

EXPLANATORY STATEMENT

Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2016

Summary

The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2016* (the Amendment Determination) is made by the Minister for Education and Training under subsection 205(1) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

The Amendment Determination amends the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the current Determination), under subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Division 1 of Part 8 of the Administration Act provides for the approval, for the purposes of the family assistance law, of child care services by the Secretary. Under subsection 205(1) of the Administration Act, the Minister may determine (by legislative instrument) rules relating to the eligibility of child care services to become approved (paragraph 205(1)(a)) and to continue to be approved (paragraph 205(1)(b)).

It is a condition for the approval of a child care service that the service satisfies any eligibility rules relating to the eligibility of the service to become approved (paragraph 195(1)(c) of the Administration Act) and a condition for the continued approval of a child care service that the service satisfies any eligibility rules relating to the eligibility of the service to continue to be approved (subsection 196(1)). A failure of an approved child care service to comply with the rules relating to the service's eligibility to continue to be approved may lead to the Secretary imposing one or more sanctions on the service under section 200 of the Administration Act or taking other action depending on the circumstance. These sanctions include, among others, placing conditions on the service, suspension or cancellation of the service's approval.

The approval of a service means that individuals can be eligible for child care benefit (CCB) or child care rebate (CCR) when their children are provided with a session of care by the service. The current Determination steps out a range of matters that the delegate may consider when deciding whether or not a service and its key personnel are suitable to administer child care fee assistance on behalf of the Commonwealth. However, the matters in the current Determination do not adequately address the risks faced by the Commonwealth from unscrupulous operators motivated to enter or remain in the sector in order to exploit child care fee assistance rather than providing high quality child care services to families.

The Amendment Determination proposes to provide clearer grounds for delegates to have regard to factors that might affect suitability, and more closely reflects the suitability criteria contained within the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016 (the JFF Bill).

The Amendment Determination includes a suitability criterion around the applicant's understanding of obligations that would apply under the family assistance law, and commitment to complying with these obligations.

Amending the current Determination to include these suitability criteria creates a more robust legislative framework, and allows compliance action to be taken where services do not satisfy these criteria.

The Amendment Determination also proposes changes to strengthen suitability criteria for key personnel and to clarify events that a service must notify the Secretary of for ongoing approval. Under the current Determination, a service must notify the Secretary of particular events including where 'an operator becomes aware of something about a member of the service's staff that affects the suitability of the staff member or carer to provide child care'. This leaves services to form their own judgement about when an event affects the person's suitability. The proposed changes would clarify the events that a service needs to notify the Secretary of. The proposed changes would also ensure that notifiable events also apply to a service's key personnel.

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

Background

Applicants for child care service approval, their key personnel and individuals who affect or are likely to affect the operation of the service are required to be suitable to be approved, and continue to be approved, to administer child care fee assistance on behalf of the Commonwealth. This is set out at section 7 of the current Determination. Subsection 7(1) requires the Secretary to assess suitability. Subsections 7(2) and 7(3) identify matters that will generally be relevant for the Secretary to take into consideration in forming a judgement about suitability.

The matters listed under subsections 7(2) and (3) in the current Determination are neither exhaustive nor mandatory. The Amendment Determination proposes to provide clearer grounds for delegates to have regard to a wider range of factors that might affect suitability, and more closely reflects the suitability criteria contained within the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016 (the JFF Bill).

The suitability criteria in the current Determination, prior to these amendments, also did not expressly deal with an applicants' understanding of their likely obligations under the Administration Act, should their application be approved. Proposed amendments allow for a delegate to take account of lacking or only rudimentary understanding of obligations under the Administration Act, or a lack of commitment to complying with relevant obligations, when assessing a new application for approval. Despite an approved service being required to manage substantial Commonwealth funds and satisfy compliance obligations, the suitability criteria in the current Determination did not specifically require an understanding of these responsibilities.

Under the current Determination, prior to these amendments a service was required to notify the Secretary of particular events including where an operator becomes aware of something about a member of the service's staff that affects the suitability of the staff member or carer to provide child care. This left the operators of services to form their own judgement about when an event affects the person's suitability. Further, the current provisions do not apply to key personnel. The Amendment Determination requires the operator of a service to notify the Secretary where it becomes aware that key personnel, a member of staff or a family day care (FDC) or in-home care (IHC) educator: has been convicted or charged with an indictable offence; has had a finding of guilt made against them for an offence against a law of the Commonwealth or a State or Territory; has become bankrupt; or has their working with children card refused, revoked or amended. The overarching requirement for the service to notify the Secretary of any events affecting suitability remains.

Consultation

Consultations were held on 23 August 2016 and 5 September 2016 including with peak bodies and the broader child care sector. Exposure drafts of proposed changes were presented and discussed. There was a broad level of support for the changes to the suitability criteria and notifiable event requirements and agreement that a more rigorous approval criterion was necessary to address fraud within the sector.

It should also be noted that the proposed changes to the suitability criteria more closely align the criteria with the suitability criteria within the JFF Bill. The stronger suitability criteria for services and their key personnel were uncontroversial in JFF Bill Regulatory Impact Statement consultations.

Regulation

The regulatory impact of implementing these changes will be minimal. Child care services and their key personnel are already required to meet suitability criteria to be approved and satisfy notifiable event requirements to continue to be approved, and administer child care fee assistance on behalf of the Commonwealth.

Subsection 7(1) of the current Determination requires the applicant to be a suitable person. Subsections 7(2) and 7(3) identify matters that the Secretary may take into consideration in forming a judgement about suitability. The matters listed under these subsections are neither exhaustive nor mandatory. As such, the proposed amendments to subsections 7(2) and 7(3) provide guidance to the public and the Secretary and her delegates, but do not change the requirement that an applicant must be suitable to operate a child care service.

While the changes provide guidance that broader considerations should be taken into account, the changes to the suitability criteria for services and their key personnel will have no effect on the vast majority of child care services which comply with their obligations under the Administration Act. Similarly, the changes to requirements to notify events simply clarify a small number of events that the department must be notified of pursuant to the existing and continuing requirement. The overarching requirement for the service to notify the Secretary of any events affecting suitability remains.

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 21198, dated 1 September 2016).

Statement of Compatibility with Human Rights

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

Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2016

This Legislative Instrument 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*.

Background

An “approved child care service” is a service which is approved by the Secretary in accordance with Division 1 of Part 8 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act). Subsection 205(1) of that Act provides that the Minister may determine rules relating to the eligibility of child care services to become approved, and to continue to be approved. Under paragraph 195(1)(c) of the Administration Act, a child care service must satisfy these rules in order to be approved, and under subsection 196(1) the approved service must satisfy the rules in order for its approval to continue.

Applicants for child care service approval and their key personnel are required to meet suitability criteria to be approved, and continue to be approved, to administer child care fee assistance on behalf of the Commonwealth. This is set out at section 7 of the current Determination.

The matters listed under these subsections, prior to the proposed amendments, did not adequately address the risks faced by the Commonwealth. For example, the criteria did not adequately go to fraud or dishonesty where criminal charges had been laid, or where a person had been found guilty of an offence but no conviction had been recorded (noting that spent convictions are not considered). The Amendment Determination addresses these omissions and more closely reflect the “fit and proper” provisions contained within the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016* (the JFF Bill).

The suitability criteria in the current Determination were also limited in their requirements for applicants to understand and be committed to compliance with their obligations under the Administration Act. Despite an approved service being required to manage fee assistance provided by the Commonwealth for individuals and satisfy compliance obligations, the suitability criteria did not specifically require a service to understand these obligations. Amendments propose to address this omission.

Under the current Determination, prior to these amendments, a service must notify the Secretary of particular events including where the operator becomes aware of something about a member of the service's staff (or a carer, if the service is a family day care service or an in-home care service) that affects the suitability of the staff member or carer to provide child care. In all cases, this leaves services to form their own judgement about when an event affects the person's suitability. Further, the provision did not automatically apply to a service's key personnel. The Amendment Determination proposes minimum standards that require notification pursuant to these provisions, including events related to the conviction or charging of a person for an indictable offence or other adverse action taken against the person, including in relation to key personnel. The overarching requirement for the service to notify the Secretary of any events affecting suitability remains.

Human rights implications

The new Determination engages the following rights:

- rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 18(2);
- right to protection against arbitrary and unlawful interferences with privacy, family and home under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- 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 establishes more rigorous suitability criteria and obligations to report changes or events that affect these criteria. The purpose of these rules is to apply a more rigorous approval and ongoing approval criteria to improve the administration of Commonwealth funds and to ensure the safety and well-being of children.

Right to privacy

Article 17 in the ICCPR provides the right to protection against arbitrary and unlawful interferences with privacy, family and home. The amendments strengthen the matters to be notified to the Secretary where the matters relate to suitability of staff, carers and key personnel of child care services.

Although personal information about staff, carer and personnel suitability will be disclosed because of the proposed amendments, disclosures will only be made where there is concern about the suitability of individuals to work with children or to be involved in the proper administration of Commonwealth funds.

To the extent that the right to privacy is limited, the limitation is reasonable and proportionate and will strengthen the best interests of children in care.

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 or her living by work which he or she freely chooses or accepts, and appropriate steps are taken to safeguard this right.

The Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. Some FDC carers and services (claiming on their carers' behalf) may experience forgone income as a result of the changes in the new Determination. However, the changes will only affect those services (and the carer's working for the services) that employ persons who, through criminal or otherwise fraudulent or dishonest behaviour, should not be working with children or administering Commonwealth funds.

Conclusion

The Amendment Determination is compatible with human rights, particularly the rights of the child and the right to work. To the extent that it places a limitation on the right to privacy, that limitation is reasonable and proportionate.

Senator the Hon Simon Birmingham, Minister for Education and Training

Explanation of the provisions

Section 1 of the Determination states the name of the Determination is the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2016*.

Section 2 states that the Determination commences on 10 October 2016 and an application provision in section 3 clarifies that the new conditions and rules imposed are to affect decisions made after commencement (including in relation to applications that had been made, but had not been considered, prior to commencement). Where applications were made prior to commencement, the Secretary will ensure applicants have the opportunity to address the new eligibility criteria before deciding on approval, should any of the matters be relevant to the delegate's decision-making.

Section 4 makes clear that the Schedule amends the current Determination on its terms.

The Schedule

Item 1 extends the meaning of "carer" to refer to individuals who are both "contracted" (as stated in the current Determination prior to amendment) and who are "otherwise engaged" to ensure that all individuals who are factually providing care in family day care or in-home care services are covered by the definition. There is also a new definition of "in-home carer" (or "IHC carer") to refer to the definition in the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015*.

Item 2 inserts a new section 7 to set out rules regarding the suitability of the applicant to operate a child care service. Where the applicant is a body rather than an individual, the suitability rules apply to the people who are responsible for the body's management.

The most important provision in section 7 is subsection 7(1) which states that the applicant must be a suitable person to operate a child care service: this provision is unchanged. Subsections (2) and (3) set out factors that a delegate should consider in making this assessment, however the matters referred to in subsections (2) and (3) are not exhaustive.

New provisions in, and amendments to former, section 7 expressly allow a delegate to have regard to:

- the arrangements the applicant has in place to ensure compliance with laws and standards, including the compliance of people managed by the applicant, such as staff and educators and others who operate the service;
- whether an applicant has or can demonstrate an understanding of the obligations that will apply to it as a result of approval as a child care service (in particular the obligations set out in Part 8A of the Administration Act);

- the applicant’s record of administering of Commonwealth, State or Territory funds;
- any order for the applicant to pay a pecuniary penalty for the contravention of a civil penalty provision of a law of the Commonwealth or a State or Territory;
- any decision under a law of the Commonwealth or a State or Territory relating to child care which adversely affects the applicant.

Subsection 7(3), as it did in the current Determination prior to these amendments, ensures that a delegate can consider the matters listed in (2) as if they also applied to key personnel and others who influence the operation of the service.

Item 3 makes some minor amendments to section 9 to clarify the heading (the previous heading just referred to family day care carers) and refers to carers “employed, contracted or otherwise engaged” in subsections (1) and (2), similar to the new definition of carer as described above.

Item 4 makes similar minor amendments to subsections 16(4) and (5) (again referring to carers “employed, contracted or otherwise engaged”).

Item 5 clarifies the “notifiable events” that must be reported to the Secretary by written notice. Notably the operator of an approved child care service must, as a minimum and following these amendments, notify the Secretary in the following cases:

- If the operator becomes aware of something in relation to staff, carers or key personnel, that affects or is likely to affect the suitability of the person to provide child care, the operator must give the Secretary written notice within 7 days of becoming aware, setting out the matter and the action that the operator has taken or intends to take to deal with the situation.
- the matters that must be notified include:
 - any criminal charge, conviction or finding of guilt against the person for an offence against a law of the Commonwealth or a State or Territory which relates to an indictable offence punishable by imprisonment of 2 years or more, or an offence for which a penalty equivalent to 40 penalty units or more could be imposed;
 - any instances of bankruptcy involving the person;
 - any refusal (which includes the cancellation) of, or conditions imposed in relation to, a working with children check (where required under the law of the State or Territory in which the service is situated) which relates to the person’s ability to work with children.