

EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Social Services

Social Security Act 1991

Social Security (Reasonable Excuse – Student Payments) Determination 2019

Purpose

The purpose of the Determination is to specify matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a participation failure in regard to youth allowance (if the person is undertaking full-time study) or austudy payment under subsections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991* (the Act).

The Determination repeals and replaces the *Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)* (the 2009 Determination), which sunsets on 1 October 2019.

Background

The Determination applies to participation failures committed by recipients of youth allowance (if the person is undertaking full time study) or austudy payment.

Youth allowance (if the person is undertaking full time study) and austudy are not participation payments, although they are subject to participation requirements in the form of qualifying study. These payments require regular ongoing participation in study to meet qualifying study load requirements, as set out in the Act. This instrument therefore sets out matters that the Secretary must take into account when considering potential participation failures of recipients who are studying.

The matters specified in the Determination are not exhaustive. Therefore, the Secretary may also take other matters into account (see subsections 550(2B), 550B(2B), 576(2B) and 576A(2B) of the Act).

The Determination has been remade in substantially the same terms as the 2009 Determination. However, changes have been made to expand the matters that the Secretary must take into account, such as the person's refugee status, when the person is serving on a jury, the breakdown of the person's relationship and when the person is subject to a community service order. These changes are beneficial to recipients of youth allowance (if the person is undertaking full time study) or austudy, as the matters that the Secretary must take into account when determining whether the person has a reasonable excuse are being expanded.

The additional provisions are also included in the *Social Security (Special Circumstances Exemption to Youth Allowance Activity Test Guidelines) Instrument 2019* (the Youth Allowance Guidelines), relating to youth allowance. The Youth Allowance Guidelines are made under provisions of the Act that are administered by the Minister of Employment, Skills, Small and Family Business. These provisions are being included in the Determination to increase coverage for austudy recipients, and to create consistency in applying the reasonable excuse exemptions.

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 is 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.

Any decision made under the relevant provisions of the Social Security Act, having regard to the matters set out in this Determination, is subject to the review provisions outlined in Parts 4 and 4A of the *Social Security (Administration) Act 1999* (the Administration Act). Further, any information collected under the Determination is protected by the information gathering and confidentiality provisions in Part 5 of the Administration Act.

Commencement

The Determination commences on the day after it is registered.

Consultation

Consultations were undertaken with the Department of Employment, Skills, Small and Family Business and Services Australia during the preparation of this Determination. This was done to ensure a co-ordinated and consistent approach for social security payments under the Act.

Regulation Impact Statement (RIS)

The Determination does not require a Regulatory Impact Statement (RIS). The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact (OBPR ID: 25220).

Explanation of the provisions

Section 1 provides how the proposed instrument is to be cited, that is, as the *Social Security (Reasonable Excuse – Student Payments) Determination 2019*.

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that subsections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the Act authorise the Secretary to make the Determination.

Section 4 defines the terms that are used in the Determination. The word ‘refugee’ is taken to have the meaning given in subsection 7(6B) of the Act. A ‘community service order’ is

defined to mean any community service order issued by a court under the laws of the Commonwealth, a State or Territory.

Section 5 in conjunction with **Schedule 1** operates to repeal the *Social Security (Reasonable Excuse—Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)*.

Section 6 makes provision for the matters to be taken into account by the Secretary in deciding whether a person had a reasonable excuse for committing a youth allowance participation failure or austudy participation failure.

Subsection 6(1) has the effect of providing that where recipients of youth allowance or austudy payment commit a participation failure, the Secretary must take into account matters listed in subsection (2) in determining whether the recipient has a reasonable excuse.

Subsection 6(2) provides for a list of matters that the Secretary must have regard to in determining whether a person had a reasonable excuse for the purposes of subsection 550(2A), subsection 550B(2A), subsection 576(2A) and subsection 576A(2A) of the Act.

Paragraph 6(2)(a) provides that if the person did not have access to safe, secure and adequate housing, or was using emergency accommodation or a refuge, this must be considered when determining whether that person has a reasonable excuse.

Paragraph 6(2)(b) provides that the person's language and literacy skills must be considered in determining whether the person had a reasonable excuse. For example, people with poor literacy and language skills may be faced with a situation where they have not read and understood what is required of them, which could lead to a failure to comply with the relevant sections of the Act.

Paragraph 6(2)(c) provides that any illness, impairment or condition (including those that are episodic or unpredictable in nature) of the person that requires treatment must be taken into account when determining whether the person has a reasonable excuse. For example, because of such condition, the person may not be able to attend an appointment or interview.

Paragraph 6(2)(d) and paragraph 6(2)(e) provide that any cognitive, neurological, psychological or psychiatric impairment or mental illness of the person must be taken into account when determining whether the person has a reasonable excuse. This recognises that a person may be unable to comply with his or her obligations because of one of these conditions. For example, a neurological impairment may make it difficult for a person to consistently attend appointments.

Paragraph 6(2)(f) provides that any drug or alcohol dependency of the person must be taken into account when determining whether the person has a reasonable excuse. This acknowledges that drug or alcohol dependency can impact the person's everyday functioning and capacity to comply with a participation requirement.

Paragraph 6(2)(g) provides that any unforeseen family or caring responsibilities of the person must be considered when determining whether the person has a reasonable excuse. For example, where a person is unexpectedly required to meet a family responsibility and appropriate alternative arrangements were unable to be made, this may impact their capacity to meet their participation requirements.

Paragraph 6(2)(h) provides that if a person is, or was, subjected to criminal violence, including domestic violence and sexual assault, this must be considered when determining if the person has a reasonable excuse.

Paragraph 6(2)(i) provides that if a person has experienced the death of an immediate family member or close relative, this must be considered when determining if the person had a reasonable excuse.

Paragraph 6(2)(j) provides that for a person who is, or was, a member of a couple, the breakdown of that relationship may inhibit a person's capacity to comply with a requirement and must be considered when determining if the person has a reasonable excuse.

Paragraph 6(2)(k) provides that if a person is, or was, serving on a jury, this must be taken into account when determining whether the person has a reasonable excuse.

Paragraph 6(2)(l) provides that where a person has been imprisoned (for a continuous period of more than 14 days) and the relevant failure occurs not more than 28 days following that person's release from prison, the impact of the person's imprisonment or release from imprisonment must be considered when determining whether the person had a reasonable excuse. This recognises that a person who was recently released from imprisonment may undergo a period of adjustment, which could impact upon the person's capacity to meet their participation requirements.

Paragraph 6(2)(m) provides that if a person is, or was, refugee (as defined in subsection 7(6B) of the Act), this must be considered when determining whether the person has a reasonable excuse.

Paragraph 6(2)(n) provides that if a person is, or was, subject to a community service order requiring the person to perform more than 20 hours of community service per week in each week the order has effect, this must be considered when determining whether the person has a reasonable excuse.

Subsection 6(3) has the effect of ensuring that the matters that are listed in subsection 6(2) must only be taken into account where the Secretary is satisfied that the matter had a significant effect on the person's capacity to comply with the obligation, or the provision of the Act, to which the failure relates.

Subsection 6(4) sets out, non-exclusively, circumstances under which a person is taken to not have access to safe, secure and adequate housing. This definition is derived from the *Supported Accommodation Assistance Act 1994*, and is intended to encompass the particular characteristics or incidents of a person's accommodation that may adversely affect them or place them at risk.

Statement of Compatibility with Human Rights

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

Social Security (Reasonable Excuse – Student Payments) Determination 2019

This Determination 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 *Social Security (Reasonable Excuse - Student Payments) Determination 2019* (the Determination) is made by the Secretary of the Department of Social Services (the Secretary) under subsections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991* (the Act).

The purpose of the Determination is to specify matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a participation failure in regard to youth allowance (if the person is undertaking full-time study) or austudy. Where a youth allowance or austudy recipient fails to meet their participation obligations under the Act, their payment may be cancelled or suspended. However, they will continue to qualify for payment if the Secretary is satisfied that they have a reasonable excuse for the failure and, where required, have given notice of the excuse. The matters specified in the Determination are not exhaustive as the Secretary may also take other matters into account under subsections 550(2B), 550B(2B), 576(2B) and 576A(2B) of the Act.

The Determination repeals and replaces the *Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)* (the 2009 Determination), which was due to sunset on 1 October 2019.

Human rights implications

The Determination engages the right to social security and the right to education.

Right to social security

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to social security.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

Article 4 of ICESCR provides that countries may limit the rights to social security in a way determined by law only in so far as this may be compatible with the nature of the rights contained within the ICESCR and solely for the purpose of promoting the general welfare in a democratic society. Such a limitation must be proportionate to the objective to be achieved.

This Determination, may in some circumstances, increase access to social security for students who have a reasonable excuse for not meeting study requirements. It does this by providing a list of matters the Secretary must take into account when determining whether a person in the affected cohort has a reasonable excuse for not meeting participation requirements. However, the Determination does not limit the Secretary's power to review a decision.

In the absence of this determination (not limited by other determinations or legislation), students in receipt of youth allowance or austudy who do not meet the study requirements for one of the reasons listed, may be ineligible for student payments.

Right to education

Article 13 of the ICESCR recognises the right of everyone to education. It provides that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms, and that higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means.

This Determination enhances the right to education for youth allowance (students) and austudy recipients by allowing continued access to student payments while recipients are temporarily unable to meet study requirements. Allowing students who are temporarily unable to study, but intend to return to study, to remain in receipt of student payments, will assist those students to access and continue education.

Conclusion

The Determination is compatible with human rights as it does not engage any of the applicable rights or freedoms. The Determination promotes access to social security and enhances the right to education. To the extent a human rights obligation is engaged or limited, the impact is for a legitimate objective, and is reasonable, necessary and proportionate as outlined above.

By providing a list of matters to be considered by the Secretary when a recipient of youth allowance (who is undertaking full-time study) and austudy does not meet participation requirements, more students will be able to continue to access social security to support their education.

Kathryn Campbell AO CSC, Secretary of the Department of Social Services