

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

Social Security (Administration) Act 1999

Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019

Purpose

The *Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019* (the DSS Guidelines) are made by the Minister for Families and Social Services under sections 132 and 146 of the *Social Security (Administration) Act 1999* (the Administration Act).

The purpose of this instrument is to set guidelines for the exercise of the Secretary's discretionary power to make a declaration that payment of a person's youth allowance or austudy payment is to continue. This relates to circumstances where the person has applied for review of a decision with respect to the payment that resulted in the application of a compliance penalty period under sections 550B, 551, 576A or 577 of the *Social Security Act 1991*.

Where a reference to youth allowance is made, this instrument only applies to youth allowance recipients who are undertaking full-time study or are a new apprentice. This instrument does not apply to youth allowance recipients who are not undertaking full-time study or are not a new apprentice as the youth allowance payable to these recipients is categorised as a participation payment (as defined in the Dictionary to the Administration Act) which is administered by the Department of Employment, Skills, Small and Family Business.

Background

Section 131 and 145 of the Administration Act provide that, in situations where an adverse decision has been made (other than an adverse decision under Division 3AA of Part 3 relating to compliance with participation payment obligations for persons other than declared program participants), the Secretary may declare that a social security payment is to continue. Section 131 applies for the purposes of a person applying to the Secretary for a review of the adverse decision under section 129 of the Administration Act. Section 145 applies for the purposes of a person seeking an AAT first review of the adverse decision. An adverse decision is a decision that suspends, cancels or reduces the rate of a social security payment.

The Secretary may declare that the payment of a social security payment is to continue pending the determination of an application for review of a decision, as if the adverse decision had not been made, if:

- an adverse decision is made in relation to a social security payment; and
- the adverse decision:

- depends on the exercise of a discretion by a person or the holding of an opinion by a person, or
 - would result in the application of a compliance penalty period, and
- a person applies to the Secretary or the Administrative Appeals Tribunal for a review of that decision.

Under sections 132 and 146 of the Administration Act, the Minister has the power to make guidelines by legislative instrument in relation to the Secretary's power to make a declaration under subsection 131(1) or 145(1) of the Administration Act which affects payments to a person who is subject to a compliance penalty period. The DSS Guidelines set out the circumstances when a person's youth allowance or austudy payment may be continued and the period for which the payment can be continued.

The DSS Guidelines have been remade to replace Division 2 of the *Social Security (Administration) (Payment Pending Review) (DEEWR) Guidelines 2009* (the 2009 Guidelines), as youth allowance and austudy payments are now administered by the Department of Social Services. Division 2 of the 2009 Guidelines will be repealed by this instrument.

The provisions in Division 1 of the 2009 Guidelines relating to participation payments, as defined in the Dictionary to the Administration Act, are administered by the Department of Employment, Skills, Small and Family Business.

Any decision made by the Secretary under sections 131 or 145 of the Administration Act is subject to the review provisions outlined in Parts 4 and 4A of the Administration Act. Further, any information collected under the DSS Guidelines is protected by the information gathering and confidentiality provisions in Part 5 of the Administration Act.

Commencement

The DSS Guidelines commence on the day after registration.

Consultation

The Department of Employment, Skills, Small and Family Business and Services Australia were consulted during the preparation of this instrument. This was done to ensure a consistent and co-ordinated approach for all social security payments under the *Social Security Act 1991*.

The instrument is beneficial as it permits decisions to be made to continue payments to social security recipients while their payments would ordinarily be reduced, suspended or cancelled, pending the outcome of a review of the adverse decision. The instrument maintains the existing policy in prior instruments and therefore no public consultation was considered necessary.

Regulation Impact Statement (RIS)

The DSS Guidelines do not require a Regulatory Impact Statement (RIS). This instrument is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact (OBPR ID: 25220).

Explanation of the provisions

Section 1 provides that the name of the DSS Guidelines is the *Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019*.

Section 2 provides that the DSS Guidelines commence on the day after it is registered.

Section 3 states that the authority for making the DSS Guidelines is sections 132 and 146 of the Administration Act.

Section 4 provides that the instrument specified in Schedule 1 is repealed as set out in that Schedule. Schedule 1 repeals Division 2 of Part 2 of the *Social Security (Administration) (Payment Pending Review) (DEEWR) Guidelines 2009*.

Section 5 defines the term ‘Act’ to be the *Social Security (Administration) Act 1991*.

Section 6 is an application provision. Subsection 6(1) provides that, for section 131 of the Administration Act, the requirements in subsection 7(1) apply to adverse decisions in relation to a youth allowance recipient or an austudy payment recipient.

Subsection 6(2) provides that, for section 145 of the Administration Act, the requirements in subsection 7(2) apply to adverse decisions in relation to a youth allowance recipient or an austudy payment recipient.

The note to section 6 explains that youth allowance payable to a person who is not undertaking full-time study or is not a new apprentice is a participation payment. This is set out in the definition of participation payment in the Dictionary to the Administration Act.

Section 7 provides for a person’s payment to continue to be paid during a compliance penalty period. Subsection 7(1) provides that the Secretary may make a declaration under section 131 of the Administration Act if, and only if, a person, who is in receipt of youth allowance or austudy payment:

- is subject to an adverse decision that results in the application of a compliance penalty period under sections 550B, 551, 576A or 577 of the *Social Security Act 1991*; and
- applies for review of the adverse decision under section 129 of the Administration Act; and
- the compliance penalty period has not ended before the person applies for review.

In these circumstances, the Secretary may declare that the person’s payment is payable to them from the date that the compliance penalty period commenced, or is to commence, and

payment is to continue to be payable pending the determination of the review, as if the adverse decision had not been made.

Note 1 to subsection 7(1) provides that a declaration made under section 131 of the Administration Act takes effect on the day it is made or on an earlier day if specified in the declaration. This is stated in paragraph 131(5)(a) of the Administration Act.

Note 2 to subsection 7(1) provides that a declaration made under section 131 of the Administration Act ceases to have effect on the day the application for review is withdrawn, when the declaration is revoked by the Secretary, or 13 weeks after a decision reviewing the adverse decision is made. This is stated in paragraph 131(5)(b) of the Administration Act.

Subsection 7(2) provides that the Secretary may make a declaration under section 145 of the Administration Act if, and only if, a person, who is in receipt of youth allowance or austudy payment:

- is subject to an adverse decision that results in the application of a compliance penalty period under sections 550B, 551, 576A or 577 of the *Social Security Act 1991*; and
- applies for review of the adverse decision under section 142 of the Administration Act; and
- the compliance penalty period has not ended before the person applies for review.

In these circumstances, the Secretary may declare that the person's payment is payable to them from the date that the compliance penalty period commenced, or is to commence, and payment is to continue to be payable pending the determination of the review, as if the adverse decision had not been made.

Note 1 to subsection 7(2) provides that a declaration made under section 145 of the Administration Act takes effect on the day it is made or on an earlier day if specified in the declaration. This is stated in paragraph 145(4)(a) of the Administration Act.

Note 2 to subsection 7(2) provides that a declaration made under section 145 of the Administration Act ceases to have effect on the day the application for review is withdrawn, when the declaration is revoked by the Secretary, or 13 weeks after a decision reviewing the adverse decision is made. This is stated in paragraph 145(4)(b) of the Administration Act.

Schedule 1 repeals Division 2 of Part 2 of the *Social Security (Administration) (Payment Pending Review) (DEEWR) Guidelines 2009*. This division applies to recipients of youth allowance and austudy payment. The Department of Social Services is responsible for the administration of youth allowance and austudy payments, while the Department of Employment, Skills, Small and Family Business is responsible for participation payments. This instrument establishes guidelines with respect to recipients of youth and austudy payments, making it appropriate to repeal Division 2 of Part 2 of the current instrument.

Statement of Compatibility with Human Rights

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

Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019

This Determination 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 *Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019* (the DSS Guidelines) are made by the Minister for Families and Social Services under sections 132 and 146 of the *Social Security (Administration) Act 1999* (the Administration Act).

The purpose of the DSS Guidelines is to set guidelines for the exercise of the Secretary's discretionary power to make a declaration that payment of a person's youth allowance (for students who are undertaking full-time study and new apprentices) or austudy payment is to continue where that person has applied for review of a decision relating to the payment that resulted in the application of a compliance penalty period under sections 550B, 551, 576A or 577 of the *Social Security Act 1991*.

Sections 131 and 145 of the Administration Act provide that, in situations where an adverse decision has been made, the Secretary may declare that a social security payment is to continue. An adverse decision is a decision that suspends, cancels or reduces the rate of a social security payment. The DSS Guidelines set out the circumstances where the Secretary may decide to continue the payment and the time period for which payment can be continued.

Human rights implications

The DSS Guidelines engages the right to social security.

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to social security.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

Article 4 of ICESCR provides that countries may limit the rights to social security in a way determined by law only in so far as this may be compatible with the nature of the rights contained within the ICESCR and solely for the purpose of promoting the general welfare in a democratic society. Such a limitation must be proportionate to the objective to be achieved.

The DSS Guidelines increases access to social security while students are studying. It is mechanical in nature and does not alter current arrangements. The Determination allows the Secretary to declare that specified social security payments are to continue where an adverse

decision would result in the suspension, cancellation or reduction of a student's rate of social security payment, pending the outcome of a review. The DSS Guidelines provides for circumstances where youth allowance (for students undertaking full-time study and new apprentices) and austudy payment can continue, which enhances access to social security by broadening that access.

In the absence of sections 131 and 145 of the Administration Act, and the DSS Guidelines, a student's payment would cease where an adverse decision is made and a compliance penalty period commences. The cessation of payment would continue until a review was completed.

Conclusion

The DSS Guidelines are compatible with human rights because it promotes access to social security. To the extent a human rights obligation is engaged or limited, the impact is for a legitimate objective, and is reasonable, necessary and proportionate as outlined above.

Senator the Hon Anne Ruston, Minister for Families and Social Services