

EXPLANATORY STATEMENT

Health and Other Services (Compensation) Act 1995

Health and Other Services (Compensation) (Repeal) Regulations 2019

Section 47 of the *Health and Other Services (Compensation) Act 1995* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Purpose

The purpose of the *Health and Other Services (Compensation) (Repeal) Regulations 2019* (the Principal Regulations) is to repeal the *Health and Other Services (Compensation) Regulations 1995* (the Previous Regulations).

The Previous Regulations have two main components. The first relates to the definition of small amounts of compensation under regulation 4. The second relates to types of payments which are not considered compensation under regulation 5.

Small amounts of compensation

Part 3 of the Act clarifies that the Act applies if a person makes a compensation claim against another person for compensation in respect of an injury. In that Part, the Chief Executive Medicare may seek recovery of eligible benefits, paid by the Commonwealth, in respect of an injury. Division 3 of Part 3 allows the Chief Executive Medicare to enter into agreements to waive part of the amount recoverable. Subsection 38(1) treats the whole amount as waived, providing the compensation amount is a “small amount”. Subsection 38(2) was introduced in 2001 and specifies a small amount of compensation is:

- a. equal to or less than \$5,000; or
- b. a higher amount if prescribed in the regulations.

Regulation 4 of the Previous Regulations does not prescribe a higher amount than \$5,000, but does provide a formula to define a small amount of compensation which increases annually according to CPI. This currently equates to an amount of approximately \$250 and will not exceed \$5,000 for many years. The Act automatically treats any amount less than \$5,000 as waived.

Regulation 4 of the Previous Regulations was not updated or omitted when subsection 38(2) of the Act was introduced in 2001 and is now redundant.

Payments not considered compensation

Regulation 5, Schedule 1 of the Previous Regulations provides that a payment made under certain provisions of the *Victorian Accident Compensation Act 1985* (as in force at 12 December 2001) is not a compensation payment, providing the payment was made between 12 December 2001 and 30 June 2006. This section has no ongoing operation, is not required for prospective claims and is therefore redundant.

Regulations 4 and 5 of the Previous Regulations are the only two non-administrative regulations within the Previous Regulations. The remaining regulations are administrative and are contained within the Act. The repeal of the Previous Regulations does not adversely affect the operation of the Health and Other Services (Compensation) Scheme.

Consultation

Consultation was undertaken with regard to the Principal Regulations and included consultation with the Office of Parliamentary Council and the Department of Human Services as the agency responsible for the administration of the Health and Other Services (Compensation) Scheme.

Compensation insurers were not consulted as the proposed amendments remove redundant regulations, with the remaining regulations duplicated within the Act. Repealing the Regulations would not affect compensation arrangements under common law.

Details of the Principal Regulations are set out in the Attachment.

The Act specifies no conditions which need to be met before the power to make the Principal Regulations may be exercised.

The Principal Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

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

Under subsection 33(3) of the *Acts Interpretation Act 1901* (*the AI Act*), 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 power to revoke the *Health and Other Services (Compensation) Regulations 1995* relies on subsection 33(3) of the AI Act.

The Principal Regulations commence the day after this instrument is registered.

Authority: Section 47 of the
 Health and Other Services (Compensation) Act 1995

ATTACHMENT**Details of the *Health and Other Services (Compensation) (Repeal) Regulations 2019*****PART 1—PRELIMINARY****Section 1 – Name**

This section provides for the Principal Regulations to be referred to as the *Health and Other Services (Compensation) (Repeal) Regulations 2019*.

Section 2 – Commencement

This section provides that the Principal Regulations commence the day after registration.

Section 3 – Authority

This section provides that the Principal Regulations are made under the *Health and Other Services (Compensation) Act 1995*.

Section 4 – Schedules

This section provides 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.

Schedule 1 – Repeals

This Schedule repeals the *Health and Other Services (Compensation) Regulations 1995*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011
Health and Other Services (Compensation) (Repeal) Regulations 2019

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

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Human rights implications

The Regulations engage Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee reports that the '*highest attainable standard of health*' takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Right to Social Security

The right to social security is contained in Article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee reports that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them. However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

Analysis

The Principal Regulations will maintain existing rights to health and social security under the Medicare Benefits Schedule.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Greg Hunt

Minister for Health