

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*A New Tax System (Family Assistance) Act 1999*

*Family Assistance (Meeting the Immunisation Requirements) Principles Amendment 2017*

### **Summary**

The *Family Assistance (Meeting the Immunisation Requirements) Principles Amendment 2017* (Amendment Principles) are made by the Minister for Social Services under subsection 6(7) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act). The Family Assistance Act is administered jointly by the Minister for Social Services and the Minister for Education and Training, and as the Amendment Principles affect both Ministers' responsibilities under the Family Assistance Act, the Minister for Education and Training has authorised the Minister for Social Services to make the instrument on his behalf.

Under Division 4 of Part 3 of the Family Assistance Act, an individual is not eligible for child care benefit (CCB) in relation to their child unless the child meets the immunisation requirements (an individual who is not eligible for CCB is also not eligible for child care rebate (CCR)). In addition, under section 61B of the Family Assistance Act, Family Tax Benefit (FTB) Part A supplement is not payable to an individual in relation to a child unless the child meets the immunisation requirements.

Section 6 of the Family Assistance Act sets out the immunisation requirements.

Subsection 6(6) of the Family Assistance Act provides that a child meets the immunisation requirements if the Secretary determines in writing that the child meets the immunisation requirements. In making a determination under subsection 6(6) the Secretary must comply with any decision-making principles made by the Minister for the purposes of subsection 6(7). The *Family Assistance (Meeting the Immunisation Requirements) Principles 2015* (Current Principles) set out those decision-making principles.

The Amendment Principles amend the Current Principles. 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 Principles are a legislative instrument for the purposes of the *Legislation Act 2003*.

The principal purpose of the Amendment Principles is to insert a new principle which allows the Secretary to determine that a child meets the immunisation requirements if attempting

to vaccinate the child would result in an unacceptable risk of physical harm to the child or a person administering a vaccination to the child. Following the commencement of the Current Principles on 1 January 2016, the Department of Human Services and the Department of Health have been contacted by a number of families who could not immunise their children because they had a disruptive behavioural disorder or developmental disorder and react with aggression or defiant behaviour when faced with a medical procedure, including vaccination.

This kind of response by a child to the vaccination procedure is not “medical contraindication” as set out in the *Australian Immunisation Handbook* (as referred to in paragraph 6(3)(a) of the Family Assistance Act), and is not otherwise addressed by any of the provisions in the Current Principles.

As a consequence, the Government has decided to amend the Current Principles to allow the Secretary, on certification by relevant medical practitioners, to determine that a child meets the immunisation requirements in these circumstances.

The Amendment Principles also make a number of minor amendments to the Current Principles: changing terminology of “medical practitioner” (a term already defined in the Family Assistance Act) to “overseas medical practitioner”; ensuring consistency with State and Territory arrangements for age of consent to medical procedures; and implementing the existing Government policy and administrative process of time-limiting the determinations under the Amendment Principles.

## **Background**

When the Australian Government introduced the No Jab, No Pay policy through amendments to the Family Assistance Act (through the *Social Services Legislation Amendment (No Jab, No Pay) Act 2015*), it recognised that there were going to be a small number of special circumstances in which it was not possible for particular children to be immunised in accordance with the standard or catch-up vaccination schedules.

The objective of the Current Principles is to ensure that the Secretary has the capacity, in appropriate circumstances, to determine that a child meets the immunisation requirements even if the child is not immunised. If the Secretary makes such a determination after having regard to these Current Principles, then a parent or carer of the child can remain eligible for CCB, CCR and the FTB Part A supplement.

The amendments intend to ensure that only parents and carers with a desire but genuine inability to vaccinate are able to continue to meet the immunisation requirements. The new principle is therefore consistent with the purpose of the Current Principles, which is to ensure that individuals in very limited, legitimate and demonstrated circumstances are not negatively impacted by their inability to vaccinate a child. In administering the Current Principles, the circumstances of each decision are reviewed at the end of a period determined by the decision maker on a case-by-case basis.

In order for the Government to be satisfied that a child will pose a risk to themselves or others if vaccination is attempted, the Amendment Principles provide for an extremely rigorous evidentiary standard to be met.

The Chief Health Officer in each state and territory must nominate in writing to the Commonwealth Chief Medical Officer the 'listed medical practitioner/s' for their state. Chief Health Officers can also request the removal of a listed medical practitioner/s if they are no longer required to perform the role.

The Department of Health consulted health departments in each State and Territory who agreed to ensure there will only be a small number of highly qualified 'listed medical practitioners' able to assess patients and refer their details to the Chief Medical Officer for consideration under this Determination.

Listed medical practitioners are expected to be clinicians with specialist expertise in immunisation, for example those working in specialist immunisation clinics. Jurisdictions have agreed that a very limited and highly qualified group of individuals would be nominated.

The Commonwealth Department of Health will keep a list of listed medical practitioners. This practitioner list is now a defined term in Section 4 of the Amendment Principles.

### **Commencement**

The Amendment Principles will commence on the day after registration with the Federal Register of Legislation.

### **Consultation**

The Department of the Prime Minister and Cabinet, the Department of Education and Training, the Department of Social Services, the Department of Human Services and the Department of Health were consulted in the preparation of the Amendment Principles. The Amendment Principles were prepared in response to concerns being raised with the Departments of Health and Human Services by families of children who could not be vaccinated without the possibility of causing harm to themselves or those administering the vaccination.

### **Regulation Impact Statement**

The Amendment Principles do not require a Regulation Impact Statement because the Amendment Principles are not regulatory in nature, will not impact on business activity and will have minimal or no compliance costs or competition impact.

### **Explanation of the provisions**

**Sections 1 to 3** of the Amendment Principles are formal provisions setting out the name, commencement date, and legal authority for the making of the Amendment Principles.

**Section 4** of the Amendment Principles provides that the Current Principles are amended as set out in the Schedule to the instrument.

**Schedule 1** then sets out the amendments to the Current Principles, as follows.

**Items 1 and 2** amend section 4 of the Current Principles, which contains definitions for the Current Principles. The effect of items 1 and 2 is to:

- repeal the term “medical practitioner” and replace it with the substantively identical term “overseas medical practitioner”. **Item 6** amends the language of paragraph 11(d) to reflect the new terminology; and
- insert a definition of “listed medical practitioner” for the purposes of the new section 13 of the Amendment Principles. A listed medical practitioner is a medical practitioner (as defined in the Family Assistance Act) whose name has been given by the Chief Health Officer of a State or Territory to the Commonwealth Chief Medical Officer, for the purposes of certifying that immunising a child would cause an unacceptable risk of physical harm to the child or a person administering a vaccination to the child.

**Item 4** inserts a new subsection (1A) into section 7 of the Current Principles, which provides that the Secretary must issue a time-limited determination under subsection 6(6) of the Family Assistance Act if satisfied that the child is likely to meet the usual immunisation requirements (as defined in subsection 4(2) of the Current Principles) within a particular time.

This requirement reflects the current policy that determinations under subsection 6(6) should be for the minimum reasonable period, and the reasons for their issue should be reviewed reasonably regularly. The new subsection complements the existing subsections 6(2) and (3). A note to the new subsection clarifies that when a time-limited determination expires, the Secretary is able to issue another determination if the circumstances still justify the issue of a determination.

**Item 5** amends section 8 of the Current Principles. Section 8 provides that the Secretary may make a determination that a child meets the immunisation requirements if, in certain circumstances, the child is in the care of an individual who does not have legal authority to make decisions about the medical treatment of the child. The Current Principles provides that the circumstances are where:

- if the child is aged under 15 years – a person (other than the child) with legal authority to make decisions about medical treatment of the child either refuses consent to the child being immunised, or does not provide consent to the child being immunised within a reasonable timeframe; or
- if the child is aged at least 15 years – the child refuses consent to being immunised, or does not provide consent to being immunised within a reasonable period of time.

In New South Wales children can consent to vaccination consent at the age of 14. If a child of this age were to refuse vaccination consent, under the Current Principles the eligible individual would not be able to seek a determination that the child meets the immunisation requirements as this can only occur if the child is at least 15. So as not to disadvantage carers in New South Wales the benchmark age of consent for the purpose of this instrument is being lowered to 14.

**Item 7** inserts a new section 13 into the Current Principles. This will allow the Secretary to make a determination under subsection 6(6) of the Family Assistance Act that a child who has not been immunised meets the immunisation requirements if:

- a listed medical practitioner has certified in a form and manner determined by the Secretary that, for the reasons set out in the certificate, immunisation of the child would result in an unacceptable risk of physical harm to the child or a person administering a vaccination to the child; and
- the Commonwealth Chief Medical Officer has certified in writing that he or she agrees with the listed medical practitioner.

The provision sets out an example of where this might occur – a child with a disruptive behavioural disorder or developmental disorder who reacts with aggression or defiant behaviour when faced with a medical procedure.

Clinical authorities have advised that there are a small number of individuals who do not meet the criteria for medical exemptions set out in the *Australian Immunisation Handbook*, but for whom the risks of vaccinating are greater than the benefits.

To address this unintended consequence and to respond to the clinical needs of this small group of individuals, these Amendment Principles have included this additional circumstances under which the Secretary of the Department of Social Services can determine that an individual meets the immunisation requirements.

Listed medical practitioners are expected to be clinicians with specialist expertise in immunisation, for example those working in specialist immunisation clinics. There will only be a very limited, and highly qualified group of medical practitioners nominated.

A note to the new section also highlights that subsection 6(3) of the Family Assistance Act already provides that a child meets the immunisation requirements if immunisation would be medically contraindicated, the child has developed a natural immunity, or the child is participating in a vaccine study.

**Item 3** amends subsection 7(1) of the Current Principles, as a consequence of the inclusion of the new section 13 in the Amendment Principles.

## Statement of Compatibility with Human Rights

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

### **Family Assistance (Meeting the Immunisation Requirements) Principles Amendment 2017**

This 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*.

#### **Overview of the Amendment Principles**

The *Family Assistance (Meeting the Immunisation Requirements) Principles Amendment 2017* (Amendment Principles) are made by the Minister for Social Services under subsection 6(7) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act). The Family Assistance Act is administered jointly by the Minister for Social Services and the Minister for Education and Training, and as the Amendment Principles affect both Ministers' responsibilities under the Family Assistance Act, the Minister for Education and Training has authorised the Minister for Social Services to make the instrument on his behalf.

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Section 6 of the Family Assistance Act sets out the immunisation requirements.

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The Amendment Principles amend the Current Principles. The principal purpose of the Amendment Principles is to insert a new principle which allows the Secretary to determine that a child meets the immunisation requirements if attempting to vaccinate the child would result in an unacceptable risk of physical harm to the child or a person administering a vaccination to the child.

The Amendment Principles also make a number of minor amendments to the Current Principles: changing terminology of "medical practitioner" (a term already defined in the Family Assistance Act) to "overseas medical practitioner"; ensuring consistency with State and Territory arrangements for age of consent to medical procedures; and implementing

the existing Government policy and administrative process of time-limiting the determinations under the Amendment Principles.

### **Human rights implications**

These Amendment Principles engage the following human rights:

- the right to health recognised in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 24 of the Convention on the Rights of the Child (CRC); and
- the right to social security in Article 9 of the ICESCR.

The right to health in Article 12 of the ICESCR requires the recognition of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In particular, countries should make provision for the healthy development of the child and the prevention, treatment and control of epidemic, endemic, occupational and other diseases. Article 24 of the CRC also contains specific obligations to ensure that children enjoy the highest attainable standard of health.

The Family Assistance Act imposes immunisation requirements as a condition of eligibility for receipt of family payments for the purpose of protecting the health of the public through increasing national immunisation rates and protecting both children and those in the community more broadly from the spread of disease. In doing so, the Family Assistance Act, in conjunction with the associated Amendment Principles, support the rights to health set out in Article 12 of the ICESCR and Article 24 of the CRC.

The Amendment Principles will amend the Current Principles to provide that the Secretary may determine that certain children meet the immunisation requirements for the purposes of subsection 6(6) of the Family Assistance Act even though they are not immunised (within the meaning of ‘immunised’ as defined in subsection 3(1) of the Family Assistance Act).

Following the commencement of the Current Principles on 1 January 2016, the Department of Human Services and the Department of Health have been contacted by a number of families who could not immunise their children because they had a disruptive behavioural disorder or developmental disorder and react with aggression or defiant behaviour when faced with a medical procedure, including vaccination.

This kind of response by a child to the vaccination procedure is not “medical contraindication” as set out in the *Australian Immunisation Handbook* (as referred to in paragraph 6(3)(a) of the Family Assistance Act), and is not otherwise caught by any of the provisions in the Current Principles.

As a consequence, the Government has decided to amend the Current Principles to allow the Secretary, on certification by relevant medical practitioners, to determine that a child meets the immunisation requirements in these circumstances.

If the Secretary makes a determination that a child meets the immunisation requirements after having regard to these Amendment Principles, then a parent or carer of the child is not prevented from obtaining access to relevant social security entitlements (FTB Part A supplement and CCB) where there are valid reasons for the child not being immunised in accordance with the standard or catch-up vaccination schedules. In this way, specifying circumstances where the Secretary can make a determination that a child meets the

immunisation requirements without being immunised, these Amendment Principles promote the right to social security in Article 9 of the ICESCR.

### **Conclusion**

These Amendment Principles are compatible with human rights as they promote rights and, to the extent that they may limit rights, these limitations are reasonable, necessary and proportionate to achieving a legitimate aim. The Amendment Principles advances the human right to health, and the right to social security.

**Minister for Social Services, the Honourable Christian Porter MP**