

EXPLANATORY STATEMENT

A New Tax System (Family Assistance) (Administration) (Child Care Benefit — Record Keeping) Amendment Rules 2017

Summary

The *A New Tax System (Family Assistance) (Administration) (Child Care Benefit — Record Keeping) Amendment Rules 2017* (Amendment Rules) are made by the Secretary of the Department of Education and Training under subsection 219F(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act).

The Amendment Rules amend the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit — Record Keeping) Rules 2006 (No. 1)* (Current Rules), 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.

The Amendment Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Subsection 219F(3) of the Family Assistance Administration Act provides the Secretary with the power to make rules relating to the keeping of records in relation to certain matters including an individual's eligibility for payment of child care benefit, a service's eligibility for payment of child care benefit in respect of a child at risk, or the service's compliance with the conditions for the continued approval of approved child care services.

To this end, the purpose of the Amendment Rules is to add a new record keeping requirement for approved family day care (FDC) services providing care to a child who is 14 years of age or older but has not yet turned 18, or is attending secondary school. The requirement is to keep any records related to meeting new eligibility provisions which amend the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (the No-one Eligible Determination) and new conditions for continued approval contained within the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination).

The new provisions referred to establish a new class of older children, who are 14 years of age or older or attending secondary school, for whom no-one is eligible for Child Care Benefit (CCB), or therefore, Child Care Rebate (CCR). However, there are certain exceptions (referred to below as "specified circumstances") to when a child is part of this new class, which can only apply if specific documentary evidence is retained, as set out by new section 10AB of the Eligibility Determination in particular. The changes made through the Amendment Rules to the Current Rules therefore update the requirements relating to record keeping, taking into account the new eligibility rules relating to older children, and the additional requirements to keep relevant evidence and a register of that evidence imposed on approved FDC

services that provide care to such children. The Amendment Rules do not affect other types of approved services.

Background

The Australian Government is committed to ensuring Commonwealth fee assistance is appropriately targeted towards subsidising high quality, genuine child care arrangements, which allow an individual to maintain employment. To achieve this objective, new changes have been introduced, which limit a person's eligibility to CCB and CCR in respect of care provided to children attending secondary school or who are 14 years of age or older. The No-one Eligible Determination, in particular, is concurrently amended to introduce a new class of older children for whom no-one is eligible for CCB or CCR, unless a specified circumstance applies. The Eligibility Determination is also concurrently amended to require approved FDC services to keep a register of certain information and documents that are relevant to establishing a person's eligibility where care is provided to an older child. The requirement to keep specified documents in new section 10AB of the Eligibility Determination is related to situations where care is provided to a child who is 14 years of age or older but has not yet turned 18, or is attending secondary school, where no individual would ordinarily be eligible for CCB or CCR, except for the fact that a specified circumstance, as set out in new section 9 of the No-one Eligible Determination, exists. The Amendment Rules therefore support the amendments made to the No-one Eligible Determination and the Eligibility Determination, by clearly establishing an obligation upon approved FDC services to keep the records specified by the Eligibility Determination for a specified circumstance in the No-one Eligible Determination to apply.

Consultation

Consultations were held on 24 November 2016 including with FDC peak bodies and other stakeholders from the broader child care sector. Further detailed consultations were held during January 2017 with FDC peak bodies. There was broad agreement that changes were necessary to address practices that are inconsistent with the policy intent of child care fee assistance. The consultations with FDC peaks resulted in the instruments being refined.

Regulation

The changes made to the Current Rules involve a minor regulatory burden.

The requirement on FDC services to record evidence of specified circumstances in a register and update the register is contained in the amendments made to the Eligibility Determination. The Amendment Rules specify that the register and supporting documentation are also records required to be kept.

A minor regulatory burden will be imposed on FDC services through the Amendment Rules as, under the Eligibility Determination, services will be required to enter the details of specified circumstances in a register if any one of the specified circumstances outlined in new subsections 9(2) or 9(3) of the No-one Eligible Determination applies. A minor regulatory burden will also be placed on a conditionally eligible individual (and in some cases, a partner of that person if the child is the Family Tax Benefit (FTB) child or regular care child of the partner) where

a specified circumstance applies, such as completing a statutory declaration or obtaining other formal evidence.

FDC for children who are 14 years of age or older, or who are attending secondary school, is not child care of the kind that the Commonwealth family assistance payments scheme was established to subsidise. These particular measures will only adversely affect those child care operators that have based their business model on providing care or other services that are inconsistent with the established policy intent.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Determination as any amendments to the Determination are effectively of a minor nature and do not substantially alter existing arrangements (OBPR ID 21442, dated 27 October 2016 and OBPR ID 21647, dated 16 December 2016).

Statement of Compatibility with Human Rights

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

A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Amendment Rules 2017

The A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Amendment Rules 2017 (the Amendment Rules) 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

The Amendment Rules are made by the Secretary of the Department of Education and Training under subsection 219F(3) of the *A New Tax System (Family Assistance) (Administration) Act 1999* and pursuant to subsection 33(3) of the *Acts Interpretation Act 1901*. The Amendment Rules amend subsection 7(2) of the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit – Record Keeping) Rules 2006* (Current Rules) to require approved family day care (FDC) services to also keep any records relevant to meeting new section 10AB of the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* (the Eligibility Determination). New section 10AB places additional register keeping obligations on FDC services that provide care to children who would otherwise fall into the new class of children who are 14 years of age or older, or who are attending secondary school, for whom no-one is eligible for Child Care Benefit (CCB) and Child Care Rebate (CCR). The amendments to subsection 7(2) do not affect the current, and ongoing obligation upon FDC services to keep records provided or created by the service for the purposes of existing section 10A of the Eligibility Determination, relating to the child swapping integrity measure provisions which were introduced in 2015.

Amendments to the *Child Care Benefit (Children in respect of whom no-one is eligible) Determination 2015* (No-one Eligible Determination) establish a new class of children who are 14 years of age or older, or who are attending secondary school for whom no-one is eligible for Commonwealth fee assistance. There are exceptions (referred to below as “specified circumstances”) to this limitation on eligibility which are also set out in new section 9 of the No-One Eligible Determination. The exceptions relate to situations where the child is younger than 18 years old, cannot reasonably be left alone in the circumstances and no individual over the age of 18 is available to provide care. In addition, if the child has not yet turned 16 years of age, there are minimum work requirements that must be met, or for children who are 14 years of age or older but have not yet turned 18, or who are attending secondary school, the child must be an ‘eligible disability child’ or benefitting from funding provided under the Inclusion Support Program, or living in a remote or very remote part of Australia. Importantly, an exception can only apply where the service has been provided with documentary evidence supporting the existence of one or more

of the specified circumstances. The requirement to keep a register, and the kind of information and documents that the register must contain, are outlined in further detail in the Eligibility Determination. The Amendment Rules therefore provide the necessary legislative support to ensure the requirement to retain the appropriate documentary evidence is clear to approved FDC services. The records which must be retained in the register vary depending on the particular circumstance that may apply. For example, for the specified circumstance relating to work to apply, documentary evidence must be provided to the service confirming that the individual usually works for a minimum period of hours at the time the session of care takes place. For the 'eligible disability child' circumstance to apply, documentary evidence must be provided to the service of a medical or psychological diagnosis that the child is suffering from a condition listed in Schedules 1 or 2 of the No-one Eligible Determination.

For all specified circumstances, documentary evidence must also include evidence that the child could not reasonably have been left alone in the circumstances and there was no individual over the age of 18 who could have provided suitable care to the child in those circumstances. This can be in the form of a statutory declaration containing a statement from the individual describing the circumstances.

Human rights implications

Together with the Eligibility Determination and the No-one Eligible Determination, the Amendment Rules engage 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)*;
- 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 No-one Eligible Determination clarifies and expands the existing classes of children in respect of whom no-one is eligible for CCB. The purpose of this expansion is to ensure that FDC is delivered in line with the policy intent for this type of care. The policy intent was that fee assistance would be paid for FDC provided to young children, unless a specified circumstance applies.

The new requirements do not prevent individuals from placing a child who is 14 years of age or older or who is attending secondary school in FDC, however, it does place tighter restrictions on the availability of Commonwealth fee assistance in these circumstances. These amendments are compatible and reinforce the rights of the child as they are aimed at ensuring only genuine commercial child care is subject to

Commonwealth fee assistance thus ensuring the child care payments system remains sustainable and properly targeted for future years.

Right to privacy

Article 17 in the ICCPR provides the right to protection against arbitrary and unlawful interferences with privacy, family and home. Australia interprets the term 'unlawful' as being taken to mean that no interference should occur except in cases envisaged by the law and the law itself must comply with the provisions, aims and objectives of the ICCPR. Interference provided for by law can be arbitrary if the law is not in accordance with the provisions, aims and objectives of the ICCPR and is not reasonable in the particular circumstances. The Australian Government has accepted that the term 'arbitrary' could encompass interferences which although lawful, would be 'unreasonable'. 'Reasonable interferences' with privacy are measures based on reasonable and objective criteria which are proportional to the purpose for which they are adopted.

The new requirement in amended subsection 7(2) of the Current Rules involves the need for approved FDC services to keep certain records, as specified in new section 10AB of the Eligibility Determination, where one or more of the circumstances listed in new section 9 of the No-one Eligible Determination may apply, and proper documentary evidence has been obtained by the service.

The effect of the Amendment Rules in particular is to make it an ongoing condition for continued approval that a service maintains a register of records specified in the Eligibility Determination, where care is provided to a child who is older than 14 but has not yet turned 18, in specified circumstances, similar to the requirement to keep a register of records relating to the child swapping integrity measure amendments introduced in 2015.

The amendments to subsection 7(2) make it clear to approved FDC services that part of their record keeping obligations involves keeping all records provided to or created by the approved FDC service for the purpose of new section 10AB of the Eligibility Determination. It is necessary to specify this as a kind of record that approved FDC services must keep to allow the Commonwealth Department of Education and Training (the Department) to ensure the service is able to demonstrate compliance with the new requirements in the amended Eligibility Determination. Approved FDC services must keep a register of specified information that it collects, as part of substantiating that an individual (or the service) is eligible to receive Commonwealth fee assistance for FDC provided to an older child because a specified circumstance applies. Because the requirement to keep information in a register extends to personal or sensitive information (under the *Privacy Act 1988*) relating to an individual's work schedule, or a child's diagnosis of disability or residential address (depending on the relevant specified circumstance), the requirements engage the right to privacy. The records required to be kept by the service may be requested to be viewed by the Department, as part of verifying a person's eligibility and/or entitlement to child care fee assistance, and ongoing monitoring of a service's compliance with the family assistance law.

Therefore, to the extent that the amendment limits the right to privacy, that limitation is reasonable and proportionate because it supports an ongoing obligation upon services to provide accurate and complete information to assist the Secretary of the Department to verify eligibility and calculate benefit entitlement, which underpins the

integrity of the entire Commonwealth payments scheme. In the absence of such obligations to keep records of information supporting claims for CCB and CCR, and the ability to access such information by the Department upon request to verify that care is being accurately reported, the Commonwealth would not be able to properly administer its child care payments scheme, leading to an increase of incorrect calculations and, in some cases, deliberate fraudulent activity. In addition, it is already a service requirement to keep records and a register for the purposes of meeting section 10A of the Eligibility Determination, which involves the collection of information similar to that required for current purposes, including whether or not the child is an eligible disability child. The new requirements do not go any further than what services are already obliged to do in that separate context, nor do they go any further than what is necessary to ensure the integrity of the child care payments scheme.

A detailed discussion of the privacy implications of new section 10AB of the Eligibility Determination can be found in the Human Rights Statement of Compatibility accompanying the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2017* which also commences on 13 March 2017.

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 Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The amendments reinforce this commitment by ensuring child care fee assistance remains available to be paid in respect of FDC provided to older children in cases where the person or persons who have caring responsibilities for the child are required to work on the care day and the child cannot reasonably be left alone in the circumstances.

Conclusion

The Amendment Rules are compatible with human rights. To the extent that the amendment places a limitation on the right to privacy, that limitation is reasonable and proportionate.

Dr Michele Bruniges, Secretary of the Department of Education and Training

Explanation of the provisions

Section 1 of the Amendment Rules states the name of the instrument. **Section 2** states Schedule 1 of the Amendment Rules commences on 13 March 2017. **Section 3** sets out the Secretary's authority to make the instrument. **Section 4** sets out application provisions to clarify that the amendments made by the Amendment Rules only apply to eligibility for sessions of care that occur on and from commencement (and ensures that no part of the Amendment Rules takes effect retrospectively). **Section 5** sets out that the *A New Tax System (Family Assistance) (Administration) (Child Care Benefit —Record Keeping) Rules 2006 (No. 1)* is amended by Schedule 1 to the Amendment Rules.

Item 1 amends subsection 7(2) to make reference to the new requirement placed on approved FDC services through amendments to the Eligibility Determination to keep any records provided to or created by the approved FDC service for the purposes of meeting new section 10AB of the Eligibility Determination.

It is a condition for continued approval that an approved FDC service comply with all rules contained in legislative instruments made under the family assistance law, including the Eligibility Determination and the Record Keeping Rules. As part of that, approved FDC services will be monitored as to their compliance with the new condition to keep all records provided to the service or created by it to help substantiate claims that care being provided to older children meet the requirements of the No-one Eligible Determination, for Commonwealth fee assistance to be payable. Full details of the records required to be kept by the approved FDC service in the register can be found in new section 10AB of the Eligibility Determination, as inserted by the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2017*.

The requirements also reflect similar requirements placed upon approved FDC services to support the child swapping integrity measures introduced in 2015, in relation to keeping records through a register to establish a specified circumstance existed for which Commonwealth fee assistance may be payable in respect of the child of an FDC carer or the partner of an FDC carer. That requirement still applies. Amended subsection 7(2) therefore retains the reference to section 10A of the Eligibility Determination, which ensures services keep any records provided to or created for the purposes of meeting that obligation.

The effect of not complying with the obligation to keep a register containing certain records is that a service will have breached a condition for continued approval, and a delegate within the Commonwealth Department of Education and Training (the Department) may impose a sanction as a result, which could include the suspension or cancellation of approval under the family assistance law. Non-compliance may also affect a person's eligibility to receive CCB or CCR, as a lack of records may lead to a finding that a person has not satisfied the criteria for a specified circumstance to apply to the general rule that no-one is eligible for Commonwealth fee assistance where care is provided to a child who is 14 years of age or older or is attending secondary school.