

The Senate

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Education and Employment  
Legislation Committee

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Family Assistance Legislation Amendment  
(Building on the Child Care Package) Bill  
2019 [Provisions]

October 2019

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# Chapter 1

## Introduction

### Referral of the inquiry

1.1 On 19 September 2019 the Senate referred the provisions of the Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019 (bill) to the Education and Employment Legislation Committee (the committee) for inquiry and report by 11 October 2019.<sup>1</sup>

### Conduct of the inquiry

1.2 Details of the inquiry were made available on the committee's website. The committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 13 organisations.

1.3 A list of submissions can be found at Appendix 1.

### Objectives of the bill

1.4 The bill seeks to make minor policy refinements and provide clarification to measures contained in the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017*.<sup>2</sup> These amendments are a response to feedback from families and the childcare sector on the implementation of the childcare package. The amendments make refinements to the operation of the childcare package introduced in July 2018 and thereby respond to findings from evaluations of the package.

1.5 The bill is comprised of two schedules:

- Schedule 1 — Amendments relating to childcare subsidies;
- Schedule 2 — Amendments relating to ensuring the integrity of the childcare subsidy system.<sup>3</sup>

1.6 These amendments will be implemented as part of a phased approach, with some measures to take effect following Royal Assent and others to commence from 13 January 2020 and 13 July 2020.<sup>4</sup>

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<sup>1</sup> *Journals of the Senate*, No. 19, 19 September 2019, p. 570.

<sup>2</sup> Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019, *Explanatory Memorandum*, pp. 2 and 9.

<sup>3</sup> *Explanatory Memorandum*, pp. 2–3.

<sup>4</sup> *Explanatory Memorandum*, pp. 13, 26–27.

### *Schedule 1 — Amendments relating to childcare subsidies*

1.7 The bill will amend the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance)(Administration) Act 1999* to have the effect of:

- removing the 50 per cent limit on the number of children a provider can self-certify for the Additional Child Care Subsidy (child wellbeing);
- allowing the Minister for Education to prescribe circumstances in which a third party may contribute to meeting the cost of an individual's childcare fees without affecting that individual's Commonwealth childcare subsidies;
- introducing a new rule-making provision to allow the Minister for Education to prescribe specific circumstances in which Commonwealth childcare subsidies can be paid where the child is absent at the start or end of an enrolment;
- amending the In Home Care rate in parallel with the rates for other care types, and the capacity for the Minister for Education to specify eligibility criteria and care requirements that must be met for access to Commonwealth-subsidised In Home Care places;
- making clear that decisions made under section 105 of the *A New Tax System (Family Assistance)(Administration) Act 1999* (Secretary initiated review) must be first subject to internal review before application is made to the Administrative Appeals Tribunal (AAT);
- simplifying the claims process for the Child Care Subsidy (CCS); and
- clarifying the policy intent of the Commonwealth and addressing unintended consequences.<sup>5</sup>

### *Schedule 2 — Amendments relating to ensuring the integrity of the childcare subsidy system*

1.8 The amendments in Schedule 2 seek to improve the Commonwealth's childcare subsidy payment framework by bringing the requirements for the approval of childcare providers and services into greater alignment with related state and territory laws.<sup>6</sup>

1.9 The bill's amendments under Schedule 2 will have the effect of:

...ensuring that where an approved provider or childcare service is suspended or cancelled under the *Education and Care Services National Law* [National Law](effectively the state/territory licencing regime for operating childcare services), access to Commonwealth childcare subsidies will be automatically suspended or cancelled.<sup>7</sup>

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<sup>5</sup> *Explanatory Memorandum*, pp. 2–3.

<sup>6</sup> *Explanatory Memorandum*, p. 6.

<sup>7</sup> *Explanatory Memorandum*, p. 6.



1.10 Other amendments proposed under the bill will allow for childcare providers to request voluntary suspension of their Commonwealth approval in certain circumstances and bring clarity to policy intent by addressing unintended consequences.<sup>8</sup>

### **Compatibility with human rights**

1.11 The bill's statement of compatibility with human rights states that it 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*.<sup>9</sup> According to the Explanatory Memorandum (EM), the bill engages the following human rights:

- the right to work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the rights of parents under Articles 3, 18 and 19 of the Convention of the Rights of the Child (CRC);
- the right to an adequate standard of living, under Article 27 of the CRC; and
- the right to social security, under Article 9 of the ICESCR.

1.12 The EM notes that the bill advances human rights by providing families with greater access to workforce participation and access to a flexible and quality childcare system. The bill also achieves this by making the scheme more transparent for families, and more efficient for the Commonwealth to administer.<sup>10</sup>

### **Structure of the report**

1.13 This report is divided into two chapters. This chapter provides an overview of the bill, while the second chapter considers key provisions of the bill and issues raised in submissions to the inquiry.

### **Financial impact statement**

1.14 While the EM states that the measures contained in the bill do not have a discernible financial impact, it notes that the Minister's Rules made under the new powers established by the bill could have a future financial impact. The EM notes that detailed costings would be developed and agreed at the appropriate time when any such Rules are being made.<sup>11</sup>

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<sup>8</sup> *Explanatory Memorandum*, p. 29.

<sup>9</sup> *Explanatory Memorandum*, p. 5.

<sup>10</sup> *Explanatory Memorandum*, pp. 7–9.

<sup>11</sup> *Explanatory Memorandum*, p. 4.

**Acknowledgements**

1.15 The committee thanks those organisations that contributed to the inquiry by preparing written submissions.

# Chapter 2

## Key provisions of the bill

### Introduction

- 2.1 In 2018, major reforms to the childcare system came into effect. The reforms were introduced as part of a childcare package that included changes to family assistance payments for childcare. The bill before the committee seeks to make some modifications to this package.<sup>1</sup>
- 2.2 The Hon Dan Tehan MP, Minister for Education, noted the significant reforms to the childcare sector from the implementation of the package in his second reading of the bill. He stated that:
- [t]his childcare package represents the biggest reforms to child care since the introduction of the Commonwealth Child Care Act in 1972.<sup>2</sup>
- 2.3 The implementation of the childcare package on 2 July 2018 simplified what was a complex childcare system for users and the childcare sector.<sup>3</sup> It delivered major reforms to the sector by introducing two new family assistance payments, the Child Care Subsidy (CCS) and the Additional Child Care Subsidy (ACCS). These new payments replaced or partly replaced a number of the previous payments, including: Child Care Benefit (CCB), Child Care Rebate (CCR), Special Child Care Benefit, Grandparent Child Care Benefit and Jobs, Education and Training Child Care Fee Assistance. Together they formed the Government's Jobs for Families Child Care Package announced in the 2015–16 Budget.<sup>4</sup>

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<sup>1</sup> A previous iteration of the 2016 bill, the *Family Assistance Amendment (Jobs for Families Child Care Package) Bill 2015*, was introduced in the 44<sup>th</sup> Parliament on 2 December 2015 but lapsed at prorogation on 15 April 2016. For a discussion of the respective bills, see Klapdor, *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016*, Bills digest, 39, 2016-17, Parliamentary Library, 18 November 2016.

<sup>2</sup> The Hon Dan Tehan MP, Minister for Education, *House of Representatives Hansard*, 18 September 2019, p. 14.

<sup>3</sup> The *Family Assistance Legislation Amendment (Jobs for Families Child care Package) Act 2017* was enacted on 4 April 2017.

<sup>4</sup> Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2015, *Explanatory Memorandum*, p. 2. See also Klapdor, *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Bill 2016*, Bills digest, 39, 2016-17, Parliamentary Library, 18 November 2016, p. 5. Other payments which make up the package include the Community Child Care Fund (including Connected Beginnings) and the Inclusion Support Program. These two payments together with the ACCS comprise the 'Child Care Safety Net'. See Australian National Audit Office, *Design and Governance of the Child Care Package*, Auditor-General Report No. 10, 2019–20, pp. 7–8, 16–18.

- 2.4 The package was designed to deliver a more affordable, accessible and flexible childcare system. Since its implementation in 2018, the system has provided subsidies to more than 1.1 million families and supported the childcare needs of 1.6 million children. The Department of Education reported that the package is supported by record funding of \$8.6 billion in 2019–20 and this is expected to increase to around \$10 billion a year over the next few years.<sup>5</sup>
- 2.5 Following the package's implementation, the Government received feedback from stakeholders during consultation with families and the childcare sector. The consultation revealed the need for minor adjustments and refinements to aspects of the package.<sup>6</sup> These modifications, contained in the bill, are considered necessary to improve the system for users and the childcare sector.
- 2.6 The bill seeks to amend the current *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) and *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to make the system easier for users and to enhance its integrity. In addition, the bill addresses unintended consequences arising from the implementation of the child care package and includes corrective and clarifying amendments in order to give effect to the original policy intent of the reforms.
- 2.7 The intent of the current bill, like its predecessor, is to 'ensure [that] more financial support is targeted to the families who work the most and earn the least' and to reduce the regulatory burden for users.<sup>7</sup>

### **Schedule 1 – Amendments relating to childcare subsidies**

- 2.8 Part 1 – It is proposed that the following amendments will commence at the start of the childcare subsidy fortnight after Royal Assent.

#### *Refining 'absence' from childcare*

- 2.9 Under the current legislation, families are prevented from accessing subsidies in circumstances where a child cannot attend a childcare service due to illness before the child's first, and after their last, physical attendance at a service. This places an unnecessary financial strain on families in circumstances where there are legitimate reasons for absences.<sup>8</sup>
- 2.10 Items 6 and 9 of the bill concerning absence provisions will provide more flexibility with regard to absences. The introduction of subsections 10(2A) and

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<sup>5</sup> Department of Education, *Submission 7*, p. [1].

<sup>6</sup> Department of Education, *Submission 7*, p. [1].

<sup>7</sup> Department of Education, *Submission 7*, p. [1].

<sup>8</sup> Department of Education, *Submission 7*, p. [3].

10(3A) to the Family Assistance Act would give the Minister the power to prescribe circumstances in which families can still access CCS for an absence.<sup>9</sup>

2.11 These proposed amendments were largely well-received by submitters. Supporters of the proposed amendments viewed these changes as providing more flexibility to the system and removing unintended negative impacts on families.<sup>10</sup>

2.12 Submitters who provided qualified support to the provisions requested further clarification on what constitutes 'specific circumstances'.<sup>11</sup> Goodstart Early Learning (Goodstart) suggested that clarification be included in the subordinate legislation, so that:

...the prescribed absences should largely align with the existing provisions around Additional Absences for CCS and ACCS but should also include public holidays and enrolment cancellation notice period (up to a maximum of two weeks).<sup>12</sup>

2.13 Family Day Care Australia (FDCA) added that relevant stakeholders should be given the opportunity to review any proposed amendments to the Minister's Rules regarding the 'exact nature' of 'prescribed circumstances'.<sup>13</sup>

### *Treatment of third party payments in calculating CCS*

2.14 Items 22 and 23 of the bill seek to amend the Family Assistance Act to allow the Minister to prescribe that certain third party payments will not be taken into account for the purpose of calculating the hourly rate of the CCS. At present, by taking into account third party payments in the calculation of childcare fees before payment is made to a recipient, the third party co-contribution disadvantages some vulnerable families from accessing affordable childcare.<sup>14</sup> The amendments seek to address this unintended consequence for families.

2.15 Items 20, 21, 25-28 of the bill address circumstances where a provider or individual receives an excess amount (where the CCS and a prescribed payment could be greater than the fee charged). The bill's provisions introduce

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<sup>9</sup> *Explanatory Memorandum*, p. 14; Department of Education, *Submission 7*, p. [3].

<sup>10</sup> KU Children Services, *Submission 1*; Early Learning and Care Council of Australia, *Submission 2*; Goodstart Early Learning, *Submission 4*; Department of Education, *Submission 7*; Australian Childcare Alliance, *Submission 9*; and Department of Human Services, *Submission 10*.

<sup>11</sup> Goodstart Early Learning, *Submission 4*, p. 3; Early Learning and Care Council of Australia, *Submission 2*, p. 3.

<sup>12</sup> Goodstart Early Learning, *Submission 4*, p. 3. See also Early Learning and Care Council of Australia, *Submission 2*, p. 3, and Leor In Home Early Learning, *Submission 13*, pp. 5-6.

<sup>13</sup> Family Day Care Australia, *Submission 8*, p. 3.

<sup>14</sup> *Explanatory Memorandum*, p. 15.

an adjusted activity-tested amount of CCS and set out the method for calculating the adjusted amount of the CCS.<sup>15</sup>

- 2.16 Items 71 and 72 of the bill would amend the Family Assistance Administration Act by recognising prescribed circumstances in which third party payments may contribute to reduce the cost of an individual's childcare fees. The provisions seek to ensure that a provider does not overcharge an individual who benefits from a prescribed payment. It is designed to prevent providers from artificially inflating fees.<sup>16</sup>
- 2.17 A large number of submitters welcomed the proposed amendments to the treatment of third party payments, including a number of submitters who expressed qualified support. KU Children Services noted that the amendments would help to 'ensure that the cost of childcare is not a barrier to accessing childcare for [...] vulnerable [or] disadvantaged children'.<sup>17</sup>

### **Expansion of third party payments to include non-government entities**

- 2.18 A number of submitters who expressed qualified support for the amendments requested that the Minister's Rules be clarified or expanded to include third party payments from non-government organisations and philanthropic funds to reduce out-of-pocket costs for vulnerable children and families.<sup>18</sup>
- 2.19 Early Childhood Australia (ECA) argued that non-government third party payments should be treated the same as state and territory payments to remove the punitive treatment of vulnerable families in receipt of non-government third party payments.<sup>19</sup> It was suggested that other benefits would be derived from broad application including no changes to the DHS/Centrelink system, no additional costs to the taxpayer, and decreased co-payment for families and/or increased number of hours of early learning.<sup>20</sup>

### *Late attendance reports and late enrolment notices*

- 2.20 Items 39, 40, 43 to 46 and 48 of the bill seek to amend subsections 67CD(1), 67CF(1), 67CH(1) and section 200A of the Family Assistance Administration Act to ensure that individuals can still access CCS and ACCS payments and

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<sup>15</sup> *Explanatory Memorandum*, pp. 16–17. The amendments equally apply to the calculation of ACCS where an individual is eligible for a session of care and benefits from a prescribed payment.

<sup>16</sup> *Explanatory Memorandum*, p. 17.

<sup>17</sup> KU Children Services, *Submission 1*, p. 1.

<sup>18</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 3; Early Childhood Australia, *Submission 3*, p. 3; Goodstart Early Learning, *Submission 4*, p. 2; SDN Children's Services, *Submission 5*, p. 4; Australian Childcare Alliance, *Submission 9*, pp. 4–5. See also Leor In Home Early Learning, *Submission 13*, p. 6.

<sup>19</sup> Early Childhood Australia, *Submission 3*, p. 3.

<sup>20</sup> Goodstart Early Learning, *Submission 4*, p. 2; SDN Children's Services, *Submission 5*, p. 4.

are not adversely affected by a provider when an attendance report is not provided within required timeframes. The amendments also allow the provider to vary, substitute or withdraw an attendance report even when a report is submitted late.<sup>21</sup> Items 69, 77 and 80 clarify the operation of these changes.<sup>22</sup>

### *Clarifying the apportioning of partner income in calculating CCS*

2.21 Item 29 of the bill would amend the Family Assistance Act to ensure the calculations of CCS 'reflects the financial capacity of the individual and their partner to meet the costs of childcare'.<sup>23</sup>

### *Clarifying attendance reporting requirements*

2.22 Item 75 seeks to amend section 204B of the Family Assistance Administration Act to reflect the original policy intent by clarifying attendance reporting to include all care provided to children in a week by approved providers.<sup>24</sup>

### *Simplifying CCS claims*

2.23 Items 35 to 38, 41, 42, 50 and 51 of the bill seek to simplify the process of making a claim for CCS by amending and repealing various provisions in the Family Assistance Administration Act.<sup>25</sup> The amendments clarify the requirements that must be met to claim CCS by stipulating that bank account and tax file number (TFN) details be provided at the time the claim is made, and not at another time, which can result in a debt. Currently, an individual has 28 days after the CCS claim is submitted to provide these details. This can result in a debt to families when CCS payments are made during this time.<sup>26</sup>

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<sup>21</sup> See Item 76 of the bill amending subsection 204B(2) of the Family Assistance Administration Act. *Explanatory Memorandum*, p. 18.

<sup>22</sup> *Explanatory Memorandum*, pp. 18–19.

<sup>23</sup> *Explanatory Memorandum*, p. 19.

<sup>24</sup> *Explanatory Memorandum*, pp. 20–21.

<sup>25</sup> These items in the bill would repeal or replace sections in 67BE, 67BF, 67CD, and 67CF; as well as repeal sections 67BG, 67BH, 67BI, and 67FF of the Family Assistance Administration Act to reflect policy intent. *Explanatory Memorandum*, p. 21.

<sup>26</sup> *Explanatory Memorandum*, p. 21.

### **Concerns regarding increased complexity and administrative burden**

2.24 The committee received a number of submissions which opposed the proposed amendments to simplify CCS claims. These submitters raised concerns that rather than simplifying CCS claims, the amendments would add increased complexity and an additional burden on users.<sup>27</sup>

2.25 Submitters who oppose the removal of the 28 day window period argued that removing this measure would be detrimental for vulnerable families.<sup>28</sup> Early Learning and Care Council of Australia (ELACCA) explained:

Currently, families making a claim for CCS have 28 days to provide a [TFN] or bank account details. In the current legislation, the provision of this information is required for the individual's CCS claim to be effective, which affects their CCS eligibility. However, their eligibility is already verified, and this information is only required for the payment (and reconciliation) of subsidies. If the information is not provided within the 28 day window, a family is deemed CCS ineligible and may incur a debt with their provider

The proposed changes may reduce administrative burden for the Department of Human Services but will increase the administrative burden for families. The reduced flexibility will have a disproportionately negative impact on families experiencing vulnerability or disadvantage, such as women and children escaping domestic and family violence who may not have ready access to their personal information.<sup>29</sup>

2.26 To avoid families from incurring debts, ELACCA recommended that the provision of TFN and bank account details be separated so 'they are not required for a CCS claim to be effective and their late or non-provision does not impact a person's CCS eligibility'.<sup>30</sup>

### *Including ABSTUDY as an eligible payment for ACCS (grandparent)*

2.27 Currently, ABSTUDY recipients are excluded from accessing ACCS (grandparent) payments because ABSTUDY payments are not listed as a social security payment eligible under paragraph 85CJ(1)(d) of the Family Assistance Act. The amendments proposed in items 16 and 17 of the bill would enable the Minister's Rules to include ABSTUDY, and any other government payments, on the list of payments for the purpose of determining ACCS (grandparent) eligibility. The implementation of the amendments contained in the bill would

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<sup>27</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 4; Early Childhood Australia, *Submission 3*, pp. 2-3; Goodstart Early Learning, *Submission 4*, p. 3; Australian Childcare Alliance, *Submission 9*, p. 5.

<sup>28</sup> See also Early Childhood Australia, *Submission 3*, pp. 2-3; Goodstart Early Learning, *Submission 4*, p. 3; Leor In Home Early Learning, *Submission 13*, p. 5.

<sup>29</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 4.

<sup>30</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 4.



also remove 'barriers for a particular class of individuals' from receiving ACCS (grandparent) where they meet the eligibility criteria.<sup>31</sup>

### *In Home Care related amendments*

2.28 Items 11, 12 18, 24 and 66 seek to amend the Family Assistance Act and Family Assistance Administration Act to incorporate In Home Care (IHC) concepts into Family Assistance Law and make available CCS to parents and providers. The authority for IHC currently resides in the Minister's Rules and the amendment seeks to incorporate it into primary legislation. The clarification regarding eligibility criteria recognises the possibly complex or extensive additional needs of recipients and the lack of availability of other types of care options appropriate to their circumstances.<sup>32</sup>

### **Transitional provisions for IHC educators for remote and very remote families**

2.29 Isolated Children's Parent's Association of Australia (ICPAA) expressed concerns that the transitional provisions to assist remote and very remote families to access IHC would not continue beyond January 2020. These provisions, which exempt IHC educators from the requirement that they have a Certificate III qualification in early childhood education and care, was designed to address the difficulties in attracting and retaining early childhood teachers in remote and very remote areas. ICPAA requested an extension of these transitional provisions for another two years to address the ongoing difficulties in attracting and retaining IHC educators in geographically isolated areas.<sup>33</sup>

2.30 Another issue raised in the ICPAA's submission concerned the lack of care for school-aged children up to the age of 15 years. As IHC is targeted at non school-aged children (0-5 years), this can cause difficulties for families with school-aged children who cannot afford to pay for boarding school or stay home to care for them. To address these challenges, ICPAA requested that families in such circumstances be able to recruit IHC educators with a Certificate III in educational support or equivalent to care for school-aged children (such as distance education students) where no teacher is physically present during formal school hours. ICPAA requested that families in such situations be able to access the CCS. This would enable parents to work while their school-aged children receive appropriate care, which is the policy intent of the childcare package.<sup>34</sup>

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<sup>31</sup> *Explanatory Memorandum*, pp. 22–23.

<sup>32</sup> *Explanatory Memorandum*, pp. 24–25; see also Department of Education, *Submission 7*, pp. [3–4].

<sup>33</sup> Isolated Children's Parents' Association of Australia (Inc), *Submission 6*, p. 1. See also Leor In Home Early learning, *Submission 13*, pp. 2–6.

<sup>34</sup> Isolated Children's Parents' Association of Australia (Inc), *Submission 6*, p. 2. See also Leor In Home Early learning, *Submission 13*, p. 6.

### *Clarifying indexation in calculating CCS*

2.31 Items 30 to 32 of the bill seek to amend the Family Assistance Act to require indexation of the CCS hourly rate caps, CCS lower income threshold, and by requiring the CCS annual cap to take place on the first day of the first CCS fortnight of the relevant income year. The amendments recognise that the final CCS fortnight of an income year 'may traverse two different income years (a CCS fortnight may begin in one income year and end during the next income year)'. It also seeks to provide consistency to CCS payments across a single fortnight and avoids fluctuations in CCS payments in an income year.<sup>35</sup>

### *Clarifying applications for AAT first review*

2.32 Items 54, 58 and 59 of the bill would amend section 111 of the Family Assistance Administration Act to clarify that decisions made under section 105 (Secretary initiated review) must first go through an internal review before an application can be made to the AAT. These amendments are consistent with existing policies and practices.<sup>36</sup>

### *Reference to State/territory body in relation to ACCS (child wellbeing)*

2.33 Under the current system, when a provider gives a certificate in relation to a child at risk of abuse or neglect under the Family Assistance Act (or applies to the Secretary for a determination), the provider is also required to give notice to an 'appropriate State or Territory body' in accordance with the Family Assistance Administration Act. This has caused some confusion due to the ambiguity of the term 'appropriate State or Territory body', with some providers conflating it with mandatory reporting to a state or territory department or agency that deals with child protection matters.<sup>37</sup>

2.34 Items 14, 15, 33, 34, 74 and 81 of the bill seek to bring clarity to the use of the term by replacing it with 'appropriate State/Territory agency' in the Family Assistance Act and Family Assistance Administration Act.<sup>38</sup>

### *Circumstances where a provider is eligible for ACCS (child wellbeing)*

2.35 Item 13 seeks to correct an inconsistency between subsection 85CA(2)(a) and subparagraph 85CA(2)(b)(i) of the Family Assistance Act to ensure the provision aligns with its policy intent, so that:

...a provider is eligible for ACCS (child wellbeing) regarding a session of care provided to a child where they are not able to identify an individual who is eligible for CCS (rather than ACCS (child wellbeing)).<sup>39</sup>

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<sup>35</sup> Explanatory Memorandum, p. 22.

<sup>36</sup> Explanatory Memorandum, p. 22.

<sup>37</sup> Explanatory Memorandum, p. 23.

<sup>38</sup> Explanatory Memorandum, p. 23.

*Other technical amendments*

- 2.36 Among some of the technical amendments proposed under the bill, are items 1 to 3, which amend sections 3 to 9 of the Family Assistance Act to incorporate the prescription for a session of care into the Minister's Rules instead of keeping it in a separate legislative instrument. The proposed change would make it easier for childcare providers to comply with Family Assistance Law requirements when the prescription of what constitutes a 'session of care' is made more accessible in a central reference point, in the Minister's Rules.<sup>40</sup>
- 2.37 Other items include a savings provision and a provision to provide powers for the Minister's and Secretary's Rules to be made to ensure documents already incorporated by reference into the Minister's and Secretary's Rules will refer to the latest version at all times.<sup>41</sup> Other items relate to correcting cross-referencing errors and removing redundant paragraphs in the Family Assistance Administration Act.<sup>42</sup>
- 2.38 Part 2 — The following amendments commence on 13 January 2020.

*Increasing the timeframe before enrolments cease*

- 2.39 Item 88 of the bill amends subparagraph 200B(1)(b)(iii) of the Family Assistance Administration Act to extend the enrolment lapse time from eight to 14 weeks to avoid the regulatory burden of re-enrolment for children returning to care and in need of CCS. This amendment is a response to feedback from families and childcare providers that the eight week timeframe for an enrolment to lapse was too short and placed an additional unnecessary burden on families and providers. The amendment is designed to address these concerns by ensuring that 'a child continues to be enrolled with a service if they attend at least one session of care during each school holiday period throughout the year'.<sup>43</sup>
- 2.40 The proposed amendment received positive feedback from a large number of submitters. Submitters welcomed the reduction in the administrative and regulatory burden for families and providers of vacation care, including for multicultural families or families who travel overseas for extended periods.<sup>44</sup>

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<sup>39</sup> *Explanatory Memorandum*, p. 23.

<sup>40</sup> *Explanatory Memorandum*, p. 25.

<sup>41</sup> See *Explanatory Memorandum*, pp. 25–26. Item 85 ensures that the existing legislative instrument setting-out what constitutes a session of care is retained until such time as the Minister's Rules are amended. Item 19 inserts 85GB(2A) in section 85GB of the Family Assistance Act.

<sup>42</sup> *Explanatory Memorandum*, p. 26. For example, see items 52, 55, 56, 61, 62 and 83, items 63 and 64, and 65, 78, 79, and 82 regarding some of these amendments.

<sup>43</sup> *Explanatory Memorandum*, p. 27.

<sup>44</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 2; Department of Education, *Submission 7*, p. [2]; Family Day Care Australia, *Submission 8*, p. 4, Australian Childcare Alliance,

- 2.41 ICPAA noted that this proposed amendment would particularly benefit families in geographically isolated areas. In these areas, it can be difficult to recruit and retain In Home Care educators. The increased timeframe would allow remote and rural families more time to find a replacement educator without losing their designated place within the In Home Care program.<sup>45</sup>
- 2.42 The Department of Human Services stated that these changes would remove 'unnecessary increased contact with the Department at the commencement of each school term by parents having to re-activate their child's enrolment'.<sup>46</sup>
- 2.43 Part 3 – The following amendments commence on 13 July 2020.

*Removing the prescribed 50 percent limit in relation to ACCS (child wellbeing)*

- 2.44 Currently, under section 85CA of the Family Assistance Act, a person is eligible for ACCS (child wellbeing) for a session of care if they meet a number of criteria. One of these is that a certificate be given under subsection 85CB by an approved provider (subsection 85CB(1)) if it considers that a child is or was at risk of serious abuse or neglect. However, there is a limit to the number of certificates a provider can issue. If the provider issues certificates to more than 50 per cent of children receiving its services, then any additional certificates issued will not take effect. A separate process would need to be taken by the provider to increase the 50 per cent limit.<sup>47</sup>
- 2.45 This default 50 per cent limit has created an unnecessary regulatory burden for approved providers and childcare services and caused delays for at-risk children accessing supported childcare.
- 2.46 Item 89 of the bill amends subsection 85CB(4) of the Family Assistance Act to remove this unnecessary regulatory burden and improve timely access for vulnerable children and families to appropriate care through ACCS (child wellbeing).<sup>48</sup>
- 2.47 This amendment received broad support from submitters.<sup>49</sup> They recognised that it would provide timely care for children at risk of abuse or neglect,

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*Submission 9*, p. 4; Department of Human Services, *Submission 10*, p. [2], Australian Community Children's Services, *Submission 11*, p. [1], Community Early Learning Australia, *Submission 12*, p. 1; Leor In Home Learning, *Submission 13*, p. 2.

<sup>45</sup> Isolated Children's Parents' Association of Australia, *Submission 6*, p. 2.

<sup>46</sup> Department of Human Services, *Submission 10*, p. [2].

<sup>47</sup> *Explanatory Memorandum*, pp. 27–28.

<sup>48</sup> *Explanatory Memorandum*, pp. 27–28. It still retains the option for the Secretary to impose a percentage limit on a service in response to compliance concerns. See Department of Education, *Submission 7*, p. [2].

<sup>49</sup> KU Children's Services, *Submission 1*, p. 1; Early Learning and Care Council of Australia, *Submission 2*, p. 2; Goodstart Early Learning, *Submission 4*, p. 2; Department of Education,

especially in low socioeconomic areas where 'vulnerability and disadvantage is more prevalent'.<sup>50</sup>

## **Schedule 2—Amendments to ensure the integrity of the childcare subsidy system**

2.48 Amendments proposed in Schedule 2 deal with the suspension and cancellation of service providers or childcare services and align the requirements closer with state and territory laws to enhance the Commonwealth's childcare subsidy integrity framework.<sup>51</sup>

### *Provider or service approval may be voluntarily suspended*

2.49 Item 17 of the bill introduces a new section (197AA) into the Family Assistance Administration Act to bring consistency between the Family Assistance Law and the *Education and Care Services National Law* (National Law—state and territory licencing regime for operating childcare services). It also gives the Secretary the power to have an approved provider or childcare service suspended for a certain period upon the provider's request. This usually applies when a provider carries out building improvements or other capital works on their premises.<sup>52</sup>

2.50 Currently, although there is provision under National Law for approved providers to request a voluntary suspension without breaching the National Law's requirements, there is no such equivalent under Family Assistance Law. The amendments will ensure that, in circumstances where an approved provider or childcare service is suspended or cancelled under National Law, access to Commonwealth childcare subsidies will also be suspended or cancelled.<sup>53</sup> Other amendments deal with specifications of written request, the Secretary's approval requirements regarding suspension start and end dates, and notice of revocation of suspension if the Secretary is satisfied of its reasonableness.<sup>54</sup>

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*Submission 7*, p. [2]; Family Day Care Australia, *Submission 8*, p. 4 Australian Childcare Alliance, *Submission 9*, p. 4; Department of Human Services, *Submission 10*, p. [2], Community Early Learning Australia, *Submission 12*, p. 1; Leor In Home Learning, *Submission 13*, p. 2.

<sup>50</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 2.

<sup>51</sup> *Explanatory Memorandum*, p. 29.

<sup>52</sup> *Explanatory Memorandum*, p. 29; Department of Education, *Submission 7*, p. [4].

<sup>53</sup> *Explanatory Memorandum*, p. 29.

<sup>54</sup> *Explanatory Memorandum*, p. 29–30; refer to subsections 197AA(2), 197AA(3), 197AA(4) and 197AA(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999*. See also Department of Education, *Submission 7*, p. [4].

### *Date of effect of approval*

2.51 Items 13 and 15 of the bill remove the requirement that the start date at which an approval of a provider's service comes into effect must be a Monday. The amendment only requires that the date be no earlier than the date the application for approval was submitted. The amendment seeks to bring more flexibility and remove any delays to families accessing CCS or ACCS.<sup>55</sup>

### *Working with children checks*

2.52 Currently, under section 195D of the Family Assistance Administration Act, a provider must ensure that an individual providing care at its childcare service must have a working with children card under a law of the state or territory where the service is located. As some states and territories issue physical working with children cards and others electronically register individuals who are required to have working with children checks, this has resulted in some ambiguity in the way the section has been interpreted. In addition, the current legislation only requires that a provider give the Secretary details of working with children cards. It does not require them to ensure that care is only provided by individuals with current working with children checks.<sup>56</sup>

2.53 To ensure the safety of children, item 14 of the bill would amend section 195D of the Family Assistance Administration Act to require that providers ensure that the people providing care on the provider's behalf must hold current working with children checks.<sup>57</sup>

### *Suspension, cancellation or variation for multiple infringement notices*

2.54 The amendment proposed to section 197B of the Family Assistance Administration Act would allow the Secretary to vary, suspend or cancel a provider's approval or a provider's approval in respect of one or more of its services if the provider has received 10 infringement notices within a 12 month period. This amendment enables the Secretary and Commonwealth to more effectively respond to providers who have been found to have persistently breached compliance requirements.<sup>58</sup>

### *Suspension, cancellation or variation if approval suspended / cancelled under National Law*

2.55 The amendment contained in item 17 of the bill would insert a new section 197AB into the Family Assistance Administration Act. The amendment would bring Family Assistance Law regarding the suspension of a childcare

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<sup>55</sup> *Explanatory Memorandum*, p. 30.

<sup>56</sup> *Explanatory Memorandum*, pp. 30–31.

<sup>57</sup> *Explanatory Memorandum*, p. 31.

<sup>58</sup> *Explanatory Memorandum*, pp. 31–32.

provider's approval to operate a childcare service into greater alignment with the National Law. The amendment seeks to have a provider's approval suspended under Family Assistance Law for the matching period of suspension under the National Law. This amendment does not apply to voluntary suspension.<sup>59</sup> A similar amendment is proposed to the Family Assistance Administration Act (with the insertion of a new section 197L). This would align more closely with the National Law in relation to the cancellation of a provider's approval (or the approval of a childcare service of the provider).<sup>60</sup> Items 2, 16, 25 and 26 of the bill provide minor amendments to clarify when a suspension can occur, the publication of information regarding a suspension or cancellation, and the recovery of debt payments from the provider following the application of sections 197AB and 197L of the Family Assistance Administration Act.<sup>61</sup>

### *Cancellation for ceasing to operate a childcare service*

2.56 Currently, the term 'ceases to operate' is not defined in Family Assistance Law. This has resulted in some ambiguity about its meaning with regards to the mandatory decision-making requirements of the Secretary in relation to the cancellation of an approved provider if the provider no longer operates an approved childcare service (or a variation of an approval in respect of one). The proposed amendments to sections 197H and 197J of the Family Assistance Administration Act seek to provide clarity by including the meaning to the term 'ceases to operate' used in the Minister's Rules.<sup>62</sup> Items 9 and 10 also amend section 138 of the same Act so that a provider under section 197H or 197J is unable to apply to the AAT for single review of that decision. This amendment restores the original intent of the package.<sup>63</sup>

### *52 week limit for review of provider debt decisions*

2.57 Items 5 to 8 of the bill seek to amend sections 109D and 111A of the Family Assistance Administration Act to give providers a timeframe of 52 weeks to seek review of decisions regarding debt raised against them.<sup>64</sup>

### *Simplifying recovery of public funding where provider at fault*

2.58 The bill seeks to replace section 71F of the Family Assistance Administration Act which deals with debt recovery arising from overpayment of CCS or

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<sup>59</sup> *Explanatory Memorandum*, pp. 32–33.

<sup>60</sup> *Explanatory Memorandum*, p. 33.

<sup>61</sup> *Explanatory Memorandum*, p. 33.

<sup>62</sup> *Explanatory Memorandum*, p. 34.

<sup>63</sup> *Explanatory Memorandum*, p. 34.

<sup>64</sup> *Explanatory Memorandum*, pp. 34–35.

ACCS to an individual as a result of a provider's mistake. The amendment simplifies the debt recovery process by requiring repayment to the Commonwealth directly from the provider without the need for a Secretary's determination.<sup>65</sup>

- 2.59 A number of submitters raised concerns with regards to the proposed amendment. FDCA contended that the proposed amendment is 'far too vague' and that the legislation 'must be more overt in its specification of what constitutes failure to comply with family assistance law' or 'more explicit in terms of outlining the nature of a breach of family assistance law'.<sup>66</sup> In addition, FDCA expressed its doubt as to whether current systems governing the administration of childcare family assistance payments could 'adequately differentiate between debts incurred as a result of CCSS administrative error, parent/ family error in estimating entitlement or service provider error'.<sup>67</sup>

### *Recovery of public funding arising from certain reviews of decisions*

- 2.60 Item 3 amends section 73 of the Family Assistance Administration Act so that the process of a second AAT review concerning the recovery of debt due to the Commonwealth also extends to decisions on AAT single review. The EM explains this amendment:

This is an important integrity measure, ensuring that where public funding has been expended in circumstances where, ultimately, it should not have been expended, that public funding can be recovered.<sup>68</sup>

- 2.61 The intention of this measure is to recover funds directly from the provider and not from the individuals who are accessing care from the provider.

### **Committee view**

- 2.62 The committee recognises the positive benefits delivered to families and communities from the implementation of the child care package. The measures contained in the package provide more assistance to the most vulnerable families and communities and enable families seeking to improve their workforce participation, whether by working more or undertaking activities (including studying, training, or volunteering) with options for paid work.
- 2.63 The committee commends the significant work undertaken by the government to reform the childcare sector. The major reforms came into effect with the implementation of the childcare package in 2018. While the reforms have delivered significant benefits to families, the bill seeks to make a number of amendments designed to restore the policy intent of the package, clarify a

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<sup>65</sup> *Explanatory Memorandum*, p. 35.

<sup>66</sup> Family Day Care Australia, *Submission 8*, p. 4.

<sup>67</sup> Family Day Care Australia, *Submission 8*, p. 4.

<sup>68</sup> *Explanatory Memorandum*, p. 36.



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number of provisions, and to address unforeseen consequences. The committee recognises that these measures are necessary to deliver a more responsive and robust childcare system.

- 2.64 The committee acknowledges the commitment of the Department of Education to ‘undertake further consultation on the development of the new Minister’s and Secretary’s Rules with the childcare sector’.<sup>69</sup> To this end, the committee encourages the department to take into account the views of submitters to this inquiry, including in relation to IHC educators in rural and remote areas.
- 2.65 The committee is of the view that the measures contained in the bill will enable families to more easily participate in paid work by making childcare assistance more accessible, affordable and responsive to the needs of families and their circumstances.

### **Recommendation 1**

**2.66 The committee recommends that the Senate pass the bill.**

**Senator the Hon James McGrath**  
**Chair**

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<sup>69</sup> Department of Education, *Submission 7*, p. [4]. The Department of Education is the policy owner, accountable authority and lead entity with responsibility for implementing the childcare reforms that make up the childcare package. See Australian National Audit Office, *Design and Governance of the Child Care Package*, Auditor-General Report No. 10, 2019–20, p. 7.



## Labor Senators' Additional Comments

- 1.1 The government introduced the current child care system in July 2018. Over the past 12 months a number of systemic design flaws and administrative burdens on families and providers have become apparent.
- 1.2 Families and providers have experienced significant delays, confusion and additional paperwork to register for the Child Care Subsidy (CCS). This has often resulted in families CCS entitlements being over or underestimated, resulting in overpayments and debts for affected families. Providers have been forced by the government to act as debt collectors, and with the government commencing data matching with the Australian Tax Office families are being issued with unexpected debt notices.
- 1.3 The introduction of the new system has left a large number of families worse off. The government's own figures estimated one in four families would be worse off under the new system.<sup>1</sup>
- 1.4 The new system has also had a negative impact on families and children trying to access the Additional Child Care Subsidy – Child Wellbeing payment. The number of children, almost all of whom are vulnerable and at-risk, accessing the Child Wellbeing payment fell by over 20 per cent in the first months of the new system, and the latest data for March 2019 shows there are still 6 per cent less children approved for this payment compared to March 2018.<sup>2</sup>
- 1.5 The government also claimed the new child care system would put downward pressure on fees. However, fees have actually increased 4.9 per cent in the 12 month period prior to March 2019 and have increased 30 per cent since the government was first elected.
- 1.6 After months of denying any problems, the government has tabled this Bill without warning or consultation. Nevertheless, the Bill improves some of the technical design flaws and problems in the childcare system, and has broad (in some cases qualified) stakeholder support.
- 1.7 Labor Senators note that a number of submitters who expressed qualified support for the amendments have requested that the Minister's Rules be clarified or expanded to include third party payments from non-government organisations and philanthropic funds to reduce out-of-pocket costs for

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<sup>1</sup> The Hon Amanda Rishworth MP, Shadow Minister for Early Childhood Education and Development, 'Minister's secret hit list: 279,000 families to lose under child care changes', *Media release*, 14 January 2018. Department of Education data obtained under Freedom of Information in December 2017

<sup>2</sup> Department of Education, Child Care in Australia quarterly report, March 2019. Available at <https://www.education.gov.au/child-care-australia-report-march-quarter-2019>.

vulnerable children and families.<sup>3</sup> Labor Senators hope that these issues can continue to be worked through by the government.

### **Access to care and the increased administrative burden for Child Care Subsidy Claims**

- 1.8 However, there is one amendment in the Bill that raises serious concerns.
- 1.9 The government argues items 35 to 38, 41, 42, 50 and 51 will simplify the system for families and providers. The amendments require that bank account and tax file number (TFN) details be provided at the time the claim is made, and not at another time. Currently, an individual has 28 days after the CCS claim is submitted to provide these details. This can result in a debt to families when CCS payments are made without information being provided within the required time frame.<sup>4</sup>
- 1.10 While the government argues it is trying to avoid families acquiring this debt, Labor Senators note that these families are indeed eligible for Child Care Subsidy and for early learning and care, but may be unable to access urgent care because they don't have immediate access to their personal information.
- 1.11 The government's own majority report reveals submissions to the inquiry were overwhelmingly concerned about the negative impact this change could have on families in difficult circumstances who do have immediate access to their personal documents (e.g. families fleeing domestic violence or natural disasters).
- 1.12 Indeed, a number of submissions made the point that this change will actually remove flexibility currently in the system, and is designed to reduce complexity in the system for the government – not for families or providers.<sup>5</sup>
- 1.13 Submitters who oppose the removal of the 28 day window period argued that removing this measure would be detrimental for vulnerable families.<sup>6</sup>
- 1.14 Early Learning and Care Council of Australia (ELACCA) explained:

Currently, families making a claim for CCS have 28 days to provide a [TFN] or bank account details. In the current legislation, the provision of

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<sup>3</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 3; Early Childhood Australia, *Submission 3*, p. 3; Goodstart Early Learning, *Submission 4*, p. 2; SDN Children's Services, *Submission 5*, p. 4; Australian Childcare Alliance, *Submission 9*, pp. 4–5. See also Leor In Home Early Learning, *Submission 13*, p. 6.

<sup>4</sup> *Explanatory Memorandum*, p. 21.

<sup>5</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 4; Early Childhood Australia, *Submission 3*, pp. 2–3; Goodstart Early Learning, *Submission 4*, p. 3; Australian Childcare Alliance, *Submission 9*, p. 5.

<sup>6</sup> See also Early Childhood Australia, *Submission 3*, pp. 2–3; Goodstart Early Learning, *Submission 4*, p. 3; Leor In Home Early Learning, *Submission 13*, p. 5.

this information is required for the individual's CCS claim to be effective, which affects their CCS eligibility. However, their eligibility is already verified, and this information is only required for the payment (and reconciliation) of subsidies. If the information is not provided within the 28 day window, a family is deemed CCS ineligible and may incur a debt with their provider.

The proposed changes may reduce administrative burden for the Department of Human Services but will increase the administrative burden for families. The reduced flexibility will have a disproportionately negative impact on families experiencing vulnerability or disadvantage, such as women and children escaping domestic and family violence who may not have ready access to their personal information.<sup>7</sup>

- 1.15 Removing the 28-day period, and blocking families from registering for the CCS without bank account or TFN details immediately available will reduce access to early learning, is unreasonable and lacks compassion for the circumstances of families.
- 1.16 Labor Senators do not believe that the administrative convenience of government should be privileged above the needs of families and providers.
- 1.17 Labor Senators believe Bill should be amended to retain the current 28-day grace period for providing personal information to better meet the needs of families and providers.

### **Recommendation 1**

- 1.18 **Labor Senators recommend that the bill be amended to protect access to early education and eligibility for CCS by retaining the 28 day window period for the provision of bank account or tax file number (TFN).**

**Senator Louise Pratt**  
Deputy Chair

**Senator Deborah O'Neill**  
Member

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<sup>7</sup> Early Learning and Care Council of Australia, *Submission 2*, p. 4.



# Appendix 1

## Submissions

### *Submissions*

- 1 KU Children's Services
- 2 Early Learning and Care Council of Australia
- 3 Early Childhood Australia
- 4 Goodstart Early Learning
- 5 SDN Children's Services
- 6 Isolated Children's Parents' Association of Australia
- 7 Department of Education
- 8 Family Day Care Australia
- 9 Australian Childcare Alliance
- 10 Department of Human Services
- 11 Australian Community Children's Services
- 12 Community Early Learning Australia
- 13 Leor In Home Early Learning