

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997

Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2023

Purpose and operation

The *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2023* (Amendment Determination) amends the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Determination 2020* (Principal Determination) to extend a situation of emergency under subsection 42-2A(1) of the *Aged Care Act 1997* (the Act).

Paragraph 42-2(3B)(c) of the Act enables approved providers to remain eligible for residential care subsidy in circumstances where a permanent residential care recipient takes leave during a declared situation of emergency. The Minister for Aged Care (or the Secretary as the delegate of the Minister) may determine a situation of emergency that 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.

The Principal Determination declared a situation of emergency for the period 1 April 2020 to 30 September 2020, therefore making emergency leave available to permanent residential care recipients for this period. This period was subsequently extended further on three occasions, with the most recent extension until 30 June 2023.

Under the Amendment Determination, the situation of emergency will be further extended enabling emergency leave to be available to permanent residential care recipients across Australia until 31 December 2023. This extension provides reassurance to permanent residential care recipients and their families that, given the ongoing unpredictable outbreaks of COVID-19, they will continue to be supported when making decisions about personal health and safety during a situation of emergency.

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 permanent residential care recipient attends hospital, periods of non-hospital leave (also known as social leave) if the number of days on which the permanent residential 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 permanent residential care recipients 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 (or the Secretary as their delegate).

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

- they are absent from the affected service; and
- they are not attending hospital for the purpose of receiving hospital treatment, or they are attending hospital for the purpose of receiving hospital treatment the day before the affected service; and
- the Minister (or the Secretary as their delegate) determines under subsection 42-2A(1) (or subsection 42-2A(5)) of the Act 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 permanent residential 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 permanent residential care recipients have indicated they wish to temporarily relocate with family to reduce their risk of exposure to the virus. The availability of emergency leave avoids permanent residential care recipients 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 that approved providers cannot elect to charge permanent residential care recipients a fee during a declared emergency in order to reserve their place in a residential care service. Whilst not all permanent residential care recipients will need to use this leave, it ensures they 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 permanent residential care recipients under the *Aged Care (Transitional Provisions) Act 1997* by virtue of paragraph 42-2(3B)(c) of that Act.

Authority

Subsection 42-2A(1) of the Act provides that the Minister may 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.

Subsection 42-2A(5) of the Act provides that the Minister may delegate the power to make a determination under subsection 42-2A(1) to the Secretary.

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 commences on the day after it is registered on the Federal Register of Legislation.

Consultation

The Department of Health and Aged Care (Department) has ensured ongoing communication with the aged care sector regarding the availability of emergency leave. Communications will continue with the extension of the situation of emergency period that will apply as a result of the Amendment Determination. The Department has also continued to respond to representations from residents and their families who are concerned about the outbreaks of COVID-19 and their personal safety.

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).

General

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

Details of the Amendment Determination are set out in **Attachment A**.

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

Details of the *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2023*

Section 1 – Name

This section 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 2023*.

Section 2 – Commencement

This section provides that the Amendment Determination commences on the day after the instrument is registered.

Section 3 – Authority

This section provides that the Amendment Determination is made under subsection 42-2A(1) of the *Aged Care Act 1997*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this Amendment Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Amendment Determination 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 2023” and substitutes the date of “31 December 2023”. In effect, this means the determined period for the situation of emergency relating to COVID-19 extends to covering all days from 1 April 2020 to 31 December 2023 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 2023

The *Aged Care (Leave from Residential Care Services) (Situation of Emergency—Human Coronavirus with Pandemic Potential) Amendment Determination 2023* (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*.

Overview of the instrument

Under section 42-2 of the *Aged Care Act 1997* (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 emergency leave from a residential care service (the affected service) on a day if:

- they are absent from the affected service; and
- they are not attending hospital for the purpose of receiving hospital treatment or they are attending hospital for the purpose of receiving hospital treatment the day before the affected service; and
- the Minister (or the Secretary as their delegate) determines under subsection 42-2A(1) (or subsection 42-2A(5)) of the Act 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 permanent residential care recipients have indicated that 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) Determination 2020* declares the ongoing COVID-19 pandemic as a situation of emergency.

The Amendment Determination ensures that emergency leave will continue to be available to permanent residential care recipients across Australia until 31 December 2023.

As the COVID-19 pandemic has had widespread impact in Australia, the Amendment Determination ensures that emergency leave is available to all permanent residential care recipients in Australia. The availability of emergency leave avoids permanent residential care recipients 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 permanent residential care recipients a fee during a declared emergency in order to reserve their place in an aged care service. Whilst not all permanent residential care recipients will need to use this leave, it ensures they 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 permanent residential care recipients 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 and visitor restrictions. These changes have caused high levels of stress for permanent residential care recipients, leading to concern from families about the impact on care recipients physical and mental health and wellbeing.

The Amendment Determination allows permanent residential care recipients who may be concerned about their care, or the safety of their living environment during the COVID-19 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 aged care subsidy for permanent residential care recipients who are absent during the emergency caused by the COVID-19 pandemic, the Australian Government will also reduce any financial pressure that may be placed on permanent residential care recipients who may otherwise be subject to a fee to retain their place in a residential care service if they have already taken 52 days of non-hospital related (social) leave.

Assisting a permanent residential care recipient to retain their place in a residential care service 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.

**The Hon Anika Wells MP
Minister for Aged Care**