

EXPLANATORY STATEMENT

Social Security (Special Circumstances Exemption to Youth Allowance Activity Test Guidelines) Instrument 2019

Summary

The *Social Security (Special Circumstances Exemption to Youth Allowance Activity Test Guidelines) Instrument 2019* (the instrument) is made by the Minister for Jobs and Industrial Relations under subsection 542H(1B) of the *Social Security Act 1991* (the Act).

The purpose of the instrument is to set out guidelines for determining whether a person has a special circumstances exemption from the activity test for youth allowance and provide guidance on the period of that exemption.

Background

One of the qualifications for youth allowance is that a person must either satisfy the activity test or not be required to satisfy the activity test. A person is not required to satisfy the activity test in respect of a period if throughout the period the person has a special circumstances exemption under section 542H of the Act.

Under subsection 542H(1) of the Act, a person has a special circumstances exemption for youth allowance for a period if the Secretary is satisfied that special circumstances beyond the person's control exist, and that it would be unreasonable in those circumstances to expect the person to satisfy the activity test for that period.

Where the Secretary makes a decision that a person has a special circumstances exemption for a period, the period cannot exceed 13 weeks (subsection 542H(2) of the Act). However, the Secretary can make more than one decision that a special circumstances exemption applies. Where this occurs, if the periods to which the decisions relate form a continuous period, the continuous period cannot exceed 13 weeks, unless the Secretary decides otherwise having regard to the continued existence, or likely continued existence, of the special circumstances on which the last preceding decision was based (subsection 542H(3) of the Act).

In making a decision under subsection 542H(1), and subject to subsections (2) and (3), the Secretary is to have regard to the guidelines made by the Minister under subsection 542H(1B) of the Act (subsection 542H(1A) of the Act).

The current guidelines are contained in the *Youth Allowance (Activity Test Exemption Guidelines) Determination 1998* (the 1998 Determination), which is due to sunset on 1 April 2019. This instrument repeals the 1998 Determination and replaces the guidelines. Some amendments have been made to the structure of the instrument and it has been updated to be consistent with current practice regarding drafting of legislative instruments. The substance of the previous guidelines have not been changed as they are working well and continue to be fit for purpose both in describing the special circumstances and setting guidance for the periods for exemption to the activity test for youth allowance recipients.

The Minister for Jobs and Industrial Relations must make guidelines in relation to participation payment recipients who are youth allowance recipients. The Minister for Families and Social Services must make guidelines in respect of all other youth allowance

recipients subject to the activity test. However, pursuant to an authorisation given by the Minister for Families and Social Services under section 34AAB of the *Acts Interpretation Act 1901*, one legislative instrument containing guidelines will be made by the Minister for Jobs and Industrial Relations that will apply to all youth allowance recipients who are subject to the activity test.

Operation of the provisions

Part 1 Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *Social Security (Special Circumstances Exemption to Youth Allowance Activity Test Guidelines) Instrument 2019*.

Section 2 – Commencement

This section provides a table setting out the commencement date for the whole of the instrument. The instrument commences on the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under subsection 542H(1B) of the Act.

Section 4 – Definitions

This section defines 'Act' as the *Social Security Act 1991*. The **note** to the section alerts the reader to the fact that certain expressions used in the instrument have the same meanings given by the Act.

Section 5 – Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in that Schedule.

Part 2 Guidelines

Section 6 – Guidelines for Secretary relating to special circumstances

This section provides that Part 2 of the instrument sets out guidelines for the exercise of the Secretary's power in subsection 542H(1) of the Act.

Section 7 – Major disruption to a person's home

Subsection 7(1) provides that special circumstances beyond a person's control exist if a major disruptive event affects the person's home and the event has a major disruptive consequence for the person.

Subsection 7(2) provides that a major disruptive event includes a flood, a fire, an earthquake, vandalism and burglary. These things are not exhaustive of what constitutes a major disruptive event and other things could be major disruptive events.

Subsection 7(3) provides that a major disruptive consequence includes where a person needs to:

- (a) arrange alternative accommodation;
- (b) arrange to replace significant household items;

(c) organise major home repairs;

(d) make insurance claims for damage to household items or the home.

These matters are not exhaustive of what constitutes a major disruptive consequence and other matters could be a major disruptive consequence.

Subsection 7(4) provides that, when the special circumstances mentioned in subsection (1) exist, that it may be unreasonable to expect the person to satisfy the activity test for a period of up to 2 weeks, starting when the major disruptive event occurs.

Section 8 – Major personal crisis

Subsection 8(1) provides that special circumstances beyond a person’s control exist if the person is experiencing a major personal crisis and the experience has a major disruptive consequence for the person.

Subsection 8(2) provides that a major personal crisis includes:

(a) the death of a family member;

(b) for a person who is a member of a couple, the breakdown of that relationship;

(c) the person is homeless and unable to obtain stable accommodation;

(d) domestic violence.

These circumstances are not exhaustive of what constitutes a major personal crisis and other circumstances could constitute a major personal crisis.

Subsection 8(3) provides that a major disruptive consequence includes where a person needs to:

(a) arrange a funeral for a deceased family member or make arrangements for the property of the deceased family member;

(b) arrange alternative accommodation;

(c) move belongings away from his or her present accommodation;

(d) arrange care for his or her child;

(e) attend counselling.

These matters are not exhaustive of what constitutes a major disruptive consequence and other matters could be a major disruptive consequence.

Subsection 8(4) provides that, when the special circumstances mentioned in subsection (1) exist, except where the person is homeless and unable to obtain stable accommodation, it may be unreasonable to expect the person to satisfy the activity test for a period of up to:

(a) 2 weeks, starting when the person begins to experience the major personal crisis;
or

- (b) if the special circumstances are extremely traumatic for the person, 4 weeks, starting when the person begins to experience the major crisis.

Subsection 8(5) provides that, where the special circumstances in subsection (1) exist because the person is homeless and unable to obtain stable accommodation, it may be unreasonable to expect the person to satisfy the activity test for a period of up to 13 weeks, starting at the beginning of that circumstance.

Section 9 – Carer duties

Subsection 9(1) provides that special circumstances beyond a person’s control exist if:

- (a) a family member of the person is temporarily incapacitated due to illness or accident; and
- (b) the family member needs full-time care during the incapacity; and
- (c) the person provides the care; and
- (d) other ways of providing the care are not reasonably available; and
- (e) the person does not qualify for a carer payment under section 198 of the Act; and
- (f) the person is unable to satisfy the activity test because the person is providing the care.

Subsection 9(2) provides that, in the section, **care** includes attention and supervision.

Subsection 9(3) provides that, when the special circumstances mentioned in subsection (1) exist, it may be unreasonable to expect the person to satisfy the activity test:

- (a) for a period of up to 13 weeks, starting when the person begins to provide the care; and
- (b) for a further period of up to 13 weeks if, at the end of the initial 13 week period, the special circumstances remain unchanged.

Section 10 – Serving on a jury

Subsection 10(1) provides that special circumstances beyond a person’s control exist if the person is serving on a jury and, under the laws of the Commonwealth, State or Territory, as the case may be, the person:

- (a) is eligible to serve on the jury; and
- (b) is not exempt from liability to serve on the jury; and
- (c) is not disqualified from serving on the jury.

Subsection 10(2) provides that, when the special circumstances mentioned in subsection (1) exist, it may be unreasonable to expect the person to satisfy the activity test:

- (a) for the period for which the person is empanelled on the jury or up to 13 weeks, whichever is the shorter; and
- (b) for a further period of up to 13 weeks if, at the end of the initial period, the special circumstances remain unchanged.

Section 11 – Refugees

Subsection 11(1) provides that special circumstances beyond a person’s control exist if the person is a refugee.

Subsection 11(2) provides that, in the section, **refugee** has the meaning in subsection 7(6B) of the Act.

Subsection 11(3) provides that, when the special circumstances mentioned in subsection (1) exist, it may be unreasonable to expect the person to satisfy the activity test for a period of up to 13 weeks starting when the person enters Australia.

Section 12 – Community Service orders

Subsection 12(1) provides that special circumstances beyond a person’s control exist if the person is subject to a community service order requiring the person to perform more than 20 hours of community service for each week that the order has effect.

Subsection 12(2) provides that, when the special circumstances mentioned in subsection (1) exist, it may be unreasonable to expect the person to satisfy the activity test:

- (a) for the duration of the person’s community service order; or up to 13 weeks, whichever is the shorter; and
- (b) for a further period of up to 13 weeks if, at the end of the initial period, the special circumstances remain unchanged.

Schedule 1 Repeals

Schedule 1 provides for the repeal of the *Youth Allowance (Activity Test Exemption Guidelines) Determination 1998*.

Consultation

The Department of Jobs and Small Business consulted affected Government departments on the minor technical amendments of the instrument. Wider consultation was not undertaken, as the instrument will not affect the application of special circumstances exemptions.

Regulatory Impact Analysis

The instrument is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

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

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This legislative instrument (the 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 instrument

One of the qualifications for youth allowance is that a person must either satisfy the activity test or not be required to satisfy the activity test. A person is not required to satisfy the activity test in respect of a period if throughout the period the person has a special circumstances exemption under section 542H of the Act.

Under subsection 542H(1) of the Act, a person has a special circumstances exemption for youth allowance for a period if the Secretary is satisfied that special circumstances beyond the person's control exist, and that it would be unreasonable in those circumstances to expect the person to satisfy the activity test for that period.

Where the Secretary makes a decision that a person has a special circumstances exemption for a period, the period cannot exceed 13 weeks (subsection 542H(2) of the Act). However, the Secretary can make more than one decision that a special circumstances exemption applies. Where this occurs, if the periods to which the decisions relate form a continuous period, that continuous period cannot exceed 13 weeks, unless the Secretary decides otherwise having regard to the continued existence, or likely continued existence, of the special circumstances on which the last preceding decision was based (subsection 542H(3) of the Act).

In making a decision under subsection 542H(1), and subject to subsections (2) and (3), the Secretary is to have regard to the guidelines made by the Minister under subsection 542H(1B) of the Act (subsection 542H(1A) of the Act).

The current guidelines are contained in the *Youth Allowance (Activity Test Exemption Guidelines) Determination 1998* (the 1998 Determination), which is due to sunset on 1 April 2019. This instrument repeals the 1998 Determination and replaces the guidelines. Some amendments have been made to the structure of the instrument and it has been updated to be consistent with current practice regarding drafting of legislative instruments. The substance of the previous guidelines have not been changed as they are working well and continue to be fit for purpose both in describing the special circumstances and setting guidance for the periods for exemption to the activity test for youth allowance recipients.

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Minister for Families and Social Services under section 34AAB of the *Acts Interpretation Act 1901*, one legislative instrument containing guidelines will be made by the Minister for Jobs and Industrial Relations that will apply to all youth allowance recipients who are subject to the activity test.

Human rights implications

The instrument engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the rights of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC); and
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC.

Article 9 of the ICESCR recognises the right to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11 of the ICESCR. Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing and to the continuous improvement of living conditions. Article 27 of the CRC also recognises the right of the child to an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

A person in receipt of a participation payment must meet the activity test or participation requirements in order to continue to receive their payment. However, the Act recognises that, whilst on payment, a person may be in a situation where they are unable to meet these requirements. This instrument provides for the special circumstances a person may experience which could grant them an exemption from the activity test. Those granted an exemption period would continue receiving payment during the period.

The Act provides that where the Secretary makes a special circumstances exemption decision under subsection 542H(1), the exemption period cannot be for a period of more than 13 weeks (subsection 542H(2) of the Act).

However, further exemption periods can be given where the Secretary makes more than one special circumstances exemption decision for a person and the periods to which the decisions relate form a continuous period. Where this occurs, the continuous period cannot exceed 13 weeks, unless the Secretary decides otherwise having regard to the continued existence, or likely continued existence, of the special circumstances on which the last preceding decision was based (subsection 542H(3) of the Act).

The instrument also provides guidance for further exemption periods of up to 13 weeks when certain special circumstances still exist for carer duties, serving on a jury and serving a community service order.

Time-limited exemption periods reflect the expectation that the special circumstance will be temporary in nature, and a person in receipt of income support should be encouraged and supported back into employment after they experience the special circumstance. However, the Secretary's ability to make further exemptions period decisions provides protections for persons who continue to experience special circumstances beyond their control after their exemption period ends.

The instrument, therefore, promotes the right to social security and the right to an adequate standard of living, as a person who is exempt from the activity test due to their special circumstances can continue to receive payment without having to meet participation requirements, provided they continue to meet all other requirements for receiving payment. Furthermore, protections exist for people who experience lasting special circumstances, as the Secretary may decide further exemption periods are appropriate in the circumstances.

Conclusion

The instrument is compatible with human rights because it promotes the protection of human rights.