

EXPLANATORY STATEMENT

Social Security (Public Interest Certificate Guidelines) (FaHCSIA) Determination 2010

Summary

The *Social Security (Public Interest Certificate Guidelines) (FaHCSIA) Determination 2010* (the Guidelines) are made under paragraph 209(a)(i) and subsection 209(b) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of the Guidelines is to assist the Secretary (or the delegate) of the Department of Families, Housing, Community Services and Indigenous Affairs in the exercise of power under paragraph 208(1)(a) to disclose information and in the determination of what is considered to be 'the public interest'.

The disclosure of protected information to a person, under paragraph 208(1)(a) of the Act in accordance with the Guidelines, does not give that person the authority to disclose that information to further parties, unless this disclosure is for the purpose for which the information was disclosed to the person, as permitted by paragraph 202(2)(e) of the Act, or the disclosure is otherwise authorised under law.

Section 209 of the Act makes the Guidelines a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. This means that the Guidelines are a legislative instrument because of subsection 6(d) of the *Legislative Instruments Act 2003*.

Changes to the 2008 Guidelines

The Guidelines revoke the *Social Security (Public Interest Certificate Guidelines) (FaHCSIA) Determination 2008*. The new Guidelines largely replicate the 2008 Guidelines, subject to the following changes.

There is an amendment to section 5 to change the definition of 'Minister' to include a Minister of State administering any part of the family assistance law. This is to clarify that a Minister includes a Minister of State administering any part of the family assistance law.

There is an amendment to subsection 11(c), to remove the words 'or an incorrectly held opinion'. This is in response to an undertaking that the Minister made to the Senate Standing Committee on Regulations and Ordinances. An incorrectly held opinion is an opinion formed on the basis of incorrect information. However, the words 'correcting a mistake of fact, a misleading perception or impression, [or] a misleading statement' will cover the circumstance that an opinion is held on the basis of incorrect information. The words 'or an incorrectly held opinion' are therefore redundant.

There is an amendment to section 12 in order to reduce disclosures:

1. to a recognised authority and only in response to requests from appropriate bodies with recognised authority for investigating reported missing persons; and
2. regarding a reported missing person—being an individual who has been accepted as a missing person by a recognised authority with responsibility for investigating reported missing persons.

There is an amendment to subparagraph 13(1)(b)(iii) to reduce disclosures to an individual or authority responsible for the administration of an estate in accordance with an appropriate State or Territory law. This will clarify that information, such as bank account details, should only be released to individuals who are legally responsible for the administration of a deceased person's estate.

There is an amendment to subparagraph 13(1)(b)(iv), to replace the subparagraph with:

'is in relation to Centrelink transferring information to the relevant authority responsible for administering the social security system in another country regarding the deceased person who, prior to their death, was qualified for, or in receipt of an Australian social security payment or held a Commonwealth Seniors Health Card; and'.

This is intended to expand the category of information Centrelink can disclose to an authority responsible for administering the social security system in another country. Previously, only information regarding deceased persons who were qualified for, or in receipt of, Australian age pension could be disclosed to the United Kingdom authority. The changes now permit information regarding deceased persons who were qualified for, or in receipt of, any social security payment, or were holding a Commonwealth Seniors Health Card, to be disclosed to an authority responsible for the social security system in any relevant country.

New section 16 allows for the disclosure of information about a public housing, or other State or Territory managed housing, resident or tenant where the disclosure is necessary to facilitate rent calculation and rent deduction in relation to public housing or State or Territory managed housing; or the disclosure is necessary to facilitate the administration of an income confirmation service in relation to public housing, or State or Territory managed housing, to avoid mistakes, underpayments and overpayments of rent, pensions, benefits and allowances.

New section 17A allows for the disclosure of the name and contact details of Centrelink customers, where these details would be used by a State or Territory government for the purpose of contacting the customer to offer compensation in various reparation processes, such as the 'stolen wages' reparations in Queensland. This would enable the disclosure of information that was formerly undertaken by the In Touch Program.

New section 17B authorises the disclosure of information such as the address of a parent or relative of a child, to a State or Territory Child Protection agency, where the agency is seeking to contact the parent or relative but there is no immediate threat to the life, health or welfare of the child. This would enable the disclosure of information that was formerly undertaken by the In Touch Program.

There is an amendment to section 18 to clarify that information may be disclosed if the disclosure is necessary for the purpose of facilitating the progress, or resolution, of any matters of relevance of a department that is administering any part of the family assistance or social security law, so long as the matter falls within the portfolio responsibilities of that department.

There is an amendment to the definition of 'parent' in subsection 19(2), to substitute the words 'natural or adoptive parent' with the words 'natural parent, adoptive parent or relationship parent'. This brings this provision into line with the amendments to social security and family assistance law made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (the Law Reform Act) which eliminates discrimination against same-sex couples, and the children of same-sex relationships, in Commonwealth legislation. The Law Reform Act extends the definition of 'parent' to include the term 'relationship parent.'

A detailed description of the full Guidelines follows.

Part 1 – Preliminary

Part 1 sets out preliminary information about the Guidelines, namely, the name of the Guidelines (**section 1**), commencement (**section 2**), revocation of the former instrument (**section 3**), purpose (**section 4**), definitions (**section 5**) and matters to which the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs is to have regard (**section 6**).

Section 6 provides for matters to which the Secretary must have regard in the giving of a public interest certificate. The Secretary must have regard to any situation in which a person (to whom the information relates) is, or may be, subject to physical, psychological or emotional abuse. In such a situation, the Secretary must also have regard to whether the person may be unable to give notice of his or her circumstances because of age, disability or social, cultural, family or other reasons. Section 6 is intended to emphasise the importance of the release of protected information where individuals are not in a position to seek assistance themselves.

Part 2 – Guidelines – public interest certificate (general)

Part 2 sets out how the disclosure of protected information can generally occur under paragraph 208(1)(a) of the Act.

Subsection 7(1) provides that a public interest certificate may be given by the Secretary if:

- the information cannot reasonably be obtained from another source other than the Department or Centrelink; and
- the disclosure is to a person who has sufficient interest in the information; and
- the Secretary is satisfied that disclosure is for the purpose of section 8, 9, 10, 11, 12, 14, 15, 16, 17, 17A, 17B, 18 or subsection 13(1) or 13(2).

Subsection 7(2) specifies that a person will have a *sufficient interest* in the relevant information if the person either has a genuine and legitimate interest in the information or the person is a Minister.

Section 8 permits disclosure of protected information to prevent, or lessen, a threat to the life, health or welfare of a person. This reflects the terms of Information Privacy Principal (IPP) 11(1)(c) in section 14 of the *Privacy Act 1988*.

Paragraph 9(1)(a) permits disclosure of protected information if the disclosure is necessary:

- for the enforcement of a criminal law in relation to an indictable offence punishable by imprisonment of 2 years or more;
- for the enforcement of a law imposing a pecuniary penalty equivalent to 40 penalty units or more; or
- to prevent an act that may have a significant adverse effect on the public revenue.

In general terms this reflects the terms of IPP 11(1)(e) in section 14 of the *Privacy Act 1988*.

Paragraph 9(1)(b) allows for disclosure where it relates to an offence, or threatened offence, against a Commonwealth employee or Commonwealth property, or in departmental or Centrelink premises.

Subsection 9(2) defines the terms ‘criminal law’ and ‘penalty unit’.

Section 10 permits disclosure of protected information to correct a mistake of fact in relation to the administration of a program of the relevant department where, either the integrity of the program is at risk if the mistake of fact is not corrected, or the mistake of fact relates to a matter that has been, or will be, published.

Section 11 permits the disclosure of information if the disclosure is necessary to brief a Minister:

- to enable that Minister to consider complaints or issues by, or on behalf of a person, and respond to that person accordingly;
- for a meeting or forum that the Minister is to attend;
- in relation to issues raised, or proposed to be raised by or on behalf of a person so that the Minister can respond by correcting a mistake of fact, a misleading perception or impression, or a misleading statement;
- about a Centrelink error or delay; or
- about an anomalous or unusual operation of the social security law.

Section 12 permits disclosure of protected information which is necessary to assist a court, coronial enquiry, Royal Commission, department or any other authority of a State or Territory in relation to the whereabouts of a reported missing person or to locate a missing person. However, disclosure will only be possible if there is no reasonable ground to believe that the missing person would not want the information disclosed.

A reported missing person is a person who has a missing person's report filed with the police.

Subsection 13(1) allows disclosure of protected information about a deceased person which is:

- necessary to assist a court, coronial enquiry, Royal Commission, department or any other authority of a State or Territory in relation to a deceased person;
- necessary to locate a relative or beneficiary of the deceased person;
- necessary to help an individual or authority responsible for the administration of the estate of the deceased person in relation to the administration of the estate of the deceased person; or
- is in relation to Centrelink transferring information to the relevant authority responsible for administering the social security system in another country regarding the deceased person who, prior to their death, was qualified for or in receipt of an Australian social security payment or held a Commonwealth Seniors Health Card.

However, disclosure will only be possible if there is no reasonable ground to believe that the deceased person would not have wanted the information disclosed.

Subsection 13(2) permits disclosure of protected information where the information is to establish the death of a person or the place where the death of the person is registered.

Section 14 permits disclosure of protected information where it is necessary to ensure a child who should be enrolled in, or attending, school, is enrolled or attending.

As part of provisions contained in Part 3B of the Act, Centrelink may collect information from parents or schools regarding the enrolment or attendance of children at school. However, State and Territory education departments and schools may not necessarily have certain information on their own records, for example they may not be aware of children who are not enrolled. Section 14 will facilitate exchange of information to ensure children who should be enrolled and attending school, under State and Territory laws, are so enrolled and attending in accordance with those laws.

Attendance at school is one of the principal indicators for school achievement and students who are regularly absent from school are those at greatest risk of dropping out of school early, becoming long-term unemployed, dependent on welfare and being involved in the justice system. It is therefore in the public interest for information held by the Commonwealth, about children of compulsory school age who are not enrolled, or attending regularly, to be provided to relevant State/Territory authorities and schools. This is so action can be taken to facilitate enrolment and improve attendance in accordance with State/Territory laws.

Section 15 permits the disclosure of information where it is necessary to plan for, meet or monitor infrastructure and resource needs in one or more schools.

It is estimated that approximately 20,000 children of compulsory school age are not currently enrolled in school in Australia. Currently State/Territory authorities and schools possess little or no information that particular schools have sufficient capacity to handle additional demand that would be placed on them when previously non-enrolled children are subsequently enrolled. The disclosure of protected information about non-enrolled children will assist in the identification of geographic areas of potential demand in relation to school infrastructure and teacher capacity. This is particularly important in the Northern Territory where the Territory government will need to ensure it can accommodate a potentially significant increase in student numbers in particular areas as a result of efforts to increase school enrolment and attendance by children.

Importantly, information can only be disclosed where a certificate has been issued setting out that it is necessary for the purposes as described in new sections 14 and 15 for the disclosure to occur. Any certificate would also clearly set out the specific information that can be disclosed. In respect of any disclosures for determining infrastructure requirements, a decision would be made as to whether de-identified statistical data would suffice. In instances where this would not assist in infrastructure planning, protected information may be disclosed.

Sections 14 and 15 are also subject to section 7 of this Determination which requires that any disclosure to a person can only occur where that person has genuine and legitimate interest and the information cannot reasonably be obtained other than from Centrelink or the Department. A certificate would

also specify who specifically disclosure can be made to in a given circumstance.

Section 16 allows for the disclosure of information about a public housing or other State or Territory managed housing resident or tenant to a department or any other authority of a State or Territory where it is necessary to facilitate:

- rent calculation and rent deduction in relation to public housing or State or Territory managed housing; or
- the administration of an income confirmation service in relation to public housing or State or Territory managed Housing to avoid mistakes, underpayments and overpayments of rent, pensions, benefits and allowances.

An example of the application of section 16 and the main impetus for introducing the section is the Automatic Income Confirmation Service (AICS). There is an existing Income Confirmation service (ICS), which is voluntary, under which all members of public housing households, who are also Centrelink clients, can authorise their relevant State or Territory housing authority (SHA) to automatically confirm details of their income directly from Centrelink. Those who do not participate in ICS must regularly verify their income to the SHA to allow for a reassessment of rent by SHA staff. The manual process of income verification consumes considerable resources for both SHAs and Centrelink. It also requires Centrelink clients to regularly respond to correspondence seeking income confirmation. If the response is not timely, action may be taken to adjust the rent and there are regular occurrences of incorrect rent payments. These outcomes increase the risk of eviction and consequently homelessness.

Information from SHAs indicate that there are at least 700 public housing evictions a year due to non-payment of rent with many more tenants each year owing rent, many without notice. On 29 November 2008 the Council of Australian Governments agreed to the National Affordable Housing Agreement (NAHA) which included the introduction of improved information exchange between the Commonwealth and the States and Territories as well as automatic rent deductions for public housing tenants to improve the operational efficiency of public housing and to reduce evictions from public housing as a priority area of reform.

Section 16 will authorise the transfer of income details for people in public housing from Centrelink to SHAs to allow for the accurate calculation of rents. In the context of AICS, section 16 will authorise the transfer of income details held by Centrelink to SHAs every six months and from time to time in response to SHA requests, which will help prevent evictions from incorrectly calculated or unpaid rent. The disclosure of information will provide administrative efficiency for both government agencies and those in public housing who need to have their rents determined according to their household income. Additionally, this disclosure of information will reduce the risk of privacy breaches, as automation will reduce SHA staff access to the income information.

Subsection 17(1) provides for relevant protected information to be disclosed where it is necessary for the establishment of the Queensland Family Responsibilities Commission as well as in assisting in the performance of its functions and exercise of its powers.

This section is aimed at supporting the Family Responsibilities Commission which was established by the *Family Responsibilities Commission Act 2008 (Qld)* (FRC Act). This statutory body underpins the Cape York Welfare Reform Trials.

Under Part 4 of the FRC Act, a notice about a person, called an 'agency notice', will be given to the FRC in a wide range of circumstances. These circumstances include: where a child who is a dependant of the person is not enrolled in school, is not meeting school attendance requirements or is the subject of a child protection notification; where the person is convicted of an offence in the Magistrates Court; and where the person is in breach of certain tenancy obligations. However, the FRC can only hold a conference about a person for whom it has received an agency notice if the person is a 'community member' (see sections 7, 8 and 49 and the definition of 'relevant person' in the Schedule to the FRC Act).

Accordingly, for each agency notice that the FRC receives, the FRC must determine, before holding a conference: who is the 'relevant person' for the agency notice; whether the relevant person is a 'welfare recipient' within the meaning of section 8 of the FRC Act; and whether the person is a 'community member' within the meaning of section 7 of the FRC Act.

The provision of this information by the Department, through Centrelink, to the FRC will facilitate the operation of the Cape York Welfare Reform Trials: it will support the FRC's decision-making, enabling the FRC to correctly identify persons who are within the jurisdiction of the FRC and ensuring that conferences are held, and decisions are made, on a valid basis.

Subsection 17(1) is also subject to section 7 of this Determination which requires that any disclosure to a person can only occur where that person has genuine and legitimate interest and the information cannot reasonably be obtained other than from Centrelink or the Department. A certificate issued under section 208 of the Act would also specify who disclosure can be made to in a given circumstance.

Subsection 17(2) confirms that the Family Responsibilities Commission means the Commission established by section 9 of the *Family Responsibilities Commission Act 2008 (Qld)*.

Section 17A allows for the disclosure of protected information where the information will be used by a State, Territory or the Commonwealth government for the purpose of contacting the customer in respect of compensation or other forms of recompense in various reparation processes, including the 'stolen wages' reparations in Queensland. This helps ensure

that this assistance, formerly undertaken under the In Touch Program, can still be provided.

Section 17B allows for the disclosure of information about a parent or relative of a child to State or Territory Child Protection agencies where the agency is seeking to contact the parent or relative when section 8 of these guidelines are not available because there is no identifiable threat to the life, health or welfare of the child. For example, section 17B may apply when a child protection agency is seeking to contact a parent to assist in a court case. This section helps ensure that this assistance, formerly undertaken under the In Touch Program, can still be provided.

Section 18 provides that protected information can be disclosed to facilitate the progress or resolution of any matters that are relevant to a department administering any part of the social security or family assistance law, where the matter is within the portfolio responsibility of that department. The Department and other departments that administer the social security law or family assistance law also administer programs and schemes that deliver additional support and assistance to people in receipt of social security and family assistance payments or entitlements. This additional support does not necessarily fall within the social security law or the family assistance law. Section 18 enables the disclosure of protected information in the public interest where it is necessary to facilitate or progress a departmental program or scheme that is designed to deliver services to support and assist a group of community members wholly or partly comprised of social security or family assistance recipients, whether or not that program or scheme falls within the social security law or family assistance law.

This section enables a delegate to disclose information where the disclosure is not already authorised by section 202 of the Act, or by another section in these Guidelines. Section 18 is also subject to section 7 of this Determination which requires that any disclosure to a person can only occur where that person has a genuine and legitimate interest and the information cannot reasonably be obtained other than from Centrelink or the Department. A certificate under section 208 of the Act would also specify who specifically disclosure can be made to in any given circumstance. Section 18 mirrors an equivalent provision of the *Family Assistance (Public Interest Certificate) (FaHCSIA) Guidelines 2010*.

Part 3 – Guidelines – public interest certificate (homeless young person)

Part 3 sets out how the release of protected information can occur under paragraph 208(1)(a) of the Act in relation to homeless young people for the purposes of a social security payment.

Part 3 has been renumbered to account for the three new sections inserted in Part 2 of the Guidelines.

Section 19 provides that this Part applies in regard to a homeless young person and provides a definition for 'homeless young person' and 'parent' for the purposes of Part 3.

Subsection 20(1) provides that a public interest certificate may be given by the Secretary if:

- the information cannot be obtained from another source other than the Department or Centrelink;
- the Secretary is satisfied that no harm will result to the homeless young person if information is disclosed; and
- the Secretary is satisfied that the disclosure is for the purpose of section 21, 22, 23 or 24.

Subsection 20(2) provides that a public interest certificate may be given by the Secretary if:

- the information cannot be obtained from another source other than the Department or Centrelink;
- the disclosure is to a welfare authority of a State or Territory;
- the homeless young person, to whom the information relates, is either in the care of a welfare authority of a State or Territory or is under 15 years of age; and
- the Secretary is satisfied that no harm will result to the homeless young person if information is disclosed.

Section 21 permits disclosure of protected information to an appropriate authority if the information is about a family member of a homeless young person and the Secretary is satisfied that the homeless young person or a family member of the homeless young person has been subjected to abuse or violence.

Section 22 permits disclosure of information if it is necessary to verify the circumstances by which a homeless young person under the age of 15 years may qualify for a social security payment, and to verify the circumstances of the young person, a parent or the parents of a homeless young person must be asked whether the homeless young person is able to live at the home of his or her parent/s.

Section 23 permits disclosure of information to facilitate reconciliation, or possible reconciliation, between a homeless young person and his or her parent/s.

Section 24 permits disclosure of information about a homeless young person to a parent, or parents, of a homeless young person if it is necessary to assure the parent or parents that the homeless young person has been in contact with the relevant department or with Centrelink. It is intended that this section will only be used where the parent or parents have sought such an assurance.

Consultation

FaHCSIA has advised the Department of Education, Employment and Workplace Relations and Centrelink of these proposed changes to the FaHCSIA Guidelines. Centrelink proposed the changes to the sections dealing with reparations, child protection agencies, missing persons and deceased persons. The Office of the Privacy Commissioner was consulted in the making of this determination. No public consultation was considered necessary.

Regulatory Analysis

These Guidelines do not require a Regulatory Impact Statement and/or a Business Cost Calculator Figure. These Guidelines are not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact. It is not expected that any compliance costs will be incurred by business as a result of these Guidelines.