Fairer Paid Parental Leave Bill 2015

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Date introduced: 25 June 2015
House: House of Representatives
Portfolio: Social Services
Commencement: Sections 1–3 on Royal Assent, Schedule 1 on 1 July 2016 and Schedule 2 on 1 April 2016.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Note on terminology

Discussions involving the matters covered by the Fairer Paid Parental Leave Bill 2015 (the Bill) can be confusing because key terms tend to be used differently (and sometimes interchangeably) by the various interested parties. In this Bills Digest, the term **Paid Parental Leave** refers to the Australian Government-funded payment scheme provided for under the *Paid Parental Leave Act 2010 (PPL Act)*.1 The scheme encompasses two categories of payment:

- **Parental Leave Pay**, which provides support for up to 18 weeks for eligible primary carers who take time off work to care for a newborn or recently adopted child and
- **Dad and Partner Pay**, which provides fathers or partners caring for a newborn or recently adopted child with up to two weeks government-funded pay.

Many employers provide paid leave for new parents on the basis of a contract of employment, enterprise agreement or a workplace policy. This is often referred to as paid parental leave and includes **paid maternity leave** and **paid paternity leave**. The Government uses the terms **employer-provided primary carer leave** and **primary carer pay** in the Bill and Explanatory Memorandum (EM) to refer to such payments.

Usage in this Bills Digest will conform with the definitions above. The exception to this is where direct quotes are used from other documents.

**Purpose of the Bill**

The purpose of the Bill is to amend the *PPL Act* to:

- target payments under the Australian Government’s Parental Leave Pay (PLP) scheme to people whose employer-provided parental leave entitlements are less than the maximum PLP scheme entitlement (the Fairer PPL measure), from 1 July 2016 and
- remove the requirement for employers to provide payments to their employees under the PPL scheme (the employer paymaster role measure), from 1 April 2016.3

The Government’s rationale for the first measure is to provide ‘fairer parental leave pay by creating a base level of paid parental leave entitlement for all eligible working mums’.3 According to the Minister for Social Services, Scott Morrison:

> This measure recognises the primary role of government-funded parental leave payments as a safety net. Payments should be aimed at people who need them most because they cannot access employer-funded payments at all or cannot access payments of the same value as, or higher than, the Paid Parental Leave scheme payments.4

The reason given for the second measure is ‘to ease administrative burdens on business’.5 The Regulation Impact Statement (RIS) for the Bill estimates that the change in administrative costs would average about $48 million annually, for the business and not-for-profit sectors.6 There is no explanation as to how this figure was calculated.

**Background**

**Objectives of Parental Leave Payments**

In proposing its government PLP scheme (later adopted by the Rudd Government), the Productivity Commission suggested that it could help achieve a range of commonly agreed objectives, including:

- generating child and maternal health benefits by increasing the time parents take away from work
- promoting the idea that parents can take time out from work for family reasons

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3. Ibid., p. 2.
5. EM, op. cit., p. 15.
• countering work participation disincentives for new parents posed by the tax/welfare system and
• increasing retention rates for business, with reduced training and recruitment costs.\(^7\)

**Current Parental Leave Payment scheme**

The *PPL Act* provides for the payment of PLP to eligible primary carers in the first year after the birth or adoption of a child. PLP is paid for a particular period (the PPL period) for up to 18 weeks at the rate of the national minimum wage (currently, $656.90 per week).\(^8\) To be eligible, claimants must have incomes of $150,000 or less.\(^9\) They must also have worked at least one day a week for at least ten of the 13 months before the birth or adoption of the child.\(^10\)

While PLP is paid from general taxation revenue, it is generally paid through the recipient’s employer. PLP is taxable income and does not include superannuation contributions. Working fathers or partners may be eligible for Dad and Partner Pay (DAPP), a separate two-week payment, paid at the national minimum wage.\(^11\)

In 2013–14, there were 144,255 recipients of PLP, and 72,975 fathers and other partners who took the full two weeks of DAPP.\(^12\) In 2014–15, PLP was expected to cost $1.9 billion and DAPP $94 million.\(^13\)

**Fairer Paid Parental Leave**

The Bill implements a 2015–16 Budget measure to remove a person’s ability to claim the full PLP entitlement if that person is receiving primary carer leave payments from their employer (primary carer pay).\(^14\)

The Department of Social Services (DSS) has recently quantified the number of people expected to be affected by the Fairer PPL measure. The figures equate to 47% of claimants—34,000 people (20%) who receive primary carer pay in excess of the maximum PLP entitlement and 45,000 people (27%) who receive primary carer pay valued at less than the maximum PLP entitlement.\(^15\) The latter group will receive primary carer pay and an additional sum of PLP to ‘top up’ their entitlement to the maximum PLP entitlement ($11,824.20).

The DSS analysis was based on data provided to the review of the PPL scheme in 2013 (PPL Review).\(^16\) These data were supplied in three phases spanning 2010–12. However, the number of affected people is likely to be larger than 79,000 given the growth in numbers of families receiving PLP since 2012 (42,975 in 2010–2011 to 144,966 in 2013–14).\(^17\)

In terms of financial impact, for those people who may have claimed the maximum PLP entitlement and whose employer primary carer pay entitlement is greater than the PLP rate, the Fairer PPL measure will reduce these household incomes by over $11,800.\(^18\) It is harder to estimate the financial impact on those whose employer primary carer pay entitlement is less than the PLP rate as this will depend on the amount of primary carer pay, which varies across industries and employers.

Any estimates of the impact of the Fairer PPL measure would also need to account for the possibility that employers may alter primary carer pay arrangements to ensure that their employees remain eligible for PLP (see stakeholders’ comments below). If employers make alternative arrangements, then a lower number of families would be financially affected. DAPP will not be affected by the Bill. The EM states:

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18. 18 weeks multiplied by the current rate of payment of $656.90 per week.
The ability for fathers and partners to access Dad and Partner Pay and employer-provided paid paternity leave is to encourage them to take additional time off work to bond with their child. Dad and Partner Pay can only be paid while on unpaid leave, which encourages dads and partners to extend their total period of leave rather than simply supplementing their income during a period of paid leave.19

**Employer paymaster role**

Currently, employers are required to provide regular instalments of PLP to employees who have been with the employer for at least 12 months prior to the birth or adoption of the child, if the Department of Human Services (DHS) has determined that an employer must do so (an employer determination) and that determination has come into force.20

Section 101 of the *PPL Act* requires DHS to make an employer determination if satisfied of certain matters—such as a person’s eligibility for PLP. The determination comes into force when the employer is notified and provides DHS with a notice accepting the determination (an acceptance notice). If there is no employer determination, an employer can voluntarily provide PLP instalments to one or more employees by giving DHS the appropriate notice (section 109).

Of parents who received PLP in 2012–13, 73.7% (123,502) received PLP through their employer. In most cases (88.3%), employers chose to provide PLP only to those employees for whom they were required to act as paymaster.21 Large businesses (200+ employees) were responsible for 65.6% of payments; small businesses (with less than 20 employees) were responsible for 13.9% of payments.22

**Previous attempts to remove the employer paymaster role**

At the 2010 and 2013 elections, the Coalition announced that, under its PPL scheme, ‘employees will be paid directly by the Commonwealth Government, not via their employer’.23 Therefore, when the Labor Government introduced the Paid Parental Leave Bill 2010, the Coalition opposed the requirement that employers act as paymasters for the PPL scheme. The then Shadow Minister for Small Business, Bruce Billson, argued:

> The Coalition insists that the small business community not be left holding the parental leave cheque because they do not need to. There is no advantage to it and there are plenty of disadvantages to that model ... So if the Rudd Labor Government has any interest whatsoever in regulatory and compliance burdens and has listened to the legitimate and substantiated concerns of the small business community, they will not force them to be the ones handling the cash with the risks that are attached to that and the inevitable costs of changing their own internal systems, payroll systems and the like; the reporting obligations back and forth to the FAO [Family Assistance Office] and to the employee; the concerns about triggering an increased financial liability for workers compensation and payroll expenses because their payroll budget is inflated by that amount. It adds no advantage whatsoever.24

Mr Billson sought to remove the employer paymaster role through the introduction of a private member’s Bill, the Paid Parental Leave (Reduction of Compliance Burden for Employers) Amendment Bill 2010. The Bill did not pass the House of Representatives.25

In 2013, the Coalition Government proposed removing the employer paymaster role from the *PPL Act* in Schedule 7 of an omnibus bill, the Social Services and Other Legislation Amendment Bill 2013.26 Schedule 7 was

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19.  EM, Statement of Compatibility with Human Rights (SC), op. cit., p. 3.
22.  Ibid., p.35.
omitted as a result of Government amendments made at the Consideration of Senate Message stage in the House of Representatives, with a view to reintroducing it in a separate Bill at a later date.\(^{27}\)

The following year, Mr Billson, now the Minister for Small Business, introduced the Paid Parental Leave Amendment Bill 2014 (PPL Amendment Bill) into the House of Representatives.\(^{28}\) In presenting the PPL Amendment Bill, Mr Billson stated:

>[The employer paymaster role] measure will generate a significant compliance cost saving for Australian businesses, especially small businesses. Small businesses are particularly impacted by regulations, as they often do not have the resources or specialised staff to deal with compliance requirements.\(^{29}\)

The PPL Amendment Bill has not been debated in the Senate and is almost identical to Schedule 2 of the current Bill.\(^{30}\) The Government has not indicated why it has chosen to reintroduce the employer paymaster measure in the Bill, rather than proceed with the PPL Amendment Bill.

**Employer attitudes to the employer paymaster role**

The Bill reintroduces the measure contained in the PPL Amendment Bill to enable DHS to pay PLP directly to employees, unless an employer elects to provide the payments to an employee and that employee agrees to their employer acting as paymaster.

In 2014, the following impacts of the employer paymaster role on employers were reported in the PPL Review:

- a high proportion of employers found that the scheme had been easy to implement in their organisation, although 41% had found organising payments time consuming
- 29% of employers reported additional costs in providing payments to their employees, primarily due to the extra workload\(^{31}\) and
- the estimated cost of implementing the PPL scheme ranged from $250 to over $1,000:
  - 45% of employers estimated the cost to be less than $250
  - 21% of employers estimated the cost to be $250–$999
  - 20% of employers estimated the cost to exceed $1,000 and
  - 14% of employers did not know the cost involved.\(^{32}\)

Phase 2 of the PPL Review (2012) canvassed 41 employers’ attitudes toward the employer paymaster role. The responses were mixed:

Of the employers who voiced an opinion about the employer role, 14 were positive, 12 were negative, and 12 were neutral or ambivalent. Employers in medium size organisations expressed mostly positive attitudes to the employer role. Employers in large organisations were polarised and either strongly for or strongly against the employer role. Employers in small organisations tended to be mostly negative or ambivalent towards the employer role...Most Phase 2 employers felt it was too early to see if the PPL scheme would lead to improved rates of retention in the organisation following periods of parental leave.\(^{33}\)

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\(^{31}\) The RIS reported the median number of hours by business size: four hours (medium sized business), five hours (small business) and seven hours (large business).

\(^{32}\) DSS, Paid Parental Leave scheme: review report, op. cit., pp. 101 and 104–05. The RIS reported that the estimated median cost of implementing the PPL scheme was $350.

\(^{33}\) Ibid., pp. 101–102.
The RIS for the current Bill agrees with the PPL Review that it is difficult to quantify the impact on employers of having to provide payments to employees but stated that the Fairer PPL measure directly responds to feedback received by the Government over a significant period of time. The RIS refers to the ‘overwhelming and sustained opposition from employer groups’ and in particular the position of the Australian Chamber of Commerce and Industry (ACCI) (see below). The RIS concludes:

Many employers are of the view that costs to administer the PPL scheme outweigh any benefits that a mandatory employer paymaster role may deliver.\(^\text{34}\)

### Position of non-government parties

#### Australian Labor Party

The Shadow Minister for Families and Payments, Jenny Macklin, has indicated that the Opposition will not support the Fairer PPL measure. Ms Macklin described the measure’s potential impact as ‘unfair’ and ‘devastating for new mums’ and contrary to the intention of the PPL scheme.\(^\text{35}\)

Labor’s scheme was designed so that Paid Parental Leave could be topped up by employers who wanted to add to the government’s scheme ... The combined benefit of the Government’s scheme and employer contributions mean women can spend more time with their babies. That’s exactly how Labor’s PPL scheme was designed to work.

The Productivity Commission, the Fair Work Ombudsman and business groups agree that employer contributions are an important part of Paid Parental Leave.\(^\text{36}\)

In the second reading debate on the PPL Amendment Bill, Ms Macklin indicated also that the Opposition will not support removal of the employer paymaster role from the PPL scheme. Ms Macklin emphasised that the scheme was designed by the Productivity Commission following ‘comprehensive investigation and extensive consultation’ and was well supported by women and their employers:

A central feature of our scheme was to ensure we found a way of enabling women to remain connected to work and their careers when they take time out of the workforce to have a baby or adopt a child. Overwhelmingly, employers have said that they support the employer role. They support it because it helps them retain a connection with their staff. It helps them to support that staff when they are ready to return to work. That is why we designed it that way. Both women and business have overwhelmingly supported this aspect of the design.\(^\text{37}\)

Ms Macklin flagged that the Opposition was prepared to make a concession for small businesses:

... during the 2013 campaign Labor took to the election a policy to enable businesses with fewer than 20 employees to streamline administration and have Centrelink make paid parental leave payments to their employees while on maternity leave. This was a sensible balance between the need to maintain a relationship with their employers while they are on paid parental leave and the need to give small businesses the option of having their paid parental leave administered by Centrelink.\(^\text{38}\)

The Opposition tabled amendments to the PPL Amendment Bill in the Senate to exempt businesses with fewer than 20 employees from having to comply with an employer determination.\(^\text{39}\) As indicated above, the Senate has not debated the PPL Amendment Bill, so whether these tabled amendments would have passed is not known. However, the Opposition’s policy position contrasts with the position adopted in this Bill, which is to remove the compulsory paymaster role for all employers.

\(^{34}\) Ibid.


\(^{38}\) Ibid.

Australian Greens

The Australian Greens (the Greens) have long been critical of the PPL scheme, describing it in 2013 as ‘a bare minimum payment based on a welfare model, rather than putting Australia firmly on the route to paid parental leave as full workplace entitlement’. The model proposed by the Greens calculates the PLP entitlement based on the primary carer’s salary, with an income cap of $100,000 and a safety net floor of the national minimum wage, to be paid for six months (26 weeks):

That means over the 6 months the paid parental leave for the primary carer will be between $16,170 and $50,000 based on their salary, plus any additional support provided by their employers.

The Greens opposed the Government’s proposed change to the employer paymaster role when the Social Services and Other Legislation Amendment Bill 2013 was debated in the Senate. The Greens member in the House of Representatives, Adam Bandt, did not comment on the PPL Amendment Bill during the second reading debate in the Lower House.

The extent of cross bench support for the Bill in the Senate is not clear. Two senators—David Leyonhjelm and Bob Day—have indicated their support for the proposed measures, while Senator Zhenya ‘Dio’ Wang has announced his opposition to the Bill. Senators Jacqui Lambie, John Madigan, Ricky Muir and Nick Xenophon have expressed concerns about the proposed changes to the PPL scheme. Senator Glenn Lazarus is yet to confirm his position.

Position of major interest groups

Australian Chamber of Commerce and Industry

The Chief Executive of the Australian Chamber of Commerce and Industry (ACCI), Kate Carnell, has recently commented that the fairer PPL measure is not likely to achieve savings in the private sector, as employers will exchange primary carer pay for other employee benefits:

Of course employers will pay their benefits differently. They won’t walk away, they will just find a different way to pay the benefit, they will act in the best interest of their company and their staff, so their staff don’t just lose $11,500 ... This policy might achieve savings in the public sector, but in the private sector it won’t work as a savings measure.

ACCI has opposed the employer paymaster role both prior to and after introduction of the PPL scheme. ACCI argues that requiring employers, including small business, to deliver public monies to employees under the scheme increases the burden on business. Its position is reflected in the Bill.

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41. Ibid.
Australian Industry Group

The Australian Industry Group (Ai Group) has stated:

The Government must ensure that new arrangements do not deter businesses from putting in place or continuing to offer their own parental leave schemes. These schemes allow businesses to attract and retain staff while they care for children.\(^{47}\)

The Chief Executive, Innes Willox, is reported to have said that employers might find ‘other ways ... to retain and incentivise their workforce’ which would affect the measure’s estimated savings.\(^{48}\)

Australian Council of Trade Unions

The Australian Council of Trade Unions (ACTU) has called on cross bench senators to vote against what it called the ‘savage and unexpected cuts’ to PLP.\(^{49}\) The ACTU argues that the proposed measure will deny 46 per cent of Australian women (80,000 families) access to government-funded PPL. The union warns that mothers could be forced to return to work earlier due to financial concerns and stated its support for 26 weeks PPL, as recommended by the World Health Organisation:

The current PPL scheme was designed to include financial contributions from government and employers and aims to meet the World Health Organisation recommendation for at least six months paid leave for new parents to promote child and maternal health, build strong families and help mothers stay in the workforce.\(^{50}\)

At its May Congress, union delegates voted to defend all employees’ rights to access the PPL scheme as well as any entitlements achieved through bargaining. The ACTU committed to work with employers to ensure that they continue to support employees with care responsibilities.\(^{51}\)

National Foundation for Australian Women

The National Foundation for Australian Women (NFAW) considers that the PPL scheme should be strengthened—for example, by increasing coverage to 26 weeks at the national minimum wage—in order to enable mothers to spend more time with their new child. NFAW compared entitlements under the current PPL scheme and the scheme as it would be amended by the Bill:

**Scenario 1: Bank Employee**

Nora is pregnant and works full time as a customer service consultant at a bank, where she earns $50,000 ($962 a week). Her employer has an 8 weeks paid parental leave scheme ($7,692 for the 8 weeks)...  

**Current PPL situation**

Nora is able to access the Government Parental Leave Payment of $11,539 (former NMW rate pre July 2015 adjustment) over 18 weeks and her employer funded parental leave of $7,692 (8 weeks). This means Nora would be able to access 26 weeks leave, with an income of $19,231. This is 76% of her regular wages for that period ($25,000)...

**Abbott Government Proposal**

Under the new proposal, Nora would no longer be able to receive both the PLP and her employer’s payment. Instead, she would have access to 18 weeks of minimum wage – made up of her employer funded leave of ($7,692)

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and a $4,134 top-up. This would bring the total amount of paid parental leave that she receives during the 18 week period to NMW $11,826 (calculated at adjusted NMW rage from 1 July 2015). This means that her parental leave drops to 66% of her regular earnings. If Nora was to stretch out her total paid parental leave entitlements to the recommended 26 weeks, her weekly payment would be $444, which is 46% of her regular earnings.\(^5\)

**Chief Executive Women**

The President of Chief Executive Women, Diane Smith-Gander, described the ability to claim PLP together with employer-provided entitlements as ‘a necessary ingredient for the sustainability of parents’ working lives’:

The continuation of the Government parental leave payment of $11,500 for an 18 week period, supplemented by employer contributions wherever possible, is also an important enabler of enhanced workforce participation and of continuity of superannuation contributions to prepare for self-funded retirement.\(^5\)

**Other interest groups**

In a joint statement, a number of organisations—such as the Australian Council of Social Services, The Parenthood, Economic Security for Women and the Victorian Women’s Trust—expressed dismay at the proposal to remove access to the minimum leave entitlements provided by the PPL scheme for all employees entitled to additional primary carer pay.\(^5\) These organisations called on the Government to reconsider its policy decision.

Two of the primary arguments made in the statement were that PLP contributes to workforce participation and employee retention rates, and is a social compact that requires a commitment from government, employers and individuals. The statement explained these positions as follows:

Paid parental leave increases lifetime workforce participation, both over the long run following the early infant years of their children, but also prior to the birth. In the absence of paid leave entitlements, many women resign from their jobs and lose contact with their former employers, making it more difficult for them to re-enter the workforce. Paid parental leave increases retention rates for business, with reduced training and recruitment costs and counters some of the incentives against working posed by the tax and welfare system. Australia’s employment rate for mothers is the lowest of all the countries in the OECD at 62%. Universal paid parental leave is a critical strategy in encouraging new parents to stay in the workforce and achieving the G20 goal of increasing women’s labour force participation by 25% by 2025.

... The Government’s refusal to contribute towards the cost of paid parental leave for employees entitled to a co-contribution from their employer will disadvantage up to 47% of families currently receiving paid parental leave. Limiting access to the Government scheme reduces incentives for employers to contribute to paid parental leave, encourage[s] parties to negotiate ancillary benefits instead and may impose a significant regulatory burden on businesses that are required to report on their existing parental leave arrangements.\(^5\)

The University of Sydney’s Marian Baird, Professor of Employment Relations Work and Organisational Studies, expressed concern that the proposed changes would increase pressure on women to return to work early, lead to more requests for part-time work and flexible work conditions, and heighten demand for child care.\(^5\)

**Financial implications**

The Explanatory Memorandum to the Bill states that the Bill will have two financial impacts:

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55. Ibid. The other two arguments were that the PPL scheme provides universal access to PLP, and significant health benefits to mothers and children.
• for the Fairer PPL scheme measure, savings of $967.7 million over the forward estimates and
• for the employer paymaster measure, $7.0 million in additional costs over five years.\(^ {57}\)

The financial impact of the Fairer PPL measure is based on estimated savings of $1,667.70 million over four years on PLP payments, reduced by taxation foregone on those payments of $700 million.\(^ {58}\) The Government has budgeted for $900,000 over four years in extra expenditure by the Administrative Appeals Tribunal, presumably to deal with disputes over PLP scheme eligibility.\(^ {59}\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^ {60}\)

The Parliamentary Joint Committee on Human Rights (PJC–HR) has commented on the Statement of Compatibility with Human Rights (SC) in relation to Schedules 1 and 2 of the Bill.\(^ {61}\)

**Schedule 1**

The SC states that Schedule 1 of the Bill:

> ... is compatible with human rights and, to the extent that it may limit certain human rights, those limitations are reasonable, necessary and proportionate. It does not disturb the existing safety net, focuses support on those working women who need it most, while assisting the Government to increase investment from within available resources in measures such as better childcare support to more effectively advance the relevant rights.\(^ {62}\)

The PJC–HR considers that Schedule 1 limits the right to social security, rights to work and maternity leave, and the right to equality and non-discrimination and has sought further information from the Minister as to whether these limitations are justifiable.\(^ {63}\) In particular, the Committee noted that the proposed amendments reduce current maternity leave entitlements and disproportionately affect women. The PJC–HR noted its usual expectation:

> ... where a measure may limit a human right ... the accompanying statement of compatibility [must] provide a reasoned and evidence-based explanation of how the measure supports a legitimate objective for the purposes of international human rights law. Additionally, it must be shown that a limitation is rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.\(^ {64}\)

The PJC–HR considered that the SC does not provide sufficient justification for the measure proposed in Schedule 1 of the Bill.\(^ {65}\)

**Schedule 2**

In 2014, the PJC–HR considered the PPL Amendment Bill which contained a substantially identical employer paymaster role measure. On that occasion, the PJC–HR sought advice from the Minister on the impact of the Bill on employees with salary sacrifice arrangements in place.\(^ {66}\) As explained in the RIS to that Bill:

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59. Ibid.
60. The Statement of Compatibility with Human Rights can be found attached at the end of the EM, after the Regulation Impact Statement.
64. Ibid., p. 52.
65. Ibid., pp. 49–50.
Where ... [an employee’s] employer is administering the ... [parental leave] payment, these salary sacrifice arrangements are able to continue and so the employee’s tax liability would continue to be calculated on a lower salary. However, as DHS does not offer salary sacrifice deduction functionality, an employee’s tax liability could increase if the mandatory employer role is removed and their employer does not opt back in. This may be a particular issue for employees in the not-for-profit sector. This impact is not a compliance cost, but is an impact on the after-tax income a person may receive, dependent on an employee’s income and the level of salary sacrificed under the arrangement.67

The PJC–HR sought clarification as to whether the removal of the requirement for employers to provide PLP to employees may limit the right to social security and the right to just and favourable conditions of work and, if so, whether any such limitations are permissible.68 The PJC–HR also sought further information as to whether the PPL Amendment Bill was compatible with the right to equality and non-discrimination, ‘given that the majority of paid parental leave recipients may be women’.69

The Minister’s response stated that the PPL Amendment Bill did not limit the essential level of benefits required as part of the right to social security. Further:

... there will still be capacity to make salary sacrifice deductions against PLP payments where employers and employees agree. The ability to make deductions for salary sacrificing is unique to PLP amongst all government payments, given the PLP employer paymaster role. This policy allows employers to apply the same treatment to PLP payments they administer on behalf of the Government as for the payment of salary and wages, if they so wish and can afford to do so. The ability for an employee to reduce the tax liability for their PLP payment through salary sacrificing is not guaranteed even under current arrangements. Therefore, there is no limitation to the right to social security as these amendments do not limit this essential level of benefit or limit access to the scheme, and allow the continuation of salary sacrifice arrangements where the employer opts in and agrees.70

The PJC–HR concluded its consideration of the PPL Amendment Bill on the basis of the further information provided by the Minister. However, as none of that information is included in the Explanatory Memorandum for the current Bill, the Committee stated its usual expectation that where additional information has been provided to establish that a measure is compatible with human rights, that information should be included in future statements of compatibility for similar types of measure.71

Committee consideration

**Senate Community Affairs Legislation Committee**

The Bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 15 September 2015.72 Further information about the inquiry is available at the committee’s webpage.73

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.74

**Structure and key provisions of the Bill**

The Bill contains two schedules, both of which amend the *PPL Act*. Schedule 1 sets out amendments relating to the fairer PPL measure. Schedule 2 contains amendments relating to the employer paymaster role measure.

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69. Ibid, p. 16.
Schedule 1 (the fairer PPL measure)

Part 1 of Schedule 1 of the Bill proposes amendments to the PPL Act dealing with how the PLP entitlement will be adjusted for claimants who receive paid parental leave entitlements from their employers (primary carer pay). Parents who receive primary carer pay will no longer be able to receive the full amount of PLP, if any. DHS will assess each claim for PLP and deduct from the maximum PLP entitlement (18 weeks multiplied by $656.90) any primary carer pay received by the claimant. Where the primary carer pay exceeds the maximum PLP entitlement, the claimant will not receive any PLP. Claimants whose primary carer pay is less than the maximum PLP entitlement will have their PLP reduced by the amount of their primary carer pay.

The process used to calculate an applicant’s PLP entitlement, where that person receives primary carer pay, is explained in detail in the Explanatory Memorandum, together with case examples.\(^7\) There are four key provisions to be inserted into the PPL Act by Item 11:

- **new sections 11A and 11B** which set out how to calculate the maximum period for which PLP is payable (maximum PLP period)
- **new section 11C** which provides that, if the ‘adjustment for primary carer pay’ is equal to or exceeds the maximum PLP period, there is no period for which PLP is payable (PLP period) and
- **new section 11D** which provides a method for calculating the ‘adjustment for primary carer pay’.

Item 13 replaces subsection 13(2) to require a person to have a PLP period in order for DHS to make a payability determination, a pre-condition for the payment of PLP. Item 20, proposed section 26 of the PPL Act makes a similar amendment in relation to the determination of claims lodged before the birth or adoption of a child (currently, an ‘initial eligibility determination’, and under the Bill, a ‘provisional entitlement determination’).

Schedule 2 (the employer paymaster role measure)

Part 1 of Schedule 2 of the Bill will amend the PPL Act to remove the requirement for employers to provide PLP to their eligible long-term employees, from 1 April 2016. DHS will continue to make employer determinations but a determination will come into force only if an employer gives DHS an acceptance notice within 14 days of receiving notice of the determination. Otherwise, DHS will pay PLP instalments directly to employees.

Under current section 101, DHS is required to make an employer determination if certain conditions are met:

- the person is eligible for PPL
- instalments are likely, if the determination is made, to be payable by the employer for at least 40 consecutive PPL days that are week days
- the person has been, or will have been, employed by the employer for at least 12 months immediately before the expected date of birth of the person’s child where the person claims before the birth, or the later of the expected date of birth and the day the child was born where the person claims after the birth
- the person is likely to be an Australian based employee of the employer for the person’s PPL period where a payability determination has been made, or the period of days for which instalments are likely to be payable if a payability determination has not yet been made and
- the employer has an Australian Business Number.

Items 17–20 amend section 101 to:

- repeal the two conditions relating to the likelihood of instalments being payable for a minimum of 40 consecutive week days and the employee having being employed by the employer for at least 12 months and
- substitute two conditions requiring an employer to have elected to pay instalments for an employee and the employee consenting to that arrangement in the claim for PLP.

Item 21 replaces section 103 to provide an employer with the right to accept or refuse to pay PLP instalments in accordance with an employer determination. DHS must revoke the determination if it does not receive an

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75. EM, op. cit., pp. 4–9.
acceptance notice within 14 days of notification or it receives a non-acceptance notice from an employer (items 28–29, subsection 108(1)).

Items 31–32 amend section 109 to set out the requirements for an acceptance notice.

Item 37 amends the Guide to Part 5-1 (internal review of decisions) to remove the reference to review of a decision to make an employer determination. Similar amendments are made throughout the Part—such as item 41 which repeals an employer’s right to apply for an internal review of an employer determination decision (section 207).

Item 46 amends the Guide to Part 5-2 (review by the AAT) to remove the reference to employer determination decisions. Similar amendments are made throughout the Part.

Item 53 amends subsection 299(1) to enable a person to elect to pay PLP instalments where there is a relationship between the payer/payee similar to an employer/employee relationship, if provided for in the PPL Rules or the regulations.

Concluding comments

Fairer PPL measure

The Fairer PPL measure is likely to face considerable opposition in the Senate. The Opposition and the Greens have indicated that they will not support the measure as it will prevent a large number of working parents from accessing government-funded PPL. The Greens’ policy actually supports access to higher rates of PPL for a longer period.

Payments under the PPL scheme were originally intended to be supplemented, not replaced, by primary carer pay. It was envisaged that it would be possible to use both forms of entitlement as part of an overall package to increase opportunities to extend leave and meet some or all of the objectives associated with PLP outlined above. This is highlighted by the Fair Work Ombudsman who lists ‘topping up’ an employee’s pay during the period of government-funded PLP to their full rate of pay as an option for employers wishing to offer a best-practice parental leave scheme. It also appears that the Government was intending to allow private employers to offer ‘top-ups’ to the far more generous PLP scheme (26 weeks paid at full income replacement up to a cap) it proposed at the 2010 and 2013 elections but which has since been set aside.

On the other hand, the Fairer PPL measure could be seen as consistent with an underlying principle of Australia’s welfare system that government support be targeted at those most in need. This approach focuses on retaining incentives for private provision, with government payments seen more as a safety net. Indeed, these principles were the source for much of the opposition to the Government’s former PLP proposal. In this sense, the Fairer PPL measure effectively redefines Government PLP as mainly a safety net scheme, marking a substantial change from the Government’s previous emphasis on it as a workplace entitlement.

Following announcement of the Fairer PPL measure, employer groups and unions have suggested that many employers would offer their current primary carer entitlements in different ways (for example, return-to-work bonuses), in order to enable their employees to continue to access the Government scheme. If this were to occur, there might be little, if any, change in the number of PLP claimants and the measure’s objective—to target PLP recipients—and its forecast savings would not be achieved.

According to Government backbencher (formerly the Coalition’s Shadow Minister on the Status of Women) Sharman Stone, the measure will address the issue of some women receiving support who do not need it at the expense of many who do:

76. PC, op. cit., pp. XX–XI.
80. L Taylor, Employers and unions unite to try to force changes to paid parental leave plan, The Guardian (online edition), op. cit.
Clearly we are in a terrible dilemma because we have the worst of all worlds – it was extraordinary that some higher-paid women, particularly public servants, were able to access a generous employer-provided scheme and also collect $11,500, but for low-income earners it was not at all unreasonable for them to add to the minimalist national scheme to get a few more weeks at home with their newborn if that was all their struggling small business employer could afford...  

Sharman Stone, who describes the current system as ‘cheap and mean’, has argued that the Coalition should attempt to negotiate a deal with the Opposition to find a way to offer more generous PLP benefits to low-income women.  

**Employer paymaster measure**

The second measure proposed in the Bill—the employer paymaster role measure—has been considered in the 43rd and 44th Parliament but has not been passed. The Opposition will support the measure insofar as it relates to small business only, whereas the Government considers that no businesses should be obligated to provide PLP instalments to their employees.

As noted earlier, employers and representative organisations such as ACCI have consistently opposed the paymaster role for employers under the PPL scheme. This objection has been based on the view that employers should not be performing what is a government function and the perceived administrative burden arising from the paymaster role. The objective of the employer paymaster role measure is the reduction of that burden and its associated cost.

However, the EM to the Bill does not clearly articulate the cost to employers of administering the PPL scheme and the RIS cites evidence from the PPL Review Phase 3 Report that most employers found the scheme easy to implement with an estimated median implementation cost of $350.00 (variable depending on the business size).

In addition, the Phase 2 Report canvassed a small selection of businesses on their view of the employer paymaster role. The responses suggest that there is a mixed view on the importance and value of the role, and hence, there is not overwhelming and sustained opposition from employers, as suggested in the RIS. It could also be argued that the Government’s provision of up to $11,800 to employers towards the cost of primary carer pay for their employees should be considered in evaluating the costs and benefits of the paymaster role.

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82. Ibid.