

EXPLANATORY STATEMENT

Child Care (Child Swapping Integrity Measure—Inclusion Support Programme) Amendment Determination 2016

Summary

The *Child Care (Child Swapping Integrity Measure—Inclusion Support Programme) Amendment Determination 2016* (the Amendment Determination) is made by the Minister for Education and Training under subsection 49(3) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act) and subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

The Amendment Determination makes amendments to update references in two existing legislative instruments consequential on the closure of the Inclusion and Professional Support Programme and the commencement of the new Inclusion Support Programme from 1 July 2016. All of the amendments aim to ensure that children with ongoing high support needs who benefit from funding under the new Inclusion Support Programme because they are undergoing an assessment of disability will not fall into a class of children with respect of whom no one is eligible, as set out in the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the No-One Eligible Determination).

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

In August 2015 the former Minister for Social Services made amendments through the following instruments to address “child swapping”: the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015*, the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2015 (No.2)* (the Eligibility Determination 2015) and *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping Amendment Rules 2015 (No.1)*.

The main amendments made by the No-One Eligible Determination ensured that an individual could not be eligible for child care fee assistance in respect of a child where the individual was a family day care educator on a day when their child was reported to be receiving care in another family day care service. These amendments were intended to address a practice identified as “child swapping” and ensure that FDC is being delivered in line with its original intent, that is, flexible home-based care

that can give parents the opportunity to care for their own children at home, while also being remunerated for caring for other people's children. The policy intent was not that FDC carers should be paid CCB for their own child(ren) to be cared for by an approved FDC service (in another FDC carer's home) on a day when the FDC carer is providing care on behalf of an approved FDC service by which they are employed, contracted or otherwise engaged.

Exceptions were inserted into the No-One Eligible Determination, including to ensure that some children would not fall into the class of children for whom no-one is eligible. One of the exceptions related to children in respect of whom a service was receiving funding under the Inclusion and Professional Support Programme, where the child was "undergoing continuous assessment of disability".

Because the Inclusion and Professional Support Programme is ceasing on 30 June 2016 and being replaced by the new Inclusion Support Programme from 1 July 2016, the amendments ensure that children with ongoing high support needs who are undergoing assessment of disability and where a child care service is receiving funding under the new Inclusion Support Programme in relation to those children, will remain covered by the exception.

Consultation

Possible amendments to the No-One Eligible Determination and Eligibility Determination were discussed with key stakeholders in the child care sector during February and March 2015 and at a meeting held on 26 March 2015 with FDC peak bodies representing the FDC sector. There was a broad level of support to preserve the reputation of the FDC sector by addressing 'sharp practices', but at the same time the FDC sector wanted to avoid unintended consequences for individual children and carers. They requested consideration of legitimate circumstances which would allow child care fee assistance to be claimed for sessions of care obtained for their own child by FDC carers on any day when they are working as an FDC carer on behalf of an approved service. These specified circumstances are set out in subsection 8(2) of the Eligibility Determination.

The Australian Government committed to a review of the efficacy of the child swapping integrity measure, including seeking the views of stakeholders, to be undertaken prior to 1 July 2016. The Amending Determination is being made to ensure that children with ongoing high support needs who are undergoing assessment of disability and the approved FDC service is receiving funding under the Inclusion Support Programme will continue to be covered.

FDC services will be informed by email of the changes before the Amendment Determination commences on 1 July 2016. Fact sheets relating to the October 2015

changes will be updated and posted on the Department of Education and Training's website.

Regulation

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Amendment Determination as the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements (OBPR ID 20831, dated 18 April 2016).

Explanation of Provisions

Section 1 sets out the name of the new Determination, how it is to be cited and is otherwise self-explanatory.

Section 2 ensures that the amendments take effect from 1 July 2016, which is the date the new Inclusion Support Programme is set to commence.

Section 3 makes clear that the amendments set out in the Schedule are effective to amend the following two existing legislative instruments: the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* and the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000*. The Minister is relying on the power in subsection 33(3) of the *Acts Interpretation Act 1901* (as applied through the *Legislation Act 2003* to legislative instruments) to make these amendments and revoke provisions.

Amendments to the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015*

Item 1 in the Schedule updates the definition of "eligible ISS child" and replaces it with "eligible ISP child" to refer to the IDF Family Day Care Top Up available under the new Inclusion Support Programme but only where the funding is made in respect of a child who is undergoing assessment for disability, including where the assessment is ongoing or continuous, as described in the new Inclusion Support Programme Guidelines.

Item 2 updates the reference to the old Inclusion and Professional Support Programme Guidelines to the new Guidelines made for the Inclusion Support Programme.

Item 3 removes an unnecessary definition.

Item 4 is the key substantive amendment to update the reference in section 8 to an “eligible ISP child” to ensure that an exception to the class of children with respect to which no-one is eligible applies to an “eligible ISP child” as defined.

Amendments to the Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000

Items 5 and 6 update definitions to refer to the new Inclusion Support Programme.

Items 7, 8 and 9 update references to refer to the new Inclusion Support Programme to ensure that conditions of continued eligibility for child care services that are relevant to identifying and recording information about “eligible ISP children” remain meaningful once the new Programme begins.

Statement of Compatibility with Human Rights

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

Child Care (Child Swapping Integrity Measure—Inclusion Support Programme) Amendment Determination 2016

The Amendment Determination makes amendments to update references in two existing legislative instruments consequential on the closure of the Inclusion and Professional Support Programme and the commencement of the Inclusion Support Programme. All of the amendments aim to ensure that children who benefit from funding under the new Inclusion Support Programme will not fall into a class of children with respect to whom no one is eligible, as set out in the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the No-One Eligible Determination).

Human rights implications

The amendments engage the following rights:

- Rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 18(2);
- Right to work under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Rights of the child

Article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration and Article 18(2) of the CRC requires State Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.

The Amendment Determination will ensure that children with ongoing high support needs who are benefiting from funding under the new Inclusion Support Programme because they are undergoing assessment for disability will not be in a class for whom no-one is eligible for child care benefit. The amendments are therefore consistent with the Commonwealth's overarching child care payments policy, which includes ensuring that parents of children with special requirements can receive child care fee assistance.

Right to work

Article 6 of the ICESCR requires that a person has a right to work, which includes the right of everyone to the opportunity to gain his/her living by work which he/she freely chooses or accepts, and appropriate steps are taken to safeguard this right.

The amendments will assist individuals with “eligible ISP children” (who are benefitting from funding under the new Inclusion Support Programme) maintain eligibility for child care fee assistance. This will assist those individuals remain engaged in the workforce.

Conclusion

The Amendment Determination is compatible with human rights.