

## **EXPLANATORY STATEMENT**

### **Issued by the Authority of the Minister for Finance**

*Financial Framework (Supplementary Powers) Act 1997*

*Financial Framework (Supplementary Powers) Amendment  
(Health Measures No. 1) Regulations 2021*

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

The *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Commonwealth Disability Support for Older Australians (DSOA) Program, which provides funding for disability services to individual older people with a disability who are ineligible for the National Disability Insurance Scheme (NDIS). The Department of Health has responsibility for the DSOA Program.

The DSOA Program is a renamed and redesigned version of the current Continuity of Support (CoS) Programme and will continue to provide grants to existing CoS providers who are assessed as being suitable to coordinate and deliver specialist disability services to a closed group of current CoS clients. The DSOA Program will continue to meet the Government's commitment to the former Council of Australian Governments to provide continuity of support for older Australians who had been receiving state managed specialist disability services but were ineligible for the NDIS at the time the NDIS was implemented. The CoS transition phase came to an end as the NDIS rollout was completed across all states and territories, with current CoS provider funding agreements ending on 30 June 2021.

The DSOA Program will deliver improved parity with the NDIS and a more client-centred program through:

- funding for disability services being better aligned with market pricing and nationally consistent across states and territories;
- moving all clients to Individual Support Packages to refocus service delivery on individual client needs; and
- meeting the Commonwealth's commitment to continue supporting the DSOA clients with complex needs to live at home or in a supported accommodation and to access increased support as their needs change.

Details of the Regulations are set out at [Attachment A](#). A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

### **Consultation**

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Health.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

**Details of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021*.

**Section 2 – Commencement**

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

**Section 4 – Schedules**

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

**Schedule 1 – Amendments**

***Financial Framework (Supplementary Powers) Regulations 1997***

**Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)**

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity that will be administered by the Department of Health (the department).

New **table item 470** establishes legislative authority for government spending on the Commonwealth Disability Support for Older Australians (DSOA) Program, which provides funding for disability services to individual older people with a disability who are ineligible for the National Disability Insurance Scheme (NDIS).

The DSOA Program is a renamed and redesigned version of the current Continuity of Support (CoS) Programme, which has legislative authority under item 154 of Part 4 of Schedule 1AB to the Principal Regulations. The DSOA Program will continue to meet the Government's commitment to the former Council of Australian Governments to provide continuity of support for older Australians who had been receiving state managed specialist disability services but were ineligible for the NDIS at the time the NDIS was implemented. The CoS transition phase came to an end as the NDIS rollout was completed across all states and territories, with current CoS provider funding agreements ending on 30 June 2021.

The Government, through the department, undertook a review of the CoS Programme which included consultation with clients and service providers. The review informed improvements commencing from July 2021 with the introduction of the DSOA Program. The intent of the

DSOA Program is to support service providers to coordinate and deliver select contemporary disability services to older Australians with a disability who were previously accessing services under the CoS Programme. The DSOA Program will deliver improved parity with the NDIS and a more client-centred program through:

- funding for disability services being better aligned with market pricing and nationally consistent across states and territories;
- moving all clients to Individual Support Packages to refocus service delivery on individual client needs; and
- meeting the Commonwealth's commitment to continue supporting the DSOA clients with complex needs to live at home or in a supported accommodation and to access increased support as their needs change.

The key changes under the DSOA Program include:

- all clients receiving tailored support under an Individual Support Package;
- a single DSOA service coordinator managing the disability services a client receives, that is:
  - coordination and oversight of all support services for the client, including making arrangements with other service providers; and
  - in most cases, the DSOA service coordinator will be the client's primary (largest) service provider;
- clients able to access increased support as their needs change, that is:
  - if a submitted change of needs application amounts to \$20,000 or more over a 12-month period, the client receives an independent assessment to ensure they are getting appropriate support (the Government will cover the cost of the assessment); and
  - the department can also request an independent assessment;
- clients and providers benefiting from disability service funding that is better aligned with the NDIS and nationally consistent across states and territories;
- the DSOA service coordinators will be offered a two-year funding agreement and a management fee equal to one per cent of each client's total funding; and
- a new online system making it easier to meet reporting requirements under the DSOA Program. This includes performance and financial reporting, client individual support plans, transfers and exits, change of needs applications, and enquiries.

The following aspects will not change under the DSOA Program:

- DSOA will remain a closed program with no new clients;
- existing quality and safeguard arrangements as outlined by the NDIS Quality and Safeguards Commission;
- services and costs excluded under the CoS Programme will remain excluded under the DSOA Program;
- existing client contribution arrangements under the CoS Programme can continue under DSOA (client contributions may increase each year in line with the Consumer Price Index); and
- support for client transition to aged care services.

The objectives of the DSOA Program are to:

- deliver high quality care, support and services to clients;
- support clients through the direct service delivery of planned respite services which allow families and other regular carers to take a break from their usual caring duties

and support and maintain the care relationship, while providing a positive experience for the person with disability;

- support clients to be informed about aged care service options and support their transition into this care where appropriate;
- provide services that are socially and culturally appropriate and free from discrimination to all clients, including those with special needs;
- facilitate client choice and enhance the independence and wellbeing of clients and ensure services are responsive to their needs;
- provide flexible, timely services that are responsive to local needs; and
- take into account the protection and promotion of the human rights of the person.

The intended outcomes of the DSOA Program are that:

- this cohort of older people with a disability:
  - will achieve similar outcomes to those they were achieving prior to the introduction of the DSOA Program;
  - are supported to be as independent as possible; and
  - have their human rights upheld in the provision and receipt of services;
- the wellbeing of this cohort of older people with a disability is maintained through the delivery of consistent, timely, high quality services and supported transition into appropriate programs such as aged care as their circumstances change and following consultation with the older person and their carer/advocate/nominee; and
- carers and care relationships are supported through the provision of respite services to older people with disability.

The DSOA Program will provide grants to existing CoS providers who are assessed as being suitable to coordinate and deliver specialist disability services to a closed group of current CoS clients. This grant funding is designed to secure continuance of services to clients supported under the current CoS Programme, utilising existing providers who have demonstrated their ability to deliver services to clients.

Grants under the DSOA Program may be used for direct service delivery and governance and operational matters. Grant funding can be used for all costs directly associated with delivering a DSOA service to clients. It may be used for coordination activities and matters associated with delivering the DSOA services to clients. Funding agreements under the DSOA Program will initially run over two years from 1 July 2021 to 30 June 2023.

Grant funding will be provided in accordance with the *Public Governance, Performance and Accountability Act 2013*, the *Commonwealth Grants Rules and Guidelines 2017*, the Accountable Authority Instructions and relevant departmental financial delegations.

The department will run a closed non-competitive (non-application based) grants process to assess current CoS service providers as suitable to deliver coordination activities under the DSOA Program. This approach will provide the best value for money for the Commonwealth. The identified organisations have already demonstrated that they have met deliverables under the terms and conditions of their current funding agreement. This means that only organisations listed in the grant opportunity guidelines are eligible to apply. The prospective grantees will be assessed individually against criteria and not against other grantees.

This grant opportunity and process will be administered by the Community Grants Hub on behalf of the department. When assessing suitability, the department will work with the Department of Social Services' Community Grants Hub to consider information about organisations available through the normal course of business in the assessment of eligibility and performance. The selection criteria will be published in the grant opportunity guidelines and experienced departmental officials will ensure that the service providers are able to continue to deliver quality services under the DSOA Program.

Following assessment of the service providers against the selection criteria, a delegate of the Minister for Health and Aged Care, the Hon Greg Hunt MP, will make the final decision to approve funding. The delegate will consider whether the proposal represents an efficient, effective, ethical and economical use of Commonwealth resources, and whether any specific requirements need to be imposed as a condition of funding. The decision of the delegate is final in all matters, including the approval of the grant and the terms and conditions of the grant.

The grant opportunity guidelines, selection criteria and information about the grant decision will be available on GrantConnect at [www.grants.gov.au](http://www.grants.gov.au).

Funding decisions made in connection with the program are not considered suitable for independent merits review, as these relate to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, and the provision of one-off funding to certain service providers. The provision of funding to the DSOA service coordinators to coordinate and provide specialist disability services will only be offered to providers with a proven record of delivering these services to the existing client base. The Administrative Review Council has recognised it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.19 of the guide, *What decisions should be subject to merit review?*).

An open competitive grants process was not deemed suitable for this grant opportunity given the closed nature of the DSOA Program in relation to same clients, same providers and the same set of core services, as well the complexity and specialised services being delivered.

All current CoS providers and clients were consulted in the development of the DSOA Program, as well as the Department of Social Services' Community Grants Hub and the Department of Finance.

An independent CoS Programme review was conducted in 2020 and examined costs and client needs, including a funding model analysis and data validation for the 3,600 clients, individual support costs and client exits. Peak Commonwealth body (National Disability Services) as well as jurisdiction peak bodies were consulted. Fifty per cent of CoS providers responded to the sector survey, with 10 per cent of clients responding.

Whilst the overall conclusion of the review is that the CoS Programme was broadly delivering on the policy intent, main areas of concerns were:

- the level of funding available to service providers is significantly lower than funding available to the NDIS participants with similar needs; and
- program administration such as additional support requests and assessment, Activity Work Plans and funding agreement extensions.

The DSOA Program seeks to address the identified areas for concern through funding being more aligned with the NDIS, reduced administrative burden with the introduction of an online portal and two-year funding offers, as well as an independent assessment of needs for additional support applications.

Funding of \$125.3 million was included in the 2020-21 Budget under the measure ‘Ageing and Aged Care’ for a period of four years commencing in 2021-22. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at pages 90 to 91. An additional amount of \$1,322.5 million previously allocated to the CoS Programme was transferred across to the DSOA Program.

Total funding of \$1,447.8 million for this program comes from Program 6.2: Aged Care Services, which is part of Outcome 6. Details are set out in the *Portfolio Budget Statements 2020-21, Budget Related Paper No. 1.7, Health Portfolio* at pages 122 to 123.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the pharmaceutical benefits, sickness benefits and medical services power, including incidental aspects (section 51(xxiiiA)); and
- the external affairs power (section 51(xxix)).

#### Social welfare power

The social welfare power in section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of certain social welfare benefits including pharmaceutical benefits, sickness benefits and medical services, including incidental aspects.

Funding under the DSOA Program will be directed towards the needs of older individuals with a disability, through Individual Support Packages.

#### External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’. The external affairs power supports legislation implementing Australia’s obligations under international treaties to which it is a party.

Article 4 of the *Convention on the Rights of Persons with Disabilities* [2008] ATS 12 (CRPD) requires States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability. Article 25 of the CRPD recognises the right of persons with disabilities to the enjoyment of the ‘highest attainable standard of health without discrimination on the basis of disability’. In particular, Article 25(b) sets out that States Parties shall:

‘[p]rovide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons’.

Funding under the DSOA Program will be directed at delivering services which are specifically required because of a person's disability.



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

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

### ***Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021***

This disallowable legislative 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 legislative instrument**

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Commonwealth Disability Support for Older Australians (DSOA) Program, which provides funding for disability services to individual older people with a disability who are ineligible for the National Disability Insurance Scheme (NDIS).

The DSOA Program is a renamed and redesigned version of the current Continuity of Support (CoS) Programme. The DSOA Program will continue to meet the Government's commitment to the former Council of Australian Governments to provide continuity of support for older Australians who had been receiving state managed specialist disability services but were ineligible for the NDIS at the time the NDIS was implemented. The CoS transition phase came to an end as the NDIS rollout was completed across all states and territories, with current CoS provider funding agreements ending on 30 June 2021.

The DSOA Program will deliver improved parity with the NDIS and a more client-centred program through:

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The DSOA Program will provide grants to existing CoS providers who are assessed as being suitable to coordinate and deliver specialist disability services to a closed group of current CoS clients. Grants under the DSOA Program may be used for direct service delivery and governance and operational matters. Grant funding can be used for all costs directly associated with delivering a DSOA service to clients. It may be used for coordination activities and matters associated with delivering the DSOA services to clients.

### **Human rights implications**

This disallowable legislative instrument engages the following rights:

- the right to live independently and be included in the community – Article 19 of the *Convention on the Rights of Persons with Disabilities (CRPD)*, read with Article 4; and
- the right to health without discrimination on the basis of disability – Article 25 of the CRPD, read with Article 4.

Article 4 of the CRPD provides that States Parties undertake to adopt legislative and other measures for the implementation of the rights recognised in the present Convention, including but not limited to the: promotion of the human rights of persons with disabilities in all policies and programs; elimination of discrimination on the basis of disability by any person, organisation or private enterprise; promotion of research and development of universally designed goods, services, equipment and facilities, and the provision of information, accessibility, and use of services, equipment and facilities; promotion of training of professionals and staff working with persons with disabilities and in the development and implementation of legislation and policies to implement the present Convention, and in other decision making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

Article 19 of the CRPD provides that States Parties recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (b) persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.

Article 25 of the CRPD provides that States Parties recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. In particular, States Parties shall:

- (b) provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimise and prevent further disabilities, including among children and older persons.

Funding will be provided to eligible service providers to coordinate and deliver select contemporary disability services to older Australians with a disability.

**Conclusion**

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Simon Birmingham  
Minister for Finance**