



Senator the Hon Anne Ruston

**Minister for Families and Social Services
Minister for Women's Safety
Senator for South Australia
Manager of Government Business in the Senate**

Ref: MC21-005332

Senator the Hon Concetta Fierravanti-Wells
Chair of Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600


Dear Senator Fierravanti-Wells

Thank you for your letter dated 24 June 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting further advice on the Paid Parental Leave Rules 2021 [F2021L00384] (PPL Rules).

In your letter, the committee sought further advice in relation to the following:

- **Privacy:**
 - 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 PPL Rules
- **Adequacy of explanatory materials:**
 - 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:**
 - 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:**
 - Whether subsection 11(6) is correctly drafted; and if not,
 - Whether subsection 11(6) can be redrafted to provide greater clarity as to its intended operation.

I am providing the following information to assist the committee.

Privacy

Section 55 of the PPL Rules prescribes factors that the Secretary must be satisfied of before certifying that a disclosure of information is necessary in the public interest, including that 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 sets out the covered disclosures. Of these, only five are new additions to the grounds already set out in the former Paid Parental Leave Rules 2010.

Identifying whether a person to whom information is to be disclosed has a genuine and legitimate interest in the information is a case by case judgement by a decision-maker, based upon the circumstances surrounding the proposed disclosure. It will be informed by the purpose of the disclosure, and is intended to minimise the information disclosed by identifying whether the disclosure needs to include particular information in order for it to be effective. This provides an additional level of surety, and informs the decision-maker's ultimate decision as to whether the disclosure is necessary in the public interest.

A range of protected information is held by my department and Services Australia for PPL purposes. This includes identifying information for claimants and other persons, sensitive information relating to birth and potentially broader health, caring arrangements for children, employment, and financial information. Only certain aspects of this information will likely be relevant to any particular disclosure.

The factors to be considered in determining whether the person has a genuine and legitimate interest in the information will vary for each of the covered disclosures. For example, a person's name, address and state of mind may be all that is necessary if information is being released because of a threat to life, health or safety under new section 56. However, research, statistical analysis and policy development may need additional information in order to allow identified aspects of the population to be analysed.

I note that for many of the covered purposes, the intended recipients, or class of recipients, are inherent in the nature of the purpose. For example:

- under section 61 (Ministerial briefing), a disclosure may only be made to a person involved in briefing a Minister (covered by subsection 55(2));
- under section 62 (Missing person), a disclosure may only be made to a court, coronial inquiry, Royal Commission, Department or other authority of the Commonwealth or a State or Territory;
- under section 67 (Reparations), a disclosure may only be made to a Department or authority of the Commonwealth, a State or Territory; and
- under section 68 (Child protection agencies), a disclosure may only be made to a child protection agency of a State or Territory;
- under section 69 (Public Housing Administration), a disclosure may only be made to a Department or authority of a State or Territory, or an agent or contracted service provider of a Department or authority of a State or Territory;
- under section 71 (APS Code of Conduct investigations), a disclosure would only be necessary if it were made to a person whose role was to investigate or make a decision on a suspected breach of the APS Code of Conduct.

Where the intended recipient of a disclosure of information covered by Subdivision B is not specifically restricted by the wording of the provision, this has been done to avoid unintentionally preventing a disclosure of information from being made in relation to some future, unforeseen circumstances in which it would be preferable for a disclosure to be made.

As an example, the types of factors that are considered when determining whether a person has a genuine and legitimate interest in the information for section 65 (Research, statistical analysis and policy development) include:

- Would the person be involved in eligible research, statistical analysis or policy development (the purposes) for which the information is required? This includes:
 - a person who would use the information directly for one or more of the three purposes permitted under the section;
 - a person who would provide ancillary services to support the purpose(s) for accessing the information – for example a person:
 - reviewing the quality of the information;
 - conducting data integration;
 - transmitting information from one secure location to another; or
 - reviewing outputs to determine whether there is a risk of a person being identified.
- Has the person been nominated by a legal entity which has requested access to the information for purposes permitted under the section?
- Is a legal entity requesting access to the information for purposes permitted under this section and is it a reputable legal entity?

Adequacy of explanatory materials

I agree that the right to privacy under Article 17 of the International Covenant on Civil and Political Rights is engaged by Part 9 of the PPL Rules. I will undertake to update the explanatory statement to address how the right to privacy is engaged.

My department has data protections in place that safeguard the use of data (including data that might be disclosed under the additional purposes in the PPL Rules), including:

- the use of only de-identified data when conducting research, statistical analysis and policy development;
- the application of the separation principle during data integration, which keeps identifying and analytic data separate; and
- the requirement for Accredited Integrating Authorities to be used for high risk projects.

Modifications to primary legislation and Parliamentary oversight

Scope for the PPL Rules to modify the operation of the primary *Paid Parental Leave Act 2010* (the Act) was necessary in order to maximise the number of persons who could receive their parental leave pay directly from the entity that generally pays their salary, regardless of the nature of their relationship with that entity. The comprehensive set of rules set out in the Act use concepts specific to an employment relationship to explain the employer's obligations. These would not apply to relationships, which are not that of employer and employee without modification. The nature of modification will vary depending upon the relationship to be identified. As a result, it is appropriate that this is provided for by allowing the PPL Rules to modify the Act, giving flexibility to accommodate different circumstances.

As you note, Part 11 of the PPL Rules 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
- the Chief of the Defence Force and a person who is a defence force member.

I note that you have suggested that the application of the PPL Rules should be self-limited in this respect, repealing after a three year operation. It is in the interests of affected paid parental leave recipients that they have certainty of the full duration of their paid parental leave arrangements (which may now span two years), as to how their parental leave pay would be paid.

All these organisations requested they be specified in the PPL Rules to enable them to pay their officers and members their paid parental leave entitlements directly. Services Australia is in regular contact with these organisations about these arrangements, and they are obliged to keep my department informed if any concerns are raised with the PPL Rules or their operation, or any unintended outcomes result. This would allow the PPL Rules to be modified or repealed accordingly where warranted.

I share the committee's concerns that there should be sufficient Parliamentary oversight of provisions of this nature, but in this instance, monitoring arrangements are more appropriate than an earlier sun setting of the instrument and the uncertainty that would create.

Clarity of drafting

Subsection 11(6) is missing "or" after paragraph (a) and paragraph (b). My department has contacted the Office of Parliamentary Counsel, and they have agreed they will use their power under Drafting Direction No.44 to make minor, technical and editorial changes, to amend the PPL Rules 2021 to fix this omission. This will ensure that the conditions that apply to a secondary claimant (such as a partner) to qualify for a flexible PPL day are clear and clarify any ambiguity in the drafting language.

Thank you for bringing the Committee's concerns to my attention. I trust this information is of assistance.

Yours sincerely

Anne Ruston

30 / 7 / 2021