

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

*Social Security Act 1991*

*Social Security (Active Participation for Disability Support Pension) Determination 2014*

### **General outline**

The *Social Security (Active Participation for Disability Support Pension) Determination 2014* (the Determination) is made by the Minister for Social Services (the Minister) for the purposes of subsections 94(3C) and 94(3E) of the *Social Security Act 1991* (the Act).

The Determination sets out the requirements and guidelines the Secretary must take into account in determining whether a person has actively participated in a program of support for the purposes of determining whether the person is qualified for disability support pension.

### **Background**

Disability support pension provides income support to people who, because of an ongoing physical, intellectual or psychiatric impairment are prevented from working or from being re-trained for work. The qualification for disability support pension requires, amongst other things, that a person has a continuing inability to work because of an impairment.

Long term dependence on disability support pension is not the best outcome for people who have skills and capacity to participate in the labour market or who are able to build such skills with appropriate assistance.

The *Family Assistance and Other Legislation Amendment Act 2011* introduced the requirement that people who made a claim (or are taken to have made a claim) for disability support pension on or after 3 September 2011, and who do not have a severe impairment, must have actively participated in a program of support.

The *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014* extended the requirement to actively participate in a program of support to certain disability support pension recipients who made a claim (or are taken to have made a claim) for disability support pension before 3 September 2011 and whose pension start date was after 2007. These recipients are required to demonstrate that they have undertaken and actively participated in a program of support.

Subsection 94(3C) of the Act provides that a person has actively participated in a program of support if the person satisfies the requirements specified in a legislative instrument made by the Minister. Subsection 94(3D) provides that the Secretary must comply with any guidelines, made by the Minister under subsection 94(3E), when deciding whether he or she is satisfied that the person has actively participated in a program of support. Subsection 94(3E) provides that any guidelines, made by the Minister for the purposes of subsection 94(3D), are to be made in a legislative instrument.

The Determination repeals the *Social Security (Requirements and guidelines – Active Participation for Disability Support Pension) Determination 2011*. The Determination now extends to setting out the requirements for active participation for those people required to demonstrate they have actively participated in a program of support as a result of the changes made to the Act by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014*.

### **Commencement**

The Determination commences on the day after it is registered.

### **Consultation**

The Determination effects changes introduced by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014*. The Department of Human Services was consulted as the agency that will implement the requirements for active participation under the Determination.

### **Regulation Impact Statement (RIS)**

A RIS is not required for this legislative instrument.

### **Explanation of the provisions**

#### **Part 1 – Preliminary**

**Section 1** states the name of the Determination.

**Section 2** states that the Determination commences on the day after it is registered.

**Section 3** states the legislative authority for making the Determination, being subsections 94(3C) and (3E) of the Act.

**Section 4** specifies the effect of the Schedules to the Determination.

**Section 5** contains interpretation provisions.

**Section 6** sets out the matters addressed in Parts 2 and 3 of the Determination. Subsection 6(1) states that Part 2 of the Determination specifies requirements for the purposes of subsection 94(3C) of the Act.

Subsection 6(2) states that Part 3 of the Determination sets out, for subsection 94(3D) and (3E) of the Act, matters that the Secretary must take into account in deciding whether he or she is satisfied that a person has actively participated in a program of support within the meaning of subsection 94(3C) of the Act.

## **Part 2 – Requirements for active participation**

**Section 7** sets out the requirements a person must meet in order to satisfy the Secretary that the person has actively participated in a program of support.

Subsection 7(1) states that a person has actively participated in a program of support if the person has, while undertaking the program of support, complied with the requirements of the program of support, participated in the program of support during the relevant period, satisfied the requirements set out in subsections (2), (3), (4) or (5), and satisfied the requirements of subsection (6).

Section 5 defines the relevant period in relation to a person. The relevant period in relation to a person (other than a reviewed 2008-2011 DSP starter under subsection 94(5) of the Act), whose impairment is not a severe impairment, is the period of 36 months prior to the person's claim for disability support pension (paragraph 5(1)(a)).

The relevant period in relation to a person who is a reviewed 2008-2011 DSP starter who:

- is participating in a program of support at the time they become a reviewed 2008-2011 DSP starter; or
- has participated in a program of support at any time during the 6 months prior to becoming a reviewed 2008-2011 DSP starter,

is the period of 36 months from the date the person began that program of support (paragraph 5(1)(b)).

The relevant period for any other reviewed 2008-2011 DSP starter is the period of 36 months from the day the person is notified they have become a reviewed 2008-2011 DSP starter (paragraph 5(1)(c)).

Subsection 5(2) clarifies that a person may be participating in a program of support for the purposes of paragraph 5(1)(b) whether or not the person is at that time actively participating in the program in accordance with section 7 of the instrument and even if the person is not participating at that time as a result of an exemption, relief or suspension from the program.

Generally, a person must participate in the program of support for at least 18 months during the relevant period in order to satisfy the requirement in paragraph 7(1)(b) (subsection 7(2)). A period during which a person does not participate in the program of support for any reason (including as a result of any exemption, relief or suspension from the program) does not count towards the requirement to participate for at least 18 months (section 8).

For example, if a person has been actively participating in a program of support for 12 months and suffers a temporary injury, and is provided with a 2 month period of exemption to recover from the temporary injury, the person will need to actively participate for a further 6 months following the expiration of the period of exemption to meet the 18 month requirement.

A person may participate in more than one program of support with more than one designated provider and all periods of active participation will be counted, provided that while participating in each program the person complied with the requirements of the program. The

period of a person's participation will be determined by adding all periods of active participation the person has undertaken in the relevant period with any designated provider.

For example, a person who has been participating with a Job Services Australia provider for 9 months, who is reassessed and found to require assistance from a Disability Employment Service, will only have to participate in a Disability Employment Service program for a further 9 months.

Subsections 7(3), (4) and (5) address situations where a person can participate in a program of support for less than 18 months and satisfy the requirement in paragraph 7(1)(b).

Subsection 7(3) sets out that a person can satisfy the requirement in paragraph 7(1)(b) if the duration of the program of support is less than 18 months and the person completed the entire program within the relevant period (as defined in section 5).

Subsection 7(4) sets out that a person can satisfy the requirement in paragraph 7(1)(b) if the program of support was terminated before the end of the relevant period (as defined in section 5) and the program was terminated because the person was unable, solely because of the person's impairment, to improve his or her capacity to prepare for, find or maintain work through continued participation in the program.

For example, a person with Multiple Sclerosis (MS) has been participating in a program of support for 6 months and during this time the person's MS deteriorates significantly. The person will have actively participated in the program of support if the person complied with the requirements of the program and the program was terminated because the person was unable, solely due to the deterioration of his or her MS, to improve his or her capacity to prepare for, find or maintain work through continued participation in the program.

Subsection 7(5) sets out that a person can satisfy the requirement in paragraph 7(1)(b) if at the end of the relevant period (as defined in section 5) the person is participating in a program of support and is prevented, solely because of the impairments from which the person suffers, from improving his or her capacity to prepare for, find or maintain work through continued participation in the program.

For example, at the end of the relevant period, a person with MS has been participating in a program of support for 6 months. During the time the person was participating in the program the person's MS deteriorated significantly. The person will have actively participated in the program of support if the person complied with the requirements of the program and the person is prevented, solely due to the deterioration of the person's MS, from improving his or her capacity to prepare for, find or maintain work through continued participation in the program.

Subsection 7(6) sets out that to satisfy the requirement in paragraph 7(1)(c) the person must provide the Secretary with the information set out in subparagraphs 7(6)(a) to (i).

The information the person provides will enable the Secretary to make a fully informed and considered assessment of the person's participation in a program of support.

**Section 8** provides that periods during which a person does not participate in a program of support for any reason are not to be counted in determining the length of the period the person has participated in the program for the purposes of satisfying the requirements for active participation under section 7. For example, a period during which a person does not participate as a result of an exemption, relief or suspension from the program will not be counted.

### **Part 3 – Matters to be taken into account in assessing active participation**

**Section 9** sets out the matters in relation to the form and content of the program of support the Secretary must take into account to be satisfied that a person has actively participated in a program of support for the purposes of paragraph 94(2)(aa) of the Act.

**Section 10** sets out the material and documents the Secretary must take into account to be satisfied a person has actively participated in a program of support for the purposes of paragraph 94(2)(aa) of the Act.

### **Part 4 – Application and transitional provisions**

**Section 11** provides that the definition of *designated provider* in the repealed *Social Security (Requirements and Guidelines — Active Participation for Disability Support Pension) Determination 2011* continues to apply in relation to a program of support that was not wholly or partly funded by the Commonwealth and started before the commencement of Part 4.

Section 5 of the Determination now defines *designated provider* as a Job Services Australia provider, a Disability Employment Services provider, an Australian Disability Enterprise or any other person who provides a program of support that is funded (wholly or partly) by the Commonwealth. This is consistent with the definition of program of support for the purposes of paragraph 94(2)(aa) of the Act as introduced by the *Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014*.

### **Schedule 1 – Repeals**

**Section 1** repeals the *Social Security (Requirements and Guidelines — Active Participation for Disability Support Pension) Determination 2011*.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

## Statement of Compatibility with Human Rights

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

### ***Social Security (Active Participation for Disability Support Pension) Determination 2014***

The *Social Security (Active Participation for Disability Support Pension) Determination 2014* (the Determination) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

The Determination repeals the *Social Security (Requirements and guidelines – Active Participation for Disability Support Pension) Determination 2011*. The Determination now extends to setting out the requirements for active participation for those people required to demonstrate they have actively participated in a program of support as required by the changes to the *Social Security Act 1991* (the Act) introduced by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014*.

The measure introduced by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014* targets those pension recipients who are under 35 years of age at the time a notice is given in relation to review of their qualification and who made a claim for disability support pension before 3 September 2011 and were granted the pension after 2007.

Subsection 94(3C) of the Act provides that a person has actively participated in a program of support if the person satisfies the requirements specified in a legislative instrument made by the Minister. Subsection 94(3D) provides that the Secretary must comply with any guidelines, made by the Minister under subsection 94(3E), when deciding whether he or she is satisfied that the person has actively participated in a program of support. Subsection 94(3E) provides that any guidelines, made by the Minister for the purposes of subsection 94(3D), are to be made in a legislative instrument.

#### **Human rights implications**

The Determination engages the following human rights:

##### Right to social security

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

The Determination gives effect to the requirement to have actively participated in a program of support under paragraph 94(2)(aa) of the Act, including as extended by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014* to certain disability support pension recipients following a review of their qualification.

Extension of the requirement to undertake a program of support as provided by the *Social Services and Other Legislation Amendment (2014 Budget Measures No. 6) Act 2014* will help to ensure that assistance to develop work capacity is provided to those disability support

pension recipients most likely to benefit from employment assistance. Assisting those people, who are able, to participate economically and socially will help ensure that the social security system remains sustainable and that available funds will be targeted to those recipients with the greatest need.

#### Right to equality and non-discrimination

The measure effected by the Determination engages the right to equality and non-discrimination under Article 2(2) of the ICESCR and more generally under Article 26 of the *International Covenant on Civil and Political Rights*.

The measure reinforces the principle that labour market participation of people with disability, including disability support pension recipients with some work capacity, should be encouraged and supported.

Targeting the requirement to participate in a program of support to disability support pension recipients who are under 35 years of age at the time of a review of their qualification ensures those at the greatest risk of spending extended periods of time dependent on income support and most likely to benefit from employment assistance, participate in a program of support.

Recipients assessed as having an ability to work at least eight hours a week will be provided with the support needed to assist them develop their work capacity while still receiving disability support pension. This will assist people to build their capacity and may increase their chance of gaining employment.

#### **Conclusion**

The Determination is compatible with human rights because it advances the protection of human rights and does not limit or preclude people from gaining or maintaining access to social security in Australia.

**Kevin Andrews, Minister for Social Services**