

# Submission to

Senate Regulations and Ordinances Committee  
and the  
Parliamentary Joint Committee on Human Rights

Requirement that services ensure their educators do not obtain a session of care for their children from an educator in any family day care service on a day on which the family day care educator provides any session of care to a child

UNDER THE

*Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval)  
Amendment Determination 2014 (No. 1)*

January 2015



Family DAY CARE AUSTRALIA

# Summary of position

Family Day Care Australia contends that the regulation under the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2014 (No. 1)* ('the Determination') that requires services to ensure their educators do not obtain a session of care for their children from an educator in any family day care service on a day on which the family day care educator provides any session of care to a child:

- trespasses unduly on personal rights and liberties;
- significantly impacts upon family day care educator and service businesses which was not identified by the Government in the formulation of this regulation<sup>1</sup>;
- that consultation on the development of the regulation should have occurred with the family day care sector;
- may be invalid; and
- does not reflect the original policy intent of the enabling Act.

## Family day care sector

The family day care sector is represented by more than 800 'approved services' and over 27,000 educators. The sector supports over 98,000 families and 165,440 children across Australia and constitutes approximately 15% of the early childhood education and care (ECEC) sector.<sup>2</sup>

Family day care is a form of regulated ECEC which predominantly takes place in the educator's home. Family day care educators are ECEC professionals, registered with a family day care approved service that is responsible for registering, supporting, training and monitoring its educators. The approved service administers a 'coordination unit', which employs administrative staff and coordinators, who act as field staff actively supporting and monitoring educators in their work.

Family day care operates under the National Quality Framework for Early Childhood Education and Care and provides flexible ECEC across both standard and non-standard hours across Australia, including in rural and remote communities where in some instances family day care is the only form of approved ECEC available to families.

## Background to the Determination

On 1 December the former Assistant Minister for Education, Sussan Ley MP ('the Assistant Minister'), made a Determination under *subsection 205 (1) of the A New Tax System (Family Assistance) (Administration) Act 1999* ('the enabling Act'). The *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2014 (No. 1)* ('the Determination') amends *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Determination 2000* by adding four new regulations which approved family day care services must comply for continued approval of their services. These include:

- A requirement that services only operate in the same state or territory where approval has been granted by the state or territory Regulatory Authority;
- A requirement that services ensure their educators do not obtain a session of care for their children from an educator in any family day care service on a day on which the family day care educator provides any session of care to a child;

1. Noting the significant impact on parents and children who use family day care as a result of the substantial decrease in available places in child care that may result. There are serious risks to broader workforce participation attached to this regulation.

2. Department of Education (2014) *Child Care and Early Learning in Summary*, December Quarter 2013.

- A requirement to comply with conditions on a service's approval imposed under the National Law; and
- A requirement that session(s) of care be attributed to an educator's Service Provider Personnel ID.

On 4 December the Assistant Minister announced that these changes were a 'part of its tougher stance on child care payment compliance'.<sup>3</sup> Family Day Care Australia categorically supports better oversight of family day care services in response to increased non-compliance within the sector as reported by the Assistant Minister;<sup>4</sup> however any regulatory response must be well considered and proportionate.

Family Day Care Australia opposes the regulation that services ensure their educators do not obtain a session of care for their children from an educator in any family day care service on a day on which the family day care educator provides any session of care to a child ('the regulation'), however provides **in principle support for the remaining three**. For these reasons, this submission focuses on the single legislative requirement that FDCA opposes.

The Determination was tabled on the last sitting day of 2014 and enforces compliance of family day care services in relation to this regulation by 3 February 2015 (2 month transition period). Family Day Care Australia is concerned this does not allow for parliamentary scrutiny to occur before the enforcement date as the next sitting period does not commence until 9 February 2015.

On 12 December 2014, Family Day Care Australia sought an extension of the transition time in which family day care services and educators must comply with this regulation from 3 February 2015 out to 1 July 2015; allowing for adequate timeframes for alternative education and care arrangements to be made and for parliamentary scrutiny of this regulation (Attachment A). No reply has been received to date.

## Impact of the regulation

Once these changes were announced Family Day Care Australia immediately consulted with its members.<sup>5</sup> Of the educators surveyed on the requirement that restricts educators' access to family day care for their own child while providing a session of family day care:

- 96 per cent did not support the regulation; and
- 42 per cent have used family day care for their own child/ren while providing a session of family day care.<sup>6</sup>

When educators were asked what the reasons were for accessing family day care for their own child while providing a session of family day care, the following were identified:

- Allows for greater flexibility compared with other approved education and care services;<sup>7</sup>
- Belief in the unique values and benefits of family day care over other approved forms of education and care;
- Suitability of family day care to the child compared with other approved care forms of education and care (e.g. long day care);
- Viability of educator's business (i.e. so the educator can provide care to the maximum ratio of children); and

3. The Hon Sussan Ley MP, [Media Release: Tighter rules to stop child care payment rorting](#), 4 December 2014

4. The Hon Sussan Ley MP, [Media Release: New Taskforce clamps down on dodgy child care services](#), 18 October 2014

5. Unpublished administrative data. Survey opened 5 December 2015, results as at 8 December 2015.

6. 649 educator respondents.

7. As educators are providing a flexible service, they in turn need to access a flexible ECEC service themselves which may not be able to be provided by long day care centres.

- Use during school holidays/after school care in order to comply with ratios and prevent disruption of care for children in service.

In addition, please see individual stories at Attachment B.

Of the 42 per cent of educators that do utilise family day care, when asked how the changes will impact on an educator's family day care business:

- 58 per cent stated there will be reduced availability of places for families accessing family day care
- 48 per cent stated there will be urgent changes to enrolments for 2015
- 47 per cent stated there will be increased costs to families
- 35 per cent stated they will stop providing family day care

It is clear that this regulation will have significant impact upon not just educators, but will also extend to families using family day care and the broader community. If this regulation goes ahead there is going to be a substantial decrease in the availability of family day care spaces in the community and increased cost to families.

The Government in making this policy decision has failed to identify the far-reaching impact this regulation will have upon the services, educators, children and parents using family day care. The [Explanatory Statement](#) attached to the Determination clearly highlights this failure:

*"...the amendments are effectively amendments of a minor nature and do not substantially alter existing arrangements"*

and

*"The majority of family day care services that already comply with these new requirements will not experience an increased regulatory burden as a result of these changes"*

This impact is far-reaching not only to the sector, but to the community. There are serious risks to broader workforce participation attached to this regulation.

Family Day Care Australia believes that the advice provided by the Office of Best Practice Regulation which exempted the need for a Regulation Impact Statement and associated consultation with the sector, was grossly inadequate.<sup>8</sup> The Government has failed to exercise best practice and adequately investigate the real impact of this regulation.

## Consultation

Family Day Care Australia, the national peak body representing the family day care sector, was not consulted on the legislative changes.

This Determination is a legislative instrument and as such when making a determination the Minister should do so in accordance with the [Legislative Instruments Act 2003](#) and associated regulation.<sup>9</sup> In addition the process should align with Government best practice for approaching regulation.<sup>10</sup>

8. Exemption is outlined in Explanatory Statement.

9. [Legislative Instruments Regulations 2004](#)

10. Australian Government, [The Australian Government Guide to Regulation](#), March 2014

Section 17(1) of the Legislative Instruments Act 2003 states the following:

*"Before a rule-maker makes a legislative instrument, and particularly where the proposed instrument is likely to:*

- (a) have a direct, or a substantial indirect, effect on business; or*
- (b) restrict competition;*

*the rule-maker must be satisfied that any consultation that is considered by the rule-maker to be appropriate and that is reasonably practicable to undertake, has been undertaken."*

As outlined above, there is certainly a substantial effect on educator and service businesses and families using family day care. Consultation with the national peak body, Family Day Care Australia is appropriate and reasonably practicable to undertake. Consultation in line with Commonwealth best practice has certainly not occurred on these matters.

## Human rights implication

Family Day Care Australia believes this regulation engages additional rights that were not identified in the required Statement of Compatibility with Human Rights within the Explanatory Statement.

The Government must assess the compatibility of new legislative instruments against the rights and freedoms contained in the seven core human rights treaties to which Australia is a party. Family Day Care Australia believes the Government has failed to identify a key right that this particular regulation engages and limits.<sup>11</sup>

Article 11(2)(c) of the Convention on the Elimination of All Forms of Discrimination against Women states that in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.

Family day care educators are qualified professionals who provide quality early education and care to families in line with the National Quality Framework. This regulation will severely restrict the network of child-care facilities available to family day care educators, and will significantly impact on their effective right to work.

The limitation upon the right of a parent to work is unreasonable and disproportionate to any identifiable compliance benefit.

<sup>11</sup> We would also encourage the Parliamentary Joint Committee on Human Rights to closely examine the engagement of rights contained in the following conventions: Convention on the Rights of the Child and International Covenant on Economic, Social and Cultural Rights

## Reason for regulation - original policy intent

The reasoning purported for this regulation is erroneous. The Explanatory Statement outlines in relation to this regulation that:

*"The purpose of this requirement is to ensure that family day care is being delivered in line with its original intent, which is flexible home-based care that can give parents the opportunity to care for their own children at home, while also caring for other people's children."*

and

*"strengthen the policy intention around carers' [sic] not claiming fee reduction payments for the care of their own children"*

The original policy intent identified within the Explanatory statement is not consistent with initial policy documentation released to accompany the enabling Act. Chapter 4.3 (Provision of care for children of carers) of the *Family Day Care Handbook* (July 2000)<sup>12</sup> states:

*"Carers working in family day care schemes are clearly workforce participants. As such, high priority should be given them [sic] if they wish place their children with other carers, either within the same scheme or in another scheme. However, a simultaneous exchange of children between two carers would not entitle them to Child Care Benefit."*

If the Government was to introduce a regulation surrounding family day care educators accessing subsidised family day care to align with the original policy intent of the enabling Act, it would be that simultaneous swapping between family day care educators would not be considered as an eligible session of a care under the enabling Act. The broad brush approach taken here is ill-informed and significantly departs from the original policy intent of the enabling Act.

## Validity

The Assistant Minister made her determination under section 205(1) of the enabling Act which states:

*The Minister may, by legislative instrument, determine:*

- (a) rules relating to the eligibility of child care services to become approved for the purposes of the family assistance law; and*
- (b) rules relating to the eligibility of those services to continue to be so approved.*

The regulation's primary function restricts the operation of family day care educators, who generally operate as sub contractors and not as family day care service employees. It is questionable whether the Minister's power under section 205(1) of the enabling Act can extend to regulation that primarily results in the restriction of the operation of a family day

<sup>12</sup>. Commonwealth of Australia, *Family Day Care Handbook*, July 2000.

care educator as opposed to an approved child care service.

Family Day Care Australia would seek that the Regulation and Ordinances Committee assess the validity of the regulation.

## Other policy and regulatory options

As the Government has failed to assess the regulatory impact and consult with Family Day Care Australia,<sup>13</sup> we are unsure as to the exact regulatory problem the Government is attempting to solve. However from the minimal information disseminated publically and from sector feedback, the primary regulatory issue that arises from unscrupulous 'child swapping' that this uninformed regulation is attempting to solve, is that the session of care is not actually occurring, the child swapping is just occurring on paper.

There are certainly mechanisms within the current regulatory framework that address fraudulent activity surrounding sessions of care not occurring and the solution lies with sufficient enforcement activity.

## What Family Day Care Australia wants

It is clear that the Government in developing this regulation has failed to identify:

- the real impact of this regulation upon family day care services, educators, children and parents; and
- that it trespasses unduly on personal rights and liberties.

In addition the regulation:

- may be invalid; and
- does not reflect the original policy intent of the enabling Act.

For reasons outlined in this submission, Family Day Care Australia requests that the Committees seek disallowance of the requirement that services ensure their educators do not obtain a session of care for their children from an educator in any family day care service on a day on which the family day care educator provides any session of care to a child when Parliament resumes sitting in February 2015.

If this regulation is disallowed, Family Day Care Australia would appreciate the opportunity to work with the Government in developing and implementing other policy and regulatory options that will aid in ensuring the provision of quality ECEC that support high quality learning and developmental outcomes for children and the safeguarding of Government investments.

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13. Noting over the past two years Family Day Care Australia has continued to flag concerns with non-compliance and significant growth in the sector with the Department of Education (formerly Department of Education, Employment and Workplace Relations).

# Attachment A



12 December 2014

The Hon Sussan Ley MP  
Assistant Minister for Education  
Federal Member for Farrer  
PO Box 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Dear Assistant Minister

I write to you in relation to the requirement under the *Child Care Benefit (Eligibility of Child Care Services for Approval and Continued Approval) Amendment Determination 2014 (No. 1)* ('the Determination') that services ensure their educators do not obtain a session of care for their children from a educator in any family day care service on a day on which the family day care educator provides any session of care to a child ('the regulation').

Family Day Care Australia (FDCA) requests you withdraw this regulation within the Determination. Failing this, FDCA requests that the Government extend the date in which family day care services and educators must comply with this regulation from 3 February 2015 out to 1 July 2015; allowing for adequate timeframes for alternative education and care arrangements to be made and for parliamentary scrutiny of this regulation.

In consulting our members it has become clear that this regulation will have significant impact upon not just educators, but will also extend to families using family day care and the broader community. The Explanatory Statement does not take into account this impact. If this regulation goes ahead there is going to be a substantial decrease in the availability of family day care spaces in the community and increased costs to families. There are serious risks to broader workforce participation attached to this regulation.

A survey of our members revealed 96 per cent of educators do not support the regulation that restricts educators' accessing family day care for their own child while providing a session of family day care. 42 per cent of educators use or have used family day care for their own children while working and providing family day care sessions.

Of this 42 per cent of educators, the data shows that as a result of restricting access to education and care services for family day care educators' own children, there will be reduced availability of places to other families (58%), urgent changes to enrolments for 2015 (48%) and increased cost to families accessing family day care (47%). It is particularly concerning that 35 per cent of family day care educator respondents indicated they will stop providing family day care and cease their business as a result of these changes.

*We champion excellent family day care*

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In addition, Family Day Care Australia believes this regulation engages additional rights that were not identified in the required Statement of Compatibility with Human Rights within the Explanatory Statement of the Legislative Instrument.

Our primary concern relates to the limitation of article 11(2)(c) of the Convention on the Elimination of All Forms of Discrimination against Women states that in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.

Family day care educators are qualified professionals who provide quality early education and care service to families in line with the National Quality Framework. This regulation will severely restrict the network of child-care facilities available to family day care educators, and will significantly impact on their effective right to work.

The Government, in formulation of this regulation, did not identify the significant impact upon the sector and broader community, nor the limits upon the right of a parent to work. Given the apparent emergence of this impact, it would be negligent and careless if the Government were to enforce compliance prior to parliamentary scrutiny of the legislative instrument.

Can you please advise Family Day Care Australia by 18 December 2014 if you are agreeable to the extension of the date in which family day care services and educators must comply with this regulation from 3 February 2015 out to 1 July 2015.

Yours faithfully



Carla Northam  
**Chief Executive Officer**

*We champion excellent family day care*

## Attachment B

**Name:** Carnley M.

**Age:** 15 months old

**Attends FDC:** Three days a week

Sharnie says her world has been turned upside down by the recent decision to restrict family day care educators from accessing family day care for their own children. Her son Carnley has cerebral palsy and family day care is the only form of early childhood education and care recommended for his condition.

"Children with cerebral palsy get sicker more often," Sharnie said.

"If Carnley were in a centre-based care environment he would get sick constantly.

"He also would be trampled all over as he's not yet walking and he would be placed in the room with the other toddlers and wouldn't be getting the one on one attention he needs - it just wouldn't work."

Sharnie says that being in family day care Carnley hardly gets sick which allows her to work. It also provides her with three days of respite knowing that her son is safe, happy and secure.

**Name:** Danica M.

**Age:** 2 years old

**Attends FDC:** Two days a week

Little two-and-a-half-year-old Danica loves going to family day care twice a week. The shy Queensland toddler is thriving in the nurturing, home-based early childhood education and care setting after an unsettling period in long day care.

"We persisted with long day care for about four months but it was obvious that she wasn't happy in that environment," mum Letitia, a family day care educator from Upper Coomera said.

"She wasn't talking, she wasn't playing with anything, she wasn't herself – because there were so many children I thought that she might not be getting the attention that she needed."

So Letitia enrolled her daughter with another nearby family day care service and after just one day in family day care Danica settled in straight away.

"Her demeanour changed instantly – she was happy and engaged with the other children," Letitia said.

"I feel it's really important for Danica's development and socialisation to be with other children in a quality early childhood environment away from her mother and it's obvious that family day care is the right fit for her."

**Name:** Harrison S.

**Age:** 3 Years old

**Attends FDC:** Two days a week

Harrison doesn't cope well with change; like other children with autism the three year old from Epsom in Victoria loves routine.

Being on the spectrum means he is also better suited to a small and nurturing early learning environment.

"Family day care is the only early childhood education and care setting that is suited to Harry and his developmental needs," mum Kelly, who has worked as a family day care educator for six years, said.

The recent changes to Family Assistance Law however will turn little Harrison's routine upside down from 3 February 2015 when Kelly will be restricted from accessing family day care for her own children.

"This change makes me furious – it is 100 per cent without doubt discrimination," Kelly said.

Kelly says alternate early childhood education and care options will not provide appropriate learning and developmental outcomes for Harrison.

"He wouldn't last a day in a centre-based environment," she said.

Kelly is also concerned how the restriction will affect her own emotional needs.

"To have Harrison in my care 24/7 without any respite has a lot of people, including me, very concerned about my own mental and emotional wellbeing," she said.

**Name:** Lyla B.

**Age:** 3 years old

**Attends FDC:** One day a week

Family day care educator Claire understands that there is no one size fits all option when it comes to early childhood education and care.

Mum to Evie, 5, and Lyla, 3, Claire chose different forms of care for her two daughters based on their individual socialisation, developmental and learning needs.

Daughter Evie excelled in a centre-based care environment with Claire saying the large group suited her larger than life and busy personality. Younger daughter Lyla however was not as outgoing and became clingy and withdrawn.

"As Lyla grew I saw her struggle to separate herself from me even to other family members," Claire said.

Claire enrolled Lyla one day a week with another family day care educator and soon saw the difference in her youngest daughter's confidence. She said the nurturing early childhood education and care environment has helped her to develop socialisation skills.

"Her little soul has flourished," Claire said.

"Her educator is able to give her the attention, care and patience that only family day care can provide".