

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

A New Tax System (Family Assistance) Act 1999

***Child Care Subsidy Amendment (Electronic Payment Exceptions and Other Measures)
Minister's Rules 2023***

AUTHORITY

The *Child Care Subsidy Amendment (Electronic Payment Exceptions and Other Measures) Minister's Rules 2023* (Amendment Rules) are made under subsection 85GB(1) 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* (Acts Interpretation Act).

Under subsection 33(3) of the Acts Interpretation Act, 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 and amend or vary any such instrument.

PURPOSE AND OPERATION

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to:

- provide an exception to the requirement to pay fees using an electronic funds transfer (EFT) system where the individual reasonably fears such payment would put the individual or their child at risk of family and domestic violence;
- make rules for a one year transition period in relation to increased hours of subsidised care for individuals who notify the Secretary of an Aboriginal or Torres Strait Islander child in their care. These rules affect when information provided to the Secretary on a child's Aboriginal and Torres Strait Islander status would impact a review of a child care subsidy (CCS) entitlement decision;
- make consequential changes to the Principal Rules to align terminology with the Family Assistance Act, following amendments made by the *Family Assistance Legislation Amendment (Cheaper Child Care) Act 2022* (Cheaper Child Care Act);
- change references to the 'Early Years Education Program' to reflect public rebranding of the initiative to 'an intensive early childhood education and care trial';
- prescribe the information about a provider that the Secretary may publish, by electronic means; and
- prescribe the financial information which must be reported by large child care providers, and the period the information relates to.

IMPACT ANALYSIS

The Office of Impact Analysis (OIA) has assessed the Amendment Rules as having no more than a minor regulatory impact (OBPR22-026829 and OBPR22-02692 for Part 1 amendments, OBPR-02667 for Part 2 and Part 3 amendments, OIA23-04819 for Part 5 amendments).

Part 4 amendments involve a change in terminology only, and therefore have no regulatory impact.

COMMENCEMENT

Sections 1 to 4 commence on the day after registration. Schedule 1 commences on 1 July 2023.

CONSULTATION

Since mid-2022, the Department of Education (the department) has consulted the early childhood education and care sector extensively on collecting 'gap fee' (the difference between child care session fees and CCS) via EFT, as well as the reporting requirements of large providers and publishing of large provider financial information to improve transparency. The department has consulted with the sector on the type of financial information to be reported and published to give greater fee transparency information for families.

The department has consulted with the Early Childhood Education and Care Reference Group (ECECRG), which is the department's key consultation and engagement mechanism for the child care sector, with varied representation across the sector. Membership includes the Secretariat of National Aboriginal and Islander Child Care. Some ECECRG members expressed concerns about the potential impact of the EFT requirement on women living in or fleeing domestic violence and indicated an exception would be appropriate. The measures in Part 1 address this concern by reducing the risk of domestic violence where a perpetrator may identify the location a child is attending care by viewing an electronic record (for example, a bank statement).

Additionally, the department consulted a number of Aboriginal Community Controlled early childhood education and care providers; domestic violence sector stakeholders from the Australian Women Against Violence Alliance and National Women's Safety Alliance; third-party software providers; and the Department of Social Services. These stakeholders agreed this exception is appropriate.

The amendments in Part 2 are technical in nature, as a consequence of terminology changes in the Family Assistance Act made by the Cheaper Child Care Act, on which the department conducted targeted consultation with the ECECRG. As a result, no further consultation has been conducted on this amendment.

The department consulted with Services Australia on the amendments in Part 3, to ensure the smooth implementation of the measure.

In Part 4, the terminology of an 'intensive early childhood education and care model trial' was developed by the Parkville Institute Ltd, which oversees the trial, in consultation with relevant parties involved in the initiative. Broader consultation was not required, as the amendments will not affect the program itself or alter the services provided to children and families.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Child Care Subsidy Amendment (Electronic Payment Exceptions and Other Measures) Minister's Rules 2023

The *Child Care Subsidy Amendment (Electronic Payment Exceptions and Other Measures) Minister's Rules 2023* (the Amendment Rules) are 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 Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to:

- provide an exception to the requirement to pay fees using an electronic funds transfer (EFT) system where the individual reasonably fears such payment would put the individual or their child at risk of family and domestic violence;
- make rules for a one year transition period in relation to increased hours of subsidised care for individuals who notify the Secretary of an Aboriginal or Torres Strait Islander child in their care. These rules affect when information provided to the Secretary on a child's Aboriginal and Torres Strait Islander status would impact a review of a child care subsidy (CCS) entitlement decision;
- make consequential changes to the Principal Rules to align terminology with the Family Assistance Act, following amendments made by the *Family Assistance Legislation Amendment (Cheaper Child Care) Act 2022*;
- change references to the 'Early Years Education Program' to reflect public rebranding of the initiative to 'an intensive early childhood education and care trial';
- prescribe the information about a provider that the Secretary may publish, by electronic means; and
- prescribe the financial information which must be reported by large child care providers, and the period the information relates to.

Human rights implications

The Amendment Rules engage the following human rights:

- **Article 3** of the Convention on the Rights of the Child (CRC), which recognises that in all actions concerning children, the best interests of the child shall be a primary consideration;
- **Article 18** of the CRC, which requires States Parties to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities;

- **Article 24** of the CRC, which recognises the right of the child to the highest attainable standard of health;
- **Article 2(c)** of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires States Parties to establish legal protection of the rights of women and protect women against discrimination; and
- **Article 3** of the CEDAW, which requires States Parties to ensure the full development and advancement of women.

Article 3 of the CRC

Article 3 of the CRC recognises that in all actions concerning children, including those undertaken by administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Amendment Rules provide an exception to the requirement to pay child care fees using an electronic funds transfer (EFT) system where the individual reasonably fears that electronic payments may put them at risk of family and domestic violence. This measure promotes the best interests of the child by mitigating the risk of family and domestic violence, which may prevent affected individuals from keeping their children enrolled.

Article 18 of the CRC

Article 18 of the CRC requires States Parties to take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities. The Amendment Rules promote these rights by increasing the transparency of information about child care providers, particularly in relation to fee information and, for large providers, financial information, enabling families to make more informed decisions and choose child care services and facilities more specific to their needs.

Article 24 of the CRC

Article 24 of the CRC recognises the right of the child to the enjoyment of the highest standard of health.

The Amendment Rules promote the right of the child to enjoy the highest standard of health by minimising children’s exposure to family and domestic violence, by reducing the risk of scenarios where a perpetrator may identify the location a child attends care by viewing an electronic record (for example, a bank statement) of their child care.

Articles 2 and 3 of the CEDAW

The CEDAW provides that in relation to discrimination against women, State Parties must:

- ensure the effective protection of women against acts of discrimination (Article 2);
- ensure the full development and advancement of women (Article 3).

Family and domestic violence is a serious issue that disadvantages and hinders the full development and advancement of women. The UN Committee on the Elimination of All Forms of Discrimination against Women has stated that gender-based violence, including

domestic violence, is a form of discrimination that seriously inhibits the ability of women to enjoy rights and freedoms on a basis of equality with men.¹

The Amendment Rules promote the rights of women by providing a positive measure that promotes the elimination of a form of violence against women, through an exception to the requirement to pay fees using an EFT system where such payment may allow a perpetrator to identify a woman's location and lead to family and domestic violence.

Maintaining access to child care is important for the participation of women in the workforce. Participation in the workforce promotes the development and advancement of women as it is an important pathway out of violent relationships, and promotes financial security, independence, social networks and increased self-esteem.² Continued access to child care may allow an affected individual to engage in processes aimed at lessening the impacts of violence and preventing future violence, such as attending counselling sessions and engaging in police and court proceedings.

Conclusion

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

Minister for Education, Jason Clare

¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (11th Session, 1992).

² *4 yearly review of modern awards – Family and Domestic Violence Leave* [2018] FWCFB 1691 [102].

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EXPLANATION OF PROVISIONS

Section 1: Name

1. This is a formal provision specifying the name of the instrument.

Section 2: Commencement

2. Sections 1 to 4 commence on the day after registration. Schedule 1 commences on 1 July 2023.

Section 3: Authority

3. This provision provides that the Amendment Rules are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act), which allows the Minister to make rules required or permitted to be prescribed by either the Family Assistance Act or the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act).

Section 4: Schedules

4. This section provides that each instrument specified in a Schedule to the Amendment Rules (that is, the *Child Care Subsidy Minister's Rules 2017* (Principal Rules)) are amended or repealed as set out in the applicable items in the Schedules to the Amendment Rules.

SCHEDULE 1 – Amendments

Part 1 – Electronic funds transfer exceptions

Item 1 – Division 1A of Part 5 (heading)

5. Item 1 updates the heading to Division 1A of Part 5 to include a reference to payment of hourly session fees. This is to reflect the changes to the Division, which relate to exceptions to the requirement to pay fees using an electronic funds transfer (EFT) system.

Item 2 – Section 54AA

6. Item 2 repeals section 54AA and substitutes it with a new section 54A. This new section is made for the purposes of subsection 201B(1A) of the Family Assistance Administration Act, which will be inserted by item 7 in Part 2 of Schedule 4 to the *Family Assistance Legislation Amendment (Cheaper Child Care) Act 2022* (Cheaper Child Care Act). The purpose of this new section is to prescribe the circumstance where an individual reasonably fears that paying the hourly session fees using an EFT system puts the individual or their child at risk of family or domestic violence. An individual in this prescribed circumstance would not be required to pay the provider using an EFT system. This measure is in response to early childhood education and care sector feedback in relation to vulnerable individuals, such as those experiencing or at risk of family or domestic violence. As highlighted by key sector stakeholders and domestic violence advocates, this individual exception to the requirement to pay fees electronically will be necessary to avoid situations of family or domestic violence where a perpetrator may identify the location where a child is attending care by viewing an electronic record (for example, a bank statement).
7. The measure allows the Secretary to decide that a particular individual is not to be required to pay the provider electronically if that individual reasonably fears that doing so would put them or their child at risk of family or domestic violence.
8. Domestic violence includes any behaviour within an intimate relationship (including current or past marriages, domestic partnerships or dates) that causes physical, sexual or psychological harm. Family violence is a broader term than domestic violence, as it refers not only to violence between intimate partners but also to violence perpetrated by parents and guardians against children, between other family members and in family-like settings.

Part 2 – Consequential amendments arising from the Family Assistance Legislation Amendment (Cheaper Child Care) Act 2022

Item 3 – Subsection 13(3)

9. Item 3 replaces ‘lower income threshold’ with ‘lower income (base rate) threshold’ to reflect the changes to the Family Assistance Act made by the Cheaper Child Care Act.
10. The amendments to terminology relating to income threshold were inserted into the Family Assistance Act to give effect to an increase in Child Care Subsidy (CCS) rates for eligible families from July 2023.

Part 3 – Transitional rules for the *Family Assistance Legislation Amendment (Cheaper Child Care) Act 2022*

Item 4 – At the end of Part 6A

11. From 1 July 2023, a new activity test result of at least 36 subsidised hours of care per fortnight will apply to an individual who notifies the Secretary of an Aboriginal or Torres Strait Islander child in their care. In practice, the new activity test result will apply from 10 July 2023, as this is the date of the first day of the CCS fortnight after the higher activity test result amendments commence on 1 July 2023.
12. Section 105C of the Family Assistance Administration Act deals with the timing of increases to CCS entitlement on internal review. The general principle that underlies section 105C is that if an individual is late to notify the department of a matter that would increase their entitlement, they may only receive backpay for a maximum of four weeks prior to that notification. This creates an incentive to notify, and an appropriate limit on how much backpay the Commonwealth may be liable to pay.
13. Subparagraph 105C(1)(b)(ia) of the Family Assistance Administration Act, which will also commence on 1 July 2023, provides that if an individual has been receiving CCS in respect of a child, but only notified the Secretary the child was an Aboriginal or Torres Strait Islander child on a particular day, they can only be backpaid any additional amount up to the start of a CCS fortnight that is no more than four weeks prior to the date of notification.
14. Item 4 inserts new Division 2 into Part 6A (Application, savings and transitional provisions) of the Principal Rules to modify the standard limitation on CCS backpay during a one year transition period for activity test changes for Aboriginal or Torres Strait Islander children.
15. Item 4 inserts new sections 61AC and 61AD into the Principal Rules. New section 61AC provides that the rules contained in new Division 2 of Part 6A are made for the purposes subitem 9(1) in Schedule 3 to the Cheaper Child Care Act.
16. New section 61AD allows the Secretary to take into account information about a child's Aboriginal and Torres Strait Islander status for the purposes of a review of a decision relating to an individual's CCS entitlement, where that information was notified before 8 July 2024. If information that an individual's child is an Aboriginal or Torres Strait Islander child is notified on or after 8 July 2024, the individual can only be backpaid for the additional amount up to the start of the CCS fortnight no more than four weeks prior to the date of notification.
17. This transitional rule ensures families are not disadvantaged during 2023-24 while awareness of the new measure is building. Once the measure commences, it will be implemented in two stages. From July 2023, notification will be by telephone or through face-to-face servicing. From July 2024, families will also be able to provide notification online or as part of their initial CCS application.

Part 4 – Intensive early childhood education and care model trial

Item 5 – Paragraphs 10(j) and 11B(c)

18. Item 5 substitutes the references to ‘Early Years Education Program replication trial’ in paragraphs 10(j) and 11B(c) of the Principal Rules, with ‘intensive early childhood education and care model trial overseen by Parkville Institute Ltd’.
19. This amendment reflects the public rebranding of the initiative to ‘an intensive early childhood education and care trial’ as contained in existing public communications and clarifies that the initiative is the intensive early childhood education and care model trial overseen by Parkville Institute Ltd.
20. The amendments rename the Early Years Education Program replication trial only. The initiative is otherwise the same.

Part 5 – Transparency Measures

Item 6 – After Part 3A

21. Item 6 inserts new Part 3B into the Principal Rules to prescribe information that the Secretary may publish, by electronic means, in relation to an approved provider, under paragraph 162B(1)(g) of the Family Assistance Administration Act.
22. New subsection 40B(1) prescribes the address, type and charged fee amounts (current and previous) of the provider’s child care services, and information included in a notice required under items 1 to 9 of the table in section 55 of the Principal Rules, as information that the Secretary may publish in relation to an approved provider. Items 1 to 9 of the table in section 55 of the Principal Rules specify that the provider must notify of fee information, its services’ operating hours, vacancies, when the provider ceases to operate a service, change of provider address, change of service address, change of provider name, change of service name and change of provider or service contact details. Publication of this information is important to ensure families are able to identify and access child care services available to them.
23. New subsection 40B(2) prescribes certain information about large child care providers (as defined in section 4A of the Family Assistance Administration Act) that the Secretary may publish under paragraph 162B(1)(g) of that Act. This information includes the large child care provider’s revenue and profits, and details of rental arrangements for each of the child care services it operates, and amount of rent paid for each of these services. Publication of this information provides an important accountability mechanism which will ensure greater transparency for families regarding the fees they pay to access child care services.

Item 7 – After the heading to Part 5

24. Item 7 inserts new Division 1AA to set out requirements for large child care providers. In particular, new section 54AA prescribes the financial information that must be included in a report given by the provider to the Secretary, for the purposes of section 203BA(2)(b) of the Family Assistance Administration Act. These amendments are intended to increase transparency and enable the department to better identify, monitor and mitigate risks posed to the financial viability of large providers who have a significant presence in the child care sector.
25. Item 7 prescribes the following information to be included in a report given under subsection 203BA(1) of the Family Assistance Administration Act:
- a. a statement of financial position (for example, a Balance Sheet);
 - b. a statement of comprehensive income (for example, Income Statement or Profit and Loss Statement);
 - c. a statement of changes in equity (for example, a Statement of Retained Earnings);
 - d. a statement of cash flows (for example, a Cash Flow Statement);
 - e. a Director's report, if one is produced for the reported period;
 - f. an Auditor's report, if the provider has been audited for the reported period;
 - g. details of rental arrangements for each child care service;
 - h. the amount of rent paid for the tenancies in which each child care services operates;
 - i. information which is material to the assessment of the provider's financial viability; and
 - j. other information necessary to assist in the understanding of the financial information reported.
26. Providers will already be required to provide much of this information in general purpose financial statements.
27. The rest of the information is prescribed as this information is necessary for the purposes of assessing a large child care provider's financial viability. In this context, financial viability means the provider's ability to generate sufficient income to provide a return on capital and equity invested by the provider, meet commitments to the provider's creditors, and sustain the provider's business through any period when it is not returning a profit.
28. The information to be reported should also be interpreted in respect of a large provider's operating context. For example, 'rental arrangements' means any arrangements in relation to the tenancies in which providers operate their services.
29. Information which is material to assessment of a provider's financial viability includes information about contextual factors which may not be noted within general purpose financial statements. This may include, but is not limited to, information about:

- a. the provider's ability to meet all liabilities payable;
 - b. the existence of debt guarantees from parent entities;
 - c. movement in holdings of child care services;
 - d. impacts of events outside the provider's control, such as weather events, pandemic or industrial action;
 - e. other forms of business support to ensure business continuity;
 - f. changes in operating environment, such as regulatory changes, changes in demand or other significant changes in markets where services are being provided;
 - g. strategies implemented by the provider to maintain or improve the provider's financial position. For example, raising further capital from investors, or the sale of services or other assets.
30. New subsection 54AA(2) provides the relevant period to which the required financial information relates. The period depends on whether the large child care provider produces annual financial reports for the financial year or for the calendar year. For providers that produce annual financial reports for the financial year, the period is the financial year. For providers that produce annual financial reports for the calendar year, the period is the calendar year.