Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012

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Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Bill 2012

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House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: Sections 1 to 3: Royal Assent; Schedule 1: 1 October 2012; Schedule 2, Part 1: at the same time as the Paid Parental Leave Act 2010 commences (1 October 2010); Schedule 2, Part 2: the day after 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/Parliamentary_Business/Bills_Legislation. 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 amends the Paid Parental Leave Act 2010 (Paid Parental Leave Act) to introduce a new parental leave payment for eligible fathers and partners.

The Bill also reintroduces measures introduced in the Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011, which is currently before the House of Representatives and will lapse. These include amendments to the Paid Parental Leave Act that refine the provisions which permit ‘keeping in touch days’ for employees on paid parental leave ¹ 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 Paid Parental Leave Act.

The Bill also reflects the ‘keeping in touch days’ amendments in the Fair Work Act 2009 (Fair Work Act). The amendments extend access to ten paid ‘keeping in touch’ days to employees on unpaid parental leave under the National Employment Standards. Employees who take additional unpaid parental leave (for a second 12 months) may also access ten 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.

According to the Explanatory Memorandum, the 2011 proposed amendments have been reintroduced as part of this Bill in order to ‘streamline the consideration of current amendments to the legislation underpinning the Paid Parental Leave scheme’. ² The relevant sections of the Bills

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¹ An explanation of ‘keeping in touch days’ is provided below in the discussion of Schedule 2 of the Bill.
² Explanatory Memorandum, p. 1.

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Digest for the Paid Parental Leave and Other Legislation Amendment (Consolidation) Bill 2011 have been reproduced with minor changes in this Digest.³

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 2010.⁴ In essence, under the Paid Parental Leave statutory scheme, eligible working parents who are primary carers of newborn or newly adopted children may receive parental leave pay for up to 18 weeks at the rate of the national minimum wage ($589.40) funded by the Government. The statutory Paid Parental Leave 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.⁵ According to Minister for Families Community Services and Indigenous Affairs, Jenny Macklin, 150,000 new mums have applied under the statutory scheme.⁶ The annual cost of the statutory Paid Parental Leave scheme for the 2011–12 financial year is expected to be around $1.4 billion.⁷

However the operation of the scheme has attracted some criticism. Adam Bandt, MP has criticised the requirements of the work test stipulated under the Paid Parental Leave Act.⁸ He argues that by restricting eligibility to parents who have been at work for ten of the last 13 months, the program excludes women who have returned to work for a period shorter than ten months between pregnancies. He reported on a constituent who had been at her current workplace for five years, during which time 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


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more than the required 330 hours, but would not have met the requirement of having worked for ten of the last 13 months. As a result, she would not be eligible for paid parental leave.

Also, the Paid Parental Leave Act’s 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.⁹

Labour lawyer, Professor Andrew Stewart, has also noted that by titling the Paid Parental Leave Act as an Act apparently authorising leave, confusion is likely since the Paid Parental Leave Act actually provides for a government payment, but does not authorise leave from work for an employee.¹⁰

In respect of partner leave at the time of a birth, the National Employment Standards incorporate that leave which used to be called ‘paternity leave’ under the title of ‘concurrent unpaid parental leave’. The National Employment Standards allow each parent to take up to 12 months’ unpaid leave (to run consecutively) or one parent can request up to 24 months’ leave. Leave has to be taken in a single continuous period. An exception to the requirements that leave be taken in a continuous period, and that parental leave periods run consecutively, is an entitlement to a maximum of three weeks’ concurrent unpaid parental leave around the time of a child’s birth/adoPTION.¹¹ In other words, the Bill will pay dads and partners two weeks of this three weeks unpaid parental leave at the minimum wage.

**Schedule 1—Dad and Partner Pay**

This Schedule implements a 2010 Labor Party election commitment to provide two weeks Paid Parental Leave for fathers of newborn babies.¹² According to the media release announcing the policy:

The involvement of fathers in children’s lives has many positive benefits for children including improved social and emotional development.

Paid Paternity Leave allows fathers and other partners to support the primary carer in their new caring role, and to recover from the birth.

This reform will encourage fathers to take some time off after the birth of a child, and help embed paternity leave as a normal aspect of work and family life. To help encourage more fathers to take time off, Paid Paternity Leave will be on a ‘use it or lose it’ basis. This means it can only be taken by the father, or partner of the primary carer.¹³

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⁹. Ibid.
11. Fair Work Act at subsection 72(5).
13. Ibid.

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In the report leading to the introduction of statutory Paid Parental Leave, the Productivity Commission proposed that that the scheme include two weeks of paternity leave (which cannot be transferred to the mother), arguing that:

Such quarantined leave recognises the child welfare and other benefits of involvement by fathers in the early months of a baby’s life. It acknowledges the lesson from overseas experiences that men rarely take paid parental leave if it is at the expense of women’s use of that leave, and more generally take low levels of leave around the birth of the child.\textsuperscript{14}

The Federal Opposition’s paid parental leave policy proposes to provide new mothers with 26 weeks paid leave at her full wage or salary capped at an income level of $150 000. Those earning over $150 000 per annum, would still receive paid parental leave but it would be capped at the $150 000 amount.

The Opposition’s scheme would ‘allow two out of the 26 weeks to be dedicated paternity leave to be used simultaneously or separately to the mother’s leave, paid at the father’s replacement wage (up to a maximum of $150 000 per annum) or the Federal Minimum Wage, whichever is greater, plus superannuation’.\textsuperscript{15} As such, the Opposition scheme is more financially generous but the paternity element covers the same period of time as the Government’s proposal (two weeks). However, while the Government’s scheme is in addition to the mother’s 18 week entitlement, the Opposition’s proposal is for the paternity leave component to be carved out of the mother’s entitlement.

**Explanation of measure**

The new payment, called Dad and Partner Pay, will be added to the Paid Parental Leave Act. Dad and Partner Pay will be paid to eligible working fathers and partners, including adopting parents and parents in same-sex couples, who are caring for a child born or adopted from 1 January 2013. The payment was originally intended to be available from 1 July 2012.\textsuperscript{16}

Like Paid Parental Leave, Dad and Partner Pay will be paid at the rate of the national minimum wage, currently $590 per week before tax. The work and income tests for Paid Paternity Leave will be the same as for Paid Parental Leave. **New section 115CB** of the Paid Parental Leave Act, to be inserted by item 67 of Schedule 1 of the Bill, sets out the tests for eligibility. To be eligible, the father or other partner must:

- have worked around one day a week in at least ten of the 392 days (broadly, 330 hours in 13 months) prior to the birth or adoption (division 3 of Part 2-3 and **new sections 115CD, 115CE and 115CF** of the Paid Parental Leave Act)


\textsuperscript{16} J Macklin and J Gillard, op. cit.

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• have earned $150,000 or less in the financial year prior to the birth (division 4 of Part 2-3 and new sections 115CG, 115CH and 115CJ of the Paid Parental Leave Act)
• satisfy the Australian residency test (division 5 of Part 2-3 of the Paid Parental Leave Act)
• be caring for the child (more than one person may be caring for the child on any particular day) (division 6 of new Part 3A-3 of the Paid Parental Leave Act) or
• not be working (division 7 of new Part 3A-3).

Eligibility will include part-time, casual and seasonal workers, as well as self-employed workers.¹⁷

Additional features of the proposed Dad and Partner Pay scheme include that it:

• is payable regardless of whether the primary carer has been in paid work or at home prior to the birth or adoption
• is payable in addition to any employer-funded paid paternity leave
• is payable even if the primary carer is not receiving Paid Parental Leave
• may be paid alongside other payments such as Baby Bonus and Family Tax Benefit
• may not be transferred to the primary carer
• will be available to fathers and partners who are the primary carers of their children in addition to any Paid Parental Leave transferred from the mother and
• will be available during the first 12 months after the birth or adoption of a child (as is the case with Paid Parental Leave).¹⁸

A notable difference from the Paid Parental Leave scheme is that Dad and Partner Pay will be paid through the Department of Human Services, rather than employers.¹⁹ The Government has not explained why it has taken this approach but the likely rationale is that (a) payment through employers is intended (inter alia) to promote continuing attachment between the employer and primary carer (to ensure the primary carer returns to work) but that (b) this objective does not apply to the same extent in the case of Dad and Partner Pay, given that workplace attachment for the father is generally less of a problem and the period of paid leave is only two weeks. Payment through the Department of Human Services means that there will be no ‘red tape’ burden for employers arising from Dad and Partner Pay.²⁰

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¹⁹. Explanatory Memorandum, p. 2. The rules relating to how the payment will be paid are set out in Division 2 of Part 3A-5.
²⁰. An Opposition Private Member’s Bill, the Paid Parental Leave (Reduction of Compliance Burden for Employers) Amendment Bill 2010, sought to make the Department of Human Services, rather than employers, responsible for paying Paid Parental Leave. The Bill did not pass the House of Representatives. For details, see http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4486%22

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Financial implications

The Government estimates the cost of Dad and Partner Pay as $188.5 million over five years.\(^1\)

Schedule 2—Other amendments

This Schedule makes minor changes to the Paid Parental Leave Act and the parental leave provisions contained within the National Employment Standards of the Fair Work Act. These are briefly explained below.\(^2\)

Paid Parental Leave Act 2010

Modification of the work test

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

- worked for at least ten of the 13 months prior to the birth or adoption of her child and
- worked for at least 330 hours in that ten 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.\(^3\)

Subsection 31(4A) of the Paid Parental Leave 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 Paid Parental Leave Act under which the Secretary may make determinations referring specifically to the work test (items 1, to 7 of Schedule 2 of the Bill).\(^4\)

Definition of ‘vocational placement’

The Dictionary at section 6 of the Paid Parental Leave Act includes the following definition of ‘employee’:

employee has its ordinary meaning and:

\(^1\) Ibid., p. 2.
\(^2\) Note: Part 1 of Schedule 2 will commence retrospectively, but will not adversely affect rights.
\(^4\) Note that these amendments in Schedule 2, Part 1 are retrospective in operation. They commence from 1 October 2010, the day of commencement of the Paid Parental Leave Act.
(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 Paid Parental Leave Act does not include a definition of the term ‘vocational placement’. To clarify the definition of employee, the Bill at item 22 of Schedule 2 adds a definition of vocational placement to section 6 of the Paid Parental Leave 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
- 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.25

**Keeping in touch days**

The Paid Parental Leave 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.26

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The Bill amends the Paid Parental Leave 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 child’s birth (item 23 of Schedule 2 of the Bill). 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.27

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.

Commonwealth employees

The Paid Parental Leave 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 Paid Parental Leave 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 35 of Schedule 2 of the Bill). 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 Paid Parental Leave.

Other changes

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

Fair Work Act 2009

Timing of unpaid parental leave

As the Bill’s Explanatory Memorandum notes, currently under the Fair Work 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 12 of Schedule 2 of the Bill amends subsection 71(3) of the Fair Work Act to provide that, for a pregnant female employee, unpaid parental leave may start earlier than six weeks before the

27. Explanatory Memorandum, p. 50.

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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.\textsuperscript{28}

\textbf{Item 14 of Schedule 2} of the Bill amends \textbf{subparagraph 72(3)(a)(i)} of the Fair Work Act 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.\textsuperscript{29}

\textbf{Unpaid parental leave arrangements where there is a stillbirth or infant death}

Under the Fair Work 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). \textbf{Item
16 of Schedule 2} of the Bill inserts \textbf{new section 77A} into the Fair Work Act 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.\textsuperscript{30}

\textbf{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 still birth or an infant death. \textbf{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.
\textbf{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.\textsuperscript{31}

\textbf{Proposed subsection 77A(8)} clarifies that these provisions do not limit the capacity of parties to
agree to reduce the period of parental leave.\textsuperscript{32}

\textbf{Keeping in touch days}

\textbf{Item 18 of Schedule 2} of the Bill 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 Fair Work Act align with the keeping in touch
arrangements for those who are entitled to receive parental leave pay under the Paid Parental Leave
Act.\textsuperscript{33}

\textsuperscript{28} Explanatory Memorandum, p. 46.
\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.

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Proposed section 79A of the Fair Work Act, inserted by item 18 of Schedule 2 of the Bill 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.\(^{34}\)

Notifying a replacement employee that the engagement is temporary

Item 19 of Schedule 2 of the Bill inserts new section 84A into the Fair Work Act, to require 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.\(^{35}\)

Financial implications

The Bill’s Explanatory Memorandum states that these amendments are part of the legislation for the Paid Parental Leave scheme and have no additional financial impact.

Concluding comments

The Dad and Partner Pay measure in Schedule 1 of the Bill is largely uncontroversial. It implements a Labor Party commitment from the 2010 election. The original proposal from the Productivity Commission for a statutory Paid Parental Leave scheme included two weeks of paternity leave which cannot be transferred to the mother. The Opposition has an alternative scheme under which two out of the 26 weeks it proposes to pay to mothers could be dedicated paternity leave, paid at the father’s replacement wage (up to a maximum of $150 000 per annum) or the Federal Minimum Wage, whichever is greater, plus superannuation.

The amendments in Schedule 2 of 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 Paid Parental Leave 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 Paid Parental Leave Act and the Fair Work Act (described above in the background to the Digest) are not addressed by the Bill.

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34. Ibid.
35. Ibid., p. 16.

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