

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

### ***Social Security Act 1991***

#### ***Social Security (Personal Care Support) (NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs) Determination 2024***

#### **Purpose**

The *Social Security (Personal Care Support) (NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs) Determination 2024* (the Determination) provides that the New South Wales (NSW) Lifetime Care and Support Scheme - direct funding of treatment and care needs (the funding scheme), established pursuant to subsection 11A(4) of the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) (the NSW Act), is an approved scheme under section 35A of the *Social Security Act 1991* (the Act).

A person who receives a payment under the funding scheme may also receive social security payments, if they meet all other eligibility requirements. The Determination has the effect that payments under the funding scheme are not taken to be income for the purposes of the income test under the social security law. This ensures that a person's entitlement to a social security payment is not affected by receiving personal care support services through the funding scheme and the operation of the income test.

Similarly, the Determination will also have the effect that a person's funding scheme payment is not assessed as income for the purposes of means tested payments under the *Veterans' Entitlements Act 1986*.

#### **Background**

When determining a person's eligibility for a social security payment, an income and assets test applies. Income is defined in subsection 8(1) of the Act, and includes any income amount earned, derived or received for a person's own use or benefit, a periodical payment by way of gift or allowance or a periodical benefit by way of gift or allowance.

However, the Act specifically exempts some amounts that would otherwise be income for the purposes of the income test. Paragraph 8(8)(zi) of the Act provides that a payment towards the cost of personal care support services for a person, being a payment made under a scheme approved under section 35A, is not income for the purposes of the Act.

Section 35A of the Act allows the Minister to determine in writing that a scheme for the provision of personal care support is an "approved scheme" for the purposes of the Act.

## *NSW Lifetime Care and Support Scheme - direct funding of treatment and care needs*

The NSW Act provides for the payment of reasonable expenses for the treatment and care needs of persons injured in motor accidents. The NSW Act established the Lifetime Care and Support Authority of New South Wales (the Authority), which administers the making of payments under the Lifetime Care and Support Scheme. A person who has suffered a motor accident injury may be eligible to participate in the Lifetime Care and Support Scheme in respect of the injury. The Authority has advised that this Scheme is intended to ensure that a person who has been injured in a motor accident in NSW is not out-of-pocket in relation to any of the expenses which they reasonably incur in obtaining treatment and care for their injury. The Scheme is intended to support the participant in their home and in the community, but does not provide them with income support.

The funding scheme forms a component of the Lifetime Care and Support Scheme. Under subsection 11A(1) of the NSW Act, the Authority is obliged to pay for all the reasonable expenses incurred in relation to the assessed treatment and care needs of a participant in the Lifetime Care and Support Scheme. However, the Authority may, under subsection 11A(4) of the NSW Act, pay the participant an amount to cover those expenses over a fixed period, pursuant to an agreement between the Authority and the participant. This category of payment is provided through the funding scheme.

This Determination exempts these funding scheme payments from being considered as income, and therefore being subject to the income test, for the purposes of the Act. The funding scheme has been an approved personal care support scheme under section 35A of the Act, in accordance with the current determination, the *Social Security (Personal Care Support – NSW Lifetime Care and Support Scheme – direct funding of treatment, rehabilitation and care services) Determination 2014* (2014 Determination). This is due to sunset on 1 October 2024. The Determination repeals and remakes the previous determination in similar terms.

### **Commencement**

This Determination will commence on the day after it is registered on the Federal Register of Legislation.

### **Authority**

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument. The Minister has the power under section 35A of the Act to repeal the current instrument and make the Determination.

## Consultation

The Department of Social Services consulted with the Lifetime Care and Support Authority of New South Wales on the text of the Determination, given that agency's responsibility for administering the funding scheme. The Authority supported the Determination being made.

The Department of Social Services consulted with Services Australia, the Department of Veterans' Affairs and the Department of Agriculture, Fisheries and Forestry on the intention to make the Determination, given the impact on income support recipients. These agencies did not raise any concerns.

The Department of Social Services did not consult with income support recipients likely to be affected by the Determination, given the beneficial nature of the Determination on affected income support recipients. The Determination is made in similar terms and serves the same purpose as the 2014 Determination.

## Impact Analysis

The Department of Social Services consulted with the Office of Impact Analysis who confirmed an Impact Analysis is not required (OIA24-07705). The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

## Availability of independent review

A decision made under the social security law, as informed by the Determination, is subject to internal and external review under Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to disallowance.

## Explanation of the provisions

**Section 1** states that the name of the Determination is the *Social Security (Personal Care Support) (NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs) Determination 2024*.

**Section 2** prescribes that the Determination commences on the day after it is registered.

**Section 3** provides that the Determination is made under section 35A of the Act.

**Section 4** provides that each instrument that is specified in a Schedule to the 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 5** provides that the scheme for the provision of personal care support known as the NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs, as established under subsection 11A(4) of the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), is an approved scheme for the purposes of section 35A of the Act.

Section 5 has the effect that a payment towards the cost of personal care support services for a person, that is made under the approved scheme, will not be assessed as income for the purposes of the social security income test (paragraph 8(8)(zi) of the Act). Similarly, such payments will not be included in the income test for means tested payments under the *Veterans' Entitlements Act 1986* (paragraph 5H(8)(ya)).

### **Schedule 1 – Repeals**

**Item 1** repeals the whole of the *Social Security (Personal Care Support – NSW Lifetime Care and Support Scheme – direct funding of treatment, rehabilitation and care services) Determination 2014*. The Determination remakes this sunseting instrument in similar terms. It is not intended that there are any changes to the approval of the scheme specified in the repealed instrument.

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

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

### **Social Security Act 1991**

#### **Social Security (Personal Care Support) (NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs) Determination 2024**

The *Social Security (Personal Care Support) (NSW Lifetime Care and Support Scheme – direct funding of treatment and care needs) Determination 2024* (the 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 Determination**

The Determination provides that the New South Wales (NSW) Lifetime Care and Support Scheme - direct funding of treatment and care needs is an approved scheme under section 35A of the *Social Security Act 1991* (the Act).

The Lifetime Care and Support Authority of NSW (the Authority) administers the making of payments under the NSW Lifetime Care and Support Scheme. A person who has suffered a motor accident injury may be eligible to be a participant in the Scheme in respect of the injury. The intended outcome of the Scheme is to ensure that a person who has been injured in a motor accident in NSW is not out-of-pocket in relation to any of the expenses which they reasonably incur in obtaining treatment and care for their injury.

As an alternative to the Authority paying for the participant's treatment and care needs as and when those expenses are incurred, the Authority may pay an amount to the participant to cover those expenses over a fixed period, pursuant to an agreement between the Authority and the participant. This is provided in subsection 11A(4) of the *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).

The Determination ensures that people receiving direct funding under this provision for the cost of personal care support services will not have this funding assessed as income for social security and veterans' entitlements purposes.

#### **Human rights implications**

This Determination engages the right to social security and the right to an adequate standard of living.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to social security and requires a social security scheme to be established under domestic law that provides a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

Article 11 of the ICESCR recognises the right to an adequate standard of living, which provides that everyone is entitled to adequate food, clothing and housing and to the continuous improvement of living conditions.

Section 35A of the Act allows the Minister for Social Services to approve a personal care support scheme, which means that payments provided to a person under such a scheme are exempt from the social security income test under the Act. The exemption also flows through to means tested payments under the *Veterans' Entitlements Act 1986*. The Determination is therefore beneficial to persons who receive income support payments as it ensures that individuals receiving a payment for personal care support from the approved personal care support scheme do not have this payment assessed for income test purposes.

### **Conclusion**

The Determination is compatible with human rights as it supports the right to social security and the right to an adequate standard of living.

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