

EXPLANATORY STATEMENT

Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1)

Summary

The *Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1)* (the Determination) is made under section 124C of the *Social Security (Administration) Act 1999* (the Act).

The Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform, as well as making the Determination in her own capacity, is also making the Determination on behalf of the Minister for School Education, Early Childhood and Youth, and the Minister for Tertiary Education, Skills, Science and Research.

Purpose

The purpose of the Determination is to amend the *Social Security (Administration) (Schooling Requirement) Determination 2009 (No. 1)* (Schooling Requirement Determination) to specify matters for the operation of new Division 3A of Part 3C of the Act, which came into effect on 1 July 2012.

The Determination amends the Schooling Requirement Determination to provide for factors the Secretary must have regard to when determining whether special circumstances apply that justify a person's failure to comply with an attendance plan or compliance notice, or enter into a school attendance plan or in determining the date of effect of an arrears payment under subsection 124NE (2), subparagraphs 124NG (1) (c) (ii) and 124NG (2) (c) (ii), or paragraph 124NG (5) (b) of the Act. The Determination does not provide an exhaustive list of the matters and circumstances that the Secretary must consider. Rather, by requiring the Secretary to consider the 'personal and family circumstances of the person', the Determination requires that a wide range of considerations (for example, illness, bereavement, cultural business etc.) must be taken into account when considering whether special circumstances apply. The Secretary must also consider whether an act or omission made by the school or by the Secretary has contributed to a person's ability to comply with a compliance notice or enter into and comply with a school attendance plan.

The Determination also provides for the meaning of 'schooling requirement period' for the purpose of subsection 124B (2) of the Act in relation to Division 3A of Part 3C of the Act.

Explanation of Provisions

Section 1 provides that the name of the Determination is the *Social Security (Administration) (Schooling Requirement) Amendment Determination 2012 (No. 1)*.

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 provides that the Schooling Requirement Determination is amended as set out in Schedule 1.

Schedule 1 – Amendments to the *Social Security (Administration) (Schooling Requirement) Determination 2009 (No. 1)*

Item 1 inserts new paragraph 5 (c) into the Schooling Requirement Determination which provides for the meaning of ‘schooling requirement period’ for subsection 124B (2) of the Act, in relation to Division 3A of Part 3C of the Act.

Item 2 repeals and replaces the heading in section 7 of the Schooling Requirement Determination.

Item 3 inserts new subsection 7 (2A) into the Schooling Requirement Determination. New subsection 7 (2A) sets out matters that the Secretary must have regard to in determining whether special circumstances apply to a schooling requirement person that justify the person’s failure to comply with a compliance notice for subsection 124NE (2) of the Act.

Item 4 inserts a reference to subsection 124NE (2) into subsection 7 (3) of the Schooling Requirement Determination. The effect of this amendment is that the Secretary may exercise discretion in determining whether special circumstances apply that justify a schooling requirement person’s failure to comply with a compliance notice for subsection 124NE (2) of the Act. That is, the matters specified in new subsection 7 (2A) are not an exhaustive list of the matters and circumstances that the Secretary can have regard to in determining whether special circumstances apply for subsection 124NE (2) of the Act.

Item 5 repeals and replaces the heading in section 8 of the Schooling Requirement Determination.

Item 6 inserts new subsections 8 (1A) and 8 (1B) into the Schooling Requirement Determination. New subsection 8 (1A) sets out matters that the Secretary must have regard to in determining whether special circumstances apply to a schooling requirement person that justify the person’s failure to enter into a school attendance plan for subparagraph 124NG (1) (c) (ii) of the Act, or that justify the person’s failure to comply with a school attendance plan in force in relation to the person for subparagraph 124NG (2) (c) (ii) of the Act.

New subsection 8 (1B) sets out matters that the Secretary must have regard to in determining whether special circumstances apply to a schooling requirement person that justify the person’s failure to comply with a compliance notice prior to the reconsideration for paragraph 124NG (5) (b) of the Act.

Item 7 inserts a reference to subparagraph 124NG (1) (c) (ii), 124NG (2) (c) (ii) and paragraph 124NG (5) (b) of the Act into subsection 8 (2) of the Schooling Requirement Determination. The effect of this amendment is that the Secretary may exercise discretion in determining whether special circumstances apply that justify a schooling requirement person’s failure to enter into a school attendance plan, failure to comply with a school attendance plan, and failure to comply with a compliance notice for subparagraph 124NG (1) (c) (ii), 124NG (2) (c) (ii) and paragraph 124NG (5) (b) of the Act, respectively. That is, the matters specified in new subsections 8 (1A) and 8 (1B) are not an exhaustive list of the matters and circumstances that the

Secretary can have regard to in determining whether special circumstances apply for the relevant provisions.

Consultation

Consultation regarding this Determination was undertaken with the Department of Families, Housing, Community Services and Indigenous Affairs, the Department of Industry, Innovation, Science, Research and Tertiary Education, and the Department of Human Services.

Regulatory Impact Analysis

This Determination is not likely to have a direct or substantial indirect effect on business and does not restrict competition.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Determination is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

Part 3C of the *Social Security (Administration) Act 1999* (the Act) provides a legislative basis for the *Improving School Enrolment and Attendance through Welfare Reform Measure* (SEAM). The Determination amends the *Social Security (Administration) (Schooling Requirement) Determination 2009 (No. 1)* (Schooling Requirement Determination) to provide for factors the Secretary must have regard to for the purposes of SEAM when determining whether special circumstances apply, and to specify the schooling requirement period.

Special circumstances

The Secretary must have regard to factors specified in the Schooling Requirement Determination when determining whether special circumstances apply under subsection 124NE (2), subparagraphs 124NG (1) (c) (ii) and 124NG (2) (c) (ii), and paragraph 124NG (5) (b) of the Act. The effect of these provisions is that if the Secretary is satisfied that there are special circumstances applying – ‘as determined in accordance with the schooling requirement determination (if any)’ – that justify a person’s failure to do certain things required of them, the person’s income support payments will not be suspended or cancelled, or arrears of those payments will be paid.

Schooling requirement period

Whether SEAM applies to a person depends relevantly upon whether the person has, or had, a ‘schooling requirement child’. Unless the child is a dependent child of the person, a person has a ‘schooling requirement child’ at a particular time if that time occurs during a ‘schooling requirement period’ and various other requirements are met. Subsection 124B (2) of the Act provides that a schooling requirement period is the period worked out ‘in accordance with the schooling requirement determination.’

Human rights implications

The Determination engages the following human rights:

Right to social security

Article 9 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to social security.

Article 26 of the Convention on the Rights of the Child recognises the right of every child to benefit from social security.

Special circumstances

The objective of SEAM is to improve the school enrolment and attendance levels of compulsory school age children. The right to education is recognised in Article 13 of the International Covenant of Economic, Social and Cultural Rights and Article 28 of the Convention on the Rights of the Child. Article 28 of the Convention of the Rights of the Child includes the obligation of State parties to take measures to encourage regular attendance at school.

To meet the objective of SEAM, Division 3A of Part 3C of the Act provides that if a recipient of certain social security payments or payments made under the *Veterans' Entitlements Act 1986* has a child who is failing to attend school as required by State or Territory law, they may be required to: attend a conference and enter into a school attendance plan; comply with a school attendance plan; or comply with a compliance notice issued under Division 3A of Part 3C of the Act. These requirements are all directed towards improving the relevant child's attendance at school. If a person does not do the things required of them, their social security payment or payment made under the *Veterans' Entitlements Act 1986* may be suspended. In some cases of extended non-compliance, their payments may be cancelled. Placing conditions on a person's right to social security in these circumstances is reasonable, necessary and proportionate in view of the high importance of regular school attendance for compulsory school age children.

The effect of subsection 124NE (2), subparagraphs 124NG (1) (c) (ii) and 124NG (2) (c) (ii), and paragraph 124NG (5) (b) of the Act is that if the Secretary is satisfied that there are special circumstances applying – ‘as determined in accordance with the schooling requirement determination (if any)’ – that justify a person's relevant non-compliance, the person's payments will not be suspended or cancelled, or arrears will be paid. This measure is designed to ensure that only those who are unwilling to comply with relevant requirements (rather than those who are unable), may have their relevant payments suspended/cancelled under SEAM.

The Determination sets out the matters that the Secretary must have regard to when determining whether special circumstances apply. Relevantly, the Determination provides that the Secretary must have regard to the ‘personal and family circumstances’ of a person. The effect of this requirement is that the Secretary must take into account a very wide range of factors (for example, illness, bereavement and cultural business etc.) when deciding whether special circumstances apply. The phrase ‘personal and family circumstances of the person’ is deliberately broad to encompass a large range of matters.

The Secretary must also consider whether an act or omission made by the relevant school or by the Secretary has contributed a person's ability to comply with the relevant requirements.

If, after considering the wide range of factors the Secretary is required to have regard to, the Secretary is satisfied that special circumstances apply which justify a person's failure to enter into a school attendance plan, comply with a school attendance plan, or comply with a compliance notice, the person's relevant social security payment or payment under the *Veterans' Entitlements Act 1986* will not be suspended or cancelled as a result of that failure. This means that such a person will continue to receive their income support payments. As a result, the Determination will safeguard a person's right to social security by ensuring that any limitation

on a person's right to social security because of the application of SEAM is reasonable and proportionate in the individual circumstances of each case.

Schooling requirement period

The Determination amends the Schooling Requirement Determination to specify the schooling requirement period for the purposes of Division 3A of Part 3C and the definition of 'schooling requirement child'.

Under s 124B (1) of the Act, a person is a 'schooling requirement child' of another person *at a particular time* if the child is a dependent child of the person, or if the conditions set out in paragraph 124B (1) (b) are satisfied – including that the time occurs during a 'schooling requirement period'.

This Determination defines the 'schooling requirement period', in relation to Division 3A of Part 3C of the Act to be a school term. This means that if a child is not a dependent child of a person, the child will not be a 'schooling requirement child' of the person during school holidays. Whether a person has (or had) a 'schooling requirement child' will affect whether Part 3C of the Act applies to them, and therefore whether their relevant social security payments or relevant payment under the *Veterans' Entitlements Act 1986* may be suspended or cancelled under Part 3C of the Act. This may safeguard a person's right to social security by ensuring that only those with, or who had, care of a child during a particular period are subject to SEAM.

However, currently, the effect of the Determination defining a 'schooling requirement period' as a school term has no impact on a person's right to social security. The definition is required in order to ensure the definition of 'schooling requirement child' in the Act is operable. It does not practically have the effect of removing the application of Part 3C to a schooling requirement person during school holidays.

Right to a fair hearing

Article 14(1) of the International Covenant on Civil and Political Rights recognises the right of everyone to a fair hearing.

Special circumstances

The Determination will not impact a person's right to a fair hearing. If the Secretary (or the Secretary's delegate) makes a determination in accordance with the Schooling Requirement Determination about whether special circumstances apply in relation to a person, the person will have all the usual guarantees of due process and rights of review provided for under Part 4 of the Act.

Conclusion

The Determination is compatible with human rights because, to the extent it impacts human rights, it safeguards human rights. The Determination does not have an adverse impact on human rights.