

EXPLANATORY STATEMENT

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

Aged Care Act 1997

Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2021

The Aged Care Act 1997 (Act) enables approved providers to remain eligible for residential care subsidy in circumstances where an aged care resident takes leave during a declared emergency situation. The Minister for Senior Australians and Aged Care Services (or their delegate) may declare a situation of emergency and determine that it 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.

Due to the ongoing nature of the COVID-19 pandemic across Australia, the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2021* (Amendment Determination) will extend the period of the situation of emergency, effectively making emergency leave available to all aged care residents recipients throughout Australia until 30 June 2022.

Purpose

The purpose of the Amendment Determination is to amend the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020* (Determination) to extend a situation of emergency under subsection 42-2A(1) of the Act. The Determination declares a situation of emergency for the period 1 April 2020 to 30 September 2020, therefore making emergency leave available to aged care residents. This was subsequently extended until 30 June 2021.

Under the changes made by the Amendment Determination, the situation of emergency will be further extended and emergency leave will be available to aged care recipients across Australia until 30 June 2022. This extension provides reassurance to aged care recipients and their families that, given the ongoing unpredictable outbreaks of COVID-19, they will continue to be supported when making decisions about a care recipient's personal health and safety during a situation of emergency.

The Amendment 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.

The leave may include any period during which a care recipient attends hospital, periods of non-hospital leave (also known as social leave) if the number of days on which the care recipient has previously been on social leave during the current financial year is less than 52, and days in respect of which flexible care subsidy is payable where the requirements specified in the *Subsidy Principles 2014* are met.

On 15 May 2020, the Act was amended to provide for emergency leave to be made available to aged care residents during a situation of emergency. A situation of emergency may include disasters (natural or otherwise), pandemics or epidemics, and is determined by legislative instrument made by the Minister.

Subsection 42-2(3B) of the Act provides that a care recipient is considered to be on what is known as emergency leave from a residential care service (the affected service) on a day if:

- they are absent from the affected service
- they are not attending hospital for the purpose of receiving hospital treatment, and
- the Minister determines under subsection 42-2A(1) that there is a situation of emergency for that day for the affected service or a class of residential care services that includes the affected service.

If a care recipient is absent from a residential care service and not on leave in accordance with the provisions in section 42-2 of the Act, the approved provider may not be eligible for residential care subsidy in respect of that care recipient. 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.

As a result of the current COVID-19 pandemic, a significant number of aged care residents have indicated they wish to temporarily relocate with family to reduce their risk of exposure to the virus. The availability of emergency leave avoids aged care residents having to utilise their social leave for a situation such as this, which is outside of their control.

The continued availability of emergency leave also ensures approved providers cannot elect to charge aged care recipients a fee during a declared emergency in order to reserve their place in an aged care service. Whilst not all care recipients will need to use this leave, it ensures residents and their families are supported to make decisions about personal health and safety during a situation of emergency.

The changes made by the Amendment 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 Amendment Determination is made under subsection 42-2A(1) of the Act. Subsection 42-2A(1) gives the Minister for Senior Australians and Aged Care Services 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.

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.

Commencement

The Amendment Determination will commence on the day after it is registered.

Consultation

The Department of Health (Department) has consulted with Services Australia in relation to payment system changes for the new emergency leave provision. The Department has informed the aged care sector of the availability of emergency leave and will update the sector on the extension of the period a situation of emergency will apply for as a result of the amendment introduced by the Amendment Determination. Since the COVID-19 pandemic started, the Department has replied to numerous representations from families of aged care residents, industry bodies and parliamentarians who have enquired about leave provisions for aged care residents during the pandemic.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted on 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) Amendment Determination 2021

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) Amendment Determination 2021*.

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

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

Section 4 states 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 – Amendment

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

Item 1 –Section 4

This item omits “30 June 2021” and substitutes the date of “30 June 2022”. In effect, this will make the determined period for the situation of emergency relating to COVID-19 all days from 1 April 2020 to 30 June 2022 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) Amendment Determination 2021

The *Aged Care (Leave from Residential Care Services) (Situation of Emergency – Human Coronavirus with Pandemic Potential) Amendment Determination 2021* 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 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.

The leave may include any period during which a care recipient attends hospital, periods of non-hospital leave (also known as social leave) if the number of days on which the care recipient has previously been on social leave during the current financial year is less than 52, and days in respect of which flexible care subsidy is payable where the requirements specified in the *Subsidy Principles 2014* are met.

Additionally, subsection 42-2(3B) of the Act provides that a care recipient is considered to be on known as emergency leave from a residential care service (the affected service) on a day if

- they are absent from the affected service
- they are not attending hospital on that day for the purpose of receiving hospital treatment, and
- the Minister determines under subsection 42-2A(1) that there is a situation of emergency for that day for the affected service or a class of residential care services that includes the affected service.

If a care recipient is absent from a residential care service and not on leave in accordance with the provisions in section 42-2 of the Act, the approved provider may not be eligible for residential care subsidy in respect of that care recipient. 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.

As a result of the current COVID-19 pandemic, a significant number of aged care residents have indicated they wish to temporarily relocate with family to reduce their risk of exposure to the virus.

For the purposes of subsection 42-2A(1) of the Act, the *Aged Care (Leave from Residential Care Services) (Situation of Emergency – Human Coronavirus with Pandemic Potential) Amendment Determination 2020* (Amendment Determination) declares the ongoing COVID-19 pandemic as a situation of emergency for an extended period. Under the Amendment Determination, emergency leave will continue to be available to aged care residents across Australia until 30 June 2022.

As the COVID-19 pandemic has impacted all of Australia, the Amendment Determination ensures that emergency leave is available to all aged care residents in Australia. The availability of emergency leave avoids residents having to utilise their social leave for a situation such as this, which is outside of their control.

The continued availability of emergency leave also ensures approved providers cannot elect to charge aged care residents a fee during a declared emergency in order to reserve their place in an aged care service. 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.

Human rights implications

The Amendment 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 United Nations 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 pandemic 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 aged care residents, leading to concern from families about the impact on a resident's physical and mental health and wellbeing.

The Amendment Determination allows residents who may be concerned about their care, or the safety of their living environment during the COVID pandemic, to exercise their right to enjoy the highest attainable level of health, by relocating to another temporary residence if they wish.

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 also reduce any financial pressure that may be placed on aged care residents who may otherwise 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 resident to retain their place in a facility helps reduce potential economic burden and supports ongoing access to an adequate standard of living once the period of emergency has ended.

Conclusion

The Amendment 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 Senior Australians and Aged Care Services