

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care and Senior Australians

Aged Care Act 1997

Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020

The *Aged Care Act 1997* (the Act) and the *Aged Care (Transitional Provisions) Act 1997* (the TP Act) provide for the regulation and funding of aged care.

Persons who are approved under the Act to provide aged care services (approved providers) can be eligible to receive subsidy payments under the Act. Approved providers may also be eligible to receive subsidy payments under the TP 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.

Both the Act and the TP Act provides that for each type of aged care, the Minister may determine the amount of subsidy and supplement payable to an approved provider for the provision of that type of aged care.

Purpose

The *Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020* (the Amending Instrument) amends the *Aged Care (Subsidy, Fees and Payments) Determination 2014*; the *Aged Care (Transitional Provisions) Principles 2014*; the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*; and the *Subsidy Principles 2014* (the Subsidy Principles).

The Act and the TP Act provide that an amount of residential care subsidy may include the amount of any relevant ‘other supplements’ (section 44-2 of the Act). Section 44-27 of the Act provides that the other supplements for a care recipient under the residential care subsidy calculator are any of the supplements prescribed in the section (for example, the hardship supplement), if applicable to the care recipient in respect of a payment period.

Paragraph 44-27(1)(c) of the Act provides that other supplements may be set out in the Subsidy Principles. Subsection 44-27(2) provides that the Subsidy Principles may specify the circumstances in which an other supplement set out for the purposes of paragraph 44-27(1)(c) will apply for a care recipient in respect of a payment period. Subsection 44-27(3) provides that the Minister may determine the amount, or the way in which the amount of the supplement is to be worked out, of any other supplements set out for the purposes of paragraph 44-27(1)(c).

Section 52-1 of the Act provides that the amount of flexible care subsidy payable in respect of a day is the amount determined, or worked out in accordance with a method determined, by the Minister by legislative instrument. This includes providing for or incorporating any other supplement set out in the Subsidy Principles.

Section 96-1 of the Act provides that the Minister has the power to make instruments providing for matters required or permitted, or necessary or convenient, in order to give effect to the relevant Part or section of the Act.

These provisions are mirrored in the equivalent sections in the TP Act.

The purpose of the Amending Instrument is to prescribe a new ‘other supplement’ for the purposes of sections 44-27 and 52-1 of the Act and sections 44-27 and 52-1 of the TP Act. This new ‘other supplement’ is the COVID-19 support supplement, which is payable for each day in February 2020 that a care recipient was being provided care by their approved provider. This will enable approved providers to receive the COVID-19 support supplement as a lump sum after they lodge their claims in June 2020.

The Amending Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

The Amending Instrument gives effect to measures announced on 1 May 2020 by the Prime Minister of a COVID-19 specific aged care support package totalling \$205 million.

The additional funding supports the provision of residential and flexible care to senior Australians during the COVID-19 pandemic and responds to financial pressures impacting approved providers of residential and flexible aged care as a result of COVID-19.

Senior Australians in residential care are the group at highest risk in the COVID-19 pandemic. It is critical the delivery of care to these vulnerable Australians is not compromised by the higher costs incurred by approved providers due to COVID-19.

The COVID-19 support supplement will be paid for residential care recipients, residential respite care recipients, and flexible care recipients.

The \$205 million funding package is aimed at covering the additional costs of caring for the health and wellbeing of aged care recipients during the COVID-19 pandemic.

Aged care services can be categorised as being in either metropolitan or non-metropolitan areas using the Modified Monash Model (MMM) classification system rating of the street location of the service.

The MMM classification system is a geographical classification system developed by the Department of Health for categorising metropolitan, regional, rural and remote locations. This system is based on both geographical remoteness and population size using population data published by the Australian Bureau of Statistics, as that system exists on 1 January 2017 (section 4 of the Subsidy Principles).

The Modified Monash Model (MMM) classification system classifies major city metropolitan areas in Australia as MMM1. The remaining classifications from MMM2 through to MMM7 are non-metropolitan rural or remote areas. This information is available on the Department of Health website via this URL/link: <https://www.health.gov.au/health-workforce/health-workforce-classifications/modified-monash-model>.

Residential care subsidies and supplements are paid on a per care recipient per day basis for a payment period of a calendar month. The number of care recipients can fluctuate as people are admitted to or discharged from care.

The calculation of the amount of the COVID-19 support supplement to be paid to residential care approved providers is based on the number of days of residential care and residential respite care they provided to approved care recipients during February 2020. Using a particular month of data is consistent with how claims and payments are made as part of the normal payment cycle to providers. The February 2020 month allows a stable month of data to be used in the calculation and facilitates the payment being made in a timely manner.

Flexible care subsidies and supplements are paid on a per allocated place per day basis. The calculation of the amount of COVID-19 support supplement for flexible care approved providers takes into account the number of residential care places allocated to Multi-Purpose Services and flexible care services during February 2020.

The COVID-19 support supplement funding provided by these measures is as follows:

- \$31.38 per day for residential and flexible care services located in metropolitan areas (MMM1) for both permanent and respite care recipients; and
- \$47.07 per day for residential and flexible care services located in areas other than metropolitan areas (MMM2 to MMM7) for both permanent and respite care recipients.

The amount of the COVID-19 support supplement is 50 per cent higher in non-metropolitan areas in recognition of the additional costs experienced by approved providers of residential and flexible aged care in regional, rural and remote areas of Australia.

These payment rates provide a lump sum payment of around \$900 per resident for a residential care service in a MMM1 metropolitan location and \$1,350 for regional, rural and remote locations.

The additional funding helps ensure the viability of residential and flexible care providers.

Authority

The Act and the TP Act both provide that for each type of aged care, the Minister may determine the amount of subsidy and supplement payable to an approved provider for the provision of that type of aged care.

The authority for making specific determinations in the Amending Instrument is set out in the following tables:

<i>Aged Care Act 1997</i>	
Residential care	Section
Other supplements	44-27
Flexible care	
Flexible care subsidy	52-1

<i>Aged Care (Transitional Provisions) Act 1997</i>	
Residential care	Section
Other supplements	44-27
Flexible care	
Flexible care subsidy	52-1

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

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.

Consultation

Due to the need to address the immediate financial impacts being experienced in aged care from COVID-19, no specific consultation was undertaken with respect to the amount of the aged care COVID-19 support supplement set out by Amending Instrument.

Commencement

The Amending Instrument commences the day after it is registered on the Federal Register of Legislation.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted and on 16 April 2020 OBPR advised that a Regulatory Impact Statement is not required for the Amending Instrument (OBPR ID 26445).

Details of the Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020

Section 1 states that the name of the Amending Instrument is the *Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020*.

Section 2 states that the Amending Instrument commences the day after it is registered.

Section 3 provides that the authority for the making of this instrument is the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997*.

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 amends the following four legislative instruments:

- The *Aged Care (Subsidy, Fees and Payments) Determination 2014* (the Subsidy, Fees and Payments Determination);
- The *Aged Care (Transitional Provisions) Principles 2014* (the Transitional Provisions Principles);
- The *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (the Transitional Provisions Determination); and
- The *Subsidy Principles 2014* (the Subsidy Principles).

The amendments to the Subsidy Principles and the Subsidy, Fees and Payments Determination apply to care recipients under the Act.

The amendments to the Transitional Provisions Principles and the Transitional Provisions Determination apply to continuing care recipients under the TP Act.

Schedule 1 – Amendments

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 1 – At the end of Part 4 of Chapter 2

Item 1 inserts new Division 6—COVID-19 support supplement (for February 2020 payment period), which consists of new section 64A and new section 64B.

New section 64A sets out that the purpose of Division 6 is to set out the amount of the COVID-19 support supplement for a day for a care recipient. New section 64A also provides that the COVID-19 support supplement is the COVID-19 support supplement set out in Subdivision F of Division 5 of Part 3 of Chapter 2 of the Subsidy Principles (see item 8 below).

New section 64B sets out that the amount of COVID-19 support supplement for a day in respect of a care recipient provided with residential care through a residential care service during the February 2020 payment period is based on the MMM classification of the street address of the residential care service. For residential care services with a street address that has a MMM classification of MMM1, the amount is \$31.38. For residential care services with a street address that has a MMM classification of MMM2 through to MMM7, the amount is \$47.07.

Item 2 – After section 91

This item inserts new section 91A after section 91. Section 91A sets out the COVID-19 support supplement equivalent amount for a day in respect of flexible care that is provided through a multi-purpose service in the period between 1 February 2020 and 29 February 2020. The amount is calculated by multiplying the COVID-19 support supplement equivalent amount for the multi-purpose service based on the MMM classification of the street address of the multi-purpose service and the number of high care places and low care places allocated in respect of the multi-purpose service.

The COVID-19 support supplement for flexible care subsidy applies to continuing care recipients under the TP Act through Chapter 3A of the Transitional Provisions Principles.

Aged Care (Transitional Provisions) Principles 2014

Item 3 – At the end of paragraph 17(h)

This item adds new sub-paragraph 17(h)(iii) to section 17, which sets out the purpose of Part 3 of the Transitional Provisions Principles. New sub-paragraph 17(h)(iii) provides that the COVID-19 support supplement is an other supplement that may apply to a care recipient.

Item 4 – At the end of Division 8 of Part 3 of Chapter 2

This item adds new Subdivision E—COVID-19 support supplement (for February 2020 payment period) at the end of Division 8 of Part 3 of Chapter 2. Subdivision E consists of section 64.

New section 64 sets out that the COVID-19 support supplement for a care recipient in respect of the payment period beginning on 1 February 2020 is the sum of all the COVID-19 support supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question.

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014

Item 5 – Section 5

This item amends the definitions in section 5 of the Transitional Provisions Determination to insert a definition for ‘Modified Monash Model classification’. The Modified Monash Model classification is defined to have the same meaning as in the Subsidy Principles.

Item 6 – At the end of Part 4 of Chapter 2

This item adds new Division 6—COVID-19 support supplement (for February 2020 payment period), which consists of new section 79A and new section 79B.

New section 79A sets out that the purpose of Division 6 is to set out the COVID-19 support supplement amount for a day for a care recipient. New section 79A also provides that the COVID 19 support supplement is the COVID 19 support supplement set out in Subdivision E of Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles (see Item 4 above).

New section 79B sets out the amount of COVID-19 support supplement for a day in respect of a care recipient provided with residential care during the February 2020 payment period is based on the MMM classification of the street address of the residential care service. For residential care services with a street address that has a MMM classification of MMM1, the amount is \$31.38. For residential care services with a street address that has a MMM classification of MMM2 through to MMM7, the amount is \$47.07.

Subsidy Principles 2014

Item 7 – At the end of paragraph 20(e)

This item adds new sub-paragraph 20(e)(iv) to section 20, which sets out the purpose of Part 3 of the Subsidy Principles. New sub-paragraph 20(e)(iv) provides that the COVID-19 support supplement is an other supplement that may apply to a care recipient.

Item 8 – At the end of Division 5 of Part 3 of Chapter 2

This item adds new Subdivision F—COVID-19 support supplement (for February 2020 payment period) at the end of Division 5 of Part 3 of Chapter 2. Subdivision F consists of new section 70AA and new section 70AB.

New section 70AA sets out that the COVID-19 support supplement for a care recipient in respect of the payment period beginning on 1 February 2020 is the sum of all the COVID-19 support supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question and the care recipient was eligible for a COVID-19 support supplement under section 70AB.

New section 70AB sets out that a care recipient is eligible for a COVID-19 support supplement on a day if they are being provided with residential care other than respite care.

New section 70AB also sets out that a care recipient who is being provided with residential care as respite care is eligible for a COVID-19 support supplement on a day if the amount of respite care basic subsidy for the care recipient is not nil under Division 2 of Part 1 of Chapter 2 of the Subsidy, Fees and Payments Determination.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020

The *Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020* 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 Legislative Instrument

The *Aged Care Legislation Amendment (Subsidies-COVID-19 Support) Instrument 2020* (the Amending Instrument) amends the *Aged Care (Subsidy, Fees and Payments) Determination 2014*; the *Aged Care (Transitional Provisions) Principles 2014*; the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*; and the *Subsidy Principles 2014*.

The purpose of the Amending Instrument is to prescribe a new ‘other supplement’ for the purposes of sections 44-27 and 52-1 of the *Aged Care Act 1997* and sections 44-27 and 52-1 of the *Aged Care (Transitional Provisions) Act 1997*. This new ‘other supplement’ is the COVID-19 support supplement, which is payable for each day in February 2020 that a care recipient was being provided care by their approved provider. This will enable approved providers to receive the COVID-19 support supplement as a lump sum after they lodge their claims in June 2020.

Human Rights Implications

The Amending 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*.

The Australian Government recognizes that aged care is a critical sector that faces additional costs of caring for the health and wellbeing of residents due to the COVID-19 pandemic. This legislative instrument gives effect to measures announced on 1 May 2020 by the Prime Minister of an additional \$205 million COVID-19 support package for aged care funding.

This legislative instrument increases the amount of funding 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. The additional funding will assist approved providers with additional costs incurred as a result of the COVID-19 pandemic. This will assist approved providers to provide care to their care recipients in accordance with an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health.

The additional aged care funding in this legislative instrument supports the viability of the residential and flexible aged care sectors that are being financially impacted by COVID-19.

Legislation requires government-subsidised aged care homes meet standards to ensure that quality care and services are provided to all residents. The Australian Government's spending on aged care will protect residential aged care recipient's rights to an adequate standard of living.

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.

**Senator the Hon Richard Colbeck
Minister for Aged Care and Senior Australians**