

EXPLANATORY STATEMENT

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

Aged Care Act 1997

Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020

The *Aged Care Act 1997* (the Act) enables approved providers to remain eligible for residential aged care subsidy in circumstances where an aged care resident takes leave in declared emergency situations. These emergency situations may include disasters (natural or otherwise), pandemics or epidemics that may impact the safe provision of residential aged care and the safety of the resident.

In order for approved providers to remain eligible for residential aged care subsidy in these situations, a situation of emergency must be determined by the Minister for Aged Care and Senior Australians (or their delegate). The Minister may determine that a situation of emergency applies to a specific area (e.g. national, state/territory, aged care planning or other region, or an individual service) and for a specified time period.

Purpose

The purpose of the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020* (the Determination) is to declare the current COVID-19 pandemic as a situation of emergency for the purposes of subsection 42-2A(1) of the Act. Under the Determination, emergency leave will be available to aged care residents across Australia from 1 April 2020 to 30 September 2020.

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

Background

Under section 44-2 of the Act, once a care recipient has been on leave from a residential care service (where that leave is not hospital leave or for the provision of flexible care) in excess of 52 days in a single financial year, the approved provider is no longer eligible for residential care subsidy in respect of that person. It is then open for an approved provider to charge the care recipient a fee to reserve their place in the service. The Act currently sets a maximum amount for the fee that may be charged under section 52C-5.

The *Aged Care Legislation Amendment (Emergency Leave) Act 2020* (the Emergency Leave Act) amended the Act to provide for a new type of leave to enable approved providers to remain eligible for residential care subsidy where aged care residents are absent from their aged care service in declared emergency situations. The Emergency Leave Act also ensures that approved providers cannot elect to charge aged care residents a fee during a declared emergency in order to retain their place in an aged care service.

As a result of the current COVID-19 pandemic, a significant number of permanent aged care residents have indicated they wish to temporarily relocate with family to reduce their risk of exposure to the virus. Emergency leave is being made available to avoid residents having to utilise their non-hospital leave (also known as social leave) for a situation such as this, which is outside of their control.

Whilst social leave is available to residents, using it in this situation could exhaust the allowable 52 day limit before the end of the pandemic. The additional costs the resident may be expected to pay to remain on leave (post the 52 days social leave), and still retain their place at the aged care home, would result in a significant financial burden on them and/or their families.

The COVID-19 pandemic has impacted all of Australia. As a result, the Determination ensures that emergency leave is available to all permanent aged care residents throughout Australia. Whilst not all residents will need to use this leave, it ensures residents and their families are supported to make decisions about personal safety in this emergency situation. If residents decide to take leave from a residential aged care facility because of the current emergency situation, they will not be required to pay a fee to reserve their place in that facility.

The Determination makes emergency leave in relation to the COVID-19 pandemic available from 1 April 2020 to 30 September 2020. This will ensure that residents who have taken leave from a residential aged care service and charged a fee to retain their place in the facility will be able to receive a refund of any additional fees charged, post the 52 days social leave, after this date. It will also ensure approved providers remain eligible for an aged care subsidy and are therefore not financially disadvantaged, in relation to residents on leave from a service.

The Determination will also apply to continuing care recipients under the *Aged Care (Transitional Provisions) Act 1997* by virtue of paragraph 42-2(3B)(c) of that Act.

Authority

The Determination is made under subsection 42-2A(1) of the Act. This subsection gives the Minister for Aged Care and Senior Australians the authority to determine in writing that there is a situation of emergency for a specified day for a residential care service, or a class of residential care services, if the Minister is satisfied that an emergency is affecting or has affected the service or services for that day, or the community in which the service or services are located for that day.

Further, the Determination is being made to cover services across Australia for a defined period of 1 April 2020 to 30 September 2020. Subsection 42-2A(2) of the Act provides that, for the purposes of a determination made under subsection 42-2A(1), a class of residential care services may include all residential care services in Australia. Subsection 42-2A(2) also provides that a day for which a situation of emergency is determined may be a day that is before, on or after the day the determination is made. In practice, this means that the period for which a situation of emergency is determined could be entirely before the date the determination is made (noting that this is restricted by Item 10 of Schedule 1 to the Emergency Leave Act), and as such provides for this situation of emergency to take effect from 1 April 2020.

Commencement

This Determination will commence on the day after it is registered.

Consultation

As the situation with the COVID-19 pandemic has evolved rapidly, no specific consultation has been undertaken with respect to emergency leave being made available. The Department of Health has, however, received numerous representations from families of aged care residents, industry bodies and Parliamentarians, seeking amendments to the leave provisions of the Act during the COVID-19 emergency. Therefore, it is expected that the Determination will be positively received within the aged care sector and broader community.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted Thursday 30 April 2020 and confirmed that no Regulatory Impact Statement would be required for the measure introducing emergency leave (OBPR reference 26445).

Details of the Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020

Section 1 provides that the name of this instrument is the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020*

Section 2 provides that the Determination commences on the day after the instrument is registered.

Section 3 states that the authority for making the Determination is subsection 42-2A(1) of the *Aged Care Act 1997*.

Section 4 provides that there is a situation of emergency, being a human coronavirus with pandemic potential (also known as the COVID-19 pandemic), determined for all days from 1 April 2020 to 30 September 2020, for all residential aged care services in Australia.

Statement of Compatibility with Human Rights

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

Aged Care (Leave from Residential Care Services) (Situation of Emergency – Human Coronavirus with Pandemic Potential) Determination 2020

The *Aged Care (Leave from Residential Care Services) (Situation of Emergency – Human Coronavirus with Pandemic Potential) Determination 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 the instrument

Under section 44-2 of the Act, once a care recipient has been on leave from a residential care service (where that leave is not hospital leave or for the provision of flexible care) in excess of 52 days in a single financial year, the approved provider is no longer eligible for residential care subsidy in respect of that person. It is then open for an approved provider to charge the care recipient a fee to reserve their place in the service. The Act currently sets a maximum amount for the fee that may be charged under section 52C-5.

The *Aged Care Legislation Amendment (Emergency Leave) Act 2020* (the Emergency Leave Act) amended the Act to provide for a new type of leave to enable approved providers to remain eligible for residential care subsidy where aged care residents are absent from their aged care service in declared emergency situations. The Emergency Leave Act also ensures that approved providers cannot decide to charge aged care residents a fee during a declared emergency in order to reserve their place in an aged care service.

As a result of the current COVID-19 pandemic a significant number of permanent aged care residents have indicated they wish to temporarily relocate with family to reduce their risk of exposure to the virus. Emergency leave is being made available to avoid residents having to utilise their non-hospital leave (also known as social leave) for a situation such as this, which is outside of their control.

The *Aged Care (Leave from Residential Care Services) (Situation of Emergency – Human Coronavirus with Pandemic Potential) Determination 2020* (the Determination) is a determination under subsection 42-2A(1) of the *Aged Care Act 1997* (the Act) and under the *Aged Care (Transitional Provisions) Act 1997* by virtue of paragraph 42 2(3B)(c) of that Act, to declare the current COVID-19 pandemic as a situation of emergency, in order to make emergency leave available to aged care residents. Under the Determination, emergency leave will be available to aged care residents across Australia, from 1 April 2020 to 30 September 2020.

As the COVID-19 pandemic has impacted all of Australia, the Determination ensures that emergency leave is available to all aged care residents in Australia. Whilst not all residents will need to use this leave, it ensures residents and their families are supported to make decisions about personal safety in emergency situations, and not suffer unnecessary financial burden as a result.

Further, the Determination determines a situation of emergency relating to the COVID-19 pandemic from a retrospective date of 1 April 2020. In effect, if an aged care resident has been absent from their residential care service from this date, their residential care service will continue to be paid residential care subsidy in their absence. This will ensure that residents who have already been financially impacted by the need to take leave from their aged care service will be able to receive a refund, if applicable, for any fees charged by their aged care service after this date. This applied to those residents that have exceeded their 52 day social leave, and are still on leave. It will also ensure providers are not financially disadvantaged.

Human rights implications

The Determination engages the following human rights as contained in article 11 and article 12(1) of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities* (CRPD):

- the right to an adequate standard of living, including with respect to food, clothing and housing, and to the continuous improvement of living conditions; and
- the right to the enjoyment of the highest attainable standard of physical and mental health.

The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

Under the Charter of Aged Care Rights, all people receiving Australian Government funded aged care services have the right to be treated with dignity and respect, and be able to make their own choices about their care.

The current emergency situation with the COVID-19 pandemic has been distressing for both residents of aged care homes, and their families, who rely on their surroundings and care staff for assurance they are secure and protected. The COVID-19 emergency has seen significant changes in the way care is delivered, such as changes in routine, visitor restrictions and new physical surrounds (e.g. moving to a new room for quarantine purposes). These changes have caused high levels of stress for individual residents, leading to concern from families about the impact on a resident's physical and mental health and wellbeing.

Therefore, if residents or families are concerned about their care, or the safety of their living environment, they have the right to relocate to another temporary residence if they wish to.

By enabling approved providers to remain eligible for an aged care subsidy for their aged care resident's absence during the emergency caused by the COVID-19 pandemic, the Australian Government will reduce any financial pressure that may be placed on aged care residents who may currently be subject to a fee to retain their place in a facility if they have taken 52 days of non-hospital related (social) leave.

Assisting an aged care recipient to retain their place in a facility by reducing the potential economic burden will enable aged care residents to maintain an adequate standard of living once the emergency period has ended.

Conclusion

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* as it promotes the human right of everyone, including those with a disability, to the enjoyment of the highest attainable standard of physical and mental health and, the right to an adequate standard of living, including with respect to food and housing and continuous improvement of living conditions.

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