

# Explanatory Statement

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## *Child Care Subsidy Secretary's Amendment (Building on the Child Care Package and Other Measures) Rules 2020*

### **Purpose and Authority**

The *Child Care Subsidy Secretary's Amendment (Building on the Child Care Package and Other Measures) Rules 2020* (Amendment Rules) are made under subsection 85GB(2) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act), as construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. Amongst other things, subsection 33(3) of the Acts Interpretation Act provides that a power to make an instrument of a legislative character (such as subsection 85GB(2) of the Family Assistance Act) includes a power to amend such an instrument.

The Amendment Rules amend the *Child Care Subsidy Secretary's Rules 2017* (Principal Rules). The Principal Rules deal with a range of administrative and machinery matters to enable the operation of the Child Care Subsidy payment and approval regime, including applications for provider and service approval and requirements for providers to make and keep written records.

In December 2019, the *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019* (Building on the Child Care Package Act) amended the Family Assistance Act and *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). Consequential amendments to the Principal Rules are required for some of the amendments to those Acts to take effect. The Amendment Rules also make a number of clarifying and technical amendments.

The Amendment Rules:

- update the kind of information to be contained in an application for approval under the Family Assistance Law;
- prescribe the information an approved provider must give when they request suspension of their approval;
- amend the record making and keeping requirements so approved providers are required to keep records where a third party makes a payment to an approved provider to assist an individual with their child care fees; and
- make a consequential amendment in relation to In Home Care to align the Principal Rules with the primary legislation as the Building on the Child Care Package Act incorporated In Home Care more fully into the primary legislation.

### **Commencement**

With the exception of Part 2 to Schedule 1 to the Amendment Rules, the Amendment Rules commence the day after the Amendment Rules are registered.

Part 2 of Schedule 1 to the Amendment Rules amends a provision of the Principal Rules that refers to a provision of the *Child Care Subsidy Minister's Rules 2017* (Minister's Rules) which is itself being amended. Consequently, Part 2 of Schedule 1 to the Amendment Rules will commence at the same time as the relevant amendment to the Minister's Rules.

## **Consultation**

The Early Childhood Education and Care Reference Group - Rules Working Group members, were consulted on 11 February 2020 and were generally supportive of the measures. On 5 February 2020, a group of stakeholders were consulted specifically in relation to In Home Care related amendments and were supportive of those amendments.

## **Regulation Impact Statement**

The proposed amendments do not significantly vary from what the Office of Best Practice and Regulation (OBPR) previously considered for the regulatory impacts of the changes in the Building on the Child Care Package Act, meaning that further regulatory consideration/impact was not required.

## Abbreviations used in this Explanatory Statement

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**Amendment Rules** means the *Child Care Subsidy Secretary's Amendment Rules (Building on the Child Care Package and Other Measures) 2020*

**ACCS** means Additional Child Care Subsidy;

**Building on the Child Care Package Act** means *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019*;

**CCS** means Child Care Subsidy;

**Family Assistance Act** means the *A New Tax System (Family Assistance) Act 1999*;

**Family Assistance Administration Act** means the *A New Tax System (Family Assistance) (Administration) Act 1999*;

**Family Assistance Law** means the Family Assistance Act and the Family Assistance Administration Act and relevant subordinate legislation;

**IHC** means In Home Care;

**Minister's Rules** means the *Child Care Subsidy Minister's Rules 2017* (being the rules made by the Minister under subsection 85GB(1) of the Family Assistance Act);

**National Law** means the *Education and Care Services National Law Act 2010* (VIC) (and equivalent legislation in other state and territory jurisdictions); and

**Principal Rules** or **Secretary's Rules** means the *Child Care Subsidy Secretary's Rules 2017* (being the rules made by the Secretary under subsection 85GB(2) of the Family Assistance Act).

## DETAILED EXPLANATION OF PROVISIONS

### Sections 1 to 4

**Sections 1 to 3** of the Amendment Rules are formal provisions setting out the name of the Rules, their commencement, and the authority to make them. **Section 4** of the Rules provides that each instrument specified in a Schedule to the Rules is amended or repealed as set out in the Schedule.

### Schedule 1—Amendments

#### Part 1—Main amendments

**Item 1** updates the definition of ‘IHC service’ in section 4 of the Principal Rules to denote that the term is short for ‘in home care service’. This definition has been amended because IHC is now a care type mentioned in the table in subclause 2(3) of Schedule 2 of the Family Assistance Act with its own CCS rate cap, and the pre-existing definition of IHC service is no longer required.

Paragraph 194A(2)(b) of the Family Assistance Administration Act states that an application for approval as a provider must, among other things, contain any information prescribed by the Secretary’s Rules. Section 6 of the Principal Rules prescribes the information to be contained in an application for approval.

**Item 2** repeals and substitutes paragraph 6(j) of the Principal Rules to better reflect the details that an application for approval must contain, in relation to the requirements set out in section 195D of the Family Assistance Administration Act (working with children checks).

**Items 3 and 4** repeal and substitute subparagraphs 6(k)(i) to 6(k)(iv) of the Principal Rules and amends subparagraphs 6(n)(vi) and 7(c)(vi) to update the kind of information that an application for approval must contain in relation to each person with management or control of the provider. Specially, this amendment reflects amendments to the Minister’s Rules which prescribe additional criteria that a provider must satisfy to be approved for the purposes of the Family Assistance Law for the purposes of paragraph 194C(f) of the Family Assistance Administration Act.

Section 197AA of the Family Assistance Administration Act allows a provider’s approval to be voluntarily suspended under the Family Assistance Law (primarily in situations where they are also voluntarily suspended under the National Law). Subsection 197AA(1) states that the Secretary may suspend a provider’s approval, or a provider’s approval in respect of one or more of its services, if the provider makes the request in writing.

Subsection 197AA(2) specifies that the written request must:

- a) be given in a form and manner approved by the Secretary
- b) specify a proposed start day for the suspension to take effect
- c) specify a proposed end day for the suspension to cease to have effect (which must not be longer than 12 months from the start day); and
- d) contain any other information prescribed by the Secretary’s rules.

**Item 5** inserts a new section 8A into the Principal Rules, which sets out other information that the written request must include for the purpose of paragraph 197AA(2)(d). Section 8A states that the written request must include:

- the name of the provider and service(s);
- the unique ID given to the provider and the service(s) by the Secretary;
- the provider’s reasons for requesting a suspension; and
- the name and contact details of the person who is making the request on behalf of the provider.

This information will assist the Secretary to identify the provider and service(s) and determine whether to exercise the discretion to suspend the provider’s approval under subsection 197AA(3).

Subsection 204K(1) of the Family Assistance Administration Act sets out reporting requirements that apply to approved providers after they give a certificate given under section 85CB of the Family Assistance Act in respect of a child, whom the provider considers to be at risk of serious abuse or neglect (**ACCS (child wellbeing) certificate**). Specifically, subsection 204K(1) requires providers, no later than six weeks after the ACCS (child wellbeing) certificate takes effect, to give an appropriate State/Territory support agency notice that the provider considers the child is or was at risk of serious abuse or neglect. Under the Building on the Childcare Package Act, references to “appropriate State/Territory body” were replaced with references to “appropriate State/Territory support agency”.

**Item 6** amends paragraph 11(a) of the Principal Rules to replace the reference to “appropriate State/Territory body” with “appropriate State/Territory support agency”. This amendment merely updates the terminology used in the Principal Rules for consistency with the terminology used in the primary legislation.

**Items 7 and 9** amend paragraphs 11(d) and 12(b) of the Principal Rules to update cross-referencing so that these provisions accurately reflect amendments made to the Minister’s Rules.

Subparagraph 202A(1)(b)(iv) of the Family Assistance Administration Act states that an approved provider must make a written record of information or an event of which it becomes aware if the information or event relates to any matter prescribed by the Secretary’s rules.

Paragraph 202B(1)(d) further states that an approved provider must keep records, in accordance with the Secretary’s Rules, of information and events in relation to any matters prescribed by the Secretary’s Rules.

**Item 8** inserts a new paragraph 11(e) into the Principal Rules, which requires providers to make a written record in circumstances where a provider receives a payment from a third party for the purposes of reducing an individual’s co-contribution costs for the purposes of paragraph 2(2A)(c) of Schedule 2 to the Family Assistance Act.

**Item 10** inserts a new paragraph 12(ia) into the Principal Rules, which requires providers to keep records relating to information about the payments from third parties mentioned in item 8 above.

These amendments will provide the department and families with greater transparency of

circumstances in which an individual receives third party payments that contribute to their child care fees, and increase transparency in terms of payment integrity.

## **Part 2—Consequential amendments relating to the Minister’s Rules**

**Item 11** amends paragraph 11(ba) of the Principal Rules to update cross-referencing so that it accurately reflect amendments to be made to the Minister’s Rules. This item will commence at the same time as a relevant amendment is made to the Minister’s Rules.

# 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 (Building on the Child Care Package and Other Measures) Rules 2020***

This Legislative 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 Legislative Instrument**

The *Child Care Subsidy Secretary's Amendment (Building on the Child Care Package and Other Measures) Rules 2020* (Amendment Rules) are made under subsection 85GB(2) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act).

The Amendment Rules amend the *Child Care Subsidy Secretary's Rules 2017* (Principal Rules). The Principal Rules deal with a range of administrative and machinery matters to enable the operation of the Child Care Subsidy payment and approval regime, including: applications for provider and service approval and requirements for providers to make and keep written records.

In December 2019, the *Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019* (Building on the Child Care Package Act) amended the Family Assistance Act and *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). There are several consequential amendments that need to be made to the Principal Rules for several of the amendments in this Act to take effect.

The Amendment Rules:

- update the kind of information to be contained in an application for approval under the Family Assistance Law;
- prescribe the information that an approved provider must give when they request suspension of their approval;
- amend the record making and keeping requirements so approved providers are required to keep records where a third party makes a payment to an approved provider to assist an individual with their child care fees; and
- make a consequential amendment in relation to In Home Care to align the Principal Rules with the primary legislation as the Building on the Child Care Package Act incorporated In Home Care more fully into the primary legislation.

### **Human rights implications**

The Amendment Rules engage the following rights:

- Articles 3 and 16 of the *Convention on the Rights of the Child* (CRC);
- Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration. Early education and child care plays a vital role in the development of Australian children. Their preparation for school and access to this care is also one of the most effective early intervention strategies to break the cycle of poverty. The Amendment Rules support one of the primary objectives of the child care package – to support families to access quality child care.

The Amendment Rules are supporting this objective by complementing amendments being made to the *Child Care Subsidy Minister's Rules 2017* (Minister's Rules) that will enable state and territory third party payments to cover some or all of the co-contribution of the cost of child care for disadvantaged and vulnerable families. These families find that even a small co-contribution to child care fees can be a barrier to accessing child care. The Amendment Rules also make changes to the information requirements that child care providers are required to keep and make where a third party is assisting a vulnerable or disadvantaged family.

#### *Right to social security*

Article 9 of the ICESCR recognises the right of everyone to social security. Under the child care package, families who meet basic eligibility criteria are entitled to Commonwealth child care subsidies so long as they meet (or are exempt from) an activity test and their combined annual income is less than \$352,453. Additionally, children at risk of serious abuse or neglect, grandparents in receipt of income support payments, families experiencing temporary financial hardship and families transitioning from income support to work are eligible for further support through the Commonwealth's ACCS that ensures children in these families have access to adequate child care.

The Amendment Rules are supporting this objective by complementing amendments being made to the Minister's Rules to enable state and territory third party payments to cover some or all of the co-contribution of the cost of child care for disadvantaged and vulnerable families. The changes to the Amendment Rules regarding the information requirements that child care providers are required to keep and make where a third party is assisting a vulnerable or disadvantaged family, will help complement the amendments to the Minister's Rules. These amendments will assist vulnerable and disadvantaged families to access child care fee assistance from the Commonwealth and state and territory governments to reduce or remove their co-contribution to the cost of child care.

#### *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 keeping requirement in the Amendment Rules engage the right to privacy, as it involves personal or sensitive information (under the *Privacy Act 1988* (Cth)) relating to a family's circumstances. 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.

To the extent that the Amendment Rules limit the right to privacy, that limitation is reasonable and proportionate because it supports an ongoing obligation upon providers to provide accurate and complete information to assist the Secretary of the department to verify eligibility and calculate CCS and ACCS 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, fraudulent activity. These 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. 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 provider of information collected. In addition, any information collected by the provider and given to the Secretary will, once it is obtained and recorded by the Secretary, be subject to the confidentiality provisions in sections 161 to 168 of the Family Assistance Administration Act.

## **Conclusion**

The Amendment Rules are compatible with human rights. Measures in this instrument are compatible with and advance human rights under the CRC, ICESCR and ICCPR. These measures ultimately ensure that child care providers and services provide parents with the ability to choose whether to work, by enabling accessible, affordable and safe child care that promotes children's development and wellbeing.

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