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Subject: Updates - Baby Priya's bill; s 22(1)

Hi s 22(1)

Some updates from WRL, for noting:

1. Potential questions regarding Baby Priya's bill
s 22(1)

Baby Priya's bill: definition of a 'stillborn child'

- On 10 October during Senate Estimates, Senator Alex Antic asked the Department of Social Services (DSS) and Senator the Hon Jenny McCallister, Minister for the National Disability Insurance Scheme, about the Stillborn Baby Payment. The Hansard extract is **attached** for reference.
- Senator Antic's questions focused on:
 - the intent of the payment
 - the rationale for providing the payment when a parent terminates their pregnancy after 20 weeks gestation
 - whether DSS holds data on the applicant having 'a tragic natural stillbirth or an abortion,' and
 - whether legislation should clearly delineate between the two.
- In response, DSS and Senator McAllister advised that they are not aware of any cases where a parent has claimed a Stillborn Baby Payment 'inappropriately'. They expressed confidence that medical professionals would work with parents in these circumstances.
- Baby Priya's Bill adopts the same definition of a stillborn child as used in the Stillborn Baby Payment and government-funded Parental Leave Pay. As such, similar questions may arise during debate on the Bill. For further detail, see questions 41–43 in the Q&A section of the debate pack (excerpt attached). The department does not recommend any additions to the debate material at this stage.
- We will continue to monitor media coverage and public commentary for any emerging issues or increased attention on this topic.

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Regards
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The Department of Employment and Workplace Relations acknowledges the traditional owners and custodians of country throughout Australia and their continuing connection to land, waters and community. We pay our respects to them and their cultures, and Elders past, present and emerging.

CHAIR: Senator Antic has the call.

Senator ANTIC: Thanks, Chair. This is a handful of questions. I'm interested in the justification for the use of funds intended to support women who've been through the grief of a stillborn baby. Through the parenting payment, those funds have been used for an abortion after 20 weeks and up to birth. What is the rationale for that payment being made in those circumstances?

Mr Lye: I'm not sure that we'd agree with the characterisation of that question.

Senator ANTIC: What's wrong with that statement?

Mr Flavel: Senator, as you, I think, would know, the payment is a stillborn baby payment. The requirements around what a stillborn birth is are prescribed in legislation. Under the family assistance act, a stillborn child needs to weigh at least 400 grams at delivery or be a child whose period of gestation was at least 20 weeks and who has not breathed since delivery and whose heart has not beaten since delivery. A qualified medical professional is required to provide written evidence that the stillborn child was delivered.

Senator ANTIC: All of which is as it is. But it is the case, is it not, that if a woman—presumably, not a 'person'—has an abortion after 20 weeks and up to birth, she is eligible for that payment in those circumstances?

Mr Flavel: I think what you would be describing are circumstances in which the medical professional is certifying or suggesting that an abortion is a stillborn.

Senator ANTIC: Is that the intent of the payment fund? Was that the original intent of it?

Mr Flavel: The intent, as per the name, is to make a payment in respect of the incredibly tragic circumstances in which somebody might find themselves with a stillborn baby.

Senator ANTIC: Does the department collect data from the application form as to whether the applicant had a tragic natural stillbirth or an abortion?

Mr Flavel: Services Australia collects this information in the forms for the purposes of processing the payment. I'm happy to check, on notice, but, as I said, it's the medical professional who is certifying that it's a stillborn baby, for the purposes of the payment.

Senator ANTIC: So you can't tell me how many payments, in the last three years, have been made for abortion procedures after 20 weeks?

Mr Flavel: What I will say is that we're not aware of circumstances in which the payment is being claimed for abortion. I'm happy to check with Services Australia whether they have any documentary evidence. Certainly, from what I've seen, the certification process by the medical professional and the way in which the process itself works does not allow for circumstances in which somebody has an abortion and then claims the stillborn baby payment.

Senator ANTIC: Is paid parental leave accessible in those circumstances, if someone were to have an abortion after 20 weeks and up to birth? Are you entitled to both payments in those circumstances?

Mr Flavel: I'm not going to characterise it in that way. You keep referring to abortion. There are a set of arrangements around a stillborn baby and what occurs in the tragic circumstances of a stillborn birth. Under those arrangements for a stillborn birth, you can be eligible for a stillborn baby payment. You can also be separately eligible—you can't get both—for paid parental leave, recognising the requirement for women and for parents generally to access leave in the period after a stillborn birth.

Senator ANTIC: Minister, does the government have a view as to whether or not that payment should be available in both circumstances, or should there be a delineation between the two?

Senator McAllister: Senator, the government supports parents who lose a baby through stillbirth. As the official has indicated to you, the medical professional certifies that stillbirth. I'm not sure what question in particular you're asking.

Senator ANTIC: Does the government take the view that it is simply okay for a medical professional to use what is, I think, a fairly sterile approach to what is a tragic incident and to effectively class an intentional abortion as the same thing as a stillbirth, which it is clearly not? It's all very well for us to dance around the issue, but the issue is that they are separate and distinct tragedies, I would say. My question is: does the government see the need for there to be some form of amendment to the act in order to enable that stillborn payment to be made for families that have suffered from the tragedy of stillbirth?

Senator McAllister: I don't have any evidence that the stillborn baby payment is being used inappropriately. I think the broader point we make is that we trust medical professionals—**Senator ANTIC:** Well, it is being used.

Senator McAllister: and women and their families to work through what can be very complex and traumatic circumstances.

Senator ANTIC: What is complex about the difference between the two incidents?

Senator McAllister: Losing a baby is complex and traumatic. A stillbirth can be complex and traumatic for families. We trust women to work through that with medical professionals— **Senator ANTIC:** We are talking about a baby at 20 weeks.

Senator McAllister: Are you interrupting? I provided an answer, Senator Antic.

Senator ANTIC: Is it the government's position that it is a baby at 20 weeks, therefore?

Senator McAllister: Senator, I've indicated to you that these are questions that we trust medical professionals to work through with women and their families.

Senator ANTIC: Good stuff. Thank you, Chair.

CHAIR: I'll go to Senator Liddle.

Fair Work Amendment (Baby Priya's) Bill 2025

s 22(1)

Fair Work Amendment (Baby Priya's) Bill 2025

s 22(1)

TERMINATION

Q41. Does this Bill mean employers have to provide employer-funded paid parental leave if an employee has a termination? Should the Bill make a distinction between stillbirths and terminations?

Q42. Is there a risk this Bill could be misused for financial gain?

Q43. Will this Bill limit employer discretion?

Q44. Do you have data about how many people terminate their pregnancies after 20 weeks who may be eligible for employer-funded paid parental leave?

STILLBORN BABY PAYMENT AND THE BILL

s 22(1)

Q46. What is the eligibility criteria for the Stillborn Baby Payment? How many people have accessed the payment, if after a termination?

Parts of document 10 (pages 74 - 123) have been removed under section 22(1)(a)(ii) of the Freedom of Information Act 1982.

Fair Work Amendment (Baby Priya's) Bill 2025

Termination

Q41. Does this Bill mean employers have to provide employer-funded paid parental leave if an employee has a termination?

Should the Bill make a distinction between stillbirths and terminations?

- This Bill does not create an entitlement to employer-paid parental leave. It only applies where there is a pre-existing entitlement but it is unclear what happens to that entitlement if a child is stillborn or dies after birth.

IF PRESSED:

- The government is focussed on giving grieving parents and their employers more certainty at a very difficult time.
- The Bill does this by using the current definition of stillborn child that applies to unpaid parental leave in the Fair Work Act and government funded Paid Parental Leave in the *Paid Parental Leave Act 2010* (Cth).

IF PRESSED:

- The Fair Work Act uses a medical definition of stillborn.
- A stillborn baby is a baby that weighs at least 400 grams or has reached at least 20 weeks gestation but hasn't breathed or had a heartbeat since their delivery.
- Laws regulating late-term termination are a matter for states and territories.

Q42. Is there a risk this Bill could be misused for financial gain?

- This Bill provides greater certainty for grieving parents around their entitlements.
- There is a low risk of this reform being exploited for financial gain, as the circumstances are rare.

Q43. Will this Bill limit employer discretion?

- Employers will still be able to negotiate with their employees whether and how they provide employer-funded paid parental leave.

IF PRESSED:

- The Bill simply ensures that, where such leave is provided, there are clear expectations about how it will apply in the event of a stillbirth or the death of a child.
- The Bill provides greater clarity for employers. This means managers won't need to make judgement calls in emotionally difficult circumstances involving grieving parents.

Q44. Do you have data about how many people terminate their pregnancies after 20 weeks who may be eligible for employer-funded paid parental leave?

- We do not have data on how many people who terminate their pregnancy after 20 weeks may be eligible for employer-funded paid parental leave.
- The Bill has a targeted purpose to provide clarity for grieving parents. While this Bill will make a big difference to impacted parents, the number of parents impacted is small. This Bill will only interfere where it is unclear from an employee's terms and conditions of employment what they are entitled to in the event of stillbirth or death of a child.

Fair Work Amendment (Baby Priya's) Bill 2025

Stillborn Baby Payment and the Bill

Q46. What is the eligibility criteria for the Stillborn Baby

Payment? How many people have accessed the payment, if after a termination?

- A medical definition of stillborn is used for Paid Parental Leave and the Stillborn Baby Payment aligns with the definition used by the Australian Institute of Health and Welfare and the legislated definition of all state and territory Registrars of Births, Deaths and Marriages.
- A stillborn baby is a baby that weighs at least 400 grams or has reached at least 20 weeks gestation but hasn't breathed or had a heartbeat since their delivery.
- Questions about the Stillborn Baby Payment are a matter for the Minister for Social Services.

Document 11 (pages 132 - 134) has been removed under section 47C of the Freedom of Information Act 1982.