

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997 *Aged Care (Transitional Provisions) Act 1997*

Aged Care Legislation Amendment (Outbreak Management Support Supplement) *Instrument 2024*

The *Aged Care Act 1997* (the Aged Care Act), the *Aged Care (Transitional Provisions) Act 1997* (the Transitional Provisions Act) and the *Aged Care Quality and Safety Commission Act 2018* (the ACQSC Act) provide for the regulation and funding of aged care services. Providers who are approved under the ACQSC Act to provide aged care (approved providers) may be eligible to receive subsidy and supplement payments in respect of the care they provide to care recipients who have been approved under the Aged Care Act as recipients of aged care (care recipients). The Aged Care Act and the Transitional Provisions Act provide that, for each type of aged care, the Minister may determine the amount of subsidy and supplements payable to an approved provider for the provision of that type of aged care.

Purpose and operation

The *Aged Care Legislation Amendment (Outbreak Management Support Supplement) Instrument 2024* (Amending Instrument) amends the aged care subordinate legislation to provide for a new supplement (the outbreak management support supplement) to be paid in respect of care recipients receiving residential care and flexible care through a multi-purpose service. The aim of the outbreak management support supplement is to better assist approved providers of residential care with outbreak management support for care recipients.

The outbreak management support supplement will apply in respect of care recipients (who are subject to the Aged Care Act and its legislative instruments) and continuing residential care recipients (who are subject to the Transitional Provisions Act and its legislative instruments).

The Amending Instrument also adjusts the formula used to calculate the amount of flexible care subsidy payable in respect of flexible care that is provided through a multi-purpose service to better assist these providers in their provision of outbreak management support for care recipients.

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014* (Subsidy Principles)
- *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy Determination)
- *Aged Care (Transitional Provisions) Principles 2014* (Transitional Provisions Principles)
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (Transitional Provisions Determination)

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

Background

The introduction of the outbreak management support supplement was announced as part of the 2023-24 Mid-Year Economic and Fiscal Outlook and will provide support for residential care and multi-purpose services to assist approved providers to manage outbreaks of COVID-19 and other infectious disease in 2024.

The Amending Instrument commences on the day after it is registered on the Federal Register of Legislation, with eligibility for the supplement commencing on or after 1 February 2024. The sum of outbreak management support supplement for a care recipient is \$2.81 per day that the care recipient was provided with care.

The outbreak management support supplement is designed to support approved providers of residential care and multi-purpose services to proactively plan for and manage outbreaks of COVID-19 and other infectious disease. This includes the purchase of rapid antigen tests, personal protective equipment and the backfill of shifts for isolating staff. It recognises the Government's ongoing commitment and investment in supporting approved providers in meeting outbreak management costs, including COVID-19, and safeguarding the health and wellbeing of care recipients.

Authority

Under section 96-1 of the Aged Care Act and 96-1 of the Transitional Provisions Act, the Minister may, by legislative instrument, make Principles (as specified in the table in the Aged Care Act by reference to the provisions specified in column 3 of the table). Section 96-1 of both Acts further provides that the Principles may provide for matters required or permitted by Act, or necessary or convenient, in order to give effect to that relevant Part or section of that Act.

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

Consultation

The development of the outbreak management support supplement has been undertaken with consideration of the 2023 COVID-19 Aged Care Support Program Grant.

The department has consulted with the sector on the development of the outbreak management support supplement by engaging with the Aged Care Advisory Group of the Australian Health Protection Principal Committee, the Aged and Community Care Providers Association Ltd and through a sector webinar held on 23 October 2023 and attended by over 500 participants from the sector.

General

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

Details of this Amending Instrument are set out in **Attachment A**.

This Amending Instrument 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 Legislation Amendment (Outbreak Management Support Supplement) Instrument 2024

Section 1 – Name

Section 1 provides that the name of the Amending Instrument is the *Aged Care Legislation Amendment (Outbreak Management Support Supplement) Instrument 2024*.

Section 2 – Commencement

Section 2 provides that the Amending Instrument commences on the day after it is registered.

Section 3 – Authority

Section 3 provides the authority for making the Amending Instrument is the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

Section 4 – Schedule

Section 4 provides that each instrument that is specified in a Schedule to the Amending Instrument is amended or repealed as set out in the applicable items in the relevant Schedule and other items in the Schedules have effect according to its terms.

SCHEDULE 1— Amendments

Schedule 1 amends the following legislative instruments to introduce the outbreak management support supplement for care recipients receiving residential care in a residential care service or flexible care delivered through a multi-purpose service:

- *Subsidy Principles 2014* (Subsidy Principles).
- *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy Determination)
- *Aged Care (Transitional Provisions) Principles 2014* (Transitional Provisions Principles)
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (Transitional Principles Determination).

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 1 – At the end of Part 7 of Chapter 2A

This item inserts a new Division 7 to Chapter 2A of the Subsidy Determination.

New section 64ZV provides that, for the purposes of subsection 44-27(3) of the Aged Care Act, the amount of the outbreak management support supplement for a day for a care recipient is \$2.81.

A note to section 64ZV explains to the reader that the outbreak management support supplement is set out in Subdivision L of Division 5 of Part 3 of Chapter 2 of the *Subsidy Principles 2014*, which also deals with eligibility for the supplement.

The amount of the outbreak management support supplement is calculated on the basis that the amount is the same for each day of residential care a care recipient receives at a residential care service during a particular payment period. The amount has been calculated as a contribution towards outbreak management, taking into account the financial costs associated with maintaining increased infection prevention control practices, including the cost of rapid antigen tests, personal protective equipment and the backfill of shifts for staff. This reasoning applies in relation to item 4 and item 7.

Item 2—Section 91 (formula)

This item repeals the existing formula used to calculate the amount of flexible care subsidy payable for a day in respect of flexible care that is provided through a multi-purpose service and replaces it with a new formula that adds in the *outbreak management support supplement amount* in section 91 of the Subsidy Determination, and substitutes it with the following formula:

$$\text{HCA} + \text{LCA} + \text{HMA} + \text{RSEA} + \text{DEA} + \text{VEA} + \text{DVEA} + \text{HMAA} + \text{ACWSA} + \text{OMSA}$$

The effect of section 91 is that the new aged care outbreak management support supplement amount is added as an additional amount to be calculated in the formula for determining the amount of flexible care subsidy payable for a day for flexible care provided through a multi-purpose service.

Item 3—Section 91 (after the definition of LCA)

This item amends section 91 of the Subsidy Determination and explains that OMSA in the formula inserted at item 2 above is the amount worked out by multiplying:

- (a) the amount that applies under section 96B for the day for a place allocated in respect of the service; and
- (b) the number of places allocated in respect of the service that are not provisionally allocated.

Item 4— At the end of Division 3 of Part 1 of Chapter 4

This item inserts new section 96B to the Subsidy Determination and provides that the amount of the outbreak management support supplement for a day for a place allocated in respect of a multi-purpose service is:

- (a) for a day on or after 1 February 2024—\$2.81; and
- (b) for any other day—nil.

The outbreak management support supplement will replace the current grant process with eligibility of the outbreak management support supplement commencing on and from 1 February 2024.

The Government will continue to deploy personal protective equipment and rapid antigen test kits, from the National Medical Stockpile to residential aged care facilities up to 30 April 2024.

The amount of the outbreak management support supplement is calculated on the basis that the amount is the same for each day of flexible care provided for a place allocated in respect of a multi-purpose service during a particular payment period.

Aged Care (Transitional Provisions) Principles 2014

Item 5 – At the end of paragraph 17(h)

Item 5 inserts new subparagraph 17(h)(ix) to the Transitional Provisions Principles. Section 17 provides that the purpose of Part 3 of Chapter 2 of the Transitional Provisions Principles is to set out matters in relation to the amount of residential care subsidy payable to an approved provider of a residential care service in respect of a continuing residential care recipient (see below) who is being provided with residential care through the service, including in paragraph 17(h) the other supplements that may apply to the continuing residential care recipient.

New subparagraph 17(h)(ix) makes clear that an ‘other supplement’ that may apply to a continuing care recipient as part of the residential care subsidy is the outbreak management support supplement.

Item 6 – At the end of Division 8 of Part 3 of Chapter 2

This item inserts new section 64H under a new Subdivision K into Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles. This introduces an additional other supplement, the outbreak management support supplement.

In particular, new section 64H provides that, for the purposes of paragraph 44-27(1)(e) of the Transitional Provisions Act, the outbreak management support supplement for a care recipient in respect of a payment period beginning on or after 1 February 2024 is the sum of all the outbreak management support supplement for the days during the period on which the care recipient was provided with residential care through the residential care service in question.

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014

Item 7 – At the end of Part 5 of Chapter 3

This item inserts a new Division 7 at the end of Part 5, Chapter 3 of the Subsidy Determination. New Division 7 deals with matters relating to the outbreak management support supplement.

This item also inserts a new section 91T to the Subsidy Determination that provides, for the purposes of subsection 44-27(3) of the Transitional Provisions Act, the amount of the outbreak management support supplement for a day for a care recipient is \$2.81.

A note to section 91T explains to the reader that the outbreak management support supplement is set out in Subdivision K of Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles, which also deals with eligibility for the supplement.

Subsidy Principles 2014

Item 8 – At the end of paragraph 20(e)

Item 8 inserts new subparagraph 20(e)(x) to include the outbreak management support supplement as an ‘other supplement’ that may apply to a care recipient receiving residential care. Section 20 provides that the purpose of Part 3 of Chapter 2 of the Subsidy Principles is to set out matters in relation to the amount of residential care subsidy payable to an approved provider of a residential care service in respect of a care recipient who is being provided with residential care through the service, including any other supplements under paragraph 20(e) that may apply to the care recipient.

Item 9 – At the end of Division 5 of Part 3 of Chapter 2

Item 9 inserts a new Subdivision L into Division 5 of Part 3 of Chapter 2 of the Subsidy Principles. This introduces an additional other supplement, the outbreak management support supplement.

This item also inserts new section 70AN to the Subsidy Principles, which deals with the outbreak management support supplement, that provides that, for the purposes of paragraph 44-27(1)(c) of the Aged Care Act, the outbreak management support supplement for a care recipient in respect of a payment period beginning on or after 1 February 2024 is the sum all the outbreak management support supplements for the days during the period on which:

- (a) the care recipient was provided with residential care through the residential care service in question; and
- (b) the care recipient was eligible for an outbreak management support supplement under new section 70AO.

This item also inserts a new section 70AO, which deals with eligibility for outbreak management support supplement.

Subsection 70AO(1) provides that a care recipient is eligible for an outbreak management support supplement on a particular day if, on that day, the care recipient is being provided with residential care other than as respite care.

Subsection 70AO(2) provides that a care recipient is also eligible for an outbreak management support supplement on a particular day if, on that day:

- (a) the care recipient is being provided with residential care as respite care;
- and

(b) under Division 3 of Part 3 of Chapter 2A of the Subsidy Determination, the basic subsidy amount for the day for the care recipient is not nil.

The reference in subsection 70AO(2) to Division 3 of Part 3 of Chapter 2A of the Subsidy Determination means that a care recipient is not eligible for an outbreak management support supplement if the care recipient is being provided with residential care as respite care on that day and that the care recipient has previously been provided with residential care as respite care on a number of days during the financial year that is more than a number of days set out in paragraph 23(1)(c) of the Subsidy Principles. The practical effect of subsection 70AO(2) is that conditions for payment of an amount of outbreak management support supplement align with those for payment of basic subsidy, and, also as intended, for payment of respite supplement.

To avoid doubt, an equivalent rule does not apply to eligibility of continuing residential care recipients for outbreak management support supplement (see item 7), as continuing residential care recipients cannot, in practice, receive residential respite care.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Outbreak Management Support Supplement) Instrument 2024

This 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) Act 2011*.

Overview of the instrument

The *Aged Care Legislation Amendment (Outbreak Management Support Supplement) Instrument 2024* (Amending Instrument) amends aged care subordinate legislation to provide for a new residential care supplement:

- *Outbreak Management support supplement*, to better assist approved providers of residential care and flexible care through a multi-purpose service with outbreak management support for care recipients.

This supplement is enacted in substantially the same form in respect of care recipients (who are subject to the Aged Care Act and its legislative instruments) and continuing residential care recipients (who are subject to the Transitional Provisions Act and its legislative instruments).

The Amending Instrument also adjusts the formula used to calculate the amount of flexible care subsidy payable in respect of flexible care that is provided through a multi-purpose service to better assist these providers in their provision of outbreak management support to care recipients.

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014* (Subsidy Principles).
- *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy Determination)
- *Aged Care (Transitional Provisions) Principles 2014* (Transitional Provisions Principles)
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (Transitional Principles Determination).

Human rights implications

Schedule 1 to the Amending Instrument engages the right to the enjoyment of the highest attainable standard of physical and mental health as contained in article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and article 25 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

Right to health

The right to health under article 12 of the ICESCR, includes the prevention, treatment and control of epidemic, endemic, occupational, and other diseases. The Amending Instrument does this by promoting environmental and industrial hygiene. In addition, it supports the prevention, treatment and control of epidemic, endemic, occupational and

other diseases by providing a contribution to managing outbreaks of COVID-19 and other infectious disease.

The Amending Instrument also promotes Article 25 of the CRPD by promoting the health of care recipients with a disability by contributing towards the costs associated with outbreak management, including the purchase of rapid antigen tests, personal protective equipment and the backfill of shifts for isolating staff.

The Amending Instrument gives effect to measures announced on 23 October 2023 by the Minister for Aged Care regarding funding increases in aged care. The additional funding will support approved providers to maintain high infection, prevention, and control standards to prevent and also respond to outbreaks of COVID-19 and other infectious disease. if, and when they occur.

The Government recognises aged care is a critical sector and people living in residential care services are amongst the most vulnerable in the community. The Amending Instrument increases the number of subsidies and supplements payable to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.

Conclusion

The Amending Instrument is compatible with human rights as it promotes the human rights of care recipients to the highest attainable standard of physical and mental health.

The Hon Anika Wells MP
Minister for Aged Care