



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

Parliament House, Canberra ACT 2600
02 6277 3066 | sdhc.sen@aph.gov.au
www.aph.gov.au/senate_sdhc

18 June 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Minister@education.gov.au

CC: dlo@education.gov.au

Dear Minister,

Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules 2020 [F2020L00406]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and the committee seeks your advice in relation to this matter.

Clarity of drafting

Parliamentary oversight

Senate standing order 23(3)(e) requires the committee to examine each legislative instrument as to whether its drafting is defective or unclear. In addition, Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument may exclude or limit parliamentary oversight.

The instrument amends the Child Care Subsidy Minister's Rules 2017 (principal rules) to provide for the making of business continuity payments (BCPs) to the providers of childcare services. New paragraph 60E(3)(a) of the principal rules provides that the amount of a BCP will be nil if the secretary is satisfied that the provider has failed to comply with any requirements on the making of BCPs set out in the *Early Childhood Education and Care Relief Package Payment Conditions* document (the document), as published by the Department of Education, Skills and Employment (the department) from time to time. In addition, new section 60F provides that supplementary amounts of BCPs are worked out in accordance with the document.

The instrument notes that the document is available on the department's website, and the explanatory statement identifies the relevant provision in the enabling legislation which enables the document to be incorporated as in force from time to time. However, the explanatory statement does not appear to explain why it was considered necessary to include conditions for the payment of BCPs in the document, rather than including the conditions on the face of the instrument.

The committee understands that the department has chosen to set out the conditions for the payment of BCPs in an external document to ensure that the department can respond flexibly to the needs of the childcare sector during the COVID-19 pandemic. The committee also understands that all changes to the conditions are published on the department's website, and are communicated to the sector by email. Finally, the committee notes that the principal rules, and other instruments associated with the childcare and family assistance sectors, make provision for matters by reference to incorporated documents.

However, the committee does not consider administrative flexibility, or consistency with other legislation, to be sufficient justification for including conditions for the payment of BCPs in an external document. From a scrutiny perspective, the committee is concerned that including the relevant conditions in the document will permit the conditions to be changed without any form of parliamentary oversight.

In this regard, it is unclear to the committee why it would not be possible to specify the conditions for the payment of BCPs on the face of the instrument, and to make changes to the conditions as necessary to respond to the changing needs of the child care sector. In this respect, the committee notes that amendments to delegated legislation (and particularly ministerial rules) are often made and registered quickly. Moreover, the department could still provide guidance on the payment of BCPs through documents published on its website, if this is necessary to ensure clarity and certainty for stakeholders.

With regard to the matters outlined above, the committee requests your detailed advice as to:

- **why it was considered necessary and appropriate to set out conditions for receiving business continuity payments in the *Early Childhood Education and Care Relief Package Payment Conditions* document (the document), rather than including those conditions on the face of the instrument;**
- **whether the instrument could be amended to specify the relevant conditions, instead of referring to the document.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **2 July 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MC20-019684

- 8 JUL 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear Senator Fierravanti-Wells

Concetta,

Thank you for your 18 June 2020 letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee), regarding the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules 2020* (Amendment Rules).

I note the Committee requested information on the following:

'...appreciate your advice as to why it was considered necessary and appropriate to set out certain conditions for receiving business continuity payments in the *Early Childhood Education and Care Relief Package Payment Conditions* document, rather than including those conditions in the instrument itself.'

My advice in response to the Committee's request is as follows.

In its response to the Secretariat of the Committee on 27 May 2020, the Department of Education, Skills and Employment outlined a number of reasons as to why these requirements are listed in the *Early Childhood Education and Care Relief Package Payment Conditions* document (the Conditions), rather than in the *Child Care Subsidy Minister's Rules 2017* as amended by the Amendment Rules, in order to best support the early childhood education and care (ECEC) sector during the COVID-19 pandemic.

I agree with the department's response that including this information in the Conditions provided much-needed flexibility to respond to the dynamic needs of the ECEC sector in a rapidly changing environment adversely affecting the sector and the Australian families who rely on it. The arrangements, which are within existing legislation and authority, allowed the Australian Government's ECEC Relief Package arrangements to complement other Government support, particularly the Jobkeeper Payment.

The department's advice to me anticipated there would be amendments to the ECEC Relief Package arising from sector data and feedback, also noting that the Government announced a planned review point for the Package one month into its implementation. Furthermore, setting out the requirements in the Conditions, as opposed to legislative rules, allowed child care providers to clearly understand their obligations for receiving Business Continuity Payments as well as their opportunities to receive additional support through the Exceptional Circumstance Supplementary Payment process, in a format that was familiar, accessible and easily understood.

In response to the Committee's concern that including relevant conditions in the Conditions document will permit said conditions to be changed without any form of Parliamentary oversight, I accept that there was no opportunity for Parliament to review the requirements for the business continuity payments under the ECEC Relief Package during the delivery of that Package.

Nevertheless, I can confirm that the Relief Package was created within existing legislative and policy authority parameters. As mentioned previously, the ECEC Relief Package was a rapid response by the Government to avoid the collapse of the ECEC sector, as advised by sector representatives and data available to the Government on the number of mass withdrawals of children from child care due to the impact of COVID-19. The Conditions have been varied during the operation of the Relief Package to incorporate greater support to services as particular circumstances and stressors have become apparent following ongoing feedback and the findings of the review. The Conditions document has also been updated to reflect emerging sector needs in line with broader policy authority.

For the Committee's information, I have approved the following changes to the Conditions document since that document was first published on 6 April 2020.

- inclusion of conditions for providers ineligible to receive JobKeeper payments and for Family Day Care and In Home Care services with educators that required an Australian Business Number to access Jobkeeper to access supplementary payments (30 April 2020)
- inclusion of a provision for a 20 per cent supplementary payment to In Home Care services and supplementary payments for services who employ in excess of 30 per cent of staff who are ineligible to receive JobKeeper (21 May 2020).

I will also be making some further administrative changes to the Conditions document to complement the Government's announcement of the extension to the duration of the Relief Package and allow for additional business continuity payments available to child care providers for the extended period.

Each version of the Conditions has also included a number of clarifications and corrections that assist child care providers to better understand and comply with their obligations under the Relief Package. The major updates to the Conditions document have been made to further support the child care sector by expanded the provider eligibility criteria to access Exceptional Circumstances Supplementary Payments.

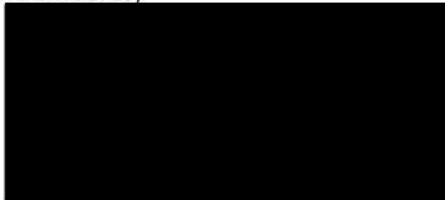
Changes to the Conditions document have been beneficial in nature and have not restricted or reduced support provided to the sector through the Relief Package.

Finally, as the Committee would be aware, the Government has announced that the ECEC Relief Package will end on 12 July 2020, and the usual payment of Child Care Subsidy will resume from Monday 13 July. The Government is also introducing a transition payment arrangement that will provide supplementary financial support to the ECEC sector until late September. The transition payments will be administered as a grants program, rather than payments under the family assistance law.

Consequently, supplementary payments of business continuity payments under the Package will cease shortly, and hence the conditions and requirements relating to them will also cease to have effect (except insofar as they continue to relate to payments already made). Given that there is no ongoing need for the Conditions beyond 12 July 2020, I would not propose to amend the Minister's Rules, retrospectively, to include the Conditions.

Thank you for raising the Senate Standing Committee for the Scrutiny of Delegated Legislation concerns. I trust this information is of assistance.

Yours sincerely

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DAN TEHAN

A blue scribble or mark, possibly a signature or initials, located below the name DAN TEHAN.



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Scrutiny of Delegated Legislation**

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27 August 2020

The Hon Dan Tehan MP
Minister for Education
Parliament House
CANBERRA ACT 2600

Via email: Minister@education.gov.au

CC: dlo@education.gov.au


Dear Minister,

**Child Care Subsidy Amendment (Coronavirus Response Measures No. 2) Minister's Rules
2020 [F2020L00406]**

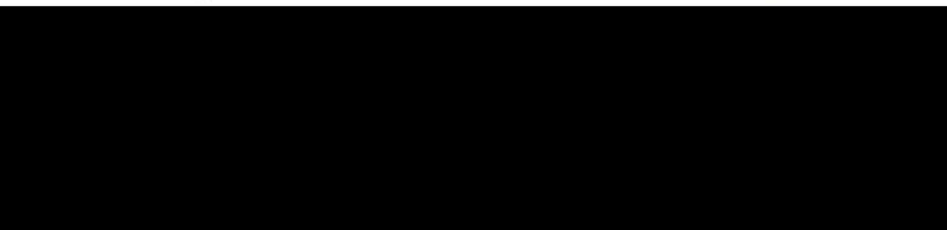
Thank you for your response of 8 July 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. On the basis of your advice that the instrument has ceased to have effect, the committee has concluded its examination of the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation