

EXPLANATORY STATEMENT

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

Aged Care Legislation Amendment (Redress Payments) Principles 2024

Purpose and operation

The *Aged Care Legislation Amendment (Redress Payments) Principles 2024* (Amending Instrument) amends the *Aged Care (Transitional Provisions) Principles 2014* and the *Subsidy Principles 2014* to exempt payments (redress payments) made under the *National Redress Scheme for Institutional Childhood Sexual Abuse Act 2018* from the value of a person's assets for residential aged care purposes. This means redress payments will not be considered when determining the person's fees or accommodation costs for residential care.

Under the Amending Instrument, the exemption of redress payments from the aged care assets test will apply to working out of the value of a person's assets from the date the redress payment was made. This includes a date in the past, as the intention is for the exemption to exclude a redress payment from the value of a person's assets regardless of when the person entered residential care and first had their assets valued. This means the exemption will benefit:

- current residential care recipients who have already received a redress payment,
- current care recipients who receive a redress payment after commencement of the Amending Instrument, and
- individuals who enter residential care and receive a redress payment after commencement of the Amending Instrument.

The value of a person's assessable assets for aged care purposes will be reduced by the amount of their redress payment, regardless of how much of the payment they retain at the time they enter residential care or at the time they have their assets assessed. This enables the redress payment to be excluded from value of the person's assets despite the payment not being quarantined (i.e. not being paid into a dedicated bank account). Excluding a redress payment from the value of the person's assets will not reduce the assets below zero.

Exempting redress payments from the value of a person's assets is expected to reduce the amount of residential care fees that may be payable (and in turn, increase the amount of residential care subsidy payable to an approved provider in respect of that person).

For current residential care recipients who received a redress payment before commencement of the Amending Instrument, the Amending Instrument will enable the value of their assets to be worked out to exclude the redress payment from the date it was paid. Any residential care subsidy previously paid in respect of those care recipients will be recalculated to take this into account. The Government will ensure the provider is paid any additional residential care subsidy payable in respect of a care recipient as a result of the redress payment exemption.

If a current care recipient has overpaid residential care fees as a result of excluding the redress payment from the value of their assets from the date it was paid, any overpaid residential care fees will be refunded to the care recipient by the provider.

The changes introduced by the Amending Instrument are applicable in respect of residential care recipients (who are subject to the *Aged Care Act 1997* and its legislative instruments) and continuing residential care recipients (who are subject to the *Aged Care (Transitional Provisions) Act 1997* and its legislative instruments).

Background

A person who has experienced institutional childhood sexual abuse can receive a payment of up to \$150,000 under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*. Redress payments are not considered income at the time they are received in the income test component of the aged care means assessment (because they are not considered income for the purposes of calculating income support payments under the *Social Security Act 1991*). However, where the payment is held by the recipient at the time they enter residential care, it is considered an assessable asset for aged care purposes. This means that some redress payment recipients are currently asked to contribute more towards their residential aged care accommodation and care costs as a result of receiving the redress payment.

The National Aged and Community Care Roundtable for Forgotten Australians and Knowmore, a specialist legal service which provides free legal advice and support for survivors of child sexual abuse, have both advocated to have redress payments excluded from the aged care means assessment.

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) identified that distrust and fear of institutions and authority are particular features of the effects of child sexual abuse in an institutional context. Thus, entering a residential aged care home can be highly traumatic for this vulnerable group, and even more so for individuals required to pay higher fees as a result of a redress payment. The exemption of redress payments from the aged care assets test under the Amending Instrument supports the Australian Government's response to the Royal Commission by safeguarding recipients of redress payments against additional trauma when entering a Government-funded institution (in this case, a residential aged care home).

The Amending Instrument exempts redress payments from the assets test under both the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

The Aged Care Act provides that the amount a person entering residential care from 1 July 2014 is asked to contribute towards the cost of their care and accommodation is determined through a 'means assessment'. The 'means assessment' is comprised of an income test (section 44-24 of the Aged Care Act) and an assets test (section 44-26A of the Aged Care Act) which are used in combination to work out the person's means tested amount (section 44-22 of the Aged Care Act).

The means tested amount is used to determine the care subsidy reduction for each care recipient (section 44-21 and 44-23 of the Aged Care Act), which is equivalent to the means tested care fee for the care recipient. This affects the amount of residential care subsidy payable to an approved provider for the care recipient and the amount of residential care fees payable by the care recipient. It is also used to set the type of accommodation costs payable by the care recipient under subsection 52G-6(a) of the Aged Care Act, that is, to determine whether the care recipient is eligible for Government assistance with their accommodation

costs (eligible for an accommodation supplement under subsection 44-28(2) of the Aged Care Act). A care recipient not eligible for assistance pays the accommodation payment they agreed with their provider before entry (section 52F-1 of the Aged Care Act), while a care recipient eligible for assistance may be asked to pay an accommodation contribution based on their means tested amount (section 52G-6 of the Aged Care Act). The result is that a care recipient with higher means (a higher means tested amount) will usually contribute more to the cost of their care and accommodation.

As part of the means assessment, the value of a person's assets for residential care is determined under sections 44-26A, 44-26B and 44-26C of the Aged Care Act and section 47 of the *Subsidy Principles 2014*. Changes to a care recipient's asset determination for their entry date to a residential care service can change their eligibility for Government assistance with accommodation costs in that service. Changes to a care recipient's asset determination while they are in care can change the amount of means tested care fee and accommodation contribution they are asked to pay.

The combined means assessment does not apply for continuing residential care recipients covered by fee arrangements in place prior to 1 July 2014. Rather, under the Transitional Provisions Act, their assets test is conducted separately to the income test. The outcome of the asset value determination determines the amount a person may be asked to contribute towards their accommodation costs, whether they are considered a supported, concession or assisted resident, and the amount of supplement payable (sections 44-8AA to 44-10 of the Transitional Provisions Act).

The value of a continuing care recipient's assets for residential care is determined in accordance with sections 44-8AB, 44-10 and 44-11 of the Transitional Provisions Act and sections 43 and 44 of the *Aged Care (Transitional Provisions) Principles 2014*. The assessment of assets for a continuing care recipient is undertaken only at their date of entry to care in a service. Any changes to their assets during their time in care do not change their contribution to accommodation costs. However, should a continuing care recipient transfer to a new aged care provider their assets are assessed again at date of entry to the new service. This means changes to their assets can affect their accommodation costs if they move residential care services.

Authority

Subsection 44-26A(1) of the *Aged Care Act 1997* provides that the value of a person's assets for the purposes of section 44-22 (Working out the means tested amount) is to be worked out in accordance with the *Subsidy Principles 2014*.

Subsection 44-10(1) of the *Aged Care (Transitional Provisions) Act 1997* provides that the value of a person's assets for the purposes of section 44-5A, 44-5B, 44-7, 44-8 or 44-8AB is to be worked out in accordance with the *Aged Care (Transitional Provisions) Principles 2014*.

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

This instrument commences on 1 January 2025.

The Amending Instrument will have retrospective application in that it applies to working out the value of a person's assets at a time that is before 1 January 2025. This will enable redress payments to be an exempt asset for the purposes of working out the value of an individual's assets from the date the redress payment was made. For current residential care recipients who have received a redress payment, the value of their assets will be recalculated to exclude the value of their redress payment. No redress payments were issued before 1 July 2018 when the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* commenced.

As the retrospective exemption of redress payments from the aged care assets test has the effect of reducing fees for care recipients, it will not disadvantage rights or impose liabilities on a person other than the Commonwealth. Any care recipients who are identified as having overpaid fees as a result of the Amending Instrument will have these overpaid fees refunded by their provider. The Commonwealth will ensure the provider is paid any additional residential care subsidy payable in respect of the care recipient.

Consultation

The Department of Social Services (DSS), which has policy responsibility for the National Redress Scheme, and Services Australia, which is the delegated administrator of the aged care income and assets tests, were consulted in the drafting of the Amending Instrument. Feedback from DSS and Services Australia was incorporated into the final Amending Instrument.

General

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

Details of this instrument are set out in **Attachment A**.

This 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 (Redress Payments) Principles 2024*

Section 1 – Name

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Redress Payments) Principles 2024*.

Section 2 – Commencement

Section 2 provides that the instrument commences on 1 January 2025.

Section 3 – Authority

Section 3 provides that the instrument is made under the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

Section 4 – Schedules

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 – Redress payments

Aged Care (Transitional Provisions) Principles 2014

Item 1 – Subsection 44(1)

This item repeals subsection 44(1) about working out the value of assets for a continuing care recipient and replaces it with an equivalent renumbered section with the added paragraph 44(1)(b). Paragraph 44(1)(b) has the effect of reducing the value of the person's assets by any redress payment paid to the person (or their administrator) under section 48 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

This reduction applies irrespective of the value of the redress payment that is still retained by the person when they enter residential care. As a result, a person's contribution towards their accommodation costs in residential care will be determined without taking into account any redress payment they have received.

Item 2 – Chapter 5 (after the heading)

This item inserts the subheading Part 1 – Amendments made by the Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022 to clearly identify that existing section 131 relates to this instrument.

Item 3 – At the end of Chapter 5

This item inserts the subheading Part 2 – Amendments made by the Aged Care Legislation Amendment (Redress Payments) Principles 2024 to clearly identify that new section 132 relates to the Amending Instrument.

The item also inserts section 132 titled Application – redress payments.

Subsection 132(1) gives retrospective and prospective effect to the amendments to section 44(1) in working out the value of a continuing residential care recipient’s assets for aged care purposes. This means the value of the person’s assets is reduced by their redress payment whether the value of assets is worked out before, on or after 1 January 2025.

Subsection 132(2) gives effect to the amendments to section 44(1) for redress payments paid before, on or after 1 January 2025. This means that from the commencement of the Amending Instrument all redress payments received by continuing care recipients are exempt from the aged care assets test, including those received before, on or after 1 January 2025. This allows the exemption to be equally applied for all continuing residential care recipients in receipt of a redress payment, regardless of when they received this payment.

Under Schedule 1 – Dictionary of the Aged Care Act a continuing residential care recipient means a person who:

- entered a residential care service before 1 July 2014, and
- has not:
 - ceased to be provided with residential care by a residential care service for a continuous period of more than 28 days (other than because the person is on leave), or
 - before moving to another residential care service, made a written choice, in accordance with the *Fees and Payments Principles 2014*, covered by Chapters 3 and 3A of the Aged Care Act in relation to the other service.

Subsidy Principles 2014

Item 4 – Subsection 47(1)

This item repeals subsection 47(1) about working out care recipient’s means tested amount—value of assets and replaces with an equivalent renumbered section with the added paragraph 47(1)(b). Paragraph 47(1)(b) has the effect of reducing the value of the person’s assets by any redress payment paid to the person (or their administrator) under section 48 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

This reduction applies irrespective of the value of the redress payment that is still retained by the person when they enter residential care. As a result, a person’s contribution towards their care and accommodation costs in residential care will be determined without taking into account any redress payment they have received.

Item 5 – At the end of Chapter 5

This item inserts the subheading Part 2 – Amendments made by the Aged Care Legislation Amendment (Redress Payments) Principles 2024 to clearly identify that the new section 113 relates to the Amending Instrument. The item also inserts section 113 titled Application – redress payments.

Subsection 113(1) gives retrospective and prospective effect to the amendments to section 47(1) in working out the value of a care recipient’s assets for aged care purposes and means tested amount. This means the value of the person’s assets is reduced by their redress payment whether the value of assets is worked out before, on or after 1 January 2025.

Subsection 113(2) gives effect to the amendments to section 47(1) for redress payments paid before, on or after 1 January 2025. This means that from the commencement of the Amending Instrument all redress payments received by residential care recipients are exempt from the aged care assets test, including those received before, on the day or after 1 January 2025. This allows the exemption to be equally applied for all care recipients in receipt of a redress payment, regardless of when they received the payment.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Redress Payments) Principles 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 the Disallowable Legislative Instrument

The *Aged Care Legislation Amendment (Redress Payments) Principles 2024* (Amending Instrument) amends the *Aged Care (Transitional Provisions) Principles 2014* and the *Subsidy Principles 2014* to exempt payments (redress payments) made under the *National Redress Scheme for Institutional Childhood Sexual Abuse Act 2018* from the value of a person's assets for residential aged care purposes. This means redress payments will not be considered when determining the person's fees or accommodation costs for residential care.

Under the Amending Instrument, the exemption of redress payments from the aged care assets test will apply to working out of the value of a person's assets from the date the redress payment was made. This includes a date in the past, as the intention is for the exemption to exclude a redress payment from the value of a person's assets regardless of when the person entered residential care and first had their assets valued. This means the exemption will benefit:

- current residential care recipients who have already received a redress payment,
- current care recipients who receive a redress payment after commencement of the Amending Instrument, and
- individuals who enter residential care and receive a redress payment after commencement of the Amending Instrument.

The value of a person's assessable assets for aged care purposes will be reduced by the amount of their redress payment, regardless of how much of the payment they retain at the time they enter residential care or at the time they have their assets assessed. This enables the redress payment to be excluded from value of the person's assets despite the payment not being quarantined (i.e. not being paid into a dedicated bank account). Excluding a redress payment from the value of the person's assets will not reduce the assets below zero.

Exempting redress payments from the value of a person's assets is expected to reduce the amount of residential care fees that may be payable (and in turn, increase the amount of residential care subsidy payable to an approved provider in respect of that person).

For current residential care recipients who received a redress payment before commencement of the Amending Instrument, the Amending Instrument will enable the value of their assets to be worked out to exclude the redress payment from the date it was paid. Any residential care subsidy previously paid in respect of those care recipients will be recalculated to take this

into account. The Government will ensure the provider is paid any additional residential care subsidy payable in respect of a care recipient as a result of the redress payment exemption.

If a current care recipient has overpaid residential care fees as a result of excluding the redress payment from the value of their assets from the date it was paid, any overpaid residential care fees will be refunded to the care recipient by the provider.

The changes introduced by the Amending Instrument are applicable in respect of residential care recipients (who are subject to the *Aged Care Act 1997* and its legislative instruments) and continuing residential care recipients (who are subject to the *Aged Care (Transitional Provisions) Act 1997* and its legislative instruments).

Human rights implications

The Amending Instrument engages the following rights:

- the right to social security in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- the right of persons with disabilities to adequate standard of living and social protection in article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

Article 9 of the ICESCR guarantees the right of everyone to social security, while article 28 of the CRPD recognises the right of persons with disabilities to adequate standard of living and social protection, including measures to ensure access to appropriate and affordable services and public housing programs.

The Amending Instrument will uphold these rights by making monetary payments made under the National Redress Scheme (redress payments) exempt from the value of a person's assets for aged care purposes. The Amending Instrument directly exempts redress payments from the asset test component of the means assessment, while also retaining the existing income exemptions for redress payments. Exempting redress payments from the aged care means assessment improves the rights to social security and social protection of redress payment recipients, and/or their partners, accessing residential care. It protects redress payment recipients, and/or their partners, from facing undue costs in accessing residential care services.

Conclusion

The Amending Instrument is compatible with human rights because it promotes the rights of care recipients to social security and social protection.

The Hon Anika Wells MP

Minister for Aged Care