

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*Social Security (Administration) Act 1999*

*Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Amendment (Military Invalidation Pension Income Streams) Specification 2024*

### **Purpose**

The *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Amendment (Military Invalidation Pension Income Streams) Specification 2024* (the Specification) amends the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Specification 2017* (the current instrument) to prescribe circumstances in which the Secretary may require a person to provide information about a military invalidity pension income stream received by a person, for social security purposes.

### **Background**

The *Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Bill 2024* (the Bill) was introduced into Parliament on 15 February 2024. The Bill proposes to amend the *Social Security Act 1991* (Social Security Act) to confirm the treatment of certain military invalidity payments affected by the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (*Douglas*) in the means test for income support payments.

A consequence of the findings in *Douglas* was that the affected military invalidity payments could no longer be classified or means tested for income support purposes under the Social Security Act in the same way as they had historically been treated. The Bill seeks to resolve this by inserting a new income stream classification and assessment regime into the Social Security Act for these payments. The affected payments would be classified as “military invalidity pension income streams” (see proposed new subsection 9(1G) and section 9BB of the Social Security Act).

The new provisions are designed to produce the same assessment of income as the historical assessments of the affected invalidity payments, and to ensure the invalidity payments continue to be treated as exempt from the assets test. These arrangements are intended to ensure veterans and/or their partners receive a level of support that is consistent with the intent of legislation and policy before the unexpected findings of the *Douglas* decision.

The new framework, contained in proposed subsection 1099AAA(1) of the Social Security Act, contains a formula for working out the amount of income to be assessed from a military invalidity pension income stream for income support purposes. This would involve subtracting the “special reduction amount” from the annual payment payable to the person under the income stream.

The “special reduction amount” is intended to be equivalent to what the “tax free components” of the income streams would be under Subdivision 307-C of the *Income Tax Assessment Act 1997*, if the income streams were assumed to be “superannuation income streams” for the purposes of the *Income Tax Assessment Act 1997*.

In order for proposed new subsection 1099AAA(1) of the Social Security Act to operate effectively, it is intended that the Secretary will be able to require persons (such as military invalidity pension income stream providers) to provide relevant information on an ongoing basis. Currently, in accordance with section 195 of the *Social Security (Administration) Act 1999*, the Secretary may require a person to give certain information about a class of persons to the Department for particular purposes relevant to the social security law. This includes information in relation to an income stream received by a person, as specified in paragraph 195(2)(ja) and the current instrument.

However, there is currently no authority for the Secretary to require information from a person in relation to a military invalidity pension income stream, given this would be a new category of income stream introduced by the amendments in the Bill. The previous authority for requiring such information relates to the pre-*Douglas* categorisation of these payments as “defined benefit income streams” that are also “asset-test exempt income streams”.

For example, subparagraph 195(2)(ja)(xviii) of the *Social Security (Administration) Act 1999* enables the Secretary to require a person to provide information about the deductible amount of a defined benefit income stream. Similarly, subparagraph 5(xvii) of the current instrument enables the Secretary to require information about the gross fortnightly payment made under a defined benefit income stream.

This Specification inserts similar provisions into the current instrument, to enable the Secretary to require information about the gross fortnightly payment and the special reduction amount in the case of military invalidity pension income streams. Consistent with the intention of the broader amendments proposed to be made by the Bill, this creates a legislative basis for the Secretary to require persons to provide the types of information needed to calculate ordinary income from military invalidity pension income streams for means testing purposes.

## **Commencement**

The Specification will commence at the same time as the *Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Act 2024* commences. However, if that Act does not commence, then the provisions in the Specification will not commence at all.

## **Consultation**

The Department of Social Services consulted with the Commonwealth Superannuation Corporation and Services Australia on the text of the Specification.

The Department also consulted with the Department of Veterans’ Affairs on the intention to make the Specification.

## Impact Analysis

An Impact Analysis is not required, as the Specification is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact (OIA23-05973).

## Explanation of the provisions

**Section 1** states that the name of the Specification is the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Amendment (Military Invalidation Pension Income Streams) Specification 2024*.

**Section 2** prescribes that the Specification will commence at the same time as the *Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Act 2024*. However, the provisions in the Specification will not commence at all, if that Act does not commence.

As the Specification is required to enable the proposed new income assessment regime to operate in relation to military invalidity pension income streams, the Specification will not be needed unless the *Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Act 2024* actually commences.

**Section 3** provides that the Specification is made under subsection 195(3A) of the *Social Security (Administration) Act 1999*.

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. In making the Specification, the Minister is relying on this subsection in conjunction with the instrument-making power in subsection 195(3A) of the *Social Security (Administration) Act 1999*.

**Section 4** prescribes 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. Section 4 gives effect to the amendments made to the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Specification 2017* by Schedule 1 to the Specification.

## Schedule 1 – Amendments

**Item 1** inserts a definition of “special reduction amount” into the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Specification 2017*. This new definition refers the reader to the definition of special reduction amount in proposed new subsection 1099AAA(1) of the Social Security Act.

**Item 2** repeals and substitutes a new subparagraph 5(xvii) to include a reference to “military invalidity pension income stream” in addition to “defined benefit income

stream". This amendment enables the Secretary to require a person to provide information about the gross fortnightly payment made under a military invalidity pension income stream, for the purposes of the proposed new means testing arrangements for these income streams in the Social Security Act.

**Item 3** makes a technical amendment to facilitate the amendments made by item 4 below.

**Item 4** inserts a new subparagraph 5(xix) into section 5 of the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Specification 2017*. This new provision enables the Secretary to require a person to provide specific information about the "special reduction amount" of a military invalidity pension income stream, for the purposes of the proposed new means testing arrangements for these income streams in the Social Security Act. This information is the special reduction amount for the year in which the notice is given, and the method used to work out the amounts that would be the tax free components for the purposes of determining that special reduction amount.

## **Statement of Compatibility with Human Rights**

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

### **Social Security (Administration) Act 1999**

#### **Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Amendment (Military Invalidation Pension Income Streams) Specification 2024**

The *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Amendment (Military Invalidation Pension Income Streams) Specification 2024* (the Specification) 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 legislative instrument**

The Specification amends the *Social Security (Obtaining Information to Verify Claims – Income Stream Recipients) Specification 2017* to prescribe circumstances in which the Secretary may require a person to provide information about a military invalidity pension income stream received by a person, for social security purposes.

These amendments to the Specification anticipate proposed amendments to the *Social Security Act 1991* contained in the Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Bill 2024 (the Bill). These amendments are intended to respond to the impact of the Full Federal Court decision in *Commissioner of Taxation v Douglas* (the *Douglas* decision) on the treatment of certain military invalidity superannuation benefits within the means test for income support payments.

Prior to the *Douglas* decision, the authority for requiring such information for the invalidity superannuation payments rested on their categorisation as defined benefit income streams that were also asset-test exempt income streams. After the *Douglas* decision, the affected payments can no longer be categorised in this way for means testing purposes.

The Bill proposes to make amendments to the *Social Security Act 1991* to introduce a new category of income stream, known as a “military invalidity pension income stream”, that will include the affected invalidity payments. Consequential amendments to the Specification are required to ensure specific information pertaining to military invalidity pension income streams can be provided to the Department for particular social security purposes.

#### **Human rights implications**

The Specification engages the right to social security contained in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the right to an adequate standard of living contained in Article 11 of the ICESCR.

Article 9 requires that a system be established under domestic law and that public authorities must take responsibility for the effective administration of the system. The

social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

Article 11 recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions.

Article 4 of the ICESCR provides that countries may limit the right to social security in a way determined by law only in so far as this may be compatible with the nature of the rights contained within the ICESCR and solely for the purpose of promoting general welfare in a democratic society. Such a limitation must be proportionate to the objective to be achieved.

The *Social Security Act 1991* and *Social Security (Administration) Act 1999* help to facilitate the process of providing access to income support payments through equity measures based on meeting specified criteria, including income and assets tests. The amendments to the Specification ensures *Douglas*-affected veterans and their partners can continue to receive appropriate social security benefits to support an adequate standard of living, consistent with their means of self-support.

## **Conclusion**

The Specification is compatible with human rights as it promotes and supports the right to social security and the right to an adequate standard of living. To the extent a human rights obligation is engaged or limited, the impact is for a legitimate objective and is necessary and proportionate.

**The Hon Amanda Rishworth MP, Minister for Social Services**