

EXPLANATORY STATEMENT

National Health Act 1953

Continence Aids Payment Scheme Amendment (eligibility) Instrument 2022

Authority

Section 12 of the *National Health Act 1953* (the Act) provides that ‘the Minister may, by legislative instrument, formulate a Continence Aids Payment Scheme (CAPS), under which the Commonwealth makes payments as a contribution towards the cost of buying products that help manage incontinence’.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that 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.

Purpose

The purpose of the *Continence Aids Payment Scheme Amendment (eligibility) Instrument 2022* (the Instrument) is to amend the eligibility criteria for the *Continence Aids Payment Scheme 2020* to ensure that care recipients who have continence products provided as part of a residential care service are not additionally eligible for payments under CAPS.

The instrument includes consequential amendments which are required as a result of the *Aged Care and Other Legislation Amendment Act 2022* amending the *Aged Care Act 1997* and *Aged Care (Transitional Provisions) Act 1997* to enable the introduction of the Australian National Aged Care Classification (AN-ACC) to replace the Aged Care Funding Instrument (ACFI) as the residential aged care subsidy calculation model from 1 October 2022.

Under AN-ACC from 1 October 2022 all care recipients who reside at a residential aged care facility on a permanent basis will receive continence products through their residential care facility, based on need, and will not require financial assistance under CAPS. Previously under ACFI, only care recipients with certain classifications received continence products as part of their residential care, and so only those classifications were excluded from being eligible for the Scheme.

The instrument also corrects a typographical error in the list of applicable medical conditions.

Consultation

These are consequential changes as a result of AN-ACC coming into effect on 1 October 2022. Therefore, limited external stakeholder consultation was undertaken as the amendments are to ensure the eligibility criteria for CAPS continues, as it currently does, to exclude those who already have their continence aids provided as part of their residential care service, meaning no-one will be left worse-off as a result of the amendments.

The Department of Health and Aged Care has consulted Services Australia, the agency responsible for administering CAPS, in relation to the need for transitional provisions to accompany the proposed amendments. Services Australia have agreed that the transitional provisions are necessary to support the changes to eligibility.

Commencement

This instrument commences on 1 October 2022.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of this instrument are set out in the Attachment.

Details of the Continance Aids Payment Scheme Amendment (eligibility) Instrument 2022**Section 1 Name**

This section provides that the name of the instrument is the *Continance Aids Payment Scheme Amendment (eligibility) Instrument 2022* (the Instrument).

Section 2 Commencement

This section provides that the instrument commences on 1 October 2022.

Section 3 Authority

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

Section 4 Schedule 1 – Amendments

This section 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.

Item 1

This item inserts three new definitions into subsection 4(1) of the instrument. Residential care, residential care service and respite care will now be referenced in the instrument and will all have the same meaning as within the *Aged Care Act 1997*.

Item 2

This item repeals subparagraph 5(2)(c)(i), which currently excludes those with certain ACFI classifications from being eligible for CAPS. The new subparagraph 5(2)(c)(i) will instead exclude all those who are being provided with residential care through a residential care service (other than residential care provided as respite care). This is to reflect that whilst only those with certain ACFI classifications had their continence products provided as part of their care, under AN-ACC all care recipients receiving residential care on a permanent basis through a residential care service will have continence products provided as required.

This amendment ensures that the Scheme continues to exclude those who have their continence aids provided as part of their residential care service. Meaning no-one will be left worse-off as a result of the amendments. Care recipients receiving respite care, flexible care services, and flexible care in the form of short-term restorative care, remain eligible to participate in the Scheme.

Item 3

This item repeals the note at paragraph 5(2)(c). The note refers to classification domains related to ACFI which will no longer be relevant for this instrument.

Item 4

This item amends part of the example in subsection 7(1) which relates to the ACFI classifications and replaces references to the ACFI classifications with a reference to care recipients receiving residential care through a residential care service (other than residential care provided as respite care) or a home care package that includes continence aids, and will refer to paragraph 5(2)(c).

Item 5

After Part 5, a new Part 6 will be added to include transitional arrangements for persons who were, immediately before 1 October 2022, eligible to participate in the Scheme. For these persons, the CAPS instrument, as in force immediately before 1 October 2022, continues to apply to the person until the end of 30 June 2023. This is to ensure persons who are currently eligible and have elected to receive payments in instalments, remain entitled to their second payment regardless of their potential change in eligibility due to amendments, and so are not worse off than those who had received a lump-sum payment. Without these transitional arrangements, the operation of subsection 13(5) of the CAPS instrument would prevent those who elected to receive payments in instalments from receiving their second payment if their eligibility ceased as a result of the amendments.

Item 6

Part 1 of the Schedule will be updated to correct a typographical error in the list of applicable medical conditions. A new line will be inserted between Smooth Muscle Myopathy and Sphincter Deficiency (anal or bladder) and will read as follows:

Smooth Muscle Myopathy

Sphincter Deficiency (anal or bladder)

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 (eligibility) Instrument 2022

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 Legislative Instrument

The *Continence Aids Payment Scheme 2020* provides for a monetary payment to be made to an eligible person, which is intended to contribute towards the cost of purchasing their continence aids.

The purpose of the *Continence Aids Payment Scheme Amendment (eligibility) Instrument 2022* (the Instrument) is to amend the eligibility criteria for the *Continence Aids Payment Scheme 2020* to ensure that care recipients who have continence products provided as part of a residential care service are not additionally eligible for payments under CAPS.

The Instrument includes consequential amendments which are required as a result of the *Aged Care and Other Legislation Amendment Act 2022* amending the *Aged Care Act 1997* and *Aged Care (Transitional Provisions) Act 1997* to enable the introduction of the Australian National Aged Care Classification (AN-ACC) to replace the Aged Care Funding Instrument (ACFI) as the residential aged care subsidy calculation model from 1 October 2022.

Under AN-ACC from 1 October 2022, all care recipients who reside at a residential aged care facility on a permanent basis will receive continence products through their residential care facility, based on need, and will not require financial assistance under the Scheme. Previously under ACFI, only care recipients with certain classifications received continence products as part of their residential care, and so only those classifications were excluded from being eligible for the Scheme.

The instrument also corrects a typographical error in the list of applicable medical conditions.

Human rights implications

This disallowable legislative instrument engages the right to an adequate standard of living in Article 11 and the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12 of the International Covenant on Economic, Social and Cultural Rights.

This instrument excludes care recipients receiving residential care through a residential care service (other than residential care provided as respite care) from participation in the CAPS. 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 their residential care service 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 required to assist in maintaining the highest attainable standard of physical and mental health as part of the residential care service a person is receiving.

Conclusion

The instrument is compatible with human rights as it further promotes the realisation of relevant rights under Articles 11 and 12 of the International Covenant on Economic, Social and Cultural 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.

Hon Anika Wells MP
Minister for Aged Care