EXPLANATORY STATEMENT
Social Security (Special Circumstances - Family) Specification 2016

Summary

This Specification is made under subsections 502C(2A), 542F(2A), 602B(2A) and 731DA(2A) of the Social Security Act 1991 (the Act).

The purpose of this Specification is to set out matters that the Secretary must take into account when determining if there are special circumstances relating to a person's family. The effect of making such a determination is that the person is exempt from having to meet participation requirements or satisfy the activity test. The Specification is relevant to participation requirements for parenting payment and the activity test for youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance and recipients of special benefit who are nominated visa holders.

Background

Under the Act, the Secretary may determine that social security recipients who are subject to participation requirements or the activity test have special circumstances relating to their family. Once the Secretary makes such a determination, the person is exempt from participation requirements or the relevant activity test. The Act contains express exemptions but also provides that the Secretary may exempt a person for up to 16 weeks at a time where there are special circumstances relating to the person’s family that make it appropriate to make such a determination. This Specification sets out the matters that the Secretary must take into account in making a special family circumstances exemption determination. The matters in this Specification are not exhaustive as the Act specifically provides that the Secretary may take into account other matters in making a special family circumstances exemption determination.

Operation of the provisions

Section 1 states the name of the Specification. Section 2 sets out the commencement date of the Specification as being the day after it is registered on the Federal Register of Legislative Instruments. Section 3 sets out the determinations that are revoked and replaced by this Specification. Section 4 provides that the “Act” referred to in the Specification is the Act.

Subsection 5(1) lists the provisions in the Act that provide for the special family circumstances exemption which are relevant for this Specification. The provisions mentioned in subsection 5(1) are relevant for parenting payment, youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance and recipients of special benefit who are nominated visa holders.

The matters that must be taken into account in determining if there are special family circumstances that make it appropriate to make the determination are set out in subsection 5(2).

Paragraphs 5(2)(a) and (b) are concerned with the caring responsibilities a person may have for others. Paragraph (a) requires such responsibilities to be taken into account if the
person cares for one or more children who have turned six but who have not commenced school. This is to support the broader policy intention that principal carers will not have participation or activity test requirements until their youngest child is at school. It takes account of the situation where children do not start school immediately upon turning six, but commence their schooling at a later time in that year.

Unless the Secretary considers that the responsibilities could have been avoided with appropriate planning, paragraph (b) requires any significant caring responsibilities to be taken into account which:

- require the person to temporarily care for an immediate family member who is incapacitated due to illness or accident; and
- mean the person will be unable, or is likely to be unable, to both look for work and participate in training activities.

Paragraph 5(2)(b) takes account of the role within the family of principal carer parents who may have responsibility in caring for children and other immediate family members. It acknowledges that if, for example, a child falls ill the principal carer parent may need to be available on a full-time basis to care for the child. However, it is intended that if appropriate alternative arrangements are able to be made for the family member to be cared for, this alternative be used.

Where a person has been subjected to domestic violence and it specifically impacts on the person’s capacity to both look for work and participate in training activities, paragraph 5(2)(c) requires that the impact of the domestic violence needs to be taken into account in determining if it is appropriate that a person should receive a special circumstances exemption.

The Act already enables the Secretary to make a determination in respect of people who have been subjected to domestic violence in the preceding 26 weeks (see paragraphs 502C(2)(a), 542F(2)(a), 602B(2)(a) and 731DA(2)(a) of the Act). Such a determination also has the effect that a person is exempt from the relevant participation requirements or activity test. Paragraph 5(2)(c) of this Specification acknowledges there may be situations where these provisions of the Act do not apply, but it is still relevant to consider the impact of domestic violence on the person. One situation would be where a person has been subjected to domestic violence more than 26 weeks prior to the proposed determination, but the experience of domestic violence is continuing to have a direct impact on a person’s current capacity to look for work and participate in training. In these circumstances, a person may require a temporary exemption from having to meet participation requirements or satisfy the activity test. (If the person was subjected to domestic violence in the 26 weeks prior to the determination being made, paragraphs 502C(2)(a), 542F(2)(a), 602B(2)(a) and 731DA(2)(a) of the Act will apply to the person, in which case it will not be necessary for the Secretary to consider whether paragraph 5(2)(c) of the instrument applies).

The final matter that must be taken into account is the person’s emotional or physical wellbeing where the person has ceased to be a member of a couple. Under paragraph 5(2)(d) this needs to be taken into account where, in the four weeks prior to the date of the proposed determination, a person has ceased to be a member of a couple and the relationship breakdown has had a significant adverse impact on the person such that the
A person would be unable to or likely to be unable to look for work and participate in training activities.

A relationship breakdown can leave people in difficult circumstances or with intense emotional responses. Paragraph 5(2)(d) takes account of the situation where a person is affected by a relationship breakdown in such a way that he or she will be unable to look for work and undertake training activities at that particular time.

**Consultation**

The Department consulted with the following organisations prior to making the Specification:

- On 6 November 2015 with:
  - Mission Australia;
  - National Welfare Rights; and
  - Uniting Care.
- On 19 November 2015 with:
  - National Employment Services Association; and
  - Jobs Australia.

These stakeholders were given the opportunity to provide comments on the draft Specification. During these consultations, stakeholders raised no concerns with the proposed Specification. The Australian Youth Affairs Coalition, Headspace, Australian Council of Social Service, Homelessness Australia and Catholic Social Services Australia were also invited to take part in the consultations.
Statement of Compatibility with Human Rights

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

Social Security (Special Circumstances - Family) Specification 2016

This Legislative Instrument (Specification) 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 Specification

The Social Security (Special Circumstances - Family) Specification 2016 (the Specification) is made under subsections 502C(2A), 542F(2A), 602B(2A) and 731DA(2A) of the Social Security Act 1991 (the Act).

The purpose of this Specification is to set out matters that the Secretary must take into account when determining whether there are special circumstances relating to a person’s family that make it appropriate to make a determination to that effect. The effect of such a determination is that the person will be exempt from having to meet their participation requirements or their activity test for a particular period of time.

Under the Act, persons who are in receipt of parenting payment, youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance or special benefit who are nominated visa holders, are exempt from participation requirements or the relevant activity test in specified circumstances. Those circumstances include where the Secretary has made a determination, in respect of a period, that there are special circumstances relating to a person’s family. The determination can be made for a period of up to 16 weeks at a time. If the person were not exempt from the activity test or participation requirements, they would have to comply with those requirements for the period, including, for example, actively seeking paid work or undertaking work that they are required by the Secretary to undertake.

This Specification sets out the matters that the Secretary must take into account in making a special family circumstances determination. The matters in this Specification are not exhaustive as the Act specifically sets out that the Secretary may take into account other matters in making a special family circumstances exemption determination.

The Specification revokes and replaces the Social Security (Special circumstances - Family) (DEWR) Specification 2006 in relation to what the Secretary must consider when making a determination in relation to recipients of parenting payment, youth allowance (except for people undertaking full-time study or new apprentices) and newstart allowance. The Specification also revokes and replaces the Social Security (Special Circumstances - Family) (FaCSIA) Specification 2006 in relation to what the Secretary must consider when making a determination for recipients of special benefit who are nominated visa holders. Both of these instruments will be repealed on 1 April 2016 by the operation of section 50 of the Legislative Instruments Act 2003. As the Act requires the Secretary to make an instrument that determines the matters the Secretary must take into account, the current instruments need to be re-made.
The Specification replicates the matters contained in the *Social Security (Unsuitable Work) (DEWR) Determination 2006* and the *Social Security (Unsuitable Work) (FaCSIA) Determination 2006*.

In summary, the Specification provides that when considering whether a special family circumstance exemption might apply, the Secretary must take into account the following matters:

- the caring responsibilities of a person who has one or more children who have turned 6 but have not commenced school; and
- where the following matters which will, or are likely to, prevent the person from being able to look for work and from being able to participate in training activities:
  - any significant caring responsibilities of the person that requires the person to temporarily care for an incapacitated family member (unless the Secretary is satisfied that those responsibilities could have been avoided with appropriate planning); and
  - the emotional or physical wellbeing of a person who has ceased to be a member of a couple within four weeks of a proposed determination.

The Specification also provides that the Secretary must take into account the impact of domestic violence on a person where the violence specifically affects the person’s capacity to both look for work and participate in training.

The Act already enables the Secretary to make a determination in respect of people who have been subjected to domestic violence in the preceding 26 weeks (see paragraphs 502C(2)(a), 542F(2)(a), 602B(2)(a) and 731DA(2)(a) of the Act). Such a determination also has the effect that a person is exempt from the relevant participation requirements or activity test. Paragraph 5(2)(c) of this Specification acknowledges there may be situations where these provisions of the Act do not apply, but it is still relevant to consider the impact of domestic violence on the person. One situation would be where a person has been subjected to domestic violence more than 26 weeks prior to the proposed determination, but the experience of domestic violence is continuing to have a direct impact on a person’s current capacity to look for work and participate in training. In these circumstances, a person may require a temporary exemption from having to meet participation requirements or satisfy the activity test. (If the person was subjected to domestic violence in the 26 weeks prior to the determination being made, paragraphs 502C(2)(a), 542F(2)(a), 602B(2)(a) and 731DA(2)(a) of the Act will apply to the person, in which case it will not be necessary for the Secretary to consider whether paragraph 5(2)(c) of the instrument applies).

The effect of the Specification is that if the Secretary considers that there are special family circumstances that make it appropriate for the person to be exempt from participation requirements or the relevant activity test, a recipient of the parenting payment, youth allowance, newstart allowance and/or the special benefit (as the case may be), will be entitled to continue receiving those payments for a period of up to 16 weeks.
Human rights implications

The Specification engages the following rights:

- the right to social security in article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to an adequate standard of living in article 11 of the ICESCR.

**Right to social security and right to an adequate standard of living**

Article 9 of the ICESCR recognises the right of everyone to social security. Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions.

The Specification itself does not affect the payment of income support. Rather, the Specification sets out the matters that the Secretary must take into account when deciding whether a determination should be made that leads to the person being exempt from meeting participation requirements or exempt from having to satisfy the activity test. The Specification is beneficial in nature because if the requirements that the Secretary must take into account were not included in it, a person could potentially be required to meet participation requirements or satisfy the activity test when faced with difficult personal circumstances that could adversely affect their family. By requiring the Secretary to take into account the matters listed in it, the Specification helps ensure that this will not occur and that the person will continue to receive income support for up to 16 weeks at a time. The Specification does not impose any requirements or obligations on a person and does not impact on the payment of a person’s income support where one of the matters set out in the Specification exists. The Specification recognises the importance of considering the individual circumstances of a person and whether, because of those circumstances, they would be able to meet participation requirements or the activity test.

The Specification does not negatively affect or limit a person’s right to social security or their right to an adequate standard of living.

**Conclusion**

The Specification is compatible with human rights because it does not limit the right to social security or the right to an adequate standard of living.