Children Care Benefit (Child at Risk and Hardship Determinations) Rules 2017

Summary

The Children Care Benefit (Child at Risk and Hardship Determinations) Rules 2017 (the 2017 Rules) are made by the Minister for Education and Training under subsection 82(3) of the A New Tax System (Family Assistance) Act 1999 (the Family Assistance Act). The 2017 Rules set out rules relating to the giving of, and the period of, child at risk and hardship certificates and determinations under Subdivision C of Division 4 of Part 4 of that Act (for special rate of child care benefit). It continues the operation of the Child Care Benefit (Rates and Hardship) Determination 2000, which is repealed under Part 4 of the Legislation Act 2003 (Sunsetting of legislative instruments), on 1 October 2017.

Background

Division 4 of Part 3 of the Family Assistance Act includes provisions relevant to the eligibility requirements for child care benefit. A person must be eligible for child care benefit, before they may be determined, under Division 4 of Part 3 of the A New Tax System (Family Assistance) (Administration) Act 1999 to be entitled to be paid child care benefit or special child care benefit (temporary financial hardship or child at risk).

Child care benefit is a means-tested payment which assists individuals with child care costs. Under family assistance law, eligibility for child care benefit arises in respect of a session of care provided to a child.

Division 4 of Part 4 of the Family Assistance Act provides for the rate of child care benefit payable to an eligible individual. Typically, the rate of child care benefit by fee reduction (that is, the rate of child care benefit payable by way of a reduction in fees charged by an approved child care service) is worked out under Schedule 2 to the Act. However, under Subdivision C of Division 4 of Part 4, approved child care services can certify, and the Secretary can determine, fee reductions or child care benefit rates and periods for which the rates apply in relation to children at risk or hardship. It further provides that the Secretary may impose limitations on an approved child care service giving certificates to individuals on grounds of hardship.

Section 82 of the Family Assistance Act specifies certificates given under section 76 and determinations under subsections 81(2), (3) or (4) of the Family Assistance Act must be made in accordance with any rules in force under paragraph 82(3)(b) of that Act. Paragraph 82(3)(a) provides that the Minister may specify what is considered hardship for the purposes of subparagraph 76(1)(b)(ii) and paragraph 81(2)(c) which allows a service and the Secretary to certify a rate if they are satisfied that an individual is experiencing hardship of a kind specified in the legislative instrument.

The 2017 Rules set out what is considered a hardship and what cannot be considered a hardship for the purposes of subparagraph 76(1)(b)(ii) and paragraph 81(2)(c). The 2017 Rules also set out what contents are required in certificates given in relation to children at risk and hardship and sets the period in which hardship determinations can be made, including determinations made by the secretary.

The Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017 (the Amendment Act) was enacted on 4 April 2017. This Amendment Act gives effect to the legislative elements of the Government’s new child care system, including the Child Care Subsidy and Additional Child Care Subsidy from 2 July 2018. The Amendment Act includes provisions to make subordinate legislation, known as Minister’s and Secretary’s Rules. Those Rules will replace many of the existing family assistance law subordinate legislative instruments.

In particular, the Amendment Act repeals and replaces the provisions in the Family Assistance Act in relation to children at risk and hardship, including section 82, and enables the making of Minister’s Rules to prescribe circumstances in which an individual is taken to be experiencing temporary financial hardship.

Consequently, the sole purpose of the 2017 Rules is to enable the operation of the current arrangements for giving of certificates and making determinations in relation to children at risk and hardship to continue between the sunsetting of the 2000 Determination on 1 October 2017 and the commencement of the new Minister’s Rules on 2 July 2018.

Consultation

Prior to this instrument being made, targeted consultation was undertaken with child care stakeholders notifying them of the remaking of the instrument and inviting their comments. Targeted consultation was deemed appropriate as the remaking of the instrument was machinery in nature to continue the operation of the Child Care Benefit (Rates and Hardship) Determination 2000 until 2 July 2018. The instrument does not substantially alter existing arrangements.

Regulatory Impact Statement

The 2017 Rules do not require a Regulatory Impact Statement or a Business Cost Calculator Figure. The 2017 Rules remake the 2000 Determination for a short period, and is machinery in nature and will not have more than minor regulatory impact. The Office of Best Practice Regulation (OBPR) agrees with this regulatory impact assessment (OBPR ID 22536).

Authority

The Child Care Benefit (Child at Risk and Hardship Determinations) Rules 2017 is made under subsection 82(3) of the A New Tax System (Family Assistance) Act 1999.

Explanation of Provisions

Part 1—Preliminary

Section 1 sets out that the name of the instrument is the Child Care Benefit (Child at Risk and Hardship Determinations) Rules 2017

Section 2 provides that the instrument commences on 1 October 2017 and is repealed immediately after the commencement of Schedule 1 to the Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017 (i.e. on 2 July 2018).

Section 3 sets out that the authority for the instrument is the A New Tax System (Family Assistance) Act 1999.

Section 4 provides that for the purposes of this instrument the terms:

hardship determination, in relation to an individual, means:

a) a certificate given by an approved child care service under subsection 76(1) of the Family Assistance Act for the reason set out in subparagraph 76(1)(b)(ii) in relation to the individual; and
b) a determination by the Secretary under subsection 81(2) of the Family Assistance Act in relation to the individual.

*hardship event*, in relation to an individual, means the event or circumstances for which a hardship determination has been made in relation to the individual.

*income support payment* has the same meaning as in the *Social Security Act 1991*.

**Part 2—Kinds of hardship**

Section 5 sets out rules in relation to the kinds of hardship for the purposes of subparagraph 76(1)(b)(ii) and paragraph 82(2)(c) of the Family Assistance Act. Subsection 5(1) specifies the kinds of hardship experienced by an individual for the giving of certificates or making determinations including from an event that has substantially reduced the individual’s capacity to pay child care fees. Subsection 5(2) specifies the types of events which may be included for the purpose of paragraph 5(1)(a).

Subsection 5(3) specifies that hardship of a kind mentioned in subsection (1) does not include hardship arising from foreseeable expenditure; non-essential expenditure; ongoing low income or increases in child care fees.

Section 5 replicates the operation of section 4 of the 2000 Determination.

**Part 3—Rules for giving certificates and making determinations**

Section 6 specifies a certificate given under section 76 of the Family Assistance Act must include a description of the circumstances that led to the service giving the certificate and include reasons the service considers the child is at risk of serious abuse or neglect and details of the hardship that the individual is experiencing relevant to the family assistance law under which the certificate has been given.

The section notes that the certificate also needs to include the matters set out at subsection 76(3) of the Family Assistance Act.

Section 6 replicates the operation of section 9 of the 2000 Determination.

Section 7 specifies that the total period of hardship determinations made in relation to a particular individual and a particular hardship event must not exceed 52 weeks.

Section 7 replicates the operation of section 6 of the 2000 Determination.

Section 8 sets out rules in relation to the periods of hardship determinations in income support cases. Subsection 8(1) specifies the time a period of a hardship determination made in relation to a particular individual and a particular hardship event of a kind mentioned in paragraph 5(1)(b) must not exceed. In particular, the first determination must not exceed 3 weeks in duration (from the Monday after the person ceased to receive an income support payment), with each successive determination not exceeding 1 week. The total period of a hardship determination must not exceed 6 weeks. It is noted that sections 77 and 78 of the Family Assistance Act also impose limits on the periods for which certain hardship determinations can be in effect.

Section 8 replicates the operation of section 7 of the 2000 Determination.

Section 9 sets out rules in relation to the periods of hardship determinations made by the Secretary. Subsection 9(1) specifies that the period of a determination made by the Secretary under subsection 81(2) of the Family Assistance Act in relation to a particular individual and a particular hardship event must be for the minimum period that the Secretary considers necessary for the individual to recover from or adjust to the hardship event.

Subsection 9(2) specifies that for the purpose of subsection (1) recovery from or adjustment to a hardship event means adaptation to the individual’s new circumstances, and does not mean a return to the circumstances that existed before the hardship event occurred. It further specifies that the Secretary must consider all of the individuals’ circumstances and whether
the general expenditure of the person is reasonable having regard to the level of housing and other costs in the area in which the person lives.

Section 9 replicates the operation of section 8 of the 2000 Determination.
Statement of Compatibility with Human Rights

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

Child Care Benefit (Child at Risk and Hardship Determinations) Rules 2017

This instrument 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 Child Care Benefit (Child at Risk and Hardship Determinations) Rules 2017 (the 2017 Rules) are made by the Minister for Education and Training under subsection 82(3) of the A New Tax System (Family Assistance) Act 1999 (the Family Assistance Act). The 2017 Rules set out rules relating to the giving of, and the period of, child at risk and hardship certificates and determinations under Subdivision C of Division 4 of Part 4 of that Act (for special rate of child care benefit). It continues the operation of the Child Care Benefit (Rates and Hardship) Determination 2000, which is repealed under Part 4 of the Legislation Act 2003 (Sunsetting of legislative instruments), on 1 October 2017.

Division 4 of Part 3 of the Family Assistance Act includes provisions relevant to the eligibility requirements for child care benefit. A person must be eligible for child care benefit, before they may be determined, under Division 4 of Part 3 of the A New Tax System (Family Assistance) (Administration) Act 1999 to be entitled to be paid child care benefit or special child care benefit (temporary financial hardship or child at risk).

Child care benefit is a means-tested payment which assists individuals with child care costs. Under family assistance law, eligibility for child care benefit arises in respect of a session of care provided to a child.

Division 4 of Part 4 of the Family Assistance Act provides for the rate of child care benefit payable to an eligible individual. Typically, the rate of child care benefit by fee reduction (that is, the rate of child care benefit payable by way of a reduction in fees charged by an approved child care service) is worked out under Schedule 2 to the Act. However, under Subdivision C of Division 4 of Part 4, approved child care services can certify, and the Secretary can determine, fee reductions or child care benefit rates and periods for which the rates apply in relation to children at risk or hardship. It further provides that the Secretary may impose limitations on an approved child care service giving certificates to individuals on grounds of hardship.

Section 82 of the Family Assistance Act specifies certificates given under section 76 and determinations under subsections 81(2), (3) or (4) of the Family Assistance Act must be made in accordance with any rules in force under paragraph 82(3)(b) of that Act. Paragraph 82(3)(a) provides that the Minister may specify what is considered hardship for the purposes of subparagraph 76(1)(b)(ii) and paragraph 81(2)(c) which allows a service and the Secretary to certify a rate if they are satisfied that an individual is experiencing hardship of a kind specified in the legislative instrument.

The 2017 Rules set out what is considered a hardship and what cannot be considered a hardship for the purposes of subparagraph 76(1)(b)(ii) and paragraph 81(2)(c). The 2017 Rules also set out what contents are required in certificates given in relation to children at risk and hardship and sets the period in which hardship determinations can be made, including determinations made by the secretary.

The 2017 Rules replicate the operation of the Child Care Benefit (Rates and Hardship) Determination 2000 (2000 Determination). The 2000 Determination is repealed on
1 October 2017, under Part 4 of the Legislation Act 2003 (Sunsetting of legislative instruments). The new 2017 Rules will operate from 1 October 2017 until 2 July 2018, when they will be superseded.

The Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017 (the Amendment Act) was enacted on 4 April 2017. This Amendment Act gives effect to the legislative elements of the Government’s new child care system, including the Child Care Subsidy and Additional Child Care Subsidy from 2 July 2018. The Amendment Act includes provisions to make subordinate legislation, known as Minister’s and Secretary’s Rules. Those Rules will replace many of the existing family assistance law subordinate legislative instruments.

In particular, the Amendment Act repeals and replaces the provisions in the Family Assistance Act in relation to children at risk and hardship, including section 82, and enables the making of Minister’s Rules to prescribe circumstances in which an individual is taken to be experiencing temporary financial hardship.

Consequently, the sole purpose of the 2017 Rules is to allow the operation of the current arrangements for giving of certificates and making determinations in relation to children at risk and hardship to continue between the sunsetting of the 2000 Determination on 1 October 2017 and the commencement of the new Minister’s Rules on 2 July 2018.

Human Rights Implications

The making of the 2017 Rules is machinery in nature to enable current legislative requirements set out in the 2000 Determination to continue until 2 July 2018. The 2017 Rules do not substantially alter existing arrangements and will not have more than minor regulatory impact or change any human rights implications under the current instrument.

The 2017 Rules engage the following rights:

- **The rights of the child** – Articles 3, 19 and 27 of the Convention of the Rights of the Child (CRC)
- **The right to social security** – Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Rights of the child

Article 3(1) of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(3) requires institutions and services responsible for the care of children to conform to standards including maintaining suitability of staff. Further all law, policy development, administrative decision making and service provision must take into account the best interests principle including in ensuring that all young children have access to appropriate and effective child care services, including programs of care and education designed to promote their well being and evolving capacities.

Primary responsibility for ensuring child care services and staff are appropriately qualified, and that care provided conforms to certain quality and safety standards rests with States and Territories (under the Education and Care Services National Law). States and Territories also have primary responsibility for child welfare laws. The Commonwealth’s child care payment system is also designed to help target parents and children most in need of support, including by ensuring that parents in hardship or children at risk of abuse or neglect can benefit from a higher rate of fee assistance.

Article 19 of the CRC requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation and that States Parties adopt institutional measures to safeguard young children. In addition to the initial assessment of suitability before a provider in respect of a child care service may be approved, there are requirements for a provider to make and
keep a written record of certain information and events including those relating to matters of where a child is at risk of serious abuse or neglect. Records must be made and retained relating to premises where care is provided and also any evidence or information in relation to the background checks as required. The failure to make or keep such records constitutes an offence and a civil penalty liability.

Setting out rules relating to the giving of, and the period of, child at risk and hardship certificates and determinations under Subdivision C of Division 4 of Part 4 of the Family Assistance Act (for special rate of child care benefit) directly promotes the best interests of the child by ensuring that all children in care, and in particular those vulnerable to risk, receive adequate and targeted protection in fulfilment of their rights. Such measures also support young children’s entitlement to safeguards and protections to promote their integration within a safe early childhood learning environment that promotes dignity and self-respect.

**Right to social security**

Article 9 of the ICESCR recognises the right of everyone to social security. Under the family assistance law all individuals who meet basic eligibility criteria will be eligible for some child care fee assistance through child care benefit or child care rebate. A higher rate of child care benefit is also payable for individuals suffering hardship or for children at risk. The family assistance law regulates the circumstances in which this special rate of child care benefit is payable, and places limits on the amounts payable and the periods for which the rate is payable. The 2017 Rules supplement these circumstances and limits.

By supplementing the circumstances in which a special rate of child care benefit is payable, imposing limits on how eligibility for the special rate is evidenced and recorded, and placing limits on the periods of time for which the special rate is payable, the 2017 Rules potentially limit the right to social security. Any such limitation is reasonable and proportionate as the 2017 Rules ensure that the special rate is properly targeted to those individuals and children who need the additional assistance. Further, this limitation on the right to social security is reasonable and proportionate given that the requirements imposed encourages proper assessment of suitability against criteria so that a fair and sustainable payment goes to those in genuine need. The limitation is also consistent with the CRC requirement that acknowledges that the right of the child to benefit from social security should take into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.

The 2017 Rules do not affect the capacity for an individual to continue to receive child care benefit generally. A child care service may still provide a session of care, or sessions of care, to a child under an original arrangement for which an individual may receive child care payments. However, this means they may not be eligible for a higher rate of child care benefit.

Article 4 of ICESCR provides that States Parties may subject economic social and cultural rights only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The UN Committee has stated that such limitations must be proportional and effectuated using the least restrictive means. The UN Committee has also stated that it 'acknowledges that the realisation of the right to social security carries significant financial implications for States parties, but notes that the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy'.

Any attenuation or limit in entitlement by specifying the kinds of hardship that attract a higher rate of child care benefit is justified in line with Article 4 in the context of the full use of the maximum available resources of the State party. Where a child is at risk of serious abuse or neglect, a higher rate of child care benefit can help support their connection with, and
engagement in, quality early learning and child care, and in turn assist their safety, wellbeing, resilience and development. As such, it needs to be regulated and administered in a manner which affords maximum benefit to the largest number of children at risk.

Conclusion

The 2017 Rules are compatible with human rights because they promote the protection of human rights, particularly the rights of the child. To the extent that the Rules place a limitation on the right to social security, that limitation is reasonable and proportionate.

Simon Birmingham
Minister for Education and Training