

# EXPLANATORY STATEMENT

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

***Aged Care Act 1997***

***Aged Care Legislation Amendment (Basic Subsidy Amount-COVID-19 Support)  
Determination 2020***

The *Aged Care Act 1997* (the Act) and the *Aged Care (Transitional Provisions) Act 1997* (the TP Act) provide for the Commonwealth to give financial support through payment of subsidies for the provision of aged care.

Under Chapter 3 of the Act, the Commonwealth pays subsidies to approved providers for aged care that has been provided. Approved providers may also be eligible to receive aged care subsidy 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 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.

## **Purpose**

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

The purpose of the Amending Determination is to amend the Subsidy, Fees and Payments Determination to provide that aged care subsidy in relation to care recipients on extended hospital leave will not be reduced during the period 1 July 2020 to 30 June 2021 (inclusive).

In relation to a care recipient provided with residential care, the Act defines extended hospital leave to include a period during which the care recipient takes leave to attend hospital for the purpose of receiving hospital treatment under subsection 42-2(2) for a continuous period of 30 days or more.

Section 9 of the Subsidy, Fees and Payments Determination shows how to calculate the basic subsidy amount in respect of a care recipient who has an Aged Care Funding Instrument (ACFI) classification that is in effect and who is on extended hospital leave.

In accordance with this section, different amounts of subsidy apply depending on the duration of the care recipient's extended hospital leave. For the first 28 days that the care recipient is on leave, the basic subsidy amount is the amount calculated under section 7 or 8

of the Subsidy, Fees and Payments Determination (whichever is applicable). For any other day, the basic subsidy amount is half that amount.

These provisions are mirrored in the TP Act and section 11 of the Subsidy and Other Measures Determination.

The Amending Determination will ensure the basic subsidy amount will not be reduced in circumstances where a care recipient is on extended hospital leave during the period 1 July 2020 to 30 June 2021 (inclusive). This amendment is in response to the increased movement of residents into hospital settings during the COVID-19 pandemic.

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

### **Background**

Under section 42-2 of the Act, a care recipient may be taken to be provided with residential care on each day that they are on leave from a residential care service.

Subsection 42-2(1) of the Act provides that a care recipient is on leave from a residential care service on each day of any period during which the care recipient attends hospital for the purpose of receiving hospital treatment, so long as the day is on or after the day on which the care recipient enters the residential care service.

A permanent resident of a residential aged care service may be on leave for an unlimited number of days to receive hospital treatment, without losing their place in the residential care service. This leave is referred to informally as hospital leave. The aged care provider must retain the care recipient's place in the aged care service while the resident is on hospital leave, irrespective of the length of time they are in hospital. The security of tenure provisions (section 6 – *User Rights Principles 2014*) outline the circumstances in which an approved provider may ask or require a care recipient to leave a residential aged care service.

Subject to certain other requirements, an approved provider may continue to remain eligible to receive subsidy in relation to an aged care recipient while they are on leave.

Section 44-3 of the Act provides that the basic subsidy amount for a day is the amount determined by the Minister by legislative instrument. Paragraph 44-3(3)(ca) of the Act provides that the Minister may determine different amounts based on whether a care recipient is on extended hospital leave.

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

Currently, where a care recipient attends hospital for a period of extended hospital leave, the basic subsidy amount is reduced after the first 28 days of extended hospital leave. The approved provider may not increase the fees payable by the aged care recipient in response to any reduction in subsidy.

During the COVID-19 pandemic, many aged care recipients have been moved from residential aged care to hospital settings for extended periods of time. The current reduction in subsidy payable in relation to these care recipients is negatively impacting the financial viability of aged care providers who are already under pressure due to the effects of COVID-19.

The amendments introduced by the Amending Determination will apply retrospectively from 1 July 2020 until 30 June 2021. As the effect of the Amending Determination increases the subsidy payable to providers a retrospective commencement will not have detrimental consequences for the aged care sector.

It is intended that no retrospective increase in resident fees will be passed on to residents as a result of these amendments. While the aged care payment system administered by Services Australia may calculate a retrospective resident debt due to this proposed change, this is automatically suppressed by the payment system and will not be passed on to aged care recipients.

### **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 Determination is set out in the following tables:

<b><i>Aged Care Act 1997</i></b>	
<b>Residential care</b>	<b>Section</b>
Basic Subsidy Amount	44-3

<b><i>Aged Care (Transitional Provisions) Act 1997</i></b>	
<b>Residential care</b>	<b>Section</b>
Basic Subsidy Amount	44-3

### **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**

Aged care providers and peak bodies have discussed this issue with the Department of Health. This is a temporary measure that will benefit the aged care sector.

### **Commencement**

The Amending Determination 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 4 September 2020 OBPR advised that a Regulatory Impact Statement is not required for the Amending Determination (OBPR ID 26445).

**Details of the Aged Care Legislation Amendment (Basic Subsidy Amount-COVID-19 Support) Determination 2020**

**Section 1** states that the name of the Amending Determination is the *Aged Care Legislation Amendment (Basic Subsidy Amount—COVID-19 Support) Determination 2020*.

**Section 2** states that the Amending Determination 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 two legislative instruments:

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

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

The amendments to the Subsidy and Other Measures 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 Section 9**

This item inserts new subsection 9(3) after subsection 9(2). Subsection 9(3) sets out that section 9 does not apply in relation to a care recipient and a day if the day is in the period between 1 July 2020 and 30 June 2021 (inclusive). In effect, no subsidy reduction will apply during this period.

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

**Item 2 – At the end of Section 11**

This item adds new subsection 11(3) after subsection 11(2). Subsection 11(3) sets out that section 11 does not apply in relation to a care recipient and a day if the day is in the period between 1 July 2020 and 30 June 2021 (inclusive). In effect, no subsidy reduction will apply during this period.

## **Statement of Compatibility with Human Rights**

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

### ***Aged Care Legislation Amendment (Basic Subsidy Amount-COVID-19 Support) Determination 2020***

The *Aged Care Legislation Amendment (Basic Subsidy Amount-COVID-19 Support) 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) Act 2011*.

#### **Overview of Legislative Instrument**

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

The purpose of the Amending Determination is to prevent the subsidy reduction that applies from the 29th day of extended hospital leave as set out in subsection 9(2) of the Subsidy, Fees and Payments Determination and subsection 11(2) of the Subsidy and Other Measures Determination applying in the period 1 July 2020 to 30 June 2021 (inclusive). This amendment is in response to the increased movement of residents into hospital settings for precautionary measures during the COVID-19 pandemic. As a result, during the current COVID-19 pandemic the subsidy paid to aged care providers will not be reduced due to aged care recipients remaining in a hospital setting for an extended period of time.

#### **Human Rights Implications**

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

- 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 United Nations Committee on Economic Social and Cultural Rights 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 Australian Government recognises 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.

The temporary pause of the extended hospital leave subsidy reduction for the period of 1 July 2020 to 30 June 2021 (inclusive) increases the amount of funding payable to approved providers affected by COVID-19 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. 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 funding payable to approved aged care providers as a result of this legislative instrument will help maintain the viability of providers who have multiple care recipients on extended hospital leave as a result of the COVID-19 pandemic. This will, in turn, support the viability of the aged care sector that is 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 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**