

***Legislation (Deferral of Sunsetting—Social Security (Active Participation for Disability Support Pension) Determination) Certificate 2025***

**EXPLANATORY STATEMENT**

Issued by the Attorney-General in compliance with  
section 15G of the *Legislation Act 2003*

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**INTRODUCTION**

The *Legislation (Deferral of Sunsetting—Social Security (Active Participation for Disability Support Pension) Determination) Certificate 2025* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. Pursuant to subsection 51(4) of the Legislation Act, the Certificate will not be subject to the disallowance provisions of that Act as the deferred sunsetting day specified in the Certificate is on or before the first anniversary of the originally scheduled sunsetting day. Subsection 51(4) of the Legislation Act provides that a certificate of deferral is exempt from disallowance if it defers the sunsetting day of an instrument by up to 12 months.

**OUTLINE**

Sunsetting is the automatic repeal of legislative instruments after a fixed period.

The Australian Government's sunsetting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunsetting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunsetting day of an instrument for a period of either 6, 12, 18 or 24 months.

The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunsetting day. This allows instruments to continue to be in force for a further but limited period of time after the date on which they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and

potential replacement, or where circumstances prevent the making of replacement instruments prior to the sunseting day.

The Certificate defers the sunseting date of *Social Security (Active Participation for Disability Support Pension) Determination 2014* (the Determination) by 12 months from 1 April 2025 to 1 April 2026.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10-year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. Where the deferral is for a short period (6 or 12 months), the certificate is exempt from disallowance because the instrument will shortly be reviewed and, if remade, subject to disallowance and parliamentary scrutiny. Subjecting short term certificates of deferral to disallowance would undermine the flexibility afforded by their further but strictly limited postponement of sunseting. In this case, the Determination is being considered in light of reforms to the Disability Employment Services (DES) model, which are due to be implemented on 1 July 2025, and a review of elements of the medical eligibility for the Disability Support Pension (DSP). Subject to the review, the Department of Social Services (the department) will provide options to Government which may consider amendments to the Act in place of remaking the Determination. In this case, the Determination would be repealed and cease to exist.

## **PROCESS BEFORE CERTIFICATE WAS MADE**

### **Regulatory impact analysis**

Certificates of deferral of sunseting are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Impact Analysis (OIA). The OIA reference for this standing exemption is ID19633.

### **Consultation before making**

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Determination is made under the *Social Security Act 1991* (the Act).

The Determination was made for the purposes of subsections 94(3C), 94(3D) and 94(3E) of the Act. It sets out the requirements and guidelines the Secretary must consider in determining whether a person has actively participated in a Program of Support. This includes for the purpose of determining

whether the person has a continuing inability to work to be qualified for the DSP. Where a person does not have a severe impairment as defined in the Act, in that their impairment is rated 20 points or more on the Impairment Tables but does not attract a rating of 20 on a single Table, the person must actively participate in a Program of Support for at least 18 months in the 36-month period prior to their DSP claim.

Most DSP claimants who are subject to the Program of Support requirements engage with DES, as it is the main employment service for people with a disability, injury and/or a health condition. The department is undertaking considerable reforms to the DES model, with some details still to be finalised. The new DES model is expected to come into effect from 1 July 2025.

The new DES model will not come into effect until after the sunset date of the Determination on 1 April 2025. A 12-month deferral will allow the department to provide advice to Government on any implications for the Program of Support, including legislative amendments, to be sequenced following implementation of the new DES model.

The department has also commenced a review of elements of the medical eligibility criteria for the DSP. As the eligibility requirements are reliant on the assessment of a person's medical condition and impairment, the review will require consultation with medical, health and allied health professionals to further understand the impacts of co-occurring conditions and cross-function impairments on a person's ability to work. The consultation will assist with determining the appropriateness of the current medical eligibility settings and inform critical advice to Government.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. This will minimise the administrative burden on stakeholders associated with consultation on an instrument that will only have effect for a limited amount of time. Any replacement instrument will be subject to further consultation and parliamentary oversight, including oversight of whether adequate consultation occurred with persons likely to be affected by the replacement instruments.

A 12-month deferral will allow sufficient time for the department to implement the DES reforms and complete the review and will avoid the need to remake the Determination in its current form for the short period of time before it is repealed and a replacement instrument may be made. As such, given that deferral of the sunset date of the Determination is consistent with the policy intent of the sunset regime and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

### **Statutory preconditions relevant to the Certificate**

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunseting day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General in writing, and
- (b) the Attorney-General to be satisfied that:
  - (i) the instrument would (apart from the operation of the sunseting provisions) be likely to cease to be in force within 24 months after its sunseting day
  - (ii) the proposed replacement instrument will not be able to be completed before the sunseting day for reasons that the rule-maker could not have foreseen and avoided
  - (iii) the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
  - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- (c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issuing of the certificate.

The rule-maker for the Determination, the Minister for Social Services, the Hon Amanda Rishworth MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunseting for the Determination. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the Determination would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after its sunseting day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

### **Statement of Reasons for issuing of the Certificate**

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of reasons for issuing the Certificate.

The Certificate defers the sunseting date of the Determination by 12 months to 1 April 2026 to enable the department to implement DES reforms and complete the review of elements of the medical eligibility for DSP.

The Determination sets out the rules for determining active participation in a Program of Support. If a person does not have what is considered a severe impairment as defined in the Act, the person must participate in a Program of Support for at least 18 months in the 36-month period prior to their DSP

claim. Most DSP claimants who are subject to the Program of Support requirements engage with DES, as it is the main employment service for people with a disability, injury and/or a health condition.

The department is undertaking considerable reforms to the DES model, with some details still to be finalised. The new DES program will consist of two service tiers for participants, tailored to people in either an intensive or flexible program. Elements of this new tiered program are still being worked through and the new DES model is not due to come into effect until 1 July 2025. The department will provide advice to Government on any implications for the Program of Support, including legislative amendments, to be sequenced following implementation of the new DES model.

The department has also commenced a review of elements of the medical eligibility criteria for the DSP. Given the breadth of conditions assessed under the DSP Impairment Tables, it is important that the department undertakes extensive consultation with a broad range of health professionals.

Depending on the results of the review and DES reforms, the department will provide options to Government which may consider amendments to the Act in place of remaking the Determination. In this case, the Determination would be repealed and cease to exist.

Accordingly, the Determination will likely cease to be in force in its current form within 24 months of its original sunset date.

### **More information**

Further details on the provisions of the Certificate are provided in Attachment A.

The Determination which is subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, is available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Certificate, and from the Department of Social Services about the Determination to which the Certificate applies.

## NOTES ON THE CERTIFICATE

### **Section 1      Name**

This section provides that the Certificate is named the *Legislation (Deferral of Sunsetting—Social Security (Active Participation for Disability Support Pension) Determination) Certificate 2025*. The Certificate may be cited by this name.

### **Section 2      Commencement**

This section provides for the Certificate to commence on the day after it is registered.

### **Section 3      Authority**

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

### **Section 4      Deferral of sunseting**

This section provides that the *Social Security (Active Participation for Disability Support Pension) Determination 2014*, for which the sunseting day is 1 April 2025, is repealed by section 51 of the *Legislation Act 2003* on 1 April 2026.

### **Section 5      Repeal of the instrument**

This section provides that the Certificate is repealed at the start of 2 April 2026.