

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

A New Tax System (Family Assistance) Act 1999

Child Care Subsidy Amendment (2023 Measures No. 1) Minister's Rules 2023

AUTHORITY

The Child Care Subsidy Amendment (2023 Measures No. 1) 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, amend, or vary any such instrument.

PURPOSE AND OPERATION

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to make a number of minor changes:

- Schedule 1 to the Amendment Rules amend the parts of the Principal Rules that deal with the In Home Care (IHC) Program. These changes include updating the language to make it more consistent and clarifying the conditions of continued approval that apply to IHC providers under section 48 of the Principal Rules.
- Part 1 of Schedule 2 to the Amendment Rules updates references to certain provisions of the social security law, to reflect amendments made by the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022*.
- Part 2 of Schedule 2 to the Amendment Rules inserts new appropriation limits for the Community Child Care Fund Special Circumstances Grant Opportunity for the 2023-24, 2024-25 and 2025-26 financial years.
- Part 3 of Schedule 2 to the Amendment Rules repeals the temporary coronavirus response measures in Schedule 3 of the Principal Rules, and remakes the provision allowing evidence of a positive COVID-19 test result to be used to support an additional allowable absence.
- Part 4 of Schedule 2 to the Amendment Rules clarifies the provider eligibility rule requiring the provider to ensure that persons with management or control of the provider held a working with children check immediately before commencing in the position.

IMPACT ANALYSIS

The Office of Impact Analysis has advised no Impact Analysis is required for the Amendment Rules because it will have no more than a minor regulatory impact (OIA ID: OIA23-05027 for Part 3 of Schedule 2 and OIA23-05123 for the remainder of the instrument).

COMMENCEMENT

Sections 1 to 4 of the Amendment Rules will commence the day after the Amendment Rules are registered. Schedule 1 and Parts 1 to 3 of Schedule 2 to the Amendment Rules will commence on 1 July 2023. Part 4 of Schedule 2 to the Amendment Rules will commence the day after the Amendment Rules are registered.

CONSULTATION

No consultation was undertaken in relation to the Amendment Rules because the changes are of a minor or machinery nature and do not substantially alter existing arrangements. In particular:

- The changes in Schedule 1 are largely aimed at clarifying the language of the Principal Rules and making them more consistent. They do not impose significant new obligations on IHC providers.
- The changes in Parts 1 and 4 of Schedule 2 do not represent a change in policy, but merely clarify and update the language of the Principal Rules.
- Part 2 of Schedule 2 is of a mechanical nature, inserting the appropriation limits that have already been approved as part of the 2023 Budget.
- Part 3 of Schedule 2 repeals provisions that would cease to have practical effect on 1 July 2023, so its changes can also be characterised as mechanical in nature.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Child Care Subsidy Amendment (2023 Measures No. 1) Amendment Rules 2023

The *Child Care Subsidy Amendment (2023 Measures No. 1) Amendment 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 make a number of minor changes:

- Schedule 1 to the Amendment Rules amend the parts of the Principal Rules that deal with the In Home Care (IHC) Program. These changes include updating the language to make it more consistent and clarifying the conditions of continued approval that apply to IHC providers under section 48 of the Principal Rules.
- Part 1 of Schedule 2 to the Amendment Rules updates references to certain provisions of the social security law, to reflect amendments made by the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022*.
- Part 2 of Schedule 2 to the Amendment Rules inserts new appropriation limits for the Community Child Care Fund Special Circumstances Grant Opportunity for the 2023-24, 2024-25 and 2025-26 financial years.
- Part 3 of Schedule 2 to the Amendment Rules repeals the temporary coronavirus response measures in Schedule 3 of the Principal Rules, and remakes the provision allowing evidence of a positive COVID-19 test result to be used to support an additional allowable absence.
- Part 4 of Schedule 2 to the Amendment Rules clarifies the provider eligibility rule requiring the provider to ensure that persons with management or control of the provider held a working with children check immediately before commencing in the position.

Human rights implications

The Amendment Rules engage the following rights:

- the rights of parents and children under the Convention on the Rights of the Child (CRC), particularly Article 18.

Rights of parents and children

Article 18(2) requires States 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.

The Amendment Rules promote this right in a number of ways. Firstly, Schedule 1 of the Amendment Rules makes amendments to clarify the obligations of an In Home Care (IHC) Provider and ensure that parents and children are able to access high quality care. Secondly, Part 2 of Schedule 2 to the Amendment Rules extends the special appropriation to fund the Community Child Care Fund Special Circumstances Grant Opportunity which helps services stay open when something unexpected happens – for example, a bushfire or flood. Thirdly, Part 3 of Schedule 2 to the Amendment Rules extends the measure that allows children to access additional allowable absences when they are sick due to COVID-19 and unable to attend care, so that parents can continue to afford to keep their children enrolled. An allowable absence is a session that the child does not attend, but for which child care subsidy is still payable (assuming the parents are liable to pay for the session). Fourthly, Part 4 of Schedule 2 clarifies the obligation to ensure that persons with management or control of a child care provider have current working with children checks before commencing in the role, so that children are safe at child care.

Together, these changes make it easier for parents and children in Australia to access child care that is safe, high quality, and affordable.

Conclusion

The Amendment Rules are compatible with human rights because they promote the rights of parents and children.

Minister for Education, The Hon Jason Clare MP

CHILD CARE SUBSIDY AMENDMENT (2023 MEASURES NO. 1) MINISTER'S RULES 2023

EXPLANATION OF PROVISIONS

Section 1: Name

1. This is a formal provision specifying the name of the instrument is the *Child Care Subsidy Amendment (2023 Measures No. 1) Minister's Rules 2023* (Amendment Rules).

Section 2: Commencement

2. This section provides that sections 1 to 4 of the Amendment Rules will commence on the day after the Amendment Rules are registered on the Federal Register of Legislation. It also provides that Schedule 1 and Parts 1 to 3 of Schedule 2 will commence on 1 July 2023, and Part 4 of Schedule 2 will commence on the day after the Amendment Rules are registered on the Federal Register of Legislation.

Section 3: Authority

3. This section provides that the Amendment Rules are made under the *A New Tax System (Family Assistance) Act 1999*.

Section 4: Schedules

4. This section provides that the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) are amended as set out in items in the Schedules to the Amendment Rules.

SCHEDULE 1 – IN HOME CARE AMENDMENTS

Child Care Subsidy Minister's Rules 2017

Items 1, 9 and 10: Section 4 (definition of *IHC Support Agency*), subsection 49B(1) and subsection 49B(2)

5. These items remove the term "In Home Care Support Agency" from the Principal Rules. Prior to this amendment, the terms "In Home Care Support Agency" and "IHC Support Agency" were used interchangeably throughout the Principal Rules.

Following these amendments, “IHC Support Agency” will be used consistently throughout.

6. This is an editorial change to enhance the readability of the Principal Rules.

Item 2: Subparagraphs 8(1)(ea)(vi) and (vii)

7. This item amends subparagraphs 8(1)(ea)(vi) and (vii) to refer to foster relationships, such as foster grandchildren, foster nieces and foster cousins. It does not substantively change the relationships that are covered by paragraph 8(1)(ea).
8. Paragraph 8(1)(ea) sets out the categories of relationships where there is no eligibility for CCS for a session of care provided by an IHC educator to a child with whom they have the relationship. However, paragraph 8(1)(ea) does not apply where subsection 8(4A) applies. In other words, if subsection 8(4A) applies, there is CCS eligibility for the session of care.
9. Subsection 8(4A) applies where:
 - a. the IHC Support Agency has made a recommendation that the care should be one for which an individual is eligible,
 - b. the care occurs in very remote Australia,
 - c. there is no other IHC educator available, and
 - d. the child is the grandchild, great-grandchild, nephew, niece, cousin, foster grandchild, foster great-grandchild, foster nephew, foster niece or foster cousin.
10. It was anomalous that paragraph 8(1)(ea) did not mention foster relationships, but subsection 8(4A) does, even though subsection 8(4A) created a carve out from paragraph 8(1)(ea). These amendments will clarify that foster relationships are also within the scope of paragraph 8(1)(ea).

Items 3 and 4: Paragraph 8(4A)(b) and subsection 8(5) (definition of *remote area child*)

11. These items amend the reference to the Australian Statistical Geography Standard Remoteness Structure to refer to the most recent edition. The most recent edition is Edition 3, and was released in March 2023.
12. The Australian Statistical Geography Structure is prepared by the Australian Bureau of Statistics. It classifies Australia into a hierarchy of statistical areas and is updated every five years to account for the growth and change in Australia’s population, economy and infrastructure. The Remoteness Structure divides Australia and the states and territories into 5 classes of remoteness on the basis of their relative access to services.
13. In 2023, the Australian Statistical Geography Standard could be accessed at <https://www.abs.gov.au/statistics/standards/australian-statistical-geography-standard-asgs-edition-3/jul2021-jun2026>.

Items 5 and 6: Subsections 48A(8) and 48A(10)

14. These items clarify the additional conditions of continued approval that apply to IHC providers.
15. Subsection 48A(8) of the Principal Rules previously provided that a provider of an IHC service must undertake to operate in a manner consistent with the *In Home Care National Guidelines*. Item 5 amends subsection 48A(8) so that the provider of the IHC must *comply with the In Home Care National Guidelines*. This clarifies the scope of the obligation and that a mere undertaking is not sufficient.
16. Similarly, item 6 removes the words “undertake to” from subsection 48A(10), to strengthen the obligation and clarify that a mere undertaking is not sufficient – the IHC service must actually do the things set out in subsection 48A(10), including:
 - a. only enrolling a child after receiving a referral from an IHC Support Agency;
 - b. informing the IHC Support Agency within 7 days after a child ceases to be enrolled at the service;
 - c. providing reasonable assistance with the IHC Support Agency.

Items 7 and 8: At the end of paragraph 48A(10)(a) and at the end of paragraph 48A(10)

17. Item 8 adds a new paragraph into subsection 48A(10). The effect of this change is that it will be a condition of continued approval for providers of IHC services that the providers must comply with any reasonable requests for information from the IHC Support Agency.
18. The IHC Support Agency is an entity that has been engaged by the Commonwealth to assist in administering the IHC program. It plays an important role in ensuring that providers of IHC services comply with their obligations under the family assistance law. The IHC Support Agency may occasionally need to ask approved providers of IHC services for information, within reason, as part of its duties in administering the IHC program. New paragraph 48A(10)(a) will require providers to comply with such requests.
19. Item 7 is a consequential editorial change.

Items 11 and 12: Section 49C (heading) and subsection 49C(2)

20. These items are editorial changes only. The amendments make minor grammatical changes to section 49C.

SCHEDULE 2 – OTHER AMENDMENTS

Part 1 – Amendments relating to references to the social security law

Child Care Subsidy Minister's Rules 2017

21. Part 1 of Schedule 2 amends references to the social security law in sections 15 and 39 of the Principal Rules to reflect the changes made by the *Social Security Law Amendment (Streamlined Participation Requirements and Other Measures) Act 2022 (SPROM Act)*. The SPROM Act, among other things, consolidated and streamlined the social security law provisions relating to mutual obligations such as the requirement to have an employment pathway plan. As a result, several of the provisions of the social security law referred to in sections 15 and 39 of the Principal Rules have been renumbered or combined with other provisions.
22. Section 15 of the Principal Rules deals with when a person is eligible for additional child care subsidy (ACCS) (transition to work). Receiving certain payments under the social security law can give rise to eligibility for ACCS (transition to work).
23. Section 39 of the Principal Rules provides that certain individuals receiving jobseeker, youth allowance, parenting payment or special benefit are entitled to a particular activity test result. An individual's activity test result will give the number of hours of subsidised care per fortnight that the individual can access. If the individual uses more hours of child care than their activity test result, CCS will not apply to the additional hours.
24. Both provisions interact closely with the social security law and refer to a number of provisions of the social security law.

Item 1: Paragraph 15(f)

25. This item amends paragraph 15(f) to reflect the changes to the social security law as part of the SPROM Act.
26. Paragraph 15(f) previously referred to "participation requirements under section 500A" of the *Social Security Act 1990* (Social Security Act). However, as part of the SPROM Act, section 500A of the Social Security Act has been repealed and the term "participation requirements" is no longer used in relation to parenting payment.
27. This item amends paragraph 15(f) to refer to the new provisions of the Social Security Act that require parenting participants to engage in mutual obligations, and changes the language to "requirements".

Item 2: Paragraph 15(f) (note)

28. This item amends the note to paragraph 15(f) to refer to “requirements” instead of “participation requirements”. As a result of the SPROM Act, the social security law no longer uses the term “participation requirements” to refer to the requirement to have an employment pathway plan.

Item 3: Paragraph 15(h)

29. This item amends paragraph 15(h) to reflect the changes to the social security law due to the SPROM Act, which repealed subdivision E of Division 1 of Part 2.11 of the Social Security Act. Paragraph 15(h) will now refer to paragraph 593(1AC)(b) of the Social Security Act, which deals with individuals who are not required to satisfy the employment pathway plan requirements.

Item 4: Paragraph 15(h) (note)

30. This item amends the note to paragraph 15(h) to refer to Subdivision C of Division 2A of Part 3 of the *Social Security (Administration) Act 1999* (SS Administration Act). This is necessary because the SPROM Act consolidated all provisions in relation to employment pathway plan requirements into Division 2A of Part 3 of the SS Administration Act.

Item 5: Subsection 39(2)

31. This item removes the word “participation” from subsection 39(2). As a result of the SPROM Act, the social security law no longer uses the term “participation requirements” to refer to the requirement to have an employment pathway plan.

Item 6: Paragraph 39(5)(b) (note)

32. This item repeals and substitutes the note to paragraph 39(5)(b). The note gives examples of when a person is exempt from the requirement to engage in qualified activities. As a result of the SPROM Act, the provisions of the social security law that dealt with mutual obligations have been moved and consolidated, so item 6 updates the note to reflect the new numbering of the relevant provisions.

Part 2 – Amendments relating to standing appropriation

Child Care Subsidy Minister's Rules 2017

33. Part 2 adds new standing appropriations for the Community Child Care Fund Special Circumstances Grant Opportunity with respect to the financial years 2023-24, 2024-25, and 2025-26.

Item 7: Subsection 78(1)

34. This item replaces the note after subsection 78(1). The previous note said that the Community Child Care Fund Special Circumstances Grant Opportunity Guidelines could be found on the Department's website www.dese.gov.au in 2020. Since then, there have been machinery of government changes, and as a result, the department's website is now www.education.gov.au. The new note will explain that the Guidelines can be found in 2023 on the new website.

Item 8: At the end of section 78

35. This item inserts six new subsections at the end of section 78 of the Principal Rules.
36. Section 233 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (FA Administration Act) provides that payments under the FA Administration Act are to be made out of the Consolidated Revenue Fund. In general, this does not extend to amounts paid under funding agreements made under section 85GA, unless a purpose is prescribed in the Principal Rules under subsection 233(2) of the FA Administration Act. Subsection 233(3) of the FA Administration Act provides that the Minister's Rules must prescribe the total amount that may be paid in respect of a financial year as a result of the purposes prescribed under subsection 233(2), and subsection 233(5) of the FA Administration Act provides that the Principal Rules may prescribe the total amount that may be paid in respect of a financial year for each purpose prescribed under subsection (2).
37. Subsection 78(1) of the Principal Rules prescribe agreements entered into under the Community Child Care Fund Special Circumstances Grant Opportunity as a purpose.
38. This item will add new subsections (8) to (13) to the end of section 78. Subsections (8) and (9) provide the total amount that can be paid in respect of 2023-24 is \$4 million, subject to any subsequent amendments, and the total amount that can be paid for the purpose of the Community Child Care Fund Special Circumstances Grant Opportunity in respect of 2023-24 is also \$4 million.

39. Subsections (10) and (11) do the same for 2024-25, with the total amount also being \$4 million. Subsections (12) and (13) do the same for 2025-26, with the total amount also being \$4 million.
40. These provisions reflect the amount that has already been approved to be committed as part of the 2023 Budget.

Part 3 – Repeal of COVID-19 measures

Child Care Subsidy Minister's Rules 2017

41. Part 3 repeals certain temporary COVID-19 measures that have been made since 2020. During 2020, 2021 and 2022, stay at home orders and other restrictions had an impact on the financial viability of child care services and the affordability of care in circumstances where children were not always able to attend. These measures were due to run until 30 June 2023. The majority of these measures are being repealed after three years into the pandemic as they are no longer necessary. However, the measure that allowed families to access additional allowable absences where a family member is sick with COVID-19 and able to prove this through a positive test result is being remade as an ongoing measure.

Items 9 and 10: Subsections 5B(2) (notes)

42. These items repeal note 2 to subsection 5B(2) of the Principal Rules and rename note 1 as just “note” to reflect that it is now the only note.
43. Note 2 previously contained a cross-reference to Part 3 of Schedule 3, which set out temporary coronavirus measures. As Schedule 3 is now being repealed, note 2 no longer serves a practical purpose.

Item 11: After section 5C

44. This item remakes clause 3.3 of Schedule 3 to the Principal Rules as an ongoing measure, in the form of new section 5D of the Principal Rules.
45. CCS eligibility is tied to a session of care that is “provided”. Under subsection 10(1) of the Family Assistance Act, a session of care is provided if the child is enrolled and attends the session or part of the session, or the session is an allowable absence under subsections 10(2), 10(3) or 10(5).
46. Subsection 10(2) provides for up to 42 basic allowable absences. Subsection 10(3) sets out when additional allowable absences can be accessed despite the child having used up their 42 absences under subsection 10(2). Additional allowable absences can be accessed where the child, or a family member of the child, is ill, and

the service has been given a certificate issued by a medical practitioner in relation to the illness.

47. Subsection 10(3A) provides that the Minister's Rules may prescribe circumstances where the requirement for the service to have been given a medical certificate does not apply. Section 5D is made under this provision.
48. Section 5D has the effect that a child can access an additional allowable absence after the initial 42 absences have been used up if:
 - a. The reason for the additional allowable absence is that the child or a family member is sick with COVID-19;
 - b. The child or family member tested positive in the seven day period ending on the day of the additional allowable absence; and
 - c. The service has been given a copy of a notice of the positive COVID-19 test result by a pathology service or a government agency.
49. In these circumstances, it is not necessary for the service to also be given a certificate issued by a medical practitioner under section 10(3)(e).
50. This provision acknowledges that a notice of a positive COVID-19 test result by a pathology service or government agency is a probative piece of evidence that the individual was really sick with COVID-19, so it may be unnecessary to also get a medical certificate.
51. This provision will also have flow on effects under subsection 5B(2) of the Principal Rules.
52. Section 5B sets out where an allowable absence or additional allowable absence may be accessed despite the session being either before the child's first attendance at the service or after the child's last attendance at the service before becoming unenrolled. One of the circumstances, in paragraph 5B(2)(a), is where both:
 - a. The child is absent from a session because of a reason specified in subsection 10(4) of the Family Assistance Act, and
 - b. If paragraph 10(3)(e) applies in relation to the absence, the service has been given a certificate issued by a medical practitioner in relation to the service.
53. In circumstances where section 5D applies – that is, where the illness is COVID-19, the person tested positive in the seven days ending on the absence and the service has been given a copy of the notice of the positive COVID-19 test result by a pathology service or a government agency – paragraph 10(3)(e) is disapplied. This means that section 5D will also permit evidence of a COVID-19 test to be used to access absences before first attendance or absences after last attendance.

Items 12 and 13: Subparagraphs 8(4B)(b)(ii) and (vi)

54. These items repeal subparagraph 8(4B)(b)(vi) of the Principal Rules and make consequential typographical changes to subparagraph 8(4B)(b)(ii).

55. Subparagraph 8(4B)(b)(vi) was a COVID-19 relief measure. Subsection 8(4B), read together with paragraph 8(1)(g), prevents a person from being eligible for a session of care if the child care service is closed on the day the session of care would have occurred. Subparagraph 8(4B)(b)(vi) created an exception to this where the service was unable to open because it did not have sufficient educators to staff the centre in compliance with the Education and Care Services National Law because one of more of its staff has COVID-19. It applied between 27 January 2022 and 30 June 2023.
56. As this measure will be spent from 1 July 2023, it is being repealed.

Item 14: Schedule 3

57. This item repeals Schedule 3 to the Principal Rules, which set out temporary coronavirus response measures.
58. These measures had effect until 30 June 2023 due to application provisions that were drafted into the substantive clauses. From 1 July 2023, they will be spent. As the impact of the COVID-19 pandemic is less severe than it was in previous years, they are not being extended.
59. Accordingly, Schedule 3 is being repealed with effect from 1 July 2023.

Part 4 – Other

Child Care Subsidy Minister's Rules 2017

Item 15: Paragraph 43(2)(a)

60. This item repeals and substitutes paragraph 43(2)(a) of the Principal Rules to clarify the policy intent of that section.
61. The policy in relation to Working With Children Checks (WWCC) has always been that it is the role of the States and Territories to regulate who is required to hold a WWCC. This is because the States and Territories have responsibility for regulating the quality and safety of child care services.
62. The family assistance law reinforces the importance of working with children's checks, as regulated by the States and Territories. Section 195D of the FA Administration Act provides that an approved provider must ensure that each individual who is required under State or Territory law to hold a WWCC has a current WWCC. This is based on the policy that a child care provider should not be able to administer child care subsidy if it does not comply with quality and safety requirements regulated by the States and Territories.
63. Section 43 of the Principal Rules sets out additional provider eligibility rules. These include that the provider must ensure that each person who has management or

control of the provider held a current WWCC immediately before the person commenced to hold that position (paragraph 43(2)(a)). The Secretary must be satisfied that the provider satisfies the provider eligibility rules before approving it under the family assistance law. Accordingly, paragraph 43(2)(a) complements section 195D by ensuring that WWCCs are considered at the point of approval.

64. This item clarifies that the obligation in paragraph 43(2)(a) only applies to persons with management or control who are required to hold a WWCC under the State or Territory law that applies. Some persons with management or control of a provider may not be required to hold a WWCC under State or Territory law – for example, if their duties are administrative or executive and they do not attend premises where children are being cared for. The requirements vary depending on the State and Territory where the service is located.
65. If a person with management or control is not required to hold a WWCC under State or Territory law, paragraph 43(2)(a) does not apply to them and the provider does not need to ensure they hold a WWCC.