

## **EXPLANATORY STATEMENT**

**Issued by the authority of the Minister for Education, the Hon Jason Clare MP**

***A New Tax System (Family Assistance) Act 1999***

***Child Care Subsidy Amendment (Additional Child Care Subsidy) Minister's Rules 2023***

### **AUTHORITY**

The *Child Care Subsidy Amendment (Additional Child Care Subsidy) 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 give effect to the Department of Education's (the Department) 2023-24 Budget measure, *Additional Child Care Subsidy – improving access*. The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to prescribe additional circumstances in which Additional Child Care Subsidy (ACCS) (child wellbeing) certificates or determinations may be backdated for a longer period (up to 13 weeks, instead of up to 28 days). The purpose of these amendments is to improve access to early childhood education and care (ECEC) for vulnerable families and children in need of extra support.

These amendments expand exceptional circumstances criteria to include where children are in formal foster care, families experiencing homelessness or families affected by the harmful use of alcohol or drugs. Families in these circumstances will benefit from additional time to collect evidence, with no impact on eligibility for ACCS (child wellbeing). This will reduce gaps in the subsidy when it takes more than 28 days to give a certificate or make an application for a determination in circumstances where there is difficulty in obtaining timely evidence for ACCS (child wellbeing) applications.

### **IMPACT ANALYSIS**

The Office of Impact Analysis (OIA) has assessed the Amendment Rules as having no more than a minor regulatory impact (OBPR23-0417).

## **COMMENCEMENT**

The Amendment Rules will commence on 16 October 2023.

## **CONSULTATION**

Targeted consultation was undertaken with the sector, via the ACCS Working Group of the Department's ECEC Reference Group, and with state and territory governments, via the Department's ACCS States & Territories Working Group. Stakeholders were supportive of the measure and their feedback is reflected in the Amendment Rules.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### Child Care Subsidy Amendment (Additional Child Care Subsidy) Minister's Rules 2023

The *Child Care Subsidy Amendment (Additional Child Care Subsidy) 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 give effect to the Department of Education's (the Department) 2023-24 Budget measure, *Additional Child Care Subsidy – improving access*. The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to prescribe additional circumstances in which Additional Child Care Subsidy (ACCS) (child wellbeing) certificates or determinations may be backdated for a longer period (up to 13 weeks, instead of up to 28 days). The purpose of these amendments is to improve access to early childhood education and care (ECEC) for vulnerable families and children in need of extra support.

These amendments expand exceptional circumstances criteria to include where children are in formal foster care, families experiencing homelessness or families affected by the harmful use of alcohol or drugs. Families in these circumstances will benefit from additional time to collect evidence, with no impact on eligibility for ACCS (child wellbeing). This will reduce gaps in the subsidy when it takes more than 28 days to give a certificate or make an application for a determination in circumstances where there is difficulty in obtaining timely evidence for ACCS (child wellbeing) applications.

#### **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 19** of the CRC, which requires that appropriate legislative, administrative, social and educational measures be taken to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, including social programmes to provide necessary support for the child and for those who have the care of the child.

- **Article 20** of the CRC, which provides that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance.

#### Article 3 of the CRC

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration.

The Amendment Rules will promote the best interests of children by ensuring that they have continuous access to and remain enrolled in ECEC, including, for example, when they are in formal foster care and may be in a position where they are transitioning between different carers and households.

#### Article 18 of the CRC

Article 18 of the CRC, and in particular, paragraph 3, requires that States Parties take all appropriate measures to ensure that children of working parents have the right to benefit from ECEC services and facilities for which they are eligible.

The Amendment Rules promote this right by expanding access to ACCS (child wellbeing), which provides financial support for families using ECEC, including, for example, children in formal foster care and at risk but still in the care of their parents, including working parents. The Amendment Rules also allow ACCS (child wellbeing) support to be backdated for up to 13 weeks where an eligible individual, usually a parent, their partner or the child is homeless or affected by the harmful use of alcohol or drugs. This will benefit certain working families by making it easier for them to access ECEC services.

#### Article 19 of the CRC

Article 19 of the CRC requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents, legal guardians, or any other person who has the care of the child. Paragraph 2 states that these measures should include the establishment of social programmes to provide necessary support for the child.

The Amendment Rules promote this right by providing additional support for ECEC for children who are “at risk”, including children in formal foster care, children in families experiencing homelessness or children with a family member affected by the harmful use of alcohol or drugs. Ensuring that these vulnerable children have continuity of access to ECEC ensures support, protection and quality care for the child at times when they may otherwise have been at risk of abuse or neglect.

### Article 20 of the CRC

Article 20 of the CRC recognises that a child temporarily or permanently deprived of his or her family environment, or in whose best interest cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the state. Paragraph 2 requires States Parties to ensure alternative care for such a child.

To that end, the Amendment Rules provide further support for children in formal foster care, children in families experiencing homelessness or children with a family member affected by the harmful use of alcohol or drugs by increasing the period an ACCS (child wellbeing) certificate or determination may be in effect for such children. This will ensure that these children have continuity of access to ECEC, even when, for example, they have just transitioned to a new formal foster care family who has not yet determined its eligibility to receive Child Care Subsidy.

### **Conclusion**

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

**Minister for Education, the Hon Jason Clare MP**

## ***Child Care Subsidy Amendment (Additional Child Care Subsidy) Minister's Rules 2023***

### **EXPLANATION OF PROVISIONS**

#### **Section 1: Name**

1. This section provides that the name of this instrument is the *Child Care Subsidy Amendment (Additional Child Care Subsidy) Minister's Rules 2023* (Amendment Rules).

#### **Section 2: Commencement**

2. This section provides that this instrument commences on 16 October 2023.

#### **Section 3: Authority**

3. This section 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 to prescribe matters required or permitted by the Family Assistance Act or the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act), or necessary or convenient to be prescribed for carrying out or giving effect to certain provisions of the Family Assistance Act and the Family Assistance Administration Act, including in relation to Additional Child Care Subsidy (ACCS) (child wellbeing).

#### **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**

#### *Child Care Subsidy Minister's Rules 2017*

#### **Item 1 – Paragraph 11A(b)**

5. This item inserts the words “or their” after the words “the individual” in paragraph 11A(b) to correct a typographical error in this paragraph.

Items 2 and 3 – After paragraph 11A(c)); At the end of section 11A

6. Items 2 and 3 amend section 11A of the Principal Rules to prescribe additional kinds of exceptional circumstances for the purposes of subsections 85CB(2A) and 85CE(5B) of the Family Assistance Act. These subsections allow the Secretary to backdate ACCS (child wellbeing) certificates and determinations to a period of more than 28 days, but no more than 13 weeks, provided that the Secretary is satisfied that an exceptional circumstance prescribed by the Principal Rules exists.
7. ACCS (child wellbeing) provides for a higher rate of early childhood education and care (ECEC) fee assistance to families with children at risk of serious abuse or neglect, the purpose of which is to reduce the possibility of the cost of ECEC being a barrier to such children either entering or remaining engaged with ECEC (see the Explanatory Memorandum to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016* on pages 25 and 26).
8. Subdivision A of Division 3 of Part 4A of the Family Assistance Act sets out the requirements for an individual or the approved provider of an approved child care service to be eligible for ACCS (child wellbeing) for a session of care provided by the service to a child. This includes that either a certificate given by the provider under section 85CB or a determination made by the Secretary under section 85CE is in effect (see paragraphs 85CA(1)(b) and (2)(a)). Such a certificate or determination must specify the day it takes effect, which must be the Monday of a week that includes an ‘at risk day’ (a day on which either the provider considers or the Secretary is satisfied that the child is or was at risk of serious abuse or neglect) and cannot be more than 28 days before the certificate is given or the application for the determination is made (see paragraphs 85CB(2)(c) and 85CE(5)(a)). However, the Secretary may extend this period to up to 13 weeks if the Secretary is satisfied that an exceptional circumstance prescribed by the Principal Rules exists (see subsections 85CB(2A) and 85CE(5B)).
9. Extending the backdating of the effect of ACCS (child wellbeing) certificates and determinations in exceptional circumstances aims to prevent vulnerable families and children from having their access to ECEC compromised and thereby being disadvantaged by circumstances that were beyond the provider’s control that made it impracticable for the provider to give such a certificate or apply for such a determination in a timely manner (see the Explanatory Memorandum to the *Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020* on pages 15 to 17).
10. The additional kinds of exceptional circumstances that the Amendment Rules prescribe for the purposes of subsections 85CB(2A) and 85CE(5B) of the Family Assistance Act include:
  - a. the child is ‘in a formal foster care arrangement’ (within the meaning of section 8E of the Principal Rules);

- b. the eligible individual, their partner or the child is homeless; and
  - c. the eligible individual, their partner or the child is affected by the harmful use of alcohol or another drug.
11. For new paragraph 11A(ca), subsection 8E(2) provides for the meaning of a child ‘in a formal foster care arrangement’. This is a broad definition that is intended to encompass the different ways in which a child may be placed in formal foster care.
12. The purpose of prescribing this circumstance as an exceptional circumstance is that children in formal foster care are particularly vulnerable and in need of stable, continuous ECEC arrangements.
13. For new paragraph 11A(e), the term ‘homeless’ is not defined, however it is meant to rely on the widely accepted definition of ‘homelessness’ in Australia that describes three kinds of homelessness and is consistent with the use of the term in social policy law more broadly (see the Department of Social Services’ Social Security Guide topic on the definition of ‘homelessness’, which can be accessed at: [guides.dss.gov.au/social-security-guide/1/1/h/74](https://guides.dss.gov.au/social-security-guide/1/1/h/74)). These kinds of homelessness include:
- a. primary homelessness, such as sleeping rough or living in an improvised dwelling;
  - b. secondary homelessness, including staying with friends or relatives and with no other usual address and people staying in specialist homelessness services; and
  - c. tertiary homelessness, including people living in boarding houses or caravan parks with no secure lease and no private facilities, both short and long-term.
14. The purpose of prescribing this circumstance as an exceptional circumstance is in recognition of the additional challenges homelessness places on families to gather evidence and establish their eligibility for subsidised care and successfully claim for Child Care Subsidy (CCS) in a timely manner. Backdating subsidy beyond 28 days helps ensure there are not unsubsidised gaps in care, which may otherwise act as a deterrent or delay to families accessing care to support children at risk or serious abuse or neglect.
15. For new paragraph 11A(f), the terms ‘harmful’, ‘alcohol’ and ‘drug’ are not defined, which means the ordinary meaning of these terms apply.
16. The purpose of prescribing this circumstance as an exceptional circumstance is in recognition of the adverse impacts of harmful drug or alcohol use across the family unit, and how this impacts timeframes to gather evidence, establish the family’s eligibility for subsidised care and successfully claim for CCS. Backdating subsidy beyond 28 days helps ensure there are not unsubsidised gaps in care, which may otherwise act as a deterrent or delay to families accessing care to support children at risk or serious abuse or neglect.



17. In line with general ACCS (child wellbeing) assessment practices, third party evidence of a prescribed exceptional circumstance must be provided before extended backdating can be applied for an application.
18. These amendments apply prospectively, that is, these additional kinds of exceptional circumstances will only apply in relation to certificates given under section 85CB or applications for a determination made under section 85CE on or after the commencement of this instrument. However, because of the operation of these sections, the effect of such a certificate or determination may be backdated up to 13 weeks before the certificate is given or the application for the determination is made, including if that period is before the commencement of this instrument.