

EXPLANATORY STATEMENT

Aged Care Act 1997

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Increasing Consumer Choice) Determination 2016

Authority

This instrument is made under section 52-1 of the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

The Transitional Provisions Act, in conjunction with the *Aged Care Act 1997* (the Act) provides for the funding of aged care services that are providing care to continuing care recipients.

Persons who are approved under the Act to provide aged care services (approved providers) can be eligible to receive subsidy payments under the Transitional Provisions Act in respect of the care they provide to continuing care recipients.

Continuing care recipients are those who entered an aged care service before 1 July 2014 and since that time have not left the service for a continuous period of more than 28 days (other than because the person is on leave), or before moving to another service, have not made a written choice to be subject to new rules relating to fees and payments that came into effect on 1 July 2014.

The Transitional Provisions Act allows the Minister to determine, by legislative instrument, the amounts of subsidy and supplements payable to an approved provider for the provision of each type of aged care.

Purpose

Aged Care Legislation Amendment (Increasing Consumer Choice) Act 2016 (the Amendment Act) makes changes to the Transitional Provisions Act which give effect to the first stage of the home care reforms announced by the Government in the 2015-16 Federal Budget. The *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Increasing Consumer Choice) Determination 2016* (Amending Determination) makes amendments that are consequential to the changes made to the Transitional Provisions Act by the Amendment Act.

The Amending Determination specifies that the subsidy amount that may be paid to an eligible approved provider is determined by the level of home care at which the continuing care recipient has been prioritised (including for periods in which the care recipient is on leave from the home care package, i.e. a suspension period).

The Amending Determination also addresses the circumstance where there are claims for home care subsidy by two or more approved providers for the same home care recipient on the same day.

A separate instrument will amend other Principles made under section 96-1 of the Act. A new set of Principles, the *Prioritised Home Care Recipients Principles 2016*, will also be created by a separate instrument.

Background

The Government announced significant reforms to home care as part of the Increasing Choice for Older Australians 2015-16 Budget Measure (the measure).

The Amendment Act amends the Act and the Transitional Provisions Act in three main areas:

1. Funding for a home care package will follow the care recipient, replacing the current system where home care places are allocated to individual approved providers to deliver services in a particular location or region. This will provide more choice for people in selecting an approved provider and will allow flexibility for care recipients to change provider, including if they move to another area to live. Approved providers will no longer have to apply for new home care places through the Aged Care Approvals Round (ACAR), significantly reducing red tape and regulation for businesses.
2. There will be a consistent national approach to prioritising access to home care through My Aged Care. The Amendment Act establishes a framework for a new national prioritisation process which will assign home care packages to people who have been approved for home care. This will allow for a more equitable and flexible distribution of home care packages based on an individual's needs and circumstances, and the time they have been waiting for care, regardless of where they live.
3. There will be a simplified process for organisations seeking to become approved providers under the Act. This will encourage new providers to enter the home care market, supporting greater choice for consumers. All providers will still need to demonstrate their suitability to become an approved provider and meet quality standards.

Documents Incorporated by Reference

A Regulation Impact Statement (OBPR ID: 18376) for the first stage of the Increasing Choice in Home Care measure was assessed as compliant by the Office of Best Practice Regulation on 27 January 2016. The Regulation Impact Statement was included in the Explanatory Memorandum to the Amendment Act.

Consultation

The Government has been strongly committed to a co-design approach with the aged care sector to inform program design, legislation design and implementation. The Department of Health (the Department) has consulted widely and worked closely with stakeholders in developing the proposed legislative arrangements for the first stage of the measure.

A key component of the consultation has been the release of two public discussion papers. The first discussion paper, released in September 2015, was on the policy framework to inform the primary legislation and received 101 submissions. The second discussion paper, released in May 2016, included an exposure draft of the delegated legislation and received 74 submissions. The discussion papers are available at agedcare.health.gov.au/increasing-choice-in-home-care.

To complement the discussion papers, several webinars have been held by the Department to explain the changes to the legislation and provide an opportunity for interested parties to provide comments and ask questions about the amendments. The webinars, including slides and transcripts, are available for viewing at agedcare.health.gov.au/increasing-choice-in-home-care.

In addition, a Home Care Reforms Advisory Group has been established under the National Aged Care Alliance (NACA) to provide ongoing advice to the Minister and the Department on policy, implementation, communication and monitoring issues. The Advisory Group comprises representatives from providers, consumers, carers, unions, health professionals, and state and territory governments.

Stakeholder feedback received through the Advisory Group, through written submissions, and through webinars has informed the final programme design and the drafting of these legislative instruments.

This Instrument commences at the same time as the Amendment Act on 27 February 2017.

This Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Increasing Consumer Choice) Determination 2016

1 Name of Determination

Section 1 provides how the proposed instrument is to be cited, that is, as the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Increasing Consumer Choice) Determination 2016* (the Amending Determination).

2 Commencement

Section 2 sets out the commencement of this instrument. The whole instrument will commence on 27 February 2017, at the same time as the *Aged Care Legislation Amendment (Increasing Consumer Choice) Act 2016* (the Amendment Act).

3 Authority

Section 3 provides that the authority for making the Determination. This instrument is made under section 52-1 of the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

Under subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act), 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.

Accordingly, the power in section 52-1 of the Transitional Provisions Act is relied on, in conjunction with subsection 33(3) of the Acts Interpretation Act, to vary the Transitional Provisions Determination.

4 Schedules

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 Amendments

The following items amend the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (the Transitional Provisions Determination).

The Transitional Provisions Determination sets out matters relating to payment of home care subsidy for continuing home care recipients.

These amendments clarify that the subsidy payable to an approved provider is determined by the level of home care for which the continuing care recipient has been prioritised. The amendment also makes it clear that the rate of subsidy to be paid while a continuing care recipient is on leave is determined in relation to the level of home care for which the continuing care recipient has been prioritised (i.e. the level of home care package they have been assigned).

Amendments will also limit the payment of subsidy and supplements to one home care provider in respect of the same care recipient on the same day. The effect of these amendments will also apply to home care fees, so a care recipient is not required to pay home care fees to more than one home care provider for the same day.

Item 1: Subsection 82(1)

Subsection 82(1) of the Transitional Provisions Determination sets out the amount of home care subsidy payable to an approved provider in respect of a care recipient for a day. It is calculated as the sum of relevant amounts from (a) to (g).

The amount of home care subsidy payable is the sum of the basic subsidy amount, and all applicable supplements, including the viability supplement, dementia and cognition supplement, veterans' supplement, top-up supplement, oxygen supplement and enteral feeding supplement.

This Item omits the words "The amount" and replaces them with the words "Subject to subsections (2) and (3), the amount" to account for the addition of a new subsection 82(3) under Item 4.

It clarifies that the amount of subsidy payable, in addition to being the sum of the amounts in subsection 82(1), is subject to the conditions expressed in the following subsections.

Item 2: Subsection 82(2)

This item amends subsection 82(2) to replace the words 'However, if' with 'If'. This is a consequential amendment to account for the change in wording to subsection 82(1) under Item 1.

Item 3: At the end of section 82

Item 3 specifies that if more than one approved provider is eligible for home care subsidy in respect of the same care recipient for the same day, the subsidy payable to each approved provider, other than the approved provider that first entered into a home care agreement with the care recipient, is nil.

This amendment supports the requirement for approved providers and care recipients to reach a mutually agreed cessation day. A mutually agreed cessation day is necessary to support changes under the Amendment Act and the User Rights Principles, which require approved providers to account for the care recipient's unspent home care amount when an approved provider ceases to provide home care to a care recipient. Once a cessation day is agreed, the approved provider has certainty of the days for which the approved provider can claim home care subsidy; and the period for calculating the care recipient's unspent home care amount.

Before providing home care services to a prioritised care recipient who has transferred providers, an approved provider should confirm the agreed cessation day with both the care recipient and the outgoing approved provider.

It is a joint responsibility of the care recipient and the approved provider to agree upon a cessation day. The cessation day should be agreed between the care recipient and the approved provider with due consideration of the circumstances, the terms of the home care agreement, and the legislation governing home care.

Similar amendments are also being made to limit payment to one home care provider in respect of the same care recipient on the same day for:

- subsidy amounts and the hardship supplement for non-continuing care recipients – refer to the *Aged Care (Subsidy, Fees and Payments) Amendment (Increasing Consumer Choice) Determination 2016*.
- Oxygen, enteral feeding, dementia and cognition, veterans' and viability supplements for non-continuing care recipients – refer to the *Aged Care Legislation Amendment (Increasing Consumer Choice) Principles 2016*.

Item 4: Section 83

Section 83 sets out in the table the amount, in dollars, of basic subsidy payable to an approved provider in respect of a care recipient on a day.

Amendments made to section 46-1 of the Act and the Transitional Provisions Act by the Amendment Act state that an approved provider is only eligible to receive home care subsidy in respect of a prioritised home care recipient. A prioritised home care recipient is defined in the Amendment Act to mean a person in relation to whom a determination under section 23B-1 of the Act (as inserted by the Amendment Act) is in effect. This includes any variation made under section 23B-2 of the Act (also inserted by the Amendment Act).

Item 4 amends section 83 by removing the words “that corresponds to the level of home care specified in the table that the care recipient received on that day” and replaces them with the words “for the level of care that is, on the day, the care recipient's level of care as a prioritised home care recipient determined under subsection 23B 1(1) of the *Aged Care Act 1997*”.

The effect of this amendment is that the amount of home care subsidy payable will be for the level of care at which the care recipient has been prioritised.

Item 5: Section 83 (table, heading to column headed “Level of home care”)

Item 5 repeals the heading “Level of Home Care” of the second column of the table in Section 83. It substitutes this with the heading “Level of Care”.

This ensures consistency of language with amendments made to section 83 under Item 4 and amendments to section 84 under Item 7, which reference the “level of care” for which the person is a prioritised home care recipient.

Item 6: Subsection 84(1) (note)

Item 6 repeals the note in 84(1) of the Transitional Provisions Determination.

The note is redundant as subsections 84(2), 84(4) and 84(5) will be amended under Item 7 to clarify that the level of care is the care recipient’s level of care as a prioritised home care recipient, and is not the level of care that “the care recipient is taken to have been provided with”.

Item 7: Paragraphs 84(2)(a) and (b), 84(4)(a) and (b) and 84(5)(a) and (b)

Section 84 sets out the calculation of the amount of basic subsidy payable to an approved provider in respect of a care recipient during a temporary suspension period.

Item 7 amends subsections 84(2)(a) and (b), 84(4)(a) and (b), and 84(5)(a) and (b) by removing the words “the level of home care that the care recipient is taken to have been provided with on the day” and replaces this with the words “the level of care that is, on the day, the care recipient’s level of care as a prioritised home care recipient determined under subsection 23B 1(1) of the Aged Care Act 1997”.

This includes any variation to the level of care under section 23B-2 of the Act (as inserted by the Amendment Act).

The effect of this amendment is that the amount of home care subsidy payable will be for the level of care at which the care recipient has been prioritised. A prioritised home care recipient is defined in the Amendment Act to mean a person in relation to whom a determination under section 23B-1 of the Act (as inserted by the Amendment Act) is in effect.

Amendments made to section 46-1 of the Aged Care Act and Transitional Provisions Act by the Amendment Act ensures that an approved provider is only eligible to receive home care subsidy in respect of a prioritised home care recipient. This amendment will ensure that an approved provider is only eligible to receive basic subsidy amount during a temporary suspension period in respect of the level of care at which that home care recipient has been prioritised.

Item 8: Subsection 84(6)

This Item repeals subsection 84(6) and substitutes it with a new subsection (6).

The new subsection covers circumstances in which a care recipient’s level of care as a prioritised home care recipient is varied under subsection 23B-2(1) of the Act (as inserted by the Amendment Act) to a higher level of care whilst care is temporarily suspended.

In these circumstances, the calculation of subsidy under subsections 84(2), 84(4) and 84(5) is only counted at the higher level of care for the days on which the care recipient's determination had been varied to be at the higher level.

Statement of Compatibility with Human Rights

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

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Increasing Consumer Choice) Determination 2016

This legislative instrument 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

Amendments are required to the *Aged Care (Transitional Provisions (Subsidy and Other Measures) Determination 2014* (the Transitional Provisions Determination) that are consequential to amendments made to the *Aged Care (Transitional Provisions) Act 1997* by the *Aged Care Legislation Amendment (Increasing Consumer Choice) Act 2016* (the Amendment Act) to give effect to the first stage of the home care reforms announced by the Government in the 2015-16 Federal Budget.

Amendments by this legislative instrument to the Transitional Provisions Determination specify that the amount of subsidy payable to an approved provider is determined by the level of home care for which the continuing care recipient has been prioritised.

The amendment also makes it clear that the rate of subsidy to be paid while a continuing care recipient is on leave is determined in relation to the level of home care for which the continuing care recipient has been prioritised.

Amendments also address the circumstance where there are claims for home care subsidy by two or more approved providers for the same home care recipient on the same day.

The Amending Determination applies only in respect of continuing care recipients. Continuing care recipients are those who entered an aged care service before 1 July 2014 and since that time have not left the service for a continuous period of more than 28 days (other than because the person is on leave) or, before moving to another service, made a written choice to be subject to new rules relating to fees and payments that take effect on 1 July 2014.

Human Rights Implications

The legislative instrument engages the following human rights:

- the right to an adequate standard of living; and
- the right to the enjoyment of the highest attainable standard of physical and mental health.

This legislative instrument is compatible with the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and

mental health as contained in article 11(1) and article 12(1) of the International Covenant on Economic, Social and Cultural Rights, and article 25 and article 28 of the Convention on the Rights of Persons with Disabilities. This legislative instrument concerns the amount of home care subsidy payable to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health. It ensures that the amount of subsidy received is equitable between care recipients.

To the extent that this legislative instrument limits any rights by limiting the payment of home care subsidy to a single approved provider in the case of overlapping claims, the limitation is reasonable. The limitation is mitigated by the fact that the legislative instrument does not remove a care recipient's ability to access home care services for that period. Further, the limitation will only apply in circumstances where a person is already receiving home care.

Conclusion

This legislative instrument is compatible with human rights as it promotes the human right to an adequate standard of living and the highest attainable standard of physical and mental health.

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Minister for Health and Aged Care