

EXPLANATORY STATEMENT

Veterans' Affairs (Treatment Principles – Extending Access to Allied Health and Rehabilitation Appliances for Residential Care Recipients) Amendment Determination 2022

(Instrument 2022 No. R36/MRCC36)

EMPOWERING PROVISIONS

For Part 1 of Schedule 1 of the attached instrument which varies the *MRCA Treatment Principles* (MRCA Treatment Principles) — subsection 286(5) of the *Military Rehabilitation and Compensation Act 2004* (the MRCA).

For Part 2 of Schedule 1 of the attached instrument which varies the *Treatment Principles* (VEA Treatment Principles) — subsection 90(5) of the *Veterans' Entitlements Act 1986* (the VEA).

PURPOSE

The VEA and the MRCA Treatment Principles set out the circumstances in which treatment may be provided to persons who are eligible to receive treatment under the provisions of various Veterans' Affairs portfolio Acts that provide for treatment and similar assistance to be provided to these persons. In addition, the Treatment Principles state the principles and criteria under which the Commissions may arrange, or accept financial responsibility for the cost of, treatment for persons eligible for treatment under the entitling Act.

The Veterans' Affairs (Treatment Principles – Extending Access to Allied Health and Rehabilitation Appliances for Residential Care Recipients) Amendment Determination 2022 (Instrument 2022 No. R36/MRCC36) (the Amendment Instrument) makes variations to the VEA Treatment Principles and the MRCA Treatment Principles – collectively known as the Treatment Principles to:

- Remove the current statutory restrictions based on a resident's classification level under Part 2.4 of the *Aged Care Act 1997* (the Aged Care Act) that statutorily prevents the Commissions from approving allied health care services and provision of rehabilitation aids and appliances for persons with a 'high level of residential care' classification level. From 1 October 2022, the funding of allied health care services, aids and appliances by the Commission for residential care recipients will no longer be restricted by the resident's classification level under Part 2.4 of the Aged Care Act.
- Amend the amount of financial support provided to eligible persons receiving residential care or residential respite care overseas to reflect the payment of an amount equal to the residential care subsidy payable each day for the same period in Australia under a new funding model known as the Australian National Aged Care Classification (the AN-ACC) that commences on 1 October 2022, plus any daily care fee the Commissions would have accepted for the veteran in Australia (if applicable).
- Make minor and other consequential changes related to the above.

Background

The amendments to the Treatment Principles give effect to a 2021-22 Budget measure to permanently expand access to aids and appliances through the Rehabilitation Appliances Program (RAP) and allied health care services from 1 October 2022 for eligible DVA clients in residential aged care. This initiative is linked to the introduction from 1 October 2022 of a new casemix-based residential aged care funding model known as the AN-ACC.

This Budget measure is being led by the Department of Health and Aged Care and is an element of the broader 2021-22 Budget measure: Aged Care — Government response to the Royal Commission into Aged Care Quality and Safety — residential aged care services and sustainability.

These changes form part of the Government's response to the recommendations from the Royal Commission into Aged Care Quality and Safety. Specifically, these changes respond to recommendation 120 that the Government should fund approved providers for delivering residential aged care through a casemix-based classification system such as the AN-ACC.

The measure to expand access to DVA funded allied health services and aids and appliances is a result of the AN-ACC funding reform, and addresses long voiced concerns of the veteran community to ensure the needs of DVA clients in residential aged care are met.

Pre-1 October 2022 funding model

Under the pre-1 October 2022 funding model for residential aged care, generally only eligible DVA clients in residential aged care with a lower classification under Part 2.4 of the Aged Care Act could access DVA-funded allied health services and aids and appliances through the Rehabilitation Appliances Program, as the cost of these services was not factored into the base funding for each resident.

Eligible DVA clients in residential aged care who had higher classification levels under Part 2.4 of the Aged Care Act were able to access equivalent services through the aged care facility, as the cost of these services was factored into the base funding for each resident.

Aged care legislative changes

The *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (the Royal Commission Response Act) amended the Aged Care Act and the *Aged Care (Transitional Provisions) Act 1997* (the Transitional Provisions Act) to enable the introduction of the AN-ACC and to replace the former Aged Care Funding Instrument (the ACFI) as the residential aged care funding model from 1 October 2022.

The *Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022* amended various legislative instruments made under the Aged Care Act and the Transitional Provisions Act to give effect to the amendments made by the Royal Commission Response Act, and to establish the new AN-ACC model as the basis of age care funding from 1 October 2022.

The AN-ACC funding model ceases to link a component of residential care subsidy to the resident's classification level under Part 2.4 of the Aged Care Act (that is, their 'ACFI classification'), and instead links a component of funding to the resident's classification level under Part 2.4A of the Aged Care Act (that is, their 'AN-ACC classification').

Moving to the AN-ACC funding model means that a classification level under Part 2.4 of the Aged Care Act cease to have effect of the funding of residential aged care from 1 October 2022.

In line with this change, from 1 October 2022, access to allied health care services and aids and appliances will be available for eligible DVA clients in residential aged care regardless of their care classification level under either Part 2.4 or 2.4A of the Aged Care Act, provided that the aged care facility is not otherwise funded to provide that service, aid or appliance.

CONSULTATION

Section 17 of the *Legislation Act 2003* requires a rule-maker to be satisfied, before making a legislative instrument that any consultation the rule-maker considered appropriate and reasonably practicable, has been undertaken.

The purpose of these variations to the Treatment Principles is to enable eligible persons in residential aged care to access allied health services, aids and appliances funded by the Department regardless of their care under the new funding model for residential aged care, without duplicating those provided by aged care facility funding. The amendments to the Treatment Principles give effect to the measure to expand access to DVA funded allied health services and aids and appliances as a result of the AN-ACC funding reform, and addresses long voiced concerns of the veteran community to ensure the needs of DVA clients in residential aged care are met.

These changes give effect to a 2021-22 Budget measure being led by the Department of Health and Aged Care. To ensure that these amendments accurately reflect the initiative and give effect to the measure, the Department undertook extensive consultation with Department of Health and Aged Care prior to and throughout the drafting process.

The Department of Health and Aged Care carried out extensive consultation in relation the development of the AN-ACC on which the basis of the changes to the Treatment Principles were made. The residential aged care sector (including consumers) was consulted on the development and implementation of the AN-ACC from 2017 to 2020, with supporting webinars and fact sheets produced since 2021 to parallel the assignment of AN-ACC classifications to care residents. The sector is generally supportive of the model, subject to introduction of the new model not reducing existing funding to residential aged care facilities.

Extensive consultation occurred within business areas within the Department, including policy, program, service delivery and legal services.

In addition, the Department of Health and Aged Care was consulted in the development of the measures in the Amending Instrument.

In these circumstances, it is considered the requirements of section 17 of the *Legislation Act 2003* have been fulfilled.

RETROSPECTIVITY

None.

DOCUMENTS INCORPORATED BY REFERENCE

Section 14 of the *Legislation Act 2003* enables legislative instruments to make provisions for matters by applying, adopting or incorporating matters contained in any other instrument or written document which is in force at the time of incorporation. Subsection 14(2) provides that unless the contrary intention appears, the legislative

instrument may not make provision in relation to a matter by applying, adapting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

Subsection 90(7A) of the VEA and 286(6B) of the MRCA provide legislative support for the Treatment Principles made under these Acts to apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

The Rehabilitation Appliances Program (RAP) National Guidelines (*RAP National Guidelines*) are incorporated by reference into the VEA Treatment Principles and the MRCA Treatment Principles as in force or existing from time to time. The definition of *RAP National Guidelines* is provided under Principle 1.4 and is listed in Schedule 1 to these Principles. Schedule 1 provides that the listed documents are incorporated by reference into the Treatment Principles in the form in which they exist from time to time.

The RAP National Guidelines are publicly available on the department's website, and can be downloaded free of charge using the following link: <https://www.dva.gov.au/providers/rehabilitation-appliances-program-rap/rap-national-guidelines>. This link is the same link that the Amendment Instrument substitutes.

MERITS REVIEW

The availability of independent merits review for administrative decisions under the MRCA and the VEA, and instruments made under these Acts, is specifically provided for under these Acts.

MRCA

Most decisions made by the Military Rehabilitation and Compensation Commission that are "original determinations" under 345(1) of the MRCA can be reconsidered, and be subject to the review by the Veterans Review Board and the Administrative Appeals Tribunal (refer to sections 344 and 345). However, determinations listed under 345(2) of the MRCA, which includes determinations made under Part 3 of Chapter 6 of MRCA (entitlement to treatment), are not original determinations. These determinations are not subject to reconsideration or independent merits review. As such, it is arguable that to include an express merits review provision for these determinations would be beyond the scope of the empowering primary legislation.

VEA

There is no independent merits review available under the VEA in respect of decisions made under the Treatment Principles.

Amendment Instrument

The amendments to both Treatment Principles made under the VEA and MRCA apply to the provision of treatment to eligible DVA clients receiving residential care or residential respite care by health providers under Part 7 and the provision of rehabilitation aids and appliances to these DVA clients under the Rehabilitation Appliances Program.

Eligibility for the services and supply of aids and appliances under the RAP is based on the definition of “entitled persons” which are based on the coverage of the two Act (eg entitled veteran and entitled widow or entitled widower, for example). Once a person’s entitlement is established under the Act, the approval process and limits to the provision of treatment services by health providers under Part 7 and the supply of aids and appliances are generally based on factual information being established. For example, paragraph 7.5.3 provides that prior approval is required for physiotherapy treatment where those services are to be provided in a public hospital.

As a consequence, the application of the criteria, the prior approval requirements and the limits to the provision of the treatment services by health providers under Part 7 and supply of aids and appliances under the RAP can be categorised in accordance with the Administrative Review Council’s publication ‘*What decisions should be subject to merits review?*’ as a type of decision that is, by its nature, unsuitable for merits review or which leaves no room for merits review.

Even, if it is arguably the case that any adverse decision of the Commissions should be independently reviewed, it is generally the practice that delegates of the Commission will review any adverse decisions, including where new information or evidence is provided by the applicant to support their application. In addition, decision makers provide the opportunity to applicants to provide additional evidence to address any preliminary adverse decision notified to them.

It is also noted that the review and appeals pathways are being carefully considered as part of the work currently underway on reform of veterans’ legislation.

REGULATORY IMPACT

The amendments in the Amendment Instrument are consequential to amendments to the Aged Care Act made by the Royal Commission Response Act. The Office of Best Practice Regulation (OBPR) was consulted on the regulatory costs of the amendments introduced by the Royal Commission Response Act, including consequential amendments. OBPR advised that a Regulatory Impact Statement was not required (OBPR ID 25927).

DETAILS / OPERATION

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. A statement of compatibility is set out in [Attachment B](#).

FURTHER EXPLANATION OF PROVISIONS

See [Attachment A](#).

FURTHER EXPLANATION OF PROVISIONS

Section 1

This section sets out the name of the instrument, the *Veterans' Affairs (Treatment Principles – Extending Access to Allied Health and Rehabilitation Appliances for Residential Care Recipients) Amendment Determination 2022*.

Section 2

This section sets out the date on which provisions of the instrument commence.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has had effect according to its terms.

Table item 1 provides that the whole of the instrument commences on 1 October 2022.

A note following this subsection provides that this table relates only to the provision of the instrument as originally made and will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of this Instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

The effect of this section is that the instrument will commence on 1 October 2022 to align with the commencement of the Australian National Aged Care Classification funding model (the AN-ACC) under Part 2.4A of the *Aged Care Act 1997* (the Aged Care Act).

Section 3

This section sets out the legislative authority for the making the instrument.

Section 286 of the *Military Rehabilitation and Compensation Act 2004* provides legislative authority to make amendments to the *MRCA Treatment Principles*.

Section 90 of the *Veterans' Entitlements Act 1986* provides legislative authority to make amendments to the *Treatment Principles (No, R52/2013)*.

Section 4

This section provides each instrument that is specified in a Schedule to this instrument is amended as set out in each of the items set out in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms. Schedule 1 to this instrument makes the changes to the *MRCA Treatment Principles* (as set out in Part 1) and the *Treatment Principles* (as set out in Part 2).

Schedule 1 – Amendments

Part 1—Amendments of the MRCA Treatment Principles made under section 286 of the Military Rehabilitation and Compensation Act 2004

MRCA Treatment Principles

Item 1 Paragraph 1.4.1 (definition of “high level of residential care (respite)”)

Item 1 repeals the definition of “high level of residential care (respite)”.

Currently, paragraph 1.4.1 provides that “high level of residential care (respite)”, means that under the *Classification Principles 2014* (the Classification Principles) the classification level for the person as a care recipient being provided with residential care as respite care is “high level residential respite care”.

This repeal reflects that from 1 October 2022 a new casemix-based funding model known as the Australian National Aged Care Classification funding model (AN-ACC) will be introduced for residential aged care services. Therefore the definition of ‘high level of residential care (respite) classification will no longer be required.

Item 2 Paragraph 1.4.1 (definition of “residential care (consisting of at least one high or two medium domain categories)”)

Item 2 repeals the definition of “residential care (consisting of at least one high or two medium domain categories)”.

Currently paragraph 1.4.1 provides that “residential care (consisting of at least one high or two medium domain categories)” means the care or service provided to a person in residential care who is a person described in paragraph 7(6)(a) of the *Quality of Care Principles 2014* (the Quality of Care Principles).

This repeal reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. Under the AN-ACC, the current care domains of lower and high level of care will cease to have effect on and from 1 October 2022, therefore the definition of ‘residential care (consisting of at least one or two medium domain categories) will no longer be required.

Item 3 Subparagraph 2.2.4(a)(ii)

Item 3 repeals subparagraph 2.2.4(a)(ii) and substitutes a new subparagraph 2.2.4(a)(ii).

New paragraph 2.2.4(a)(ii) refers to an amount equal to the amount of residential care subsidy that would be payable if the member or former member was in Australia, plus any daily care fee that the Commission would have accepted responsibility for if the member or former member was in Australia.

Instead of referring to the amount equal to the amount of residential care subsidy payable for a person given a high level of residential care, the substituted subparagraph 2.2.4(a)(ii) refers to an amount of residential care subsidy that would

have been payable if the member or former member was in Australia for the same period.

This substitution reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. Therefore the reference to high level of residential care will no longer reflect the residential aged care services.

Item 4 Subparagraph 2.2.4(b)(ii)

Item 4 repeals subparagraph 2.2.4(b)(ii) and substitutes a new subparagraph 2.2.4(b)(ii).

New paragraph 2.2.4(b)(ii) refers to an amount equal to the amount of residential care subsidy that would be payable if the member or former member was in Australia, plus any daily care fee that the Commission would have accepted responsibility for if the member or former member was in Australia.

Instead of referring to the amount equal to the amount of residential care subsidy payable for a person given a high level of residential care (respite), the substituted subparagraph 2.2.4(b)(ii) refers to an amount of residential care subsidy that would be payable if the member or former member was in Australia for the same period (not exceeding 63 days in a financial year).

This substitution is a consequential amendment that reflects that item 2 repeals the definition of high level of residential care (respite). Rather than specifying that the person was needed to be in receipt of a high level of residential care (respite), the substituted subparagraph refers to the amount payable if the member or former member was in Australia.

Item 5 Paragraph 7.1.3

Item 5 repeals paragraph 7.1.3 and substitutes a new paragraph 7.1.3.

Currently, paragraph 7.1.3 provides that subject to paragraphs 7.1C.1, 7.5.3, 7.6.2 and 7.6A.2, the Commission will not accept financial responsibility for services listed in paragraph 7.1.2 for an entitled person receiving residential care if the person is a person described in paragraph 7(6)(a) of the Quality of Care Principles.

Paragraph 7(6)(a) of the Quality of Care Principles refers to a care recipient whose classification level includes high ADL domain category, high CHC domain category, high behaviour domain category or a medium domain category in at least 2 domains.

New paragraph 7.1.3 provides that the Commission will not accept financial responsibility for a service listed in paragraph 7.1.2 for an entitled person receiving residential care if the Commission is satisfied that it is more appropriate in the situation that the service is provided by owner or operator of the residential care facility because it is fair for the owner or operator to bear the cost of supplying the service. The appropriateness of the owner or operator providing the service would be due to the funding or subsidies received under Commonwealth, State or Territory legislation.

A note is included after paragraph 7.1.3. The note provides an example that if the Commission is taken to have accepted financial responsibility for amounts in respect of the entitled person's residential care under Part 10 on the basis that those amounts

are intended to cover services listed in paragraph 7.1.2, the Commission will not also accept financial responsibility for those services under paragraph 7.1.2.

For example, if an owner of a residential care facility received funding under Commonwealth legislation in relation to a specific service to be provided to a person in an aged care facility, it may be fair that the owner of the residential care facility bears the cost of supplying the service to the eligible person. This ensures that no duplication of funding in relation to a specified service such as allied health services is made available to a person in an aged care facility.

The effect of the new paragraph is that the Commission will not accept financial responsibility for an allied health service for an entitled person receiving residential care where it is more appropriate for the service to be provided by owner or operator of the residential care facility. This is intended to remove any potential for duplication of services and to ensure that the most appropriate provider, be that the Commission or the owner or operator of the residential care facility, be financially responsible for providing that service.

Item 6 Principle 7.1C

Item 6 repeals Principle 7.1C.

Paragraph 7.1C.1 of Principle 7.1C provides that for treatment provided in the period between 10 December 2020 and 30 June 2022, the Commission accepts financial responsibility for services listed in paragraphs 7.1.2(a), (aa), (b), (c), (dd), (e), (h), (j), (k), (l), (m) and (n) and for treatments between 1 July 2022 and 31 December 2022, the Commission will accept financial responsibility for services listed in paragraphs 7.1.2(e), (l) and (m) in the circumstances set out in paragraph (a) and (b).

The circumstance set out in paragraph (a) is that the entitled person must be receiving residential care as described in paragraph 7(6)(a) of the Quality of Care Principles and the circumstance set out in paragraph (b) is that the services must be provided in accordance with the limits imposed in the relevant section of the Notes for Allied Providers and in the applicable Fee Schedule.

Paragraph 7(6)(a) of the Quality of Care Principles refers to a care recipient whose classification level includes high ADL domain category, high CHC domain category, high behaviour domain category or a medium domain category in at least 2 domains.

This repeal reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. In addition, the fixed period specified in paragraph 7.1C.1 no longer applies, and that allied health services are now available to residential aged care facility patients who are eligible persons without any restriction on the level of care classification of specified patients.

As Part 7.1C only includes paragraph 7.1C.1, Principle 7.1C in its entirety has been repealed.

By removing Principle 7.1C, the Commission will effectively accept financial responsibility for relevant services listed in paragraph 7.1.2 for eligible persons in residential care from 1 October 2022, regardless of their care classification under the AN-ACC and as long as there is no duplication of supplying these services to the eligible person.

Item 7 Paragraph 7.5.3

Item 7 repeals paragraph 7.5.3, including the note, and substitutes a new paragraph 7.5.3.

Paragraph 7.5.3 provides that subject to paragraph 7.1C.1, prior approval is required for physiotherapy treatment where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility or where those services are to be provided in a public hospital.

New paragraph 7.5.3 provides that prior approval is required for physiotherapy treatment where those services are to be provided in a public hospital.

This amendment firstly removes the reference to paragraph 7.1C.1 as a consequence of item 6 repealing Part 7.1C, and secondly reflects that the definition of residential care (consisting of at least one high or two medium domain categories) has been repealed by item 2.

Item 8 Paragraph 7.6.2

Item 8 omits ‘Subject to paragraph 7.1C.1, prior’ and substitutes ‘Prior’ in paragraph 7.6.2.

This amendment is consequential to the amendment made by item 6 that repeals Part 7.1C. As paragraph 7.1C.1 is repealed by item 6, the reference to paragraph 7.6.2 being subject to paragraph 7.1C.1 has been removed.

Item 9 Paragraph 7.6.2(a)

Item 9 repeals paragraph 7.6.2(a).

Paragraph 7.6.2(a) provides that for podiatry treatment, prior approval is required where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility.

This substitution is a consequential amendment that reflects that item 2 repeals the definition of residential care (consisting of at least one high or two medium categories)”.’

As a result of the repeal of paragraph 7.6.2(a), prior approval is now only required for podiatry treatment in the following circumstances: where those services are to be provided in a public hospital, where podiatry treatment involves providing an Electrodynographic Analysis and Report and for podiatry treatment involving delivering services valued at over \$60 under the Miscellaneous Items listed in the Deed of Agreement between the Commission and the podiatrist.

Item 10 Paragraph 7.6.2 (note)

Item 10 repeals the note in paragraph 7.6.2.

The note in paragraph 7.6.2 refers to paragraph 7.1C.1 providing that during 10 December 2020 and 30 June 2022 the Commission will accept financial responsibility for certain services listed in paragraph 7.1.2 (including podiatry) without the requirement for prior approval.

This amendment is consequential to the amendments made by items 6 and 9. Item 6 repeals part 7.1C and item 9 repeals paragraph 7.6.2(a).

Item 11 Paragraph 7.6A.2

Item 11 repeals paragraph 7.6A.2, including the note, and substitutes a new paragraph 7.6A.2.

Paragraph 7.6A.2 provides that subject to paragraph 7.1C.1, prior approval is required for diabetes educator services where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility or where those services are to be provided in a public hospital.

New paragraph 7.6A.2 provides that prior approval is required for diabetes educator services where those services are to be provided in a public hospital.

This amendment firstly removes the reference to paragraph 7.1C.1 as a consequence of item 6 repealing Part 7.1C, and secondly reflects that the definition of residential care (consisting of at least one high or two medium domain categories) has been repealed by item 2.

Item 12 Paragraph 10.3.1(b)

Item 12 omits ‘residential care (consisting of at least one high or two medium domain categories)’ and substitutes ‘residential care’ in paragraph 10.3.1(b).

This substitution is a consequential amendment that reflects that item 2 that repeals the definition of residential care (consisting of at least one high or two medium categories)”.

As a result of this substitution, the Commission may, in exceptional circumstances, accept financial responsibility for the daily care fee for a veteran who has a dependant and is receiving residential care in a residential care facility because of war-caused injury or war-caused disease, or both, without the requirement or limitation that the residential care consist of at least one high or two medium domain categories.

Items 13, 14, 15, 17 Subparagraph 11.3.6(a)(ii) (note), Subparagraph 11.3.6(a)(iv) (note (2)), Subparagraph 11.3.6(b) (note (4)) and Subparagraph 11.3.6(c) (note)

These items omit the link to the website that contains the RAP Schedule of Equipment, and substitutes a new link to the website that contains the RAP Schedule of Equipment.

This amendment is required as the website page containing the RAP Schedule of Equipment has been changed. The RAP Schedule of Equipment can be accessed on the Department’s website by using the new substituted link.

Item 16 Subparagraph 11.3.6(c)(iii) (second occurring)

Item 16 omits “(iii) it is otherwise” and substitutes “(iv) it is otherwise”.

This minor amendment corrects the subparagraph numbering to ensure that the subparagraphs in paragraph 11.3.6(c) are consecutively numbers with no duplications.

There are currently two subparagraphs (iii) in paragraph 11.3.6(c).

Part 2—Amendments of the Treatment Principles made under section 90 of the Veterans’ Entitlements Act 1986

Treatment Principles

Item 18 Paragraph 1.4.1 (definition of “high level of residential care (respite)”)

Item 18 repeals the definition of “high level of residential care (respite)”.

Currently, paragraph 1.4.1 provides that “high level of residential care (respite)” means, under the Classification Principles the classification level for the person as a care recipient being provided with residential care as respite care is “high level residential respite care”.

This repeal reflects that from 1 October a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. Under the AN-ACC, the current care domains of lower and high level of care will cease to exist, therefore the definition of ‘high level of residential care (respite) classification will no longer be required.

Item 19 Paragraph 1.4.1 (definition of “residential care (consisting of at least one high or two medium domain categories)”)

Item 19 repeals the definition of “residential care (consisting of at least one high or two medium domain categories)”.

Currently paragraph 1.4.1 provides that “residential care (consisting of at least one high or two medium domain categories)” means the care or service provided to a person in residential care who is a person described in paragraph 7(6)(a) of the Quality of Care Principles.

This repeal reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. Under the AN-ACC, the current care domains of lower and high level of care will cease to have effect on and from 1 October 2022, therefore the definition of ‘residential care (consisting of at least one or two medium domain categories) will no longer be required.

Item 20 Subparagraph 2.2.4(a)(ii)

Item 20 repeals subparagraph 2.2.4(a)(ii) and substitutes a new subparagraph 2.2.4(a)(ii).

New paragraph 2.2.4(a)(ii) refers to an amount equal to the amount of residential care subsidy that would be payable if the veteran was in Australia, plus any daily care fee that the Commission would have accepted responsibility for if the veteran was in Australia.

Instead of referring to the amount equal to the amount of residential care subsidy payable for a person given a high level of residential care, the substituted subparagraph 2.2.4(a)(ii) refers to an amount of residential care subsidy that would have been payable if the veteran was in Australia for the same period.

This substitution reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. Therefore the reference to high level of residential care will no longer reflect the residential aged care services.

Item 21 Subparagraph 2.2.4(b)(ii)

Item 21 repeals subparagraph 2.2.4(b)(ii) and substitutes a new subparagraph 2.2.4(b)(ii).

New paragraph 2.2.4(b)(ii) refers to an amount equal to the amount of residential care subsidy that would be payable if the veteran was in Australia, plus any daily care fee that the Commission would have accepted responsibility for if the veteran was in Australia.

Instead of referring to the amount equal to the amount of residential care subsidy payable for a person given a high level of residential care (respite), the substituted subparagraph 2.2.4(b)(ii) refers to an amount of residential care subsidy that would be payable if the veteran was in Australia for the same period (not exceeding 63 days in a financial year).

This substitution is a consequential amendment that reflects that item 18 repeals the definition of high level of residential care (respite). Rather than specifying that the person was needed to be in receipt of a high level of residential care (respite), the substituted subparagraph refers to the amount payable if the veteran was in Australia and receiving residential care (respite).

Item 22 Paragraph 7.1.3

Item 22 repeals paragraph 7.1.3 and substitutes a new paragraph 7.1.3.

Currently, paragraph 7.1.3 provides that subject to paragraphs 7.1C.1, 7.5.3, 7.6.2 and 7.6A.2, the Commission will not accept financial responsibility for services listed in paragraph 7.1.2 for an entitled person receiving residential care if the person is a person described in paragraph 7(6)(a) of the Quality of Care Principles.

Paragraph 7(6)(a) of the Quality of Care Principles refers to a care recipient whose classification level includes high ADL domain category, high CHC domain category, high behaviour domain category or a medium domain category in at least 2 domains.

New paragraph 7.1.3 provides that the Commission will not accept financial responsibility for a service listed in paragraph 7.1.2 for an entitled person receiving residential care if the Commission is satisfied that it is more appropriate in the situation that the service is provided by owner or operator of the residential care facility because it is fair for the owner or operator to bear the cost of supplying the service. The appropriateness of the owner or operator providing the service would be due to the funding or subsidies received under Commonwealth, State or Territory legislation.

A note is included after paragraph 7.1.3. The note provides an example that if the Commission is taken to have accepted financial responsibility for amounts in respect of the entitled person's residential care under Part 10 on the basis that those amounts are intended to cover services listed in paragraph 7.1.2, the Commission will not also accept financial responsibility for those services under paragraph 7.1.2.

For example, if an owner of a residential care facility received funding under Commonwealth legislation in relation to a specific service to be provided to a person in an aged care facility, it may be fair that the owner of the residential care facility bears the cost of supplying the service to the eligible person. This ensures that no duplication of funding in relation to a specified service such as allied health services made available to a person in an aged care facility.

The effect of the new paragraph is that the Commission will not accept financial responsibility for an allied health service for an entitled person receiving residential care where it is more appropriate for the service to be provided by owner or operator of the residential care facility. This is intended to remove any potential for duplication of services and to ensure that the most appropriate provider, be that the Commission or the owner or operator of the residential care facility, be financially responsible for providing that service.

Item 23 Principle 7.1C

Item 23 repeals Principle 7.1C.

Paragraph 7.1C.1 of Principle 7.1C provides that for treatment provided in the period between 10 December 2020 and 30 June 2022, the Commission accepts financial responsibility for services listed in paragraphs 7.1.2(a), (aa), (b), (c), (dd), (e), (h), (j), (k), (l), (m) and (n) and for treatments between 1 July 2022 and 31 December 2022, the Commission will accept financial responsibility for services listed in paragraphs 7.1.2(e), (l) and (m) in the circumstances set out in paragraph (a) and (b).

The circumstance set out in paragraph (a) is that the entitled person must be receiving residential care as described in paragraph 7(6)(a) of the Quality of Care Principles and the circumstance set out in paragraph (b) is that the services must be provided in accordance with the limits imposed in the relevant section of the Notes for Allied Providers and in the applicable Fee Schedule.

Paragraph 7(6)(a) of the Quality of Care Principles refers to a care recipient whose classification level includes high ADL domain category, high CHC domain category, high behaviour domain category or a medium domain category in at least 2 domains.

This repeal reflects that from 1 October 2022 a new casemix-based funding model known as the AN-ACC will be introduced for residential aged care services. In addition, the fixed period specified in paragraph 7.1C.1 no longer applies, and that allied health services are now available to aged care facility patients who are eligible persons without any restriction on the level of care classification of specified patients.

As Part 7.IC only includes paragraph 7.1C.1, Principle 7.1C in its entirety has been repealed.

By removing Principle 7.1C, the Commission will effectively accept financial responsibility for relevant services listed in Part 7.1.2 for eligible persons in residential care from 1 October 2022, regardless of their care classification under the AN-ACC and as long as there is no duplication of supplying these services to the eligible person.

Item 24 Paragraph 7.5.3

Item 24 repeals paragraph 7.5.3, including the note, and substitutes a new paragraph 7.5.3.

Paragraph 7.5.3 provides that subject to paragraph 7.1C.1, prior approval is required for physiotherapy treatment where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility or where those services are to be provided in a public hospital.

New paragraph 7.5.3 provides that prior approval is required for physiotherapy treatment where those services are to be provided in a public hospital.

This amendment firstly removes the reference to paragraph 7.1C.1 as a consequence of item 23 repealing Part 7.1C, and secondly reflects that the definition of residential care (consisting of at least one high or two medium domain categories) has been repealed by item 19.

Item 26 Paragraph 7.6.2

Item 26 omits ‘Subject to paragraph 7.1C.1, prior’ and substitutes ‘Prior’ in paragraph 7.6.2.

This amendment is consequential to the amendment made by item 23 that repeals Part 7.1C. As paragraph 7.1C.1 is repealed by item 23, the reference to paragraph 7.6.2 being subject to paragraph 7.1C.1 has been removed.

Item 27 Paragraph 7.6.2(a)

Item 27 repeals paragraph 7.6.2(a).

Paragraph 7.6.2(a) provides that for podiatry treatment, prior approval is required where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility.

This substitution is a consequential amendment that reflects that item 19 repeals the definition of residential care (consisting of at least one high or two medium categories)”.

As a result of the repeal of paragraph 7.6.2(a), prior approval is now only required for podiatry treatment in the following circumstances: where those services are to be provided in a public hospital, where podiatry treatment involves providing an Electrodynographic Analysis and Report and for podiatry treatment involving delivering services valued at over \$60 under the Miscellaneous Items listed in the Deed of Agreement between the Commission and the podiatrist.

Item 27 Paragraph 7.6.2 (note)

Item 27 repeals the note in paragraph 7.6.2.

The note in paragraph 7.6.2 refers to paragraph 7.1C.1 providing that during 10 December 2020 and 30 June 2022 the Commission will accept financial responsibility for certain services listed in paragraph 7.1.2 (including podiatry) without the requirement for prior approval.

This amendment is consequential to the amendments made by items 23 and 26. Item 23 repeals part 7.1C and item 26 repeals paragraph 7.6.2(a).

Item 29 Paragraph 7.6A.2

Item 29 repeals paragraph 7.6A.2, including the note, and substitutes a new paragraph 7.6A.2.

Paragraph 7.6A.2 provides that subject to paragraph 7.1C.1, prior approval is required for diabetes educator services where those services are to be provided to an entitled person receiving residential care (consisting of at least one high or two medium domain categories) in a residential care facility or where those services are to be provided in a public hospital.

New paragraph 7.6A.2 provides that prior approval is required for diabetes educator services where those services are to be provided in a public hospital.

This amendment firstly removes the reference to paragraph 7.1C.1 as a consequence of item 23 repealing Part 7.1C, and secondly reflects that the definition of residential care (consisting of at least one high or two medium domain categories) has been repealed by item 19.

Item 29 Paragraph 10.3.1(b)

Item 29 omits ‘residential care (consisting of at least one high or two medium domain categories)’ and substitutes ‘residential care’ in paragraph 10.3.1(b).

This substitution is a consequential amendment that reflects that item 19 that repeals the definition of residential care (consisting of at least one high or two medium categories)”.

As a result of this substitution, the Commission may, in exceptional circumstances, accept financial responsibility for the daily care fee for a veteran who has a dependant and is receiving residential care in a residential care facility because of war-caused injury or war-caused disease, or both, without the requirement or limitation that the residential care consist of at least one high or two medium domain categories.

Item 30 Paragraph 11.1.1 (note (3)) (second occurring)

Item 30 omits the second occurring ‘Note (3)’ in paragraph 11.1.1 and substitutes ‘Note (4)’

This amendment corrects a previous drafting error by changing a duplicated note (3) to note (4).

Items 31, 32, 33, 35 Subparagraph 11.3.6(a)(ii) (note), Subparagraph 11.3.6(a)(iv) (note (2)), Subparagraph 11.3.6(b) (note (4)) and Subparagraph 11.3.6(c) (note)

These items omit the link to the website that contains the RAP Schedule of Equipment, and substitutes a new link to the website that contains the RAP Schedule of Equipment.

This amendment is required as the website page containing the RAP Schedule of Equipment has been changed. The RAP Schedule of Equipment can be accessed on the Department’s website by using the new substituted link.

Item 34 Subparagraph 11.3.6(c)(iii) (second occurring)

Item 34 omits “(iii) it is otherwise” and substitutes “(iv) it is otherwise”.

This minor amendment corrects the subparagraph numbering to ensure that the subparagraphs in paragraph 11.3.6(c) are consecutively numbers with no duplications.

There are currently two subparagraphs (iii) in paragraph 11.3.6(c).

Statement of Compatibility with Human Rights

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

Veterans' Affairs (Treatment Principles – Extending Access to Allied Health and Rehabilitation Appliances for Residential Care Recipients) Amendment Determination 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 the Determination

The purpose of the Disallowable Legislative Instrument is to amend the Treatment Principles which set out the circumstances in which treatment may be provided to persons who are eligible to receive treatment under the provisions of various Veterans' Affairs portfolio Acts.

The Disallowable Legislative Instrument gives effect to a 2021-22 Budget measure to permanently expand access to aids and appliances through the Rehabilitation Appliances Program (RAP) and allied health care services from 1 October 2022 for eligible DVA clients in residential aged care.

This initiative is linked to the introduction on 1 October 2022 of the new casemix-based residential aged care funding model known as the Australian National Aged Care Classification (or the AN-ACC) through amendments to the *Aged Care Act 1997*, the *Aged Care (Transitional Provisions Act 1997)* and related legislative instruments by the *Aged Care and Other Legislation Amendment (Royal Commission Response Act 2022)* and the *Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022*.

Human rights implications

This Disallowable Legislative Instrument engages Article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the right to health.

The Right to Health

Article 12 of the ICESCR promotes the right of all individuals to enjoy the highest attainable standards of physical and mental health.

The United Nations Committee on Economic, Social and Cultural Rights has stated in General Comment 14 (2000) that health is a 'fundamental human right indispensable for the exercise of other human rights' and that the right to health is not to be understood as the right to be healthy, but rather entails a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the *'highest attainable standard of health'* takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

Article 4 of the ICESCR provides that countries may subject economic, social and cultural rights (such as the right to health) only to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.' The United Nations Committee has stated that such limitations must be proportionate and must be the least restrictive alternative where several types of limitations are available and that even where such limitations are permitted, they should be of limited duration and be subject to review.

Analysis

The Disallowable Legislative Instrument advances the right to health by expanding access to aids and appliances through the Rehabilitation Appliances Program (RAP) and allied health care services for eligible Department of Veterans' Affairs clients in residential aged care.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because it promotes and advances the right to health.

Vicki Rundle
Rule-Maker
Deputy Secretary, Veteran and Family Policy
Department of Veterans' Affairs