Paid Parental Leave Amendment (Work Test) Bill 2019

Michael Klapdor
Social Policy Section

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House: House of Representatives
Portfolio: Social Services
Commencement: 1 January 2020.

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 Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at October 2019.
Purpose of the Bill

The purpose of the Paid Parental Leave Amendment (Work Test) Bill 2019 (the Bill) is to amend the Paid Parental Leave Act 2010 (the PPL Act) to:

- allow the work test period (used to determine eligibility for Paid Parental Leave Pay) for a pregnant woman in an unsafe job to be moved from the 13-month period prior to the birth of her child to the 13-month period before the woman had to cease work due to the hazards connected with her employment and
- extend the permissible break in the work test from eight weeks to 12 weeks between two working days.

The measures were announced in the Women’s Economic Security Statement 2018 and included in the 2018–19 Mid-Year Economic and Fiscal Outlook (MYEFO). The measures are expected to cost $6.74 million over the forward estimates and will commence on 1 January 2020. The more significant change to Paid Parental Leave Pay announced in the Women’s Economic Security Statement 2018, which would allow the 18 week Paid Parental Leave Pay period to be taken in separate blocks of leave, is not included in the Bill.

Both measures were previously included in a package of parental leave changes announced in the 2015–16 MYEFO and proposed in the Fairer Paid Parental Leave Bill 2016 and the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017. The Coalition Government announced that it would not proceed with these measures in the 2017–18 Budget and both these Bills were discharged from the notice paper.

Background

Parental Leave Pay

The PPL Act provides eligible working parents with up to 18 weeks of payment at the National Minimum Wage (currently $740.60 per week before tax) when they take leave from work to care for a newborn or recently adopted child. The payment, Parental Leave Pay (PLP), was introduced on 1 January 2011. PLP is paid in addition to, and irrespective of, any employer-provided paid parental leave which the person may receive.

A separate payment, Dad and Partner Pay (DAPP), can be paid to fathers, partners and other adoptive parents for up to two weeks while they are on unpaid leave to care for a newborn or recently adopted child.

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8. DHS, Dad and Partner Pay, DHS website, last updated 3 October 2019.
In 2017–18, a total of 159,372 parents started receiving PLP. The Department of Social Services estimates that 48.5 per cent of mothers with new babies received PLP in 2017–18, a decrease from the 53.3 per cent of mothers who received PLP in 2015–16. There were 81,882 fathers and partners who received DAPP in 2017–18.

**Eligibility for Parental Leave Pay**

To be eligible for PLP, an individual who is the birth mother or initial primary carer adoptive parent must:

- be the primary carer of their newborn or recently adopted child and
- satisfy the work, income and residency tests
- be on leave or not working from the time they become the child’s primary carer until the end of their PLP period (the period they are eligible to receive PLP)
- not have already received PLP for the child (and their partner/former partner must not have received PLP for the child)
- not be subject to a Newly Arrived Resident’s Waiting Period.

In exceptional circumstances, a person other than the birth mother or initial primary carer adoptive parent may be able to claim PLP as the primary claimant.

**Work test**

To satisfy the work test, a claimant must have performed 330 hours of qualifying work over a period spanning at least 295 consecutive days (around ten months) within the 392 day period (around 13 months) prior to the expected or actual date of birth or placement of the child for adoption.

A person is considered to have qualifying work for a day if there was at least one hour of paid work or at least one hour of paid leave on that day. Previous periods of PLP or DAPP (for a previous child) may also be counted as qualifying work.

A birth mother may also satisfy the work test if the Department of Human Services is satisfied that they would have met the work test requirements but for the fact their child was born prematurely and/or they had a pregnancy-related illness or complication that prevented them from performing paid work.

Days where a person has not performed qualifying work that do not fall within a ‘permissible break’ cannot be considered when calculating a claimant’s 295 consecutive day qualifying period. A permissible break is one between two work days (or at the beginning of the assessed period) where the break is not more than 56 days (eight weeks).

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10. Ibid.
11. DSS, ‘2.2.1 PLP eligibility overview’, *Paid Parental Leave guide*, DSS website, last reviewed 1 July 2019.
12. Ibid.
13. DSS, ‘2.2.2.10 When a person satisfied the work test for PLP’, *Paid Parental Leave guide*, DSS website, last reviewed 6 February 2017.
15. DSS, ‘2.2.2.10 When a person satisfied the work test for PLP’, op. cit.
Income test
An individual can satisfy the income test if their adjusted taxable income for the reference income year is not above $150,000. The reference income year is the financial year which ended before either the day the person makes a claim or day the child is born/day of placement, whichever is earlier.

Residency test
To meet the residency test, a PLP claimant must be living in Australia and be an Australian citizen, the holder of a permanent visa or a Special Category Visa (SCV), or the holder of a temporary visa determined by the Minister of Social Services as a qualifying visa class for Special Benefit.

New permanent residents must wait two years before they are eligible for PLP—only time spent in Australia as a resident counts towards this waiting period. Australian citizens, refugees, SCV holders and some other individuals may be exempt from this waiting period.

Committee consideration

Senate Standing Committee for the Selection of Bills
On 19 September 2019, the Senate Selection of Bills Committee deferred consideration of the Bill to its next meeting.

Senate Standing Committee for the Scrutiny of Bills
The Senate Scrutiny of Bills Committee had no comments to make in relation to the Bill.

Senate Community Affairs Legislation Committee
The Senate Community Affairs Legislation Committee held inquiries into both previous Bills that the measures were contained in. The proposed measures were relatively minor compared to the main amendments proposed in those Bills and were not discussed in the inquiry reports.

Policy position of non-government parties/independents
The Australian Labor Party supports the Bill. Shadow Minister for Families and Social Services Linda Burney stated in her second reading speech on the Bill:

These changes will enable an extra 180 mothers to receive paid parental leave each year, according to the government. However, these changes have been very slow in coming and too many Australian women and their families have missed out on the benefits of paid parental leave as a result.

17. DSS, ‘2.2.3 PPL scheme income test for PLP’, Paid Parental Leave guide, DSS website, last reviewed 1 July 2019.
19. DSS, ‘2.2.4.10 Australian residency test for PLP’, Paid Parental Leave guide, DSS website, last reviewed 20 March 2019; Social Security (Class of Visas - Qualification for Special Benefit) Determination 2015 (No. 2).
22. Senate Standing Committee for Selection of Bills, Report, 6, 2019, The Senate, 19 September 2019, [p. 4].
In 2013, the Australian Jockeys Association publicly identified the problem and called on the Abbott government to fix its legislation. The community has been campaigning for these changes for many years. Labor supports the changes in the bill.  

Independent MP Zali Steggall stated that she supported the Bill.

**Position of major interest groups**

At the time of writing, no major interest groups appeared to have commented on the Bill.

**Financial implications**

According to the Explanatory Memorandum, the measures in the Bill will cost $6.74 million over three years from 2019–20.

**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.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights had no comment on the Bill on the basis it was in the category of Bills that did not engage, or only marginally engaged, human rights; promoted human rights; and/or permissibly limited human rights.

**Key issues and provisions**

The Bill proposes two changes to the PLP work test:

- allow for an earlier work period to be assessed in situations where a pregnant woman has to cease work due to the hazardous nature of her employment
- extend the permissible break between work days, used to determine days that count towards a claimants 295 consecutive day qualifying period, from eight weeks to 12 weeks.

**Ceasing hazardous work**

The Bill proposes to allow for an exception from the current work test assessment period for pregnant women who have to cease work due to the hazards connected with their employment and the risks those hazards pose to their pregnancies. The current work test assesses days and hours of work in 13 months prior to birth (or adoption). The Bill would allow for women who need to cease hazardous work due to the risk posed to their pregnancy to have the 13 month period prior to them ceasing work to be assessed, rather than the 13 months prior to birth. The exception will only apply in situations where the PLP claimant is the birth mother.

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Rationale

In his second reading speech for the Bill, Minister for Trade, Tourism and Investment Simon Birmingham explained the rationale for the measure:

Currently, a pregnant woman may not meet the work test because she needs to cease work due to the hazardous nature of her job, despite the fact that she may have a long history and attachment to the workforce.

While most women are covered under the *Fair Work Act 2009*, which allows pregnant employees to move to a safe job or receive ‘no safe job’ leave, there are a small number of circumstances where women miss out. For example, construction workers, miners and jockeys often work on contracts and do not have employers who can provide them with alternative safe work.

To address these circumstances, women in these situations will have their work test period calculated from the date they ceased work due to the hazardous nature of their occupation, rather than from the date of the birth of their child.\(^\text{30}\)

Pregnant employees covered by the National Employment Standards in the *Fair Work Act 2009* are entitled to move to a safe job if it is not safe for them to do their normal job because of their pregnancy.\(^\text{31}\) If no safe job is available, the employee is entitled to take ‘no safe job’ leave.\(^\text{32}\) Where an employee is entitled to unpaid parental leave, this no safe job leave is paid.\(^\text{33}\)

As the Minister indicated, not all pregnant employees are entitled to these arrangements or able to access a safe job or paid ‘no safe job’ leave. Unpaid leave is not considered ‘qualifying work’ for the PLP work test.\(^\text{34}\)

Female horse racing jockeys were referred to in a number of second reading speeches as one of the occupations of concern and the Australian Jockeys Association has been lobbying for change on this issue since at least 2013.\(^\text{35}\) Bendigo MP Lisa Chesters stated that netballers and those in manual jobs had also raised the issue.\(^\text{36}\)

An estimated 20 additional mothers will be able to access PLP each year as a result of the measure.\(^\text{37}\)

Key provisions

**Item 1** inserts a definition of *claimant’s work cessation day* at section 6 of the *PPL Act*. The definition refers to paragraph 33(2A)(c), inserted by **item 2**.

Section 33 of the *PPL Act* defines the *work test period* for the purpose of the PLP work test. **Item 2** repeals subsections 33(1) and (2) and inserts proposed subsections 33(1), (2) and (2A). Under the amendments, the *work test period* for a primary claimant is the 392 days immediately before:

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\(^{31}\) *Fair Work Act 2009*, section 81.

\(^{32}\) Ibid., section 81A.

\(^{33}\) *Fair Work Ombudsman (FWO)*, *Pregnant employee entitlements*, FWO website, n.d.

\(^{34}\) DSS, *2.2.2.20 Work test for PLP*, Paid Parental Leave guide, DSS website, last reviewed 6 February 2017.


• the day the child is born unless
• if subsection 33(2A) applies (where the person ceases work due to hazards that pose a risk to the pregnancy) and the person would not satisfy the work test under the other criteria, then the claimant’s work cessation day or
• if the child is born after the expected date of birth and the person would not satisfy the work test under the other criteria, then the expected date of birth of the child.

Proposed subsection 33(2A) sets out the criteria for those pregnant women who cease work due to hazards that pose a risk to the pregnancy. To meet these criteria, the person must be the primary claimant:

• who is pregnant with a child or is the birth mother of the child
• who is performing or performed ‘paid work of a particular kind’ before the birth of the child and
• who will cease or ceased performing that work on a particular day (the claimant’s work cessation day) because of hazards connected with that kind of work that pose or posed a risk to the pregnancy and
• who meets any conditions prescribed under the Paid Parental Leave Rules 2010 (a legislative instrument made by the Minister for Social Services).

Details of the particular kinds of work which are to be covered by subsection 33(2A) are not contained in the legislation. It is likely that these and other conditions, which may relate to the kinds of hazard or proof that the hazards posed a risk to the pregnancy, will be outlined in the Paid Parental Leave Rules.

**Extending the permissible break**

The Bill will extend the period between working days that can be considered a permissible break in calculating a claimant’s 295 day qualifying period. The permissible break will be increased from eight to 12 weeks.

As discussed in the Background section, to meet the current work test a claimant must have performed 330 hours of qualifying work over a period spanning at least 295 consecutive days (around ten months) within the 392 day period (around 13 months) prior to the expected or actual date of birth or placement of the child for adoption. Days where a person has not performed qualifying work that do not fall within a ‘permissible break’ cannot be counted towards a claimant’s 295 consecutive day qualifying period. A permissible break is one between two work days (or at the beginning of the assessed period) where the break is not more than 56 days (eight weeks). 38

The measure will allow those with long breaks in their period of work, particularly casual or sessional workers, to still qualify for PLP.

**Rationale**

In his second reading speech for the Bill, Minister for Trade, Tourism and Investment Simon Birmingham stated:

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In some professions, such as teaching, there may routinely be a longer break between two work days, which prevents mothers from accessing Parental Leave Pay, despite having a legitimate attachment to the workforce.

For example, it is not uncommon for casual teachers to finish work a week or two early towards the end of a school year. However, if these teachers do not recommence work until a few weeks into the next school term, they could easily exceed the current eight week rule, even if they had worked continuously throughout the rest of the year.

... The Government believes that these working mothers should be entitled to paid leave to allow them time to recover from the birth, bond with their baby and receive the health and developmental benefits that the Paid Parental Leave scheme can help facilitate.39

The Government estimates that around 180 additional mothers will be entitled to PLP each year as a result of this measure.40 The Minister’s second reading speech only gives the example of teachers benefitting from the measure but mothers in other occupations may also benefit.

**Key provisions**

The criteria for determining when there is a permissible break are set out at section 36 of the *PPL Act*. Items 3 and 4 amend references to the maximum number of consecutive days in a permissible break at subsection 36(2) and paragraph (36)(3)(c) to substitute the number 56 with 84. This will mean that the maximum number of consecutive days allowed for a period between two working days (or at the beginning of a qualifying period) to be considered a permissible break will be 84 consecutive days (12 weeks) rather than 56 consecutive days (eight weeks).

**Concluding comments**

The proposed amendments are relatively minor but will provide access to PLP for a small number of people who would otherwise be excluded due to the hazardous or interrupted nature of their work.

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40. Ibid.
Paid Parental Leave Amendment (Work Test) Bill 2019

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