

## **EXPLANATORY STATEMENT**

### ***National Health Act 1953***

#### ***Continence Aids Payment Scheme Amendment (Merits Review) Instrument 2020***

The *National Health Act 1953* (Act) relates to the provision of pharmaceutical, sickness and hospital benefits, as well as the provision of medical and dental services.

Section 12 of the Act provides that ‘the Minister may, by legislative instrument, formulate a Continence Aids Payment Scheme, under which the Commonwealth makes payments as a contribution towards the cost of buying products that help manage incontinence.’

### **Background**

The Continence Aids Payment Scheme (CAPS) was introduced on 1 July 2010, replacing the former Continence Aids Assistance Scheme (CAAS). Under CAAS the Commonwealth had a contract with a sole provider to provide continence aids (up to an annual value) to people with permanent and severe incontinence, provided they met the eligibility criteria. When CAPS came into effect, assistance for eligible persons changed from the physical supply of subsidised continence aids under CAAS to a monetary payment under CAPS intended to contribute toward the purchase of continence aids.

The *Continence Aids Payment Scheme 2020* (the Instrument) prescribes the arrangements relating to the CAPS under the Act. It commenced on 1 July 2020 and replaced the *Continence Aids Payment Scheme 2010*, which was due to sunset on 1 October 2020.

Under the Instrument an annual or six monthly payment (indexed annually) is available to people five years of age and over who suffer from permanent and severe incontinence caused by particular kinds of conditions (listed in the Schedule to the Instrument) and who satisfy other eligibility criteria set out in the instrument. The payments help to offset the costs of purchasing continence products from a supplier of choice by a person who satisfies the eligibility criteria (called a 'participating person').

Where certain requirements have been met, the payments may be directed to an 'authorised payment recipient' for the participating person, namely:

- the person's legal representative;
- the person's Centrelink Payment Nominee;
- the person's Department of Veterans' Affairs Trustee;
- a responsible person who has been approved by the Secretary; or
- an organisation that is authorised, and agrees, to receive a CAPS payment as the person's agent.

This payment framework gives people with permanent and severe incontinence, their legal representatives and carers the flexibility to manage CAPS payments in the way that is most suited to their needs.

The CAPS payment is managed by the Department of Health and is administered by Services Australia. An applicant is required to complete and return to Services Australia a CAPS

Application Form which, among other things, must include a statement prepared and signed by a health professional certifying that the applicant has been diagnosed by a doctor with an eligible neurological condition or eligible other condition, as the case may be, which has caused permanent and severe incontinence.

Subsection 12(3)(c) of the Act states ‘...the legislative instrument may provide for ... the amount of the contribution that is payable in each financial year in relation to a person who is participating in the scheme’.

From 1 July 2020 Australians who need continence aids will be able to receive the aids through either the National Disability Insurance Scheme (NDIS) or the CAPS. CAPS participants who are also eligible for the NDIS may choose to receive their continence supports from the NDIS or remain with CAPS.

### **Purpose**

The purpose of the *Continence Aids Payment Scheme Amendment (Merits Review) Instrument 2020* (the Instrument) is to provide for merits review of decisions of the Secretary of the Department of Health (the Department) under sections 21 and 22 of the Instrument.

### **Consultation**

The Department of Health has consulted Services Australia, the agency responsible for administering CAPS for the Department of Health, on the proposed amendments. The amendments follow correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding merits review of the Secretary’s decisions under sections 21 and 22 of the Instrument.

### **Commencement**

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

### **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.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. Details of this Instrument are set out in Attachment A.

**Details of the Contenance Aids Payment Scheme Amendment (Merits Review) Instrument 2020**

**Section 1 Name**

This section provides that the name of the instrument is the *Contenance Aids Payment Scheme Amendment (Merits Review) Instrument 2020* (the Instrument).

**Section 2 Commencement**

This section provides that the whole of the Instrument commences the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 Authority**

This section provides that the Instrument is made under section 12 of the *National Health Act 1953* (the Act).

**Section 4 Schedules**

This section provides that each instrument that is 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.

**Schedule 1 – Amendments**

Schedule 1 to the Instrument provides for the *Contenance Aids Payment Scheme 2020* (the Instrument) to be amended to introduce review of the Secretary's decisions under sections 21 and 22 of the Instrument, and make consequential amendments relating to the introduction of the review provision.

**Item 1**

This item inserts a note at the end of s 21 of the Instrument that is consequential to the insertion of new section 26 to provide for review of the Secretary's decisions under sections 21(1) and (3) of the Instrument (see Item 4 below).

The note refers to the requirement under new subsection 26(2) for the Secretary to provide a signed notice that includes the reasons for the decision and advising that an application may be made to the Secretary for the review of the decision, in circumstances where the Secretary makes a decision under subsection 21(1) or (3).

**Item 2**

This item repeals and replaces subsection 22(8) of the Instrument and is consequential to the insertion of new section 26 to provide for review of the Secretary's decision under subsection 22(7) of the Instrument (see Item 4 below).

New subsection 22(8) removes the requirement for the Secretary to inform the participating person and the organisation in writing where a decision is made under subsection 22(7), as this requirement is now reflected in subsections 26(2) and (3). It also includes a new note that refers to this requirement, consistently with the new note inserted at the end of section 21 (see Item 1 above).

### Item 3

This item repeals and replaces the heading to section 25 of the Instrument, which previously read 'Review of decisions'. The new heading now reads 'review of decisions relating to eligibility'. This amendment is consequential to the insertion of new section 26 which provides for the review of decisions by the Secretary, rather than the decisions of the Chief Executive Medicare that are covered by section 25, and ensures that it is clear the types of decisions that are covered by each section.

### Item 4

This item inserts new section 26 into the Instrument to provide for review of the Secretary's decisions under sections 21 and 22 of the Instrument, including internal review by the Secretary and independent merits review by the Administrative Appeals Tribunal. The review arrangements under this section are consistent with the arrangements for the review of the Chief Executive Medicare's decisions relating to eligibility to participate in the scheme (see sections 6, 9 and 25 of the Instrument, and sections 14 and 15 of the Act).

Subsection 26(1) provides that the section applies to decisions of the Secretary under subsections 21(1) and (3), and 22(7) of the Instrument. In summary:

- Subsection 21(1) provides that the Secretary may approve an individual to represent a person who is unable to act on his or her own behalf because of a physical or mental impairment (an 'assisted person'), or a minor, for particular purposes. Subsection 21(2) sets out the matters about which the Secretary must be satisfied in order to approve an individual under subsection 21(1).
- Subsection 21(3) provides that the Secretary may revoke an approval under subsection 21(1) if satisfied that it is appropriate to do so in the circumstances.
- Subsection 22(7) provides that the Secretary may direct the Chief Executive Medicare to decline to make a CAPS payment in certain circumstances.

In circumstances where the Secretary makes a relevant decision under section 21 or 22 of the Instrument, subsection 26(2) requires the Secretary to give each relevant person or organisation a signed notice that states:

- the decision
- the day when the decision has effect
- the reasons for the decision
- that, within 28 days after receiving the notice (or such longer period allowed by the Secretary), the person or organisation may apply to the Secretary for a review of the decision, and
- how the person or organisation may apply for the review.

Subsection 26(3) sets out the persons and organisations to which the Secretary must give notice, which differs depending on whether the relevant decision is under s 21 or 22 of the Instrument.

Subsections 26(4) to (6) provide for the internal review of decisions by the Secretary. Subsection 26(4) provides for a person or organisation that is aggrieved by the relevant decision of the Secretary under 21 or 22 of the CAPS Instrument to apply to the Secretary for review of the decision.

Under subsection 26(5), the application for review must:

- be made by written notice given to the Secretary
- be made within 28 days after the day the person or organisation received notice of the decision, or such longer period allowed by the Secretary, and
- set out the reasons for making the request.

Where an application for review is made, the Secretary must review the decision (subsection 26(6)), and give the person or organisation a signed notice that states:

- the decision
- the day when the decision has effect
- the reasons for the decision, and
- that, within 28 days after receiving the notice, the person or organisation may apply to the Administrative Appeals Tribunal for a review of the Secretary's decision.

Subsection 26(7) provides that an application may be made to the Administrative Appeals Tribunal for the review of the Secretary's internal review decision under subsection 26(6). Such reviews would be conducted under the *Administrative Appeals Tribunal Act 1975*.

## Statement of Compatibility with Human Rights

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

### Continence Aids Payment Scheme Amendment (Merits Review) Instrument 2020

This 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 Instrument

The Continence Aids Payment Scheme (CAPS) makes a monetary payment to an eligible person which is intended to contribute to their costs in purchasing continence aids.

The purpose of the *Continence Aids Payment Scheme Amendment (Merits Review) Instrument 2020* (the Instrument) is to amend the *Continence Aids Payment Scheme 2020* (CAPS 2020 Instrument) to provide for a person or organisation that is aggrieved by a decision of the secretary under section 21 or 22 of the Instrument to seek review of the decision. This includes internal review by the Secretary, and independent merits review by the Administrative Appeals Tribunal (AAT).

The decisions of the Secretary under sections 21 and 22 of the Instrument relate to (respectively):

- the approval (and revocation of approval) of a person to represent a participating person who is an assisted person (a person unable to act on his or her own behalf because of a physical or mental impairment) or a minor, and
- direct that the Chief Executive Medicare decline to make a payment to an organisation that has been approved to receive CAPS payments in certain circumstances.

#### Human rights implications

As set out above, the amendments in the Instrument are limited to providing for review of decisions under the Instrument. To this extent, the amendments do not themselves engage human rights.

However, to the extent that decisions under sections 21 and 22 of the Instrument may have an effect on a participating person under the CAPS, the amendments made by this Instrument may engage the same human rights as the Instrument.

As set out in the Statement of Compatibility with Human Rights for the Instrument, that instrument engages:

- the right to equality and non-discrimination contained in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and the right to health contained in Article 12 of that covenant
- the rights of people with disabilities in the Covenant on the Rights of Persons with Disabilities, especially articles 3(b) and 4 which require Parties to ensure and promote

the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability

As also set out in the Statement of Compatibility with Human Rights for the Instrument, that Instrument limits the rights of people with disabilities by excluding from participation in the CAPS people who are participants in the NDIS whose NDIS plan contains a consumables budget (that includes continence aids) as evidence that reasonable and necessary support the reasonable and necessary supports will be funded under the NDIS.

This limitation on the right to equality and non-discrimination is designed to achieve the legitimate objective of ensuring that a person who is receiving continence aids as part of a care package subsidised by the Commonwealth under the *National Disability Insurance Scheme Act 2013* does not also receive a payment from the Commonwealth under the *National Health Act 1953* which is intended as a contribution towards the purchase of continence aids, which would be a form of ‘double-dipping’.

The Instrument engages but does not limit the rights to health and to non-discrimination on the basis of disability. A care recipient who is excluded from participation in the CAPS, will be provided with the continence aids he or she requires to assist in maintaining the highest attainable standard of physical and mental health as part of the NDIS package of care and services he or she is receiving.

The Instrument contributes towards the realisation of rights contained in articles 11 and 12 of the International Covenant on Economic Social and Cultural Rights, specifically the right of everyone to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health.

The amendments in the Instrument further contribute to the realisation of these rights, as providing for review of decisions will provide a safeguard for participating persons where decisions under sections 21 and 22 of the Instrument may affect them.

### **Conclusion**

The Instrument is compatible with human rights as it further promotes the realisation of relevant rights and, to the extent that the Instrument generally operates to limit the right to equality and non-discrimination, that limitation is reasonable, necessary and proportionate.