

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Education

A New Tax System (Family Assistance) Act 1999

Child Care Subsidy Amendment (Outside School Hours Care Services and Other Measures)

Minister's Rules 2024

AUTHORITY

The *Child Care Subsidy Amendment (Outside School Hours Care Services and Other Measures) Minister's Rules 2024* (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

Outside School Hours Care for Preschool Children

The Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to allow services that primarily provide care to children who attend an early educational program, such as a preschool or kindergarten, or a combination of such children and children who attend school, to be approved as outside school hours care (OSHC) services.

As a result of the amendment, approval as an OSHC service means that Child Care Subsidy and Additional Child Care Subsidy is claimable by families for care provided to children at the service before and after (but not during) the preschool session, or on a day they would usually attend a preschool session but are not attending because the preschool is not operating (such as a preschool holiday). Early childhood educational programs vary between states and territories and may be referred to as a preschool or kindergarten program, depending on the jurisdiction. The amendment allows OSHC to be provided at sites where care is provided primarily to 4-year-old preschool children (the year 2 years before grade 1 of school). The key purpose of this amendment is to ensure that an approved OSHC service can provide care to this cohort of children. Three-year-old preschool children will still be able to attend an OSHC service but an OSHC service cannot primarily provide care to 3-year-old preschool children.

Financial Information Reporting, Charitable Donations and Fee Reporting

The Amendment Rules amend the Principal Rules to prescribe the period within which financial information is to be provided by large child care providers under section 54AA; and when providers are required to notify the Secretary of fee information under section 55.

The Amendment Rules also amend the Principal Rules so that the prohibition on providers offering inducements in section 48B does not apply to contributions or donations to charities.

Additional Family Day Care Educator information

The Amendment Rules prescribe additional information required to be notified to the Secretary about Family Day Care (FDC) educators.

IMPACT ANALYSIS

The Office of Impact Analysis has advised that no Impact Analysis is required for the Amendment Rules because they are unlikely to have more than a minor impact (OIA24-07504).

COMMENCEMENT

Items 1 to 4 in Schedule 1 to the Amendment Rules commence on the day after the Amendment Rules are registered. Items 5, 6 and 7 of Schedule 1, which require providers to notify the Secretary of fee information at regular intervals and the provisions relating to FDC educator information, commence on 1 September 2024.

CONSULTATION

Outside School Hours Care for Preschool Children

The Department of Education (department) has engaged in an extensive consultation process. During this process, the department heard from the relevant departments for education of the states and territories, as well as the South Australian Royal Commission. Following the publication of the Final Report of the Royal Commission into Early Childhood Education and Care, the department worked closely with key stakeholders and consulted with states and territory governments, as well as the sector.

State and territory education policy departments had a neutral or positive reaction to OSHC services primarily providing care to children who attend an early educational program.

Some sector organisations and peak bodies indicated support for the changes, noting the beneficial impacts on family choice and likely increase in the accessibility of programs. Other organisations expressed concerns, indicating they thought the changes may have detrimental impacts on quality and create increased competition on Centre-Based Day Care (CBDC) services. It has been noted by other stakeholders that key aspects of the National Quality Framework, such as educator to teacher ratios, apply based on the aged of children attending a service rather than the service type, and therefore there would be no diminishment of quality between CBDC and OSHC.

Financial Information Reporting, Charitable Donations and Fee Reporting

The department engaged in a consultation process through its ongoing working relationships with providers, as well as formal consultation mechanisms. Limited feedback was provided on these changes, but feedback received was strongly supportive.

Additional Family Day Care Educator information

The department has engaged in a consultation process through its ongoing working relationship with stakeholders including Family Day Care Australia (FDCA), who liaised directly with several Family Day Care (FDC) providers who each use one of the three main third-party CCS software programs. As a result of consultation with FDCA, the proposed timeframe for an approved provider to notify the Secretary after an FDC educator ceases to be engaged by or registered with the approved provider's service was extended.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Child Care Subsidy Amendment (Outside Schools Hours Care Services and Other Measures)

Minister's Rules 2024

The *Child Care Subsidy Amendment (Outside School Hours Care Services and Other Measures) Minister's Rules 2024* (the Amendment Rules) 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 Amendment Rules amend the *Child Care Subsidy Minister's Rules 2017* (Principal Rules) to allow services that primarily provide care to children who attend an early educational program, such as a preschool or kindergarten, or a combination of such children and children who attend school, to be approved as outside school hours care (OSHC) services.

As a result of the amendment, approval as an OSHC service means that Child Care Subsidy and Additional Child Care Subsidy is claimable by families for care provided to children at the service before and after (but not during) the preschool session, or on a day they would usually attend a preschool session, but are not attending because the preschool is not operating (such as a preschool holiday). Early childhood educational programs vary between states and territories and may be referred to as a preschool or kindergarten program, depending on the jurisdiction. The key purpose of this amendment is to ensure that an approved OSHC service can provide care to this cohort of children.

The Amendment Rules also amend the Principal Rules to ensure that the prohibition on providers offering inducements in section 48B does not apply to contributions or donations to charities.

The Amendment Rules amend the Principal rules to prescribe the period within which financial information is to be provided by large child care providers under section 54AA; and when providers are required to notify the Secretary of fee information under section 55. The Amendment Rules also prescribe additional information required to be notified to the Secretary about Family Day Care (FDC) educators.

Human rights implications

The Amendment Rules engage the following human rights:

- the right to education under Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and under Articles 28 and 29 of the *Convention on the Rights of the Child* (CRC), read with Articles 3, 4 and 18(2);
- the rights of parents and children under Article 24 of the CRC; and

- the rights contained in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), particularly Articles 2(c) and 3.
- the right to protection against arbitrary and unlawful interferences with privacy, family and home under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and under Article 16 of the CRC.

Right to education

Article 13(1) of the ICESCR relates to the right of everyone to education ‘directed to the full development of the human personality and the sense of its dignity’, including that ‘[t]he development of a system of schools at all levels shall be actively pursued’.

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.

Article 4 of the CRC requires States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC. These rights include the right of the child to education (Article 28).

Article 18(2) of the CRC requires States Parties to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.

Article 29 of the CRC, provides that States Parties agree that the education of the child shall be directed to, amongst other things, ‘[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential’ (Article 29(1)(a)).

The Amendment Rules allow OSHC services to be approved to primarily provide care to children who attend early educational programs, including preschool or kindergarten, or a combination of such children and children who attend school. This measure promotes the right to education by improving access to care either side of the preschool session, ultimately enabling access to preschool education. It is widely accepted that access to high quality early childhood education and care has a positive impact on children’s development.¹

Rights of parents and children

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 enabling the child to continue accessing wrap around care in the same environment as their preschool learning. This minimises the disruptive nature of transitions between services, thereby enhancing the right of the child to enjoy their fullest standard of health.

Rights contained in the CEDAW

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

¹ Australian Institute of Family Studies (2013) [Access to early childhood education in Australia](#).

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

Maintaining access to early childhood education and care, and services that provide wrap around supports promotes the development and advancement of women by providing them with the opportunity to engage in work, study, or training at their desired level. Having the freedom to participate in these activities is an important pathway out of violent relationships, promotes financial security, independence, creates community connection and increased self-esteem.²

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.

The Amendment Rules require providers to give the Secretary information that may be ‘personal information’ under the *Privacy Act 1988* (Cth) (Privacy Act) including a change of physical address of the premises from which a Family Day Care (FDC) educator provides care for the service. Any limitation on the right to privacy is reasonable and proportionate, given the objective is to promote child safety.

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 applies in relation to the management by the provider of information collected. In addition, any information collected by the provider and provided 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 *New Tax System (Family Assistance) (Administration) Act 1999*.

To the extent that the right to privacy is limited, the limitation is reasonable and proportionate and as such, this instrument is compatible with the right to privacy.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of human rights recognised under the ICESCR, CRC and CEDAW.

Minister for Education, Jason Clare

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

***Child Care Subsidy Amendment (Outside Hours School Care Services and Other Measures)
Minister's Rules 2024***

EXPLANATION OF PROVISIONS

Section 1: Name

1. This section provides that the name of the instrument is the *Child Care Subsidy Amendment (Outside School Hours Care Services and Other Measures) Minister's Rules 2024* (Amendment Rules).

Section 2: Commencement

2. Items 1 to 4 in Schedule 1 to the Amendment Rules commence on the day after the Amendment Rules are registered. Items 5, 6 and 7 of Schedule 1, which require providers to notify the Secretary of fee information at regular intervals and the provisions relating to FDC educator information, commence on 1 September 2024.

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). Subsection 85GB(1) allows the Minister to make rules required or permitted to be prescribed 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, which include provisions relating to Child Care Subsidy (CCS) or Additional Child Care Subsidy (ACCS).

Section 4: Schedules

4. This section provides that 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 45(3)(b)

5. This item replaces paragraph 45(3)(b) of the Principal Rules with a new paragraph that allows services that, in the opinion of the Secretary, primarily provide care

outside normal school hours to children who attend an early educational program, such as a preschool or kindergarten (referred to as ‘preschool children’), or a combination of such children and children who attend school (referred to as ‘school children’), to be approved as an outside school hours care (OSHC) service.

6. An OSHC service is one of the types of child care services that may be approved under the Family Assistance Administration Act (see subclause 2(3) of Schedule 2 to the Family Assistance Act). A parent or carer of a child may be eligible for CCS for a session of care provided by an approved child care service to the child.
7. To approve a service, the Secretary must be satisfied that the service meets the service eligibility rules set out in section 194D of the Family Assistance Administration Act.
8. Paragraph 194D(a) requires that, to satisfy the eligibility rules, the service must not be a service that primarily provides an early educational program to children in the year that is 2 years before grade 1 of school (such as a preschool or kindergarten). To meet this requirement an OSHC Service operating from preschool premises must be materially distinguishable from the preschool service.
9. Paragraph 194D(g) requires a service to satisfy any other criteria prescribed in the Principal Rules.
10. Subsection 45(3) of the Principal Rules prescribes, for the purposes of paragraph 194(g) of the Family Assistance Administration Act, additional criteria that a service must satisfy to be approved as an OSHC service.
11. Subsection 45(3) provides that the OSHC service must be approved as a centre-based day care service under the Education and Care Services National Law (as applied in the relevant State or Territory where the service will operate) or hold any other required State or Territory licences. In addition, the OSHC must, in the opinion of the Secretary, primarily provide care outside normal school hours to children who attend school. Item 1 extends this to include preschool children or a combination of preschool children and school children.
12. Enabling an approved OSHC service to primarily provide care outside normal school hours care to children who attend an early educational program supports greater flexibility in provision to preschool or kindergarten children.
13. Parents and carers will benefit from increased access to wrap around care hours, supporting parents and carers to engage in work, study, or training.

Item 2 – After subsection 45(3)

14. This item inserts new subsection 45(3A) into the Principal Rules, which defines ***normal school hours*** to ‘include normal hours of an early educational program provided to children in the year that is 2 years before grade 1 of school (such as preschool or kindergarten) (referred to as ‘normal preschool hours’). This definition clarifies that, in relation to preschool children, ‘normal school hours’ includes normal

- preschool hours, which is essential to ensure that an OSHC service may be approved to primarily provide care outside normal preschool hours to preschool children.
15. The phrase ‘normal hours of an early educational program provided to children in the year that is 2 years before grade 1 of school (such as preschool or kindergarten)’ is not defined, which means its ordinary meaning applies.
 16. Unlike school children, preschool children do not usually attend preschool every weekday during an academic school year. Under the Preschool Reform Agreement, the Australian Government funds the States and Territories to operate preschool programs for 15 hours a week over three days for 30 weeks or 600 hours a year. However, preschool operating hours vary across each State and Territory. For example, rather than three days a week, some States and Territories operate preschool programs for two full days and one half day a week.
 17. Therefore, what is meant by outside normal school hours for preschool children will vary between children and across each State and Territory. However, such hours will comprise the hours before and after (but not during) the preschool session on the days when the child usually attends preschool. Outside School Hours Care also extends to care provided to the child on a day they would usually attend a preschool session, but are not attending because the preschool is not operating (such as a preschool holiday).

Item 3 – After paragraph 48B(2)(i)

18. This item inserts new paragraph 48(2)(j) into the Principal Rules. Section 48B provides, for the purposes of section 195E of the Family Assistance Administration Act, that it is a condition of continued approval that an approved provider does not offer inducements in relation to enrolments or the quantity of care for which a child is enrolled. Subsection 48B(2) provides that subsection 48B(1) does not apply to certain benefits. This item inserts an additional benefit, contributions or donations to charities, into subsection 48B(2). This amendment clarifies the policy intent of the inducement ban by removing restrictions on providers to make charitable donations or contributions in a way that is linked to enrolments, or enrolment numbers. It enables providers to provide philanthropic support to charity and enhance their social impact.

Item 4 – After subsection 54AA(2)

19. This item inserts new subsection 54AA(3) into the Principal Rules, which prescribes, for the purposes of subparagraph 203BA(2)(c)(ii) of the Family Assistance Administration Act, the period within which financial information is required to be reported by a large child care provider under section 203BA.
20. Section 4A of the Family Assistance Administration Act sets out the meaning of a **large child care provider**. Subsection 4A(1) provides that a provider is a **large child**

care provider for a financial year if, at any time in the financial year, the provider operates 25 or more approved child care services, proposes to do so or does so with one or more other related providers. Subsection 4A(3) sets out the meaning of **related providers**.

21. Subsection 203BA of the Family Assistance Administration Act imposes a requirement on large child care providers for a financial year to report financial information to the Secretary in accordance with subsection 203BA(2). Such a report must be:
 - a. given in a form and manner approved by the Secretary;
 - b. include financial information of a kind prescribed by the Minister's Rules relating to either a financial year or a different period prescribed by the Minister's Rules; and
 - c. be given either within 3 months after the end of that period or within a different prescribed by the Minister's Rules.
22. The purpose of this requirement is to improve transparency in the child care sector and enable the department to better identify, monitor and mitigate risks relating to the financial viability of large child care providers who have a significant presence in the sector.
23. New subsection 54AA(3) of the Principal Rules provides, for purposes of subparagraph 203BA(2)(c)(ii), that the period within which financial information is required to be reported under section 203BA of the Family Assistance Administration Act is the period of 4 months after the end of the period that applies under paragraph 203BA(2)(b). The period that applies under paragraph 203BA(2)(b) is prescribed by subsection 54AA(2) of the Principal Rules and depends on whether the large child care provider produces annual financial reports for the financial year or the calendar year. This means that such reports must be given within 4 months after the end of the financial year or the calendar year to which the relevant annual financial report relates.
24. The purpose for this amendment is to bring reporting periods into closer alignment with regulators like Australian Securities and Investment Commission, thereby reducing regulatory burdens on providers. This supports the provision of timely and accurate final or audited financial information relevant to the delivery of the transparency measures.

Item 5 – Section 55 (table item 1, column headed “When notification needs to be provided”, after item 1.2)

25. Section 55 of the Principal Rules requires an approved provider to notify the Secretary of the matters set out in table item 1 within 14 days of certain events, including within 14 days of a change to fee information.
26. This item amends table item 1 to require approved child care providers to notify the Secretary of fee information at regular intervals in addition to when the events

currently prescribed in item 1 occur. As a result of the amendment, notification will be required (even if fee information has not changed) within 14 days after the end of both the financial year and the calendar year. This supports greater transparency in the early childhood education and care sector and allows families to make informed decisions about service selection.

27. Providers are required to notify the Secretary of any change to fee information within 14 days after the change under section 55. The purpose of this amendment is to ensure that providers are required to notify the Secretary of fee information at regular intervals, including any fee changes that had not been reported within 14 days as required.
28. This item has a deferred commencement date to minimise the regulatory burden of complying with fee reporting obligations.

Item 6 - Section 55 (after table item 21)

29. Section 55 of the Principal Rules requires an approved provider to notify the Secretary of the matters set out in table item 1 within 14 days of certain events, including information about any new person who becomes a Family Day Care (FDC) educator in relation to the service.
30. This amendment inserts a new table item 22 to require an approver provider to notify the Secretary if an FDC educator ceases to be engaged by or registered with any of the Provider's approved child care services, or if 3 months have passed since the educator last provided care on behalf of the provider. The notification must include the date the person ceased to be engaged by or registered with the service.
31. Notification will be required within 42 days after the educator ceases to be engaged by or registered with the service; or within 7 days after the end of the 3 month period after the date the educator last provided care on behalf of the provider; whichever occurs earlier.
32. The purpose of this amendment is to prevent FDC educators from remaining registered with Providers long after they cease to be engaged by those Providers.
33. This amendment will increase data integrity and accuracy in relation to FDC educators. It will also address the inherent safety risks associated with re-engaging an educator who remained registered with a Provider while they were not engaged by that Provider.

Item 7 - Section 55 (after table item 22)

34. This amendment inserts a new item in section 55 to require a Provider to notify the Secretary of a change of the physical address of the premises from which an FDC educator provides care for the service. Notification will be required no later than 14 days before the change, or, if the change was not foreseeable at that time, within 7 days after the provider becomes aware of the change.

35. Section 55 requires providers to notify the Secretary of a range of matters including the name and contact details of a person who becomes an FDC educator in relation to the service (item 10) and a change of physical or postal address of the premises from which any of the provider's approved child care service operates (item 6).
36. This amendment will expressly require providers to notify the Secretary of a change of the physical address of the premises from which an FDC educator provides care for the service, within a clearly defined timeframe.