

EXPLANATORY STATEMENT

Social Security (Employment Pathway Plan Requirements) Determination 2015 (No. 1)

Summary

The *Social Security (Employment Pathway Plan Requirements) Determination 2015 (No. 1)* (the Determination) is made by the Secretary of the Department of Employment (the Secretary) under subsections 501A(4), 544B(1B), 606(1B) and 731M(1B) of the *Social Security Act 1991* (the Act).

The Determination applies to Parenting Payment Employment Pathway Plans, Youth Allowance Employment Pathway Plans, Newstart Employment Pathway Plans and Special Benefit Employment Pathway Plans. The purpose of this Determination is to set out requirements that cannot be contained in those Employment Pathway Plans.

Background

Recipients of parenting payment, youth allowance, newstart allowance and special benefit who have participation requirements or activity test requirements under the Act are generally required to enter into an employment pathway plan (EPP) which sets out the activities that they must undertake in order to receive their income support payment. The Act empowers the Secretary to determine the requirements contained in a person's EPP, and also requires the Secretary to determine, by legislative instrument, requirements that EPPs must not contain.

The Determination revokes and replaces the *Social Security (Employment Pathway Plan Requirements) (FaHCSIA) Determination 2009 (No.1)* and the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)*.

The Determination replicates the *Social Security (Employment Pathway Plan Requirements) (FaHCSIA) Determination 2009 (No.1)* in relation to what cannot be included in Special Benefit Employment Pathway Plans. The Determination also replicates the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* in relation to what cannot be included in Parenting Payment Employment Pathway Plans, Newstart Employment Pathway Plans and Youth Allowance Employment Plans for persons who are not early school leavers.

The Determination does not replicate the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* in relation to what cannot be included in Youth Allowance Employment Pathway Plans for early school leavers. Paragraph 6 of that determination, which provided that a Youth Allowance Employment Pathway plan to which section 544DA of the Act applies must not contain a requirement to look for work, is not included in the Determination.

Subsection 544DA(2) of the Act provides that a Youth Allowance Employment Pathway Plan for an early school leaver must require the person to undertake approved courses of training or education, or a combination of such courses and other activities that the Secretary considers suitable, for at least the appropriate number of hours per week. Subsection 544DA(4) provides that the appropriate number of hours per week is 25, or such other number as the Secretary considers appropriate having regard to a person's circumstances. The

practical effect of not replicating paragraph 6 of the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* in the Determination is that an early school leaver who is receiving Youth Allowance can have a requirement to look for work in their EPP, where they are not undertaking study or training for at least 25 hours per week, or such other period that the Secretary considers appropriate. This recognises that an education pathway is not always suitable for young people and seeks to ensure that, where appropriate, early school leavers are engaging in activities that keep them connected with the labour market.

Explanation of the provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 January 2016.

Section 3 provides that the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* and the *Social Security (Employment Pathway Plan Requirements) (FaHCSIA) Determination 2009 (No.1)* are revoked.

Section 4 contains interpretation provisions.

Section 5 details the activities that must not be included in a Parenting Payment Employment Pathway Plan, a Youth Allowance Employment Pathway Plan, a Newstart Employment Pathway Plan or a Special Benefit Employment Pathway Plan.

Section 5 consists of three paragraphs. Paragraph 5(a) sets out five specific types of activities (subparagraph 5(a)(i) to (v)) that cannot be a requirement in a Parenting Payment Employment Pathway Plan, a Youth Allowance Employment Pathway Plan, a Newstart Employment Pathway Plan or a Special Benefit Employment Pathway Plan. The activities in paragraph 5(a) are: participation in, seeking to be involved in, or involvement in a criminal activity; involuntarily undergoing psychiatric or psychological treatment; involuntarily undergoing medical treatment; for a person residing in Australia, seeking to be involved in or being involved or undertaking an activity which is required to be undertaken outside of Australia; and seeking work, participating in or being involved in the sex or adult entertainment industry.

While it may be appropriate that people undertake psychological treatment or medical treatment on a voluntary basis to assist them to prepare for work, it is considered inappropriate for involuntary treatment to be a requirement in a Parenting Payment Employment Pathway Plan, a Youth Allowance Employment Pathway Plan, a Newstart Employment Pathway Plan or a Special Benefit Employment Pathway Plan. Subparagraphs 5(a)(ii) and (iii), however, do not preclude such treatment from being included in an Employment Pathway Plan as a voluntary activity if a person so chooses.

Paragraph 5(b) has the effect that any activity that would contravene a Commonwealth, State or Territory discrimination or occupational health and safety law cannot be a requirement in a Parenting Payment Employment Pathway Plan, a Youth Allowance Employment Pathway Plan, a Newstart Employment Pathway Plan or a Special Benefit Employment Pathway Plan. Paragraph 5(b) ensures that in setting activities within an EPP,

specific consideration is given to relevant anti-discrimination and occupational health and safety legislation.

Paragraph 5(c) applies when it has been established by medical evidence that a person has an illness, (including psychological impairment or mental illness) disability or injury. If this has been established, then, as set out in subparagraph 5(c)(i), an activity that medical evidence indicates would aggravate the person's illness, disability or injury cannot be a requirement in a Parenting Payment Employment Pathway Plan, a Youth Allowance Employment Pathway Plan, a Newstart Employment Pathway Plan or a Special Benefit Employment Pathway Plan. Additionally, as provided for in subparagraph 5(c)(ii), an activity in circumstances where appropriate support or facilities to take account of the person's illness disability or injury are not available cannot be a requirement in a person's EPP. This ensures that unreasonable expectations are not made of people with conditions that require special consideration. For example, if a person requires use of a wheelchair accessible toilet, it is inappropriate for a person to be required to attend a training session in a venue without such a toilet.

Consultation

The Department of Employment invited a number of organisations with potential interest in the Determination to participate in consultations regarding it. Of those invited, the following organisations participated in the consultations:

- Mission Australia;
- National Welfare Rights;
- Uniting Care;
- National Employment Services Association; and
- Jobs Australia.

These organisations were provided with the draft Determination and were invited to provide comments. The organisations did not raise any concerns with the draft Determination.

Regulatory Impact Analysis

This Determination does not require a Regulatory Impact Statement (RIS). This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

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

Social Security (Employment Pathway Plan Requirements) Determination 2015 (No 1)

The *Social Security (Employment Pathway Plan Requirements) Determination 2015 (No 1)* (the Determination) is compatible with the 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

The Determination is made by the Secretary of the Department of Employment (the Secretary) under subsections 501A(4), 544B(1B), 606(1B) and 731M(1B) of the *Social Security Act 1991* (the Act).

The purpose of this Determination is to set out requirements that cannot be contained in an Employment Pathway Plan (EPP). The Determination applies to Parenting Payment EPPs, Youth Allowance EPPs, Newstart EPPs and Special Benefit EPPs.

The Determination replicates the *Social Security (Employment Pathway Plan Requirements) (FaHCSIA) Determination 2009 (No.1)* in relation to what cannot be included in Special Benefit EPPs. The Determination also replicates the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* in relation to what cannot be included in Parenting Payment EPPs, Newstart EPPs and Youth Allowance EPPs for persons who are not early school leavers.

Early School Leavers

The Engaging Early School Leavers measure announced in the 2015-16 Budget introduces changes for early school leavers who are receiving Youth Allowance (other). From 1 January 2016, early school leavers who are required to enter into an EPP can have a requirement to look for work included in their EPP where they are not undertaking 25 hours a week study or training.

Accordingly, the Determination does not replicate the *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* in relation to what cannot be included in Youth Allowance EPPs for early school leavers. Paragraph 6 of that determination, which stated that a Youth Allowance EPP to which section 544DA of the Act applies (ie an early school leaver) must not contain a requirement to look for work, is not included in the Determination.

Subsection 544DA(2) of the Act provides that a Youth Allowance EPP for an early school leaver must require the person to undertake approved courses of training or education, or a combination of such courses and other activities that the Secretary considers appropriate, for at least the appropriate number of hours per week. Subsection 544DA(4) provides that the appropriate number of hours per week is 25, or such other number as the Secretary considers appropriate having regard to a person's circumstances. The practical effect of not replicating paragraph 6 of the *Social Security (Employment Pathway Plan Requirements) (DEEWR)*

Determination 2009 (No.1) in the Determination is that an early school leaver who is receiving Youth Allowance can have a requirement to look for work in their EPP, where they are not undertaking study or training for at least 25 hours per week, or such other period that the Secretary considers appropriate.

Employment Pathway Plans Requirements and the Determination

Under the Act, the Secretary may require a person who receives Parenting Payment, Youth Allowance, Newstart or Special Benefit to enter into an EPP. Generally, unless an exemption applies, the person is required to comply with the requirements in the EPP. If a person does not comply with their EPP, their income support might become not payable.

The Act provides for the terms that are to be contained in an EPP as well as requirements that must not be included in an EPP. Subsections 501A(4) relating to payment of Parenting Payment, 544B(1B) relating to payment of Youth Allowance, 606(1B) relating to payment of Newstart Allowance and 731M(1B) relating to payment of Special Benefit require the Secretary to determine by legislative instrument the kinds of requirements that EPPs to which these payments relate must not contain. In this regard, while the Act contains other provisions under which a person's income support might not become payable, the Determination itself does not affect the payment of income support. Rather, the Determination limits the requirements that the Secretary can include in a person's EPP. The Determination is beneficial because if the requirements it contains were not included in it, a person's EPP could include those requirements and the person would be required to undertake them in order to receive income support.

In summary, the Determination provides that an EPP must not contain a requirement to:

- seek to be or be involved in a criminal activity,
- undergo involuntary psychiatric, psychological or medical treatment;
- for a person residing in Australia, seek to be or be involved in an activity which is required to be undertaken outside of Australia;
- seek work in or be involved in the sex or adult entertainment industry;
- undertake an activity that would contravene a Commonwealth, State or Territory discrimination or occupational health and safety law;
- where a person has an illness, disability or injury; undertake an activity that would aggravate the illness, disability or injury or where appropriate support or facilities to manage or take account of the illness, disability or injury would not be available.

Human rights implications

The Determination potentially engages the following rights:

- the right to social security in article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the right to an adequate standard of living in article 11 of the ICESCR; and
- the right to work in article 6 of the (ICESCR).

Right to social security and right to an adequate standard of living

Article 9 of the ICESCR recognises the right of everyone to social security. Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions.

As discussed above, the Determination does not impose any requirements or obligations on a person and does not impact on the payment of a person's income support. The Determination imposes limitations on the Secretary as to what the Secretary can require of a person in their EPP. Accordingly, the Determination does not negatively affect or limit a person's right to social security or their right to an adequate standard of living.

Right to work

Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to work. This includes the right to the opportunity to gain a living by work which the person freely chooses or accepts, and is considered an inherent part of human dignity.¹

To enable people to realise their right to work, States are required, among other things, to assist and support individuals in order to enable them to identify and find available employment, and to protect their right to just and favourable conditions of employment.²

The *Social Security (Employment Pathway Plan Requirements) (DEEWR) Determination 2009 (No.1)* required that EPPs for early school leavers must not contain a requirement to look for work. The Determination does not have a similar provision. This is to allow the implementation of the Engaging Early School Leavers measure of the 2015-2016 Budget. This measure will require early school leavers to have a requirement in their EPP to look for work when it is appropriate. An EPP can only require an early school leaver to look for suitable work, as the social security law provides that work which provides terms and conditions less generous than the applicable statutory conditions is not taken to be suitable work for the purposes of social security law.³

By allowing an EPP for an early school leaver to, where appropriate, include a requirement to look for work in the Determination promotes the right to work. It will allow more early school leavers in appropriate circumstances to experience the benefits of employment, including greater social and economic inclusion.

The Determination enhances and protects the right to work by prescribing what EPPs must not contain. The Determination provides that an EPP must not contain a requirement to seek or be involved in work in a number of situations that could otherwise adversely affect a person. For example the Determination provides that if a person has an illness, disability or injury, their EPP cannot contain a requirement that they undertake or seek to undertake an activity that would aggravate that illness, disability or injury. The Determination also provides that a person's EPP cannot contain requirement to undertake an activity where

¹ Committee on Economic, Social and Cultural Rights, General Comment 18, paragraphs 1 and 2.

² Committee on Economic, Social and Cultural Rights, General Comment 18, paragraph 12.

³ See section 541D of the *Social Security Act 1991* in relation to Youth allowance.

adequate support facilities that take account of their illness, disability or injury are not available.

Conclusion

The Determination is compatible with human rights because it does not limit the right to social security or the right to an adequate standard of living. The Determination enhances and protects the right to work.