

EXPLANATORY STATEMENT

National Health Act 1953

Continence Aids Payment Scheme Amendment (Administrative Review Tribunal) Instrument 2024

Purpose and operation

The *Continence Aids Payment Scheme 2020* (CAPS) provides for a monetary payment (CAPS payment) to be made to an eligible person, which is intended to contribute towards the cost of purchasing their continence aids.

The *Continence Aids Payment Scheme Amendment (Administrative Review Tribunal) Instrument 2024* (the Instrument) amends the *Continence Aids Payment Scheme 2020* by replacing references to the Administrative Appeals Tribunal with the newly established Administrative Review Tribunal.

The *Administrative Review Tribunal Act 2024* establishes the new Administrative Review Tribunal which replaces the Administrative Appeals Tribunal. As such, existing references to the Administrative Appeals Tribunal have been replaced with the Administrative Review Tribunal in the Instrument. The Instrument provides that persons aggrieved by decisions made by the Chief Executive Medicare under sections 6 or 9 of CAPS may seek a review by the Administrative Review Tribunal of that decision under section 25 of CAPS. Similarly, persons aggrieved by decisions made by the Secretary of the Department of Health and Aged Care under subsections 21(1), 21(3) or 22(7) of the CAPS may seek a review by the Administrative Review Tribunal of that decision under section 26 of CAPS.

Authority

The Instrument is made under section 12 of the *National Health Act 1953* (the Act). Section 12(4) of the Act provides that the Minister may, by legislative instrument, provide that applications may currently be made to the Administrative Appeals Tribunal for review of decisions made in the exercise of powers conferred by the instrument.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

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.

Commencement

The Instrument commences on 14 October 2024.

Consultation

The *Administrative Review Tribunal Act 2024* (ART Act) will commence on 14 October 2024. The Attorney-General's Department has led extensive consultation on the ART Act

and further consequential amendments. The amendments in the Instrument give effect to the new Administrative Review Tribunal and commence in alignment with the commencement date of the Administrative Review Tribunal. Due to the minor nature of the amendments to the Instrument, further consultation was considered unnecessary.

General

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

Details of the Instrument are set out in **Attachment A**.

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

***Continence Aids Payment Scheme Amendment (Administrative Review Tribunal)
Instrument 2024***

Section 1 – Name

This section provides that the name of the Instrument is the *Continence Aids Payment Scheme Amendment (Administrative Review Tribunal) Instrument 2024*.

Section 2 – Commencement

This section provides that the Instrument commences on 14 October 2024.

Section 3 – Authority

This section provides that the Instrument is made under section 12 of the *National Health Act 1953*.

Section 4 – Schedule

This section 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.

Schedule 1 – Amendments

Continence Aids Payment Scheme 2020

Item 1 – Subsection 25(2) (note):

Item 1 omits “Administrative Appeals Tribunal” from the note in subsection 25(2) of the *Continence Aids Payment Scheme 2020* and substitutes it with “Administrative Review Tribunal”.

This replaces the existing Administrative Appeals Tribunal reference with the new Administrative Review Tribunal.

Item 2 – Paragraph 26(6)(d)

Item 2 omits “, within 28 days after receiving the notice, the person or organisation may apply to the Administrative Appeals Tribunal” from paragraph 26(6)(d) of the *Continence Aids Payment Scheme 2020* and substitutes it with “the person may apply to the Administrative Review Tribunal”.

This removes the existing requirement of 28 days after receiving the notice, for an aggrieved person to apply to the Administrative Review Tribunal for a review of the Secretary’s decision.

Item 3 – Subsection 26(7)

Item 3 omits “Administrative Appeals Tribunal” from subsection 26(7) of the *Continence Aids Payment Scheme 2020* and substitutes it with “Administrative Review Tribunal”.

This replaces the existing Administrative Appeals Tribunal reference with the new Administrative Review Tribunal.

Statement of Compatibility with Human Rights

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

*Continence Aids Payment Scheme Amendment (Administrative Review Tribunal) Instrument
2024*

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 Legislative Instrument

The *Continence Aids Payment Scheme 2020 (CAPS)* provides for a monetary payment (CAPS payment) to be made to an eligible person which is intended to contribute to their costs in purchasing continence aids.

The purpose of the *Continence Aids Payment Scheme Amendment (Administrative Review Tribunal) Instrument 2024* (the Instrument) is to replace references from the existing Administrative Appeals Tribunal with the new Administrative Review Tribunal from 14 October 2024.

Human rights implications

The Instrument engages the right to an adequate standard of living in Article 11(1) and the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The purpose of the CAPS reflects the preambular language of the ICESCR inasmuch it relates to the “inherent dignity of the human person”. The CAPS provides subsidised access to continence aids for individuals covered under the Scheme, provides dignity and sanitary protection for those suffering from permanent or severe incontinence, particularly for individuals who would have limited or no access to continence aids because of their financial circumstances. This supports the right to an “adequate standard of living” for the purposes of Article 11(1) of the ICESCR.

The Instrument replaces references to the existing Administrative Appeals Tribunal with the new Administrative Review Tribunal. The Instrument provides that persons aggrieved by decisions made by the Chief Executive Medicare under sections 6 or 9 of CAPS may seek a review by the Administrative Review Tribunal of that decision under section 25 of CAPS. Sections 6 of the CAPS relates to application to, and approval, the Chief Executive Medicare of a person to participate in the Scheme where eligibility criteria are met and section 9 which relates to a decision of the Chief Executive Medicare that a person no longer meets the eligibility criteria.

The Instrument also provides similarly persons aggrieved by decisions made by the Secretary of the Department of Health and Aged Care under subsections 21(1), 21(3) or 22(7) of the CAPS, may seek a review by the Administrative Review Tribunal of that decision under section 26 of CAPS. Subsection 21(1) of the CAPS relates to the Secretary's discretion to approve an individual to represent an assisted person or a minor as an authorised representative or an authorised payment recipient to act for the person or to receive payments as agent of the person, or both. Subsection 21(3) relates to the Secretary's ability to revoke an approval if appropriate to do so in the circumstances. With respect to decisions made relating to a minor, Article 3 of the Convention on the Rights of the Child is engaged in that decisions are made with the best interests of the child as a primary consideration. Subsection 22(7) relates to the Secretary's power to direct the Chief Executive Medicare to decline a payment to an organisation authorised to receive CAPS payments where certain criteria are satisfied.

As provided above, the purpose of the Instrument preserves the right of persons who are aggrieved by the decisions made under sections 6 and 9, and subsections 21(1), 21(3) and 22(7) of the CAPS to seek continued access to merits review of those decisions under the Administrative Review Tribunal.

Conclusion

The Instrument is compatible with human rights as it further promotes the realisation of relevant rights under Articles 11 and 12 of the ICESCR, and Article 3 of the Convention on the Rights of the Child.

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Minister for Aged Care