

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

Social Security (International Agreements) Act 1999

*Social Security (International Agreements) Amendment (New Zealand)
Regulations 2017*

The *Social Security (International Agreements) Act 1999* (the Act) gives effect to any social security agreement between Australia and another country relating to reciprocity in social security or superannuation matters if the text of the agreement is set out in a Schedule to the Act. Section 6 of the Act provides that the provisions of a scheduled international social security agreement have effect despite anything in the social security law. An agreement is a scheduled international agreement if the text of the agreement is set out in a Schedule to the Act.

Section 25 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient for carrying out or giving effect to the Act.

In particular, subsection 8(1) of the Act provides that a Schedule setting out the terms of an agreement between Australia and another country, if the agreement relates to reciprocity in social security or superannuation matters, may be added to the Act by the regulations.

Section 9 of the Act provides that the regulations may repeal a Schedule to this Act.

The purpose of the Regulations is to repeal and substitute Schedule 3 to the Act setting out the terms of the *Agreement on Social Security between the Government of Australia and the Government of New Zealand* (the Agreement).

The Agreement, made at Wellington on 8 December 2016 modifies and replaces the Agreement providing for matters relating to social security entered into at Canberra on 28 March 2001, as amended on 21 February 2002.

The Agreement coordinates the social security systems of Australia and New Zealand to give better access to certain income support payments for people who move between the two countries.

The Agreement clarifies that only New Zealand Working Age Residence (defined as residence from age 20 until pension age) can be used to meet the 10 year qualifying residence requirement for Disability Support Pension (DSP). In 2013 the Full Federal Court held, in *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous* [2013] FCAFC 75, that Article 12(4) of the current Agreement means that any residence in New Zealand can be used to qualify a person for DSP. The original intention, agreed by both Parties, was that only New Zealand Working Age Residence can be used.

Additionally, the Agreement takes account of the increase in Age Pension age in Australia, which becomes 65.5 in July 2017 and continues to increase by six months every two years until it reaches 67 in July 2023. To claim Age Pension or New Zealand Superannuation

under the revised Agreement, a person must have reached whichever pension age is higher at the time they claim.

Furthermore, the Agreement aligns and ties portability of payments in third countries to portability provisions in the social security law of Australia. The current Agreement specifies that a payment under the Agreement is payable in a third country for 26 weeks, whereas under the social security law Carer Payment is payable outside Australia for six weeks and disability support pension is generally payable for four weeks in any 12 month period.

The Agreement preserves the entitlements of those persons currently receiving benefits under the current arrangements. Specifically people granted DSP through use of residence in New Zealand at any age will be grandfathered, and people receiving payment outside Australia and New Zealand at implementation will continue to be entitled to 26 weeks portability for that absence.

All international agreements specify 'entry into force' requirements, which stipulate that each party notify the other party in writing of the completion of their respective statutory and constitutional procedures required for the entry into force. An agreement would then come into operation on a date specified by reference to the exchange of the notification of completion of all statutory and constitutional procedures.

Article 27 of the Agreement provides for entry into force on 1 July 2017, provided that the Parties have notified each other by notes exchanged through the diplomatic channel that all matters necessary to give effect to the Agreement have been satisfied. Otherwise, the Agreement will come into force on the first day of the third month following the date of the last such notification.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Sections 1 to 5 of the Regulations commence on the day after the Regulations are registered. Schedule 1 to the Regulations, which contains the text of the Agreement, will commence on the day after registration or on the day the Agreement comes into force for Australia (whichever occurs later). The Minister must announce, by notifiable instrument, the day the Agreement enters into force for Australia.

The commencement provision in section 2 of the Regulations satisfies the requirements of subsection 8(2) of the Act that regulations not come into operation on a day earlier than the day the relevant agreement comes into effect for Australia.

In line with Article 27 of the Agreement, the commencement provision in section 2 of the Regulations does not include a mechanism by which the Regulations will automatically commence or be repealed if the Agreement does not enter into force for Australia. Article 27 of the Agreement anticipates a commencement date of 1 July 2017, but commencement is not time limited. The Agreement could commence at any time after 1 July 2017 provided that notes stating that all matters necessary to give effect to the Agreement have been completed have been exchanged through the diplomatic channel.

As commencement of the Agreement may not be readily traceable by readers, section 2 also provides that the Minister must announce, by notifiable instrument, the day the Agreement enters into force for Australia.

Section 3 of the Regulations specifies that the Regulations are made under subsection 8(1) and section 9 of the *Social Security (International Agreements) Act 1999*. Section 4 of the Regulations provides that the Regulations will be repealed the day after Schedule 1 to the Regulations commences. Part 3 of Chapter 3 of the Legislation Act provides for the automatic repeal of spent legislative instruments, but only those whose only legal effect is to amend or repeal one or more other legislative instruments. Part 3 of Chapter 3 of the Legislation Act does not operate to automatically repeal spent legislative instruments which amend or repeal Acts. For this reason, to ensure the Regulations do not remain in force once spent, section 4 has been included to ensure that the Regulations will be repealed once Schedule 1 to the Regulations commences.

Section 5 of the Regulations provides that legislation specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Consultation

The Department of Foreign Affairs and Trade and the Attorney-General's Department were consulted in the preparation of the text of the Agreement.

The Department of Social Services (DSS) did not consult more broadly regarding Australia's proposed entry into the Agreement as there are no major changes to the current Agreement, and nor are significant numbers of people affected.

The amendment clarifying that only New Zealand working age residence can be used to qualify a person for Disability Support Pension (DSP) restores the original policy intention of the current Agreement, as agreed by both countries.

Amendments to require claimants to meet the qualifying age for pension from both countries cater for pending changes in the qualifying age for the Age Pension, which begin from 1 July 2017. The qualifying age will increase in six-monthly increments from the current qualifying age of 65 until it reaches 67 by July 2023. This amendment aligns the Agreement with domestic provisions and ensures that people who wish to use the Agreement are eligible for the age pension from both countries, consistent with the cost-sharing principles underlying the Agreement.

The amendments to reduce the period of portability in third countries under the Agreement and align and tie them to Australia's social security law will make them consistent with the portability period applying to all other DSP and Carer Payment recipients.

Regulatory Impact Analysis

The Department of Social Services consulted with the Office of Best Practice Regulation ('OBPR') in relation to the requirement for a Regulation Impact Statement. OBPR advised that the regulatory impacts of the Agreement are nil and the RIS requirements have been met (reference 16543).

Statement of Compatibility with Human Rights

Social Security (International Agreements) Amendment (New Zealand) Regulations 2017

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

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

This Legislative Instrument replaces Schedule 3 to the *Social Security (International Agreements) Act 1999*. It contains the terms of the revised Agreement on Social Security between the Government of Australia and the Government of New Zealand made on 8 December 2016.

The Agreement coordinates the social security systems of Australia and New Zealand to give better income support protection for people who move between the two countries.

The Agreement clarifies that only New Zealand Working Age Residence (defined as residence from age 20 until pension age) can be used to meet the 10 year qualifying residence requirement for DSP. In 2013 the Full Federal Court held, in *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous* [2013] FCAFC 75, that Article 12(4) of the current Agreement means that any residence in New Zealand can be used to qualify a person for DSP. The original intention, agreed by both Parties, was that only New Zealand Working Age Residence can be used.

Additionally, the Agreement takes account of the increase in Age Pension age in Australia, which becomes 65.5 in July 2017 and continues to increase by six months every two years until it reaches 67 in July 2023. To claim Age Pension or New Zealand Superannuation under the revised Agreement, a person must have reached whichever pension age is higher at the time they claim.

Furthermore, the Agreement aligns and ties portability of payments in third countries to portability provisions in the social security law of Australia. The current Agreement specifies that a payment under the Agreement is payable in a third country for 26 weeks, whereas under the social security law Carer Payment is payable outside Australia for six weeks and DSP is generally payable for four weeks in any 12 month period.

Human rights implications

This Legislative Instrument has considered the human rights implications particularly with reference to the right to social security as contained within Article 9 of the International Covenant on Economic, Social and Cultural Rights.

This Legislative Instrument supports the right to social security as it allows people in both Australia and New Zealand to access social security assistance that would not have otherwise been available to them.

The amended qualifying conditions contained in the Legislative Instrument are reasonable, proportionate and transparent. Most significantly, these conditions will ensure that benefits available under the Agreement are not more favourable than benefits available domestically.

The Legislative Instrument preserves the entitlements of those persons currently receiving benefits under the current arrangements. Specifically people granted DSP through use of residence in New Zealand at any age will be grandfathered, and people receiving payment outside Australia and New Zealand at implementation will continue to be entitled to 26 weeks portability.

Conclusion

The Legislative Instrument supports the right to social security and is compatible with human rights. To the extent that this human rights obligation is engaged, it is reasonable, proportionate and transparent in achieving its objectives.

The Department of Social Services