

EXPLANATORY STATEMENT

Veterans' Affairs (Treatment Principles – Extend Eligibility for Allied Health Treatment to Residential Care Recipients) Determination 2020 (Instrument No. R42/MRCC42 of 2020)

EMPOWERING PROVISIONS

For Schedule 1 of the attached instrument which varies the *Treatment Principles* (VEA Treatment Principles) — subsection 90(5) of the *Veterans' Entitlements Act 1986* (the VEA).

For Schedule 2 of the attached instrument which varies the *MRCA Treatment Principles* (MRCA Treatment Principles) — subsection 286(5) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

PURPOSE

The attached instrument *Veterans' Affairs (Treatment Principles – Extend Eligibility for Allied Health Treatment to Residential Care Recipients) Determination 2020* (Instrument No. R42/MRCC42 of 2020) makes variations to the VEA Treatment Principles and the MRCA Treatment Principles – collectively known as the Treatment Principles.

The Treatment Principles set out the circumstances in which treatment may be provided to persons who are eligible to receive treatment under the provisions of various Veterans' Affairs portfolio Acts.

Part 10 of the Treatment Principles provides that the Repatriation Commission or Military Rehabilitation and Compensation Commission (as the case may be) may arrange for the provision of residential care to specified entitled persons and to accept financial responsibility for that care.

Paragraphs 7.1.3 of the Treatment Principles currently prevent the Commissions from funding allied health services for DVA clients who are high care residential aged care facility residents.

The proposed amendments will enable eligible persons in residential care with eligibility for treatment under the Treatment Principles with the same additional treatment being provided to other persons in residential care under Medicare Benefits Schedule (MBS) arrangements.

Extension of Eligibility for Allied Health Treatment to Residential Care Recipients

The proposed amendments to the Treatment Principles and those being made to the relevant Fee Schedules and the Provider Notes (the incorporated documents for the purposes of the Treatment Principles which provide the conditions under which the Commissions will accept financial responsibility for allied health services) will make temporary amendments that will ensure that the allied health and mental health services being provided under the MBS to the general residents of aged care facilities

will also be available to those residents of aged care facilities who are eligible for treatment under the Treatment Principles.

The measures implemented by the proposed amendments to the Treatment Principles form part of the Australian Government's response to recommendation three of the Royal Commission into Aged Care Quality and Safety's *COVID-19 special report*.

On 30 November 2020 the Australian Government announced that it would invest a further \$132.2 million in its response to the Aged Care Royal Commission's recommendations on COVID-19.

The additional measures to support residents of aged care facilities whose physical and mental wellbeing had been affected by the COVID-19 pandemic or the measures taken to contain its spread include:

- \$12.1 million for additional individual allied health sessions under the Medicare chronic disease management plans; and
- \$35.5 million to provide access to Medicare subsidised individual psychological services under the *Better Access to Psychiatrists, Psychologists and General Practitioners* (Better Access) initiative.

From 10 December 2020 until 30 June 2022, new residential aged care facility (RACF) MBS items and the equivalents incorporated into the Treatment Principles will be available to replicate the existing face to face and telehealth items for allied health chronic disease management plan services, indigenous follow up services for eligible patients who have received a health assessment, and group assessment services.

There will also be new temporary RACF MBS items and the equivalents incorporated into the Treatment Principles that permit care recipients to access up to 10 services per calendar year for selected physical therapy services, including exercise physiology, occupational therapy and physiotherapy. In addition, new temporary face-to-face MBS items and the equivalents incorporated into the Treatment Principles will be introduced for care recipients of a RACF for longer initial individual allied health chronic disease management services and initial Indigenous follow up services.

Also from 10 December 2020 until 30 June 2022, the eligibility requirements for the Better Access initiative will be expanded to permit care recipients of a RACF to access up to 20 individual psychological services each calendar year, where their medical practitioner working in general practice or psychiatrist determines they would clinically benefit from additional mental health support.

Should a person's residential aged care subsidy cover allied or mental health treatment, it is intended that the aged care provider should remain responsible for the provision of that service.

Under the Aged Care *Quality of Care Principles 2014*, RACFs are required to provide most allied health services, without cost, to high care residents (including those whose classification level as determined under the *Classification Principles 2014* with a high ADL domain category, high CHC domain category, high behaviour domain category and a medium domain category in at least 2 domains).

The variations to the Treatment Principles will take effect from the 10 December 2020.

CONSULTATION

Section 17 of the *Legislation Act 2003* requires a rule-maker to be satisfied, before making a legislative instrument that any consultation the rule-maker considered appropriate and reasonably practicable, has been undertaken.

The Royal Commission into Aged Care Quality and Safety recommended the immediate creation of items under the MBS to facilitate access to additional health support for residents of aged care. The Government has received stakeholder advice supporting the expansion of health services for care recipients in a residential aged care facility and this advice was used to inform this policy. Due to the short timeframe in drafting this legislative instrument to implement the new items, further consultation on the drafting of the legislative instrument was not undertaken.

The purpose of these variations to the Treatment Principles is to amend the provisions of the Treatment Principles under which allied health treatment is provided to include residential care recipients in receipt of a high level of care.

In these circumstances, it is considered the requirements of section 17 of the *Legislation Act 2003* have been fulfilled.

RETROSPECTIVITY

Yes. Amendments to commence from 10 December 2020.

DOCUMENTS INCORPORATED BY REFERENCE

None.

REGULATORY IMPACT

This proposal does not have any regulatory impact on businesses, community organisations or individuals.

FURTHER EXPLANATION OF PROVISIONS

See Attachment A.

FURTHER EXPLANATION OF PROVISIONS

Section 1

This section sets out the name of the instrument - the *Veterans' Affairs (Treatment Principles – Extend Eligibility for Allied Health Treatment to Residential Care Recipients) Determination 2020*.

Section 2

This section provides that the instrument commences on 10 December 2020.

Section 3

This section sets out the legislative authority for the making of the variations to the Treatment Principles.

Section 4

Section 4 provides that the variations to the Treatment Principles, as outlined in each of the Schedules to the instrument, have effect.

Schedule 1 – (Variations to the Treatment Principles under the Veterans' Entitlements Act 1986)

Item 1 amends paragraph 7.1.3 to include a reference to new paragraph 7.1C.1 (inserted by **Item 2** of this Schedule).

The effect of the amendment to paragraph 7.1.3 is to provide that many of the allied health services listed in paragraphs 7.1.2 may be provided to eligible persons in receipt of a high level of residential care. Those services include the following (with reference to the relevant provisions of paragraphs 7.1.2):

- audiology (paragraph (a));
- diabetes educator services (paragraph (aa));
- dietetics (paragraph (b));
- chiropractic services (paragraph (c));
- exercise physiology (paragraph (dd));
- occupational therapy (paragraph (e));
- osteopathic services (paragraph (h));
- physiotherapy (paragraph (j));
- podiatry (paragraph (k));
- psychology (paragraph (l));
- social work (paragraph (m)); and
- speech pathology (paragraph (n)).

Eligible persons are those defined in paragraph 1.4.1 as an “entitled person” and include:

- veterans;
- widows and widowers of veterans;
- children of veterans who are eligible for treatment;

- dependant partners of veterans;
- ADF members eligible for treatment under the DRCA.

Previously, eligible persons in receipt of a high level of residential care were not entitled to receive any of the allied health services listed in paragraph 7.1.2 (exceptions were provided under paragraph 7.1.3 for physiotherapy, podiatry and diabetes education services where the prior approval of a delegate of the Repatriation Commission was obtained).

Item 2 inserts new Principle 7.1C, “Extended Eligibility for Treatment by Allied Health Providers for Entitled Persons Receiving Residential Care”.

New paragraph 7.1C.1 provides for the period from 10 December 2020 to 30 June 2022 (both dates inclusive) that the Repatriation Commission will accept financial responsibility for the allied health services listed in paragraphs (a), (aa), (b), (c), (dd), (e), (h), (j), (k), (l), (m), and (n) of paragraph 7.1.2 for eligible persons defined as an “entitled person” who is in receipt of a high level of residential care.

Note (1) to paragraph 7.1C.1 refers the reader to the description in paragraph 7(6)(a) of the *Quality of Care Principles 2014* of a person in receipt of a “high level of residential care” as a person whose classification level under the *Classification Principles 2014* includes any of the following:

- high ADL domain category;
- high CHC domain category;
- high behaviour domain category;
- a medium domain category in at least 2 domains.

Items 3 to 8 are consequential amendments to paragraphs 7.5.3, 7.6.2 and 7.6A.2 to include references to the respective paragraphs being subject to new “paragraph 7.1C.1”.

The effect of the amendments is described in the Notes to be inserted in each of the amended paragraphs which provides that despite the prohibition and the exceptions to it that are set out in paragraph 7.1.3, that, for the period from 10 December 2020 to 30 June 2022 that the Repatriation Commission will accept financial responsibility for the provision of those health services that are listed in paragraph 7.1C.1 for eligible persons in receipt of a high level of residential care.

Schedule 2 – (Variations to the Treatment Principles under the Military Rehabilitation and Compensation Act 2004) (MRCA)

Item 1 amends paragraph 7.1.3 to include a reference to new paragraph 7.1C.1 (inserted by **Item 2** of this Schedule).

The effect of the amendment to paragraph 7.1.3 is to provide that many of the allied health services listed in paragraphs 7.1.2 may be provided to eligible persons in receipt of a high level of residential care. Those services include the following (with reference to the relevant provisions of paragraphs 7.1.2):

- audiology (paragraph (a));
- diabetes educator services (paragraph (aa));
- dietetics (paragraph (b));
- chiropractic services (paragraph (c));
- exercise physiology (paragraph (dd));
- occupational therapy (paragraph (e));
- osteopathic services (paragraph (h));
- physiotherapy (paragraph (j));
- podiatry (paragraph (k));
- psychology (paragraph (l));
- social work (paragraph (m)); and
- speech pathology (paragraph (n)).

Eligible persons are those defined in paragraph 1.4.1 as an “entitled person” and include:

- veterans;
- widows and widowers of veterans;
- children of veterans who are eligible for treatment;
- dependant partners of veterans;
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Previously, eligible persons in receipt of a high level of residential care were not entitled to receive any of the allied health services listed in paragraph 7.1.2 (exceptions were provided under paragraph 7.1.3 for physiotherapy, podiatry and diabetes education services where the prior approval of a delegate of the Military Rehabilitation and Compensation Commission (MRCC) was obtained).

Item 2 inserts new Principle 7.1C, “Extended Eligibility for Treatment by Allied Health Providers for Entitled Persons Receiving Residential Care”.

New paragraph 7.1C.1 provides for the period from 10 December 2020 to 30 June 2022 (both dates inclusive) that the MRCC will accept financial responsibility for the allied health services listed in paragraphs (a), (aa), (b), (c), (dd), (e), (h), (j), (k), (l), (m), and (n) of paragraph 7.1.2 for eligible persons defined as an “entitled person” who is in receipt of a high level of residential care.

Note (1) to paragraph 7.1C.1 refers the reader to the description in paragraph 7(6)(a) of the *Quality of Care Principles 2014* of a person in receipt of a “high level of residential care” as a person whose classification level under the *Classification Principles 2014* includes any of the following:

- high ADL domain category;
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- a medium domain category in at least 2 domains.

Items 3 to 8 are consequential amendments to paragraphs 7.5.3, 7.6.2 and 7.6A.2 to include references to the respective paragraphs being subject to new “paragraph 7.1C.1”.

The effect of the amendments is described in the Notes to be inserted in each of the amended paragraphs which provides that despite the prohibition and the exceptions to it that are set out in paragraph 7.1.3, that, for the period from 10 December 2020 to 30 June 2022 that the MRCC will accept financial responsibility for the provision of those health services that are listed in paragraph 7.1C.1 for eligible persons in receipt of a high level of residential care.

Statement of Compatibility with Human Rights

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

Veterans' Affairs (Treatment Principles – Extend Eligibility for Allied Health Treatment to Residential Care Recipients) Determination 2020

Overview of the Determination

The purpose of the Determination is to enable eligible persons in residential care with eligibility for treatment under the Treatment Principles with the same additional treatment being provided to other persons in residential care under Medicare Benefits Schedule (MBS) arrangements.

The proposal forms part of the Australian Government's announcement on 30 November 2020 that it would invest a further \$132.2 million in its response to the Aged Care Royal Commission's recommendations on COVID-19.

Additional measures to support residents of aged care facilities whose physical and mental wellbeing had been affected by the COVID-19 pandemic or the measures taken to contain its spread include:

- \$12.1 million for additional individual allied health sessions under the Medicare chronic disease management plans; and
- \$35.5 million to provide access to Medicare subsidised individual psychological services under the *Better Access to Psychiatrists, Psychologists and General Practitioners* (Better Access) initiative.

From 10 December 2020 until 30 June 2022, new residential aged care facility (RACF) MBS items and the equivalents incorporated into the Treatment Principles will be available which replicate the existing face to face and telehealth items for allied health chronic disease management plan services, indigenous follow up services for eligible patients who have received a health assessment, and group assessment services.

There will also be new temporary RACF MBS items and the equivalents incorporated into the Treatment Principles that permit care recipients to access up to 10 services per calendar year for selected physical therapy services, including exercise physiology, occupational therapy and physiotherapy. In addition, new temporary face-to-face MBS items and the equivalents incorporated into the Treatment Principles will be introduced for care recipients of a RACF for longer initial individual allied health chronic disease management services and initial Indigenous follow up services.

Human rights implications

This instrument engages Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. 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.

The Committee reports that the '*highest attainable standard of health*' takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Right to Social Security

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

Analysis

This instrument advances the right to health and the right to social security of care recipients with eligibility for treatment under the Treatment Principles of a residential aged care facility by providing for an increase to the amount of allied health services (including mental health services) that are funded by DVA at no cost to the eligible DVA client.

This will ensure that DVA clients who are care recipients of a residential aged care facility receive access to allied health and mental health support under the Treatment Principles in the same way as other older Australians residing in a residential aged care facility in recognition of the impacts of the COVID-19 pandemic and the measures taken to contain its spread.

Conclusion

This instrument is compatible with human rights as it advances the right to health and the right to social security.

Vicki Rundle
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