



AUSTRALIAN  
SENATE

**Senate Standing Committee for the  
Scrutiny of Delegated Legislation**

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24 June 2021

Senator the Hon Anne Ruston  
Minister for Families and Social Services  
Parliament House  
CANBERRA ACT 2600

Via email: [dlos@dss.gov.au](mailto:dlos@dss.gov.au)

  
Dear Minister,

**Paid Parental Leave Rules 2021 [F2021L00384]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to this matter.

***Privacy***

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

Part 9 of the instrument provides for matters relating to the disclosure of information and prescribes guidelines for the exercise of the Secretary's power to give a certificate in relation to a disclosure that is necessary in the public interest.

In accordance with subparagraph 55(1)(d)(i), the Secretary, may certify the disclosure of information is necessary in the public interest if they are satisfied, among other things, "the person to whom the information will be disclosed ... has a genuine and legitimate interest in the information."

Subdivision B of Division 2 of Part 9 of the instrument sets out the covered disclosures for public interest certificates. For each covered disclosure, the explanatory statement does not provide detail on who might be a person with "a genuine and legitimate interest in the information".

Where an instrument contains provisions which may trespass on the right to privacy, the committee expects that the explanatory statement should explain the nature and scope of the provisions. The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted.

The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. Explanatory statements should also indicate whether the safeguards in the *Privacy Act 1988* apply.

**In light of the above, the committee requests your advice as to what factors will be considered in determining whether a person has "a genuine and legitimate interest in the information" for each covered disclosure set out in Subdivision B of Division 2 of Part 9 of the instrument.**

### ***Adequacy of explanatory materials***

Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The committee notes that while a statement of compatibility has been included in the explanatory statement to the instrument, the statement of compatibility does not provide detail about how the instrument engages the right to privacy, despite Part 9 of the instrument setting out guidelines for disclosure of personal information.

**In light of the above, the committee requests your advice as to whether the statement of compatibility can be amended to include detail on how the instrument engages the right to privacy.**

### ***Modifications to primary legislation***

#### ***Parliamentary oversight***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This may include instruments which provide modifications to primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

Part 3-5 of the *Paid Parental Leave Act 2010* (the Act) provides for employer determinations to be made for an employer and an employee. If an employer determination is in force, the employer is required to pay instalments of Parental Leave Pay to the employee. Subsection 299(1) of the Act allows for rules or regulations to provide for employer determinations to be made for persons in a relationship similar to that of an employer and employee. Subsection 299(2) allows rules or regulations to modify any provision of the Act in relation to those persons.

Part 11 of the instrument makes modifications to the Act to empower the Secretary to make employer determinations in relation to the Police Commissioner and law enforcement officers of states other than Queensland or the Australian Capital Territory, the Crown in right of Queensland and Queensland law enforcement officers, the AFP Commissioner and an AFP officer, and the Chief of the Defence Force and a person who is a defence force member.

The committee has long been concerned with provisions in delegated legislation which modify primary legislation. The committee therefore expects the explanatory statement to any modification instrument to comprehensively justify the nature and scope of the relevant modifications.

In this regard, while the explanatory statement explains that the Act permits the modifications it remains unclear why it was considered necessary and appropriate to address the extension of the Act to persons who are not employees and employers in delegated legislation, rather than primary legislation.

The instrument appears to be subject to the standard sunset period of 10 years.

The committee's longstanding view is that provisions that modify the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

In light of this, from a scrutiny perspective, the committee considers that the instrument should be amended to specify that Part 11 ceases to operate three years after commencement. If it becomes

necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

**The committee therefore requests your advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to extend the operation of the Act to law enforcement officers and defence force members;**
- **whether the instrument can be amended to provide that Part 11 ceases within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

***Clarity of drafting***

Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

Section 11 of the instrument sets out the eligibility criteria for secondary claimants who may claim Parental Leave Pay in exceptional circumstances. Subsection 11(6) appears to be missing "or" after paragraph (a) and paragraph (b), as seen in comparable subsections 9(6) and 10(6).

**The committee would therefore appreciate your advice as to:**

- **whether subsection 11(6) is correctly drafted; and if not**
- **whether subsection 11(6) of the instrument can be redrafted to provide greater clarity as to its intended operation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **8 July 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**  
**Senate Standing Committee for the Scrutiny of Delegated Legislation**