

Explanatory Statement

Child Care Benefit (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018

Summary

The *Child Care Benefit (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018* (the Amendment Determination) is made by the Minister for Education and Training under subsection 200(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act).

The Amendment Determination amends the *Child Care Benefit (Breach of Conditions for Continued Approval) Determination 2017* (the Principal Determination), under subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

The Principal Determination outlines factors to be considered by the Secretary in making decisions on sanctions on approved child care services under subsections 200(1) and (3) of the Administration Act.

The purpose of the Amendment Determination is to provide clear guidance to decision makers as to the appropriate sanction that is expected to be imposed in relation to particular serious breaches. The Amendment Determination gives greater clarity to delegates of the Secretary of the Department of Education and Training (the Department) in imposing sanctions under section 4 of the Principal Determination. The Amendment Determination will not only provide delegates with greater clarity, but will also be considered by the Administrative Appeals Tribunal when it reviews the Department's sanction decisions with respect to child care services. The greater clarity provided by the amendments is not a departure from the way the Principal Determination was already intended to operate prior to these amendments. The amendments merely clarify existing expectations of decision makers when dealing with serious breaches. In particular, nothing about the amendments is intended to imply that a level of leniency is justified in relation to decisions made prior to these amendments commence.

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

Division 1 of Part 8 of the Administration Act provides for the approval, for the purposes of the Family Assistance Law, of child care services by the Secretary, and imposes conditions for continued approval on approved child care services.

A failure of an approved child care service to comply with any condition for approval may lead to the Secretary imposing one or more sanctions on the service under subsection 200(1) of the Administration Act. These sanctions include, among others, suspension or cancellation of the service's approval.

Under section 195A of the Administration Act, all obligations that are stated to be imposed on an "approved child care service", are actually imposed on its operator (being the person, including a corporation, that applied for approval).

Under subsection 200(5) of the Administration Act, the Minister may, by legislative instrument, determine factors to be taken into account by the Secretary in applying sanctions under subsection 200(1) of the Act.

The Amendment Determination makes amendments to the Principal Determination by establishing clearer direction on when cancellation is the appropriate sanction to impose for certain types of contraventions. This amendment aligns the legislative regime with the compliance and enforcement strategy of the Department whereby service operators engaging in serious non-compliance should be cancelled, rather than subject to a less serious sanction.

A proposed operator can only be granted approval to operate a child care service under the Family Assistance Law where, among other matters, the Secretary (or a delegate) of the Department is satisfied that the operator is suitable to operate a child care service. The approval framework is established to ensure the integrity of Commonwealth child care fee assistance is protected and, in particular: (a) that service operators can be relied on to pass on fee reductions to eligible individuals as required under law; and (b) that they accurately report attendance for this purpose. It is also a condition for continued approval of a service that its operator complies with all applicable state and territory laws including those that deal with children's health and safety and the quality of care. Only those operators that meet their obligations, and continue to do so, should continue to be approved. An operator's approval with respect to a child care service is not a right or entitlement. Cancellation of approval under the Family Assistance Law also does not necessarily result in closure of the business, it only means that child care service payments are no longer payable with respect to the care provided by the service. Whether a child care service is still able to operate following cancellation of Commonwealth approval hinges on whether the service maintains approval under the state/territory based *Education and Care Services National Law*.

There are a range of circumstances relating to the lawful administration of Commonwealth child care fee assistance and child safety, where it is more appropriate to cancel a service, rather than imposing another sanction. The expectation has always been that serious breaches, especially those that result from misrepresentations in attendance reports and in the consequent receipt of large sums of money, will lead to cancellation. The Amendment Determination clarifies the existing intention of the law by ensuring that, in circumstances where child care fee assistance is not being properly safeguarded, or where services are not complying with their obligations relating to child safety, the appropriate course of action is to cancel the operator's approval with respect to a child care service.

The Amendment Determination will operate from the day it is registered until 2 July 2018, when it will be superseded. The *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* enacted on 4 April 2017 repeals and replaces the provisions in the Administration Act relating to consequences of breach of conditions for continued approval, including section 200.

Consultation

On 15 December 2017, these proposed changes were discussed with the Department's Implementation and Transition Reference Group, which consists of members from child care peak bodies and services. Members were supportive of the changes.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Amendment Determination as the amendments do not introduce any new compliance costs for providers or families. (OBPR ID 23225, dated 3 January 2018).

Authority

The *Child Care Benefit (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018* is made under subsection 200(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

Explanation of Provisions

Section 1 sets out that the name of the instrument is the *Child Care Benefit (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018*.

Section 2 provides that the instrument commences on the day it is registered 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 subsection 200(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999*.

Section 4 is an application provision that clarifies that the amendments made by the Amendment Determination apply to decisions made on and from commencement. In addition, it makes clear the intention that the Amendment Determination also applies to review decisions made on and from commencement. The amendments clarify the existing expectation of decision makers (including those undertaking merits review) in respect of serious breaches of conditions of continued approval. The application provision does not have retrospective effect as it only applies to new decisions, or review decisions, made after commencement and the amendments merely reflect existing expectations.

It is consistent with the scope and purpose of the Principal Determination that it continues to provide guidance on which sanction to impose at the decision making point, following the conduct that led to the breach of a condition of continued approval. In that context, the amendments are prospective in that they only guide new decisions made after commencement, including decisions made on review.

Section 5 sets out that the *Child Care Benefit (Breach of Conditions for Continued Approval) Determination 2017* is amended by Schedule 1 to the Amendment Determination.

Schedule 1

Items 1-3 amend section 4 of the Principal Determination. The amendments to section 4 are intended to clarify that the Secretary must take into account the factors listed in subsection (1) in applying a sanction under subsection 200(1) of the Administration Act in relation to all services.

New subsection 4(2) provides that the appropriate sanction is cancellation where, after having regard to the factors in subsection (1), the Secretary considers the service's failure to comply with conditions for continued approval has been serious or frequent. The service's commitments or measures taken, or proposed to be taken, to remedy the non-compliance are not considerations that weigh against cancellation once the Secretary considers that the non-compliance that has occurred was serious or frequent.

Item 4 inserts new section 4A, which outlines circumstances where there is presumption in favour of cancellation with respect to certain breaches.

Subsection (1) specifies that the appropriate sanction is cancellation where the non-compliance involves repeated breaches of the service's obligations under section 219N of the Administration Act.

Subsection (2) clarifies the meaning of "repeated breaches" referred to in subsection (1). A repeated breach involves either 100 or more misreported sessions of care which are inaccurately reported or contain incomplete information, or the payment of \$5,000 or more in (overpaid) "child care service payments" (as defined in section 3 of the Administration Act) as a result of the misreporting under section 219N of the Administration Act. Note that a "session of care" is defined under section 9 of the *A New Tax System (Family Assistance) Act 1999* in relation to a particular child. The *Child Care Benefit (Session of Care) Determination 2016* establishes that a "session of care" is the minimum period of time that a service operator charges a fee for providing child care. As such, in counting to 100 for the purposes of this provision, the delegate is to count each session, per day, per child.

Subsection (3) specifies that the appropriate sanction is cancellation where the non-compliance involves a false, misleading or otherwise inaccurate information being provided about child care reported to have taken place. This includes cases where a service has reported attendance when the relevant educators could not have provided the care, or where the children could not have attended the care, or where the service reported attendance to attract child care fee assistance when they knew, or ought to have known, there was no eligibility or entitlement.

Subsection (4) specifies that the appropriate sanction is cancellation where the non-compliance involves a failure to update the Secretary about changes to key personnel as required under section 19 of the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Rules 2017*.

Subsection (5) specifies that the appropriate sanction is cancellation where the non-compliance involves not being suitable to operate a child care service due to not meeting the suitability matters under sections 7, 8, 9 or 16 of the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Rules 2017*, including because a member (or members) of the key personnel of the service is unsuitable.

Subsection (6) specifies that the appropriate sanction is cancellation where the non-compliance involves the failure to comply with an obligation relating to children's health or safety, as set out in Parts 4.2, 4.3, 4.4 and regulation 163 of the *Education and Care Services National Regulations* (which apply as a condition of continued approval because of subsection 196(3) of the Administration Act, as indicated in a new note).

Statement of Compatibility with Human Rights

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

Child Care Benefit (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018

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 (Breach of Conditions for Continued Approval) Amendment Determination (No.1) 2018* (Amendment Determination) is made by the Minister for Education and Training under subsection 200(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act).

The Amendment Determination amends the *Child Care Benefit (Breach of Conditions for Continued Approval) Determination 2017* (the Principal Determination), which outlines factors to be considered by the Secretary in making decisions on sanctions on approved child care services under subsections 200(1) and (3) of the Administration Act.

Division 1 of Part 8 of the Administration Act provides for the approval, for the purposes of the Family Assistance Law, of child care services by the Secretary, and imposes conditions for continued approval of approved child care services.

A failure of an approved child care service to comply with any conditions of approval may lead to the Secretary imposing one or more sanctions on the service under subsection 200(1) of the Administration Act. These sanctions include, among others, suspension or cancellation of the service's approval.

Under subsection 200(5) of the Administration Act, the Minister may, by legislative instrument, determine factors to be taken into account by the Secretary in applying sanctions under subsection 200(1) of the Act.

The purpose of the Amendment Determination is to direct decision makers as to the appropriate sanction to impose in relation to particular serious breaches consistently with existing expectations and the Australian Government's compliance and enforcement strategy.

The Amendment Determination will operate from the day it is registered until 2 July 2018, when it will be superseded. The *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* enacted on 4 April 2017 repeals and replaces the provisions in the Administration Act relating to consequences of breach of conditions for continued approval, including section 200. Similar provisions dealing with matters to consider when imposing a sanction will be outlined in the *Child Care Subsidy Minister's Rules 2017*.

Human Rights Implications

The Amendment Determination engages the following rights:

The rights of parents and children – Article 18 and Article 3 of the Convention of the Rights of the Child (CRC) and Article 24(1) of the International Covenant on Civil and Political Rights (ICCPR)

The rights of parents and children

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration and Article 18(2) of the CRC 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. Article 24 of the ICCPR is specifically devoted to children, stipulating that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his or her status as a minor, on the part of his family, society and the State.

The Family Assistance Law imposes eligibility rules and conditions for continued approval for child care services to ensure that services continue to provide quality care for children and families. The Amendment Determination engages the rights of the parents and children by ensuring that before a decision is made on the sanctions to be imposed on an approved child care service for breaches of conditions of continued approval, which may affect access to child care, the severity and frequency of the failures are taken into account.

The instrument also requires an assessment as to whether a failure to comply involved the health or safety of children in the care of a service. The purpose of the amendments is to ensure that service operators who engage in serious breaches are not able to maintain their approval. This measure is aimed at protecting children, parents who use child care, and public expenditure.

The rights of the child

Article 3 of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration and Article 18(2) of the CRC 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 Determination establishes more rigorous suitability criteria and obligations to report changes or events that affect these criteria. The purpose of these rules is to apply a more rigorous approval and ongoing approval criteria to improve the administration of Commonwealth funds and to ensure the safety and well-being of children.

Conclusion

The Amendment Determination is compatible with human rights because it promotes the protection of human rights.

Simon Birmingham

Minister for Education and Training