) and (3) provide that, if, before the unpaid parental leave starts, the employee or employer gives written notice cancelling the leave, then the employee is not entitled to unpaid parental leave. Proposed subsections 77A(4) to (7) provide that, where unpaid parental leave has started and there is a stillbirth or infant death, the employee may, by giving notice to the employer, return to work within four weeks of giving such notice, or the employer may, by giving notice to the employee, require the employee to return to work at least six weeks after that notice is given.14

Proposed subsection 77A(8) clarifies that these provisions do not limit the capacity of parties to agree to reduce the period of parental leave.15

Keeping in touch days

Item 10 provides that employees who are on unpaid parental leave will be able to perform permissible paid work for short periods for the purposes of keeping in touch. It also provides that the arrangements under the FW Act align with the keeping in touch arrangements for those who are entitled to receive parental leave pay under the PPL Act.16

Proposed section 79A provides that an employee may come to work on keeping in touch days and work performed on a keeping in touch day will not break the single continuous period of unpaid parental leave. Proposed subsection 79A(2) sets out the circumstances in which a day (or part of a day) on which the employee performs work for the employer is a keeping in touch day. Proposed subsection 79A(3) restrains the employer in influencing the employee’s decision to work or not work on a keeping in touch day. Proposed subsection 79A(4) allows additional keeping in touch days to be taken, if the employee extends the 12 months period of unpaid parental leave.17
Notifying a replacement employee that the engagement is temporary

Item 11 inserts new section 84A, which requires an employer, before engaging an employee to perform the work of another employee accessing unpaid parental leave, to notify the replacement employee that the engagement is temporary.\(^\text{18}\)

**Concluding comments**

The amendments in the Bill are minor and uncontroversial. The extension of the period of time in which an employer-requested keeping in touch day cannot occur from 14 to 42 days from the birth of the child is probably the most significant change. The Government argues that this reflects the intent of the PPL scheme in allowing the primary carer to take time off work to care for their newborn or adopted child.

The more substantial criticisms of the interface between the two Acts (described above in the background to the Digest) are not addressed by the Bill.

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\(^{18}\) Ibid., p. 16.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2463.

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