

# Explanatory Statement

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### *Child Care Subsidy Secretary's Amendment Rules (No. 1) 2018*

#### Summary

The *Child Care Subsidy Secretary's Amendment Rules (No. 1) 2018* (the Rules) are made under subsection 85GB(2) of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act).

The Rules amend the *Child Care Subsidy Secretary's Rules 2017* (F2017L01463) (Principal Rules) and prescribe matters that are permitted as empowered by the Assistance Act and the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

The amendments to the Principal Rules also rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which states that “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 Rules are made prior to the commencement of section 85GB of the Assistance Act as permitted by section 4 of the *Acts Interpretation Act 1901*. Section 85GB was inserted into the Assistance Act through Schedule 1 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Amendment Act), which commences on 2 July 2018. These Rules will also commence on 2 July 2018, immediately following the commencement of the enabling provision the Principal Rules.

In particular, the Rules deal with a range of technical changes to refer to in home care (IHC) providers, services and educators, including applications for provider and child care service approval, and requirements for approved providers to issue statements of entitlement to individuals, and to make and keep written records.

#### Background

The Principal Rules, made on 7 November 2017, give effect to a range of administrative and machinery matters to enable the operation of the new child care subsidy (CCS) payment and approval regime, including making claims for CCS, applications for provider and child care service approval, complying written arrangements, requirements for approved providers to issue statements of entitlement to individuals and to make and keep written records.

The Rules amend the Principal Rules by prescribing technical consequential changes to expand current requirements for family day care (FDC) providers, child care services and educators to IHC providers, child care services and educators.

## In home care

From 2 July 2018, the new IHC program will be delivered through a brokerage model with IHC Support Agencies servicing each state and territory and assisting the Department of Education and Training (the department) in administering the IHC program. The new arrangements replace the existing IHC program and the ceasing Interim Home Based Carer ('Nanny Pilot') Programme, to align with the Australian Government's new child care package. The refined IHC program is intended to assist parents and carers who are unable to access other approved forms of child care, such as those who work non-standard hours, are geographically isolated or have families with challenging and complex needs.

## **Consultation**

In developing the policy enshrined in these Rules, the department consulted extensively with a wide range of stakeholders including providers and relevant Government departments and agencies through targeted consultation including on the draft In Home Care National Guidelines and exposure draft of the Rules.

The independent evaluations of the previous IHC program and ceasing Nanny Pilot Programme were taken into consideration in the development of the policy for the new IHC.

## **Regulation Impact Statement**

The Rules expand on the practical application of the policy objectives of particular provisions in the Assistance Act and Administration Act. It is also expected that the new, enhanced IT system will reduce regulatory burden currently experienced by families and the child care sector.

OBPR advised an additional Regulation Impact Statement (RIS) for the Rules was not required, as the Rules are simply giving effect to the policy intent of the child care package (OBPR ID 22401).

Specific to the new IHC program, OBPR determined that it was deemed to have minor regulatory impact to business, community organisations and individuals, therefore a RIS was not required (OBPR ID 22882).

## **Explanation of the provisions**

### **Preliminary**

This contains preliminary matters relating to the name of the rules, commencement, authority and definitions.

**Section 1** states the name of the instrument as the *Child Care Subsidy Secretary's Amendment Rules (No. 1) 2018* (the Rules).

**Section 2** states that all provisions of the Rules commence on 2 July 2018, immediately after the commencement of the Principal Rules, which commence on 2 July 2018.

**Section 3** states that the Secretary is authorised to make the Rules under subsection 85GB(2) of the Assistance Act.

**Section 4** contains a definition and is self-explanatory.

**Section 5** provides that the Principal Rules are amended as set out in the various items in the Schedule to the Rules (as described below).

### **Schedule – Amendments to Principal Rules**

**Item 1** replaces the commencement information table in subsection 2(1) of the Principal Rules, confirming that the whole of these Rules are to commence on 2 July 2018, immediately after the commencement of the Amendment Act, with the exception of paragraph 10(ia) which is to commence on 14 January 2019. New paragraph 10(ia) will commence later than other provisions to ensure that providers and third party software providers have an additional period after the commencement day to ensure that statements of entitlement can include details about actual (physical) attendance times (in addition to session times) in their IT systems.

**Item 2** replaces the definition of “educator” in section 4 of the Principal Rules, which has been extended to include an IHC educator.

**Item 3** inserts the definitions for “IHC educator” and “IHC service” into section 4 of the Principal Rules.

**Item 4** inserts “or an IHC service” into subparagraph 6(n)(vii) so that the requirement to provide a declaration applies to the provider of both an FDC service and an IHC service in an application for approval under subparagraph 194A(2)(b) of the Administration Act.

**Items 5 and 6** insert new paragraph (o) into section 6, which will ensure that evidence of contact with an IHC Support Agency is required to be included in an application for approval in respect of an IHC service under section 194A of the Administration Act.

**Item 7** clarifies that the prescribed information under section 7 may not apply to every application (due to the amendments made by items, 6, 7 and 8, as below).

**Item 8** inserts “or an IHC service” into subparagraph 7(c)(vii) so that the requirement to provide a declaration applies to the approved provider of both an FDC service and an IHC service in an application to add a child care service under subparagraph 196A(2)(b) of the Administration Act.

**Items 9 and 10** insert new paragraph (d) into section 7, which will ensure that evidence of contact with an IHC Support Agency is required to be included in an application to add an IHC service under subparagraph 196A(2)(b) of the Administration Act.

**Item 11** replaces paragraph 10(i) with two new paragraphs. New paragraph 10(i) will apply immediately from 2 July 2018 to ensure that statements of entitlement need to contain daily and weekly totals of the number of hours of care provided during the statement period, including start and end times for each session of care. New paragraph 10(ia) will apply from 14 January 2019 and, from that time, will also (in addition to the details required by paragraph 10(i)) require statements of entitlement to include daily and weekly totals of the number of hours of the child’s physical attendance during the statement period, including start and end times of the child’s physical attendance.

**Item 12** inserts new paragraph (ba) into section 11, so that an IHC service is required to provide the address and contact number of the premises, when care is provided at premises other than the residential premises referred to at subsection 48A(9) of the *Child Care Subsidy Minister’s Rules 2017* due to exceptional circumstances.

## Statement of Compatibility with Human Rights

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

### ***Child Care Subsidy Secretary's Amendment Rules (No. 1) 2018***

The *Child Care Subsidy Secretary's Amendment Rules (No. 1) 2018* (the 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*.

#### **Overview of the Legislative Instrument**

The Rules are made under subsection 85GB(2) of the *A New Tax System (Family Assistance) Act 1999* (the Assistance Act).

The Rules amend the *Child Care Subsidy Secretary's Rules 2017* (Principal Rules) and prescribe matters that are permitted as empowered by the Assistance Act or the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

In particular, the Rules deal with a range of technical changes to refer to in home care (IHC) providers, services and educators, including applications for provider and child care service approval and requirements for approved providers to issue statements of entitlement to individuals, and to make and keep written records.

#### **Human rights implications**

The Rules engage the following rights:

- the rights of children and parents under the Convention on the Rights of the Child (CRC), particularly Article 3, 18(2), 19 and 27;
- the right to work and the right to social security under Articles 6 and 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the 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 under Article 16 of the CRC.

#### ***Rights of children and parents***

Article 3(1) of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(3) requires institutions and services responsible for the care of children to conform to standards established by competent authorities, particularly in the areas of safety and health.

Article 18(2) also 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.

Although primary responsibility for ensuring child care services and staff are appropriately qualified, and that care provided conforms to certain quality and safety standards rests with

the State and Territory authorities, the Commonwealth has also taken steps to supplement and complement those regimes. The Rules therefore reflect an increasing recognition of the importance of cooperation between the various levels of government.

The Rules supplement the requirements in the Administration Act in order to enable the proper administration and oversight of care provided to children under the Australian Government's new child care package. The Rules also furthers Article 3(3) of the CRC by implementing mechanisms that allows for the proper assessment of the suitability of provider, child care service and staff.

In particular, Part 3 of the Rules requires additional information to be contained in an application for provider's approval under section 194A of the Administration Act or in an application to vary a provider's approval under section 196A of the Administration Act. The information and evidence required in Part 3 helps to ensure that there is sufficient information to verify the legitimacy of a potential provider and child care service, and to allow for the assessment of whether an applicant is a suitable person to operate a child care service including by reference to its staff or key personnel (to complement Part 4 of the *Child Care Subsidy Minister's Rules 2017*). An applicant is required to include details of working with children cards, and various background checks in relation to each person with management or control of the provider and those with responsibility for the day-to-day operation of the child care service. These measures are intended to ensure that approved providers, persons with management or control, and educators, can be appropriately assessed, to ensure that children receive an appropriate standard of care and education. The measures therefore promote the rights of the child, as well as furthering Article 18(2) of the CRC by facilitating the proper development of institutions, facilities and services for the care of children.

Article 19 of the CRC requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Article 23 recognises the right of the disabled child to special care and ensure the extension of assistance, subject to available resources, to the child and those responsible for his or her care, for which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

In addition to the initial assessment of suitability before a provider in respect of a service may be approved, Division 3 Part 4 of the Rules require an approved provider to make and keep a written record of certain information and events including those relating to matters of where a child is at risk of serious abuse or neglect. This particular record making and keeping requirement supplements section 204K of the Administration Act where an approved provider is required to notify the relevant State or Territory authority when a child is considered at risk of serious abuse or neglect. Records must be made and retained relating to premises where care is provided and also any evidence or information in relation to the background checks as required under both the Rules and the *Child Care Subsidy Minister's Rules 2017*. The failure to make or keep such records constitutes an offence and a civil penalty liability. This measure ensures investigation and inspection of records, where necessary, including for child protection and safety purposes.

IHC services provide early childhood education and care for families for whom other approved care types are not available or appropriate. This care type ensures that children can have access to quality care to support their learning and development when their families' circumstances prevent them from attending other type of child care services.

IHC Support Agencies have been established to advocate for families and to ensure the support they receive is tailored to their needs. Their role in providing recommendations to the Secretary on the allocation of places will help ensure places are available for those families who need care the most and support a more equitable distribution of places nationally. IHC Support Agencies will also establish referral pathways to disability and family support services to assist families to access the support they need.

### ***Right to an adequate standard of living***

Article 27 of the CRC requires that States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 27(3) requires States Parties to take appropriate measures to assist parents and others responsible for the child to support the child's development.

In relation to IHC, these Rules enable children with unique family circumstances to have access to quality education and care in their family home. Where families do not have the ability to access other forms of approved child care, these Rules help ensure children have access to quality education and care tailored to meet the needs of families and children.

### ***Right to work and social security***

Article 6 of the ICESCR requires that States Parties recognise the right to work, including through developing policies and techniques to achieve steady economic, social and cultural development and full and productive employment. Article 9 recognises the right of everyone to social security.

Under Part 4 of the Principal Rules, an approved provider is required to give individuals statements of entitlement outlining all the key information, including the individual's breakdown of fee reduction, fees charged and the amount of sessions of care provided by the approved child care service. This measure ensures that individuals are informed of the amount and extent of family assistance payment they are entitled to within a statement period, and therefore promoting their right to social security.

The Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The right to work goes to the core objective of new Child Care Subsidy (CCS) and Additional Child Care Subsidy (ACCS) payments and the new IHC program, to help parents who want to work, or who want to work more. The Rules reinforce this commitment by ensuring child care fee assistance can be paid in a broader range of circumstances that will further the capacity of individuals to engage in work, study, training and other activities that promote workplace participation and engagement.

The Rules will support parents of children including those with disability by facilitating pathways to appropriate support to help maintain their workforce participation and provide access to subsidised child care for their children where necessary, without which these parents may have had to reduce their level of participation in the workforce or stop work altogether.

The Rules will support workforce participation for families by providing a flexible option where the family is not able to access other types of approved child care services during the times care is required.

Parents and carers who work non-standard hours or are geographically isolated face significant challenges with workforce participation where other forms of approved child care are not readily available. Similarly, workforce participation for families with challenging and complex needs are often inhibited. IHC supports such families through provision of access to education and care in the family home at times suitable for parents and carers, thereby facilitating increased workforce participation through access to child care fee subsidies.

### ***Right to privacy***

Article 17 of the ICCPR and Article 16 of the CRC requires that no one shall be subject to arbitrary or unlawful interference with privacy. 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 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 additional record making and keeping requirements in sections 6, 7, 10 and 11 of the Rules engage the right to privacy, as it involves personal or sensitive information (under the *Privacy Act 1988* (Cth)) relating to a child’s circumstances, an individual’s police background checks and residential address. The records required to be kept by the approved child care service may be requested to be viewed by the Department of Education and Training (the department), as part of verifying a person’s eligibility and/or entitlement to child care fee assistance, and ongoing monitoring of an approved child care service’s compliance with the family assistance law.

Therefore, to the extent that the Rules limits the right to privacy, that limitation is reasonable and proportionate because it supports an ongoing obligation upon approved providers to provide accurate and complete information to assist the Secretary of the department to verify eligibility and calculate fee assistance 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 CCS or ACCS, 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. These requirements do not go any further than what approved child 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.

Any limitation on the right to privacy is also reasonable and proportionate, given the objective is to allow the Secretary of the department to make robust decisions to only approved providers and child care services which demonstrate suitability to provide child care services, which is ultimately in the best interests of the child. Further, there are a number of safeguards in place in relation to the information that is collected and disclosed by the provider. This includes that the *Privacy Act 1988* applies in relation to the management by the approved provider of information collected. In addition, any information collected by the approved provider and provided to the Secretary of the department will, once it is obtained



and recorded by the Secretary, be subject to the confidentiality provisions in sections 161 to 168 of the Administration Act. This affords a considerably higher level of protection to such information than is imposed under the *Privacy Act 1988*.

## **Conclusion**

The Rules are compatible with human rights. Measures in the Rules are compatible with and advance human rights under the CRC, ICESCR and CRPD. These measures ultimately enable parents who wish to work by providing avenues to child care fee assistance, with the aim that children can have access to care that promotes their development and wellbeing.

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