

EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Social Services

Social Security (Administration) Act 1999

Social Security (Administration) (Authorised Certifier) Determination 2019

Purpose

The *Social Security (Administration) (Authorised Certifier) Determination 2019* (the **instrument**) is made under subsection 63A(9) of the *Social Security (Administration) Act 1999* (**Act**).

Subsections 63(2AA), (2AB) and (2AC) of the Act allow the Secretary to require a person to provide a proof of life certificate under certain circumstances. Section 63A of the Act outlines the requirements for a valid proof of life certificate, including that the certificate must include a statement by an authorised certifier.

This instrument specifies the classes of person that are authorised certifiers for the purposes of verifying that the social security recipient is alive through the proof of life certificate provided under section 63A of the Act.

Background

The *Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Act 2019* (the **Amendment Act**) amends the Act by introducing a requirement for certain welfare recipients aged 80 years and over, who have been absent from Australia for at least two years, to provide a proof of life certificate at least once every two years in accordance with a notice sent by the Secretary. The majority of social security recipients affected by this new requirement receive Age Pension. The policy intent behind the Amendment Act is to ensure that Services Australia (formerly the Department of Human Services) does not continue to provide social security payments to pension recipients who have died while living overseas.

Proof of life certificates

Subsections 63(2AA), (2AB) and (2AC) of the Act set out the circumstances under which proof of life certificates are to be given to the Secretary.

Subsection 63(2AA) of the Act states that the Secretary may require a person to provide a proof of life certificate if that person is at least 80 years old, has been continuously absent from Australia in the last 2 years, and is receiving any of the following social security payments:

- Age Pension;
- Carer Payment;
- Disability Support Pension;
- Widow B Pension;
- Wife Pension.

Subsection 63(2AB) of the Act states the Secretary may issue a notice requiring the person, within 13 weeks, to provide a proof of life certificate that relates to themselves and has been completed within that 13 week period. If the notified person enters Australia within the 13 week period, they do not need to provide a proof of life certificate. Where a person's circumstances continue to meet subsection 63(2AA) of the Act, the Secretary must, under subsection 63(2AC) of the Act, notify the person that a proof of life certificate is required at least once every 2 years.

Subsection 63A(4) of the Act provides that a proof of life certificate, that relates to a person, must include a statement by an authorised certifier. Under subsection 63A(8) of the Act, an authorised certifier is a person included in a class of persons specified in a determination under subsection 63A(9). Subsection 63A(9) provides for the Secretary to determine that one or more classes of persons are authorised certifiers for the purpose of section 63A of the Act.

The effect of this instrument is that any person included in one of the classes of persons listed in section 5 of the instrument is an authorised certifier for the purposes of section 63A of the Act.

Authorised certifiers

In order to make the certification process as easy as possible, overseas social security recipients will have a range of options available to enable verification of their proof of life certificate. Providing a range of people who can act as authorised certifiers will ensure recipients can easily locate a person to certify their certificate.

The instrument specifies classes of persons recognised under Australian law and in the social security recipient's place of residence.

The majority of authorised certifiers will be recognised in the recipient's place of residence. These authorised certifiers must be authorised or entitled to practise, or hold their position in the same country as the recipient's place of residence. This aims to ensure that these authorised certifiers are able to verify the identification documentation provided by the person. There is no requirement for these authorised certifiers to also be resident in that same country.

Specified persons who are authorised or entitled to practice, or hold their position, under relevant Australian laws will also be an authorised certifier for the purposes of section 63A of the Act.

Authorised certifiers recognised under Australian law include Australian Consular or Diplomatic Officers and other relevant staff authorised to perform consular acts who are located overseas. The other classes of persons who are entitled to practice, or hold their position, under relevant Australian laws mirror those recognised in the recipient's place of residence. However, it is unlikely that these classes of people will need to act as an authorised certifier, given they are primarily located in Australia.

Subsection 63A(9) is intended to provide sufficient flexibility for the Secretary to specify additional classes of persons as authorised certifiers if it becomes necessary to do so in the future.

Incorporation by reference

Under paragraph 14(1)(a) and subsection 14(3) of the *Legislation Act 2003* (the **Legislation Act**), a legislative instrument may reference provisions of another Act by applying, adopting or incorporating it, with or without modification, as in force or existing from time to time. Section 10 of the *Acts Interpretation Act 1901* (the **Acts Interpretation Act**) (as applied by subsection 13(1) of the Legislation Act) has the effect that, unless otherwise specified, references to Acts in a legislative instrument can be taken to be references to those Acts as in force from time to time.

Under section 5 of this instrument, a number of terms that are defined in other Commonwealth Acts (that is, terms defined under the *Australian Federal Police Act 1979* (**AFP Act**), the *Consular Fees Act 1955* (**Consular Fees Act**) and the *Health Insurance Act 1973* (**Health Insurance Act**)) are incorporated by reference. In accordance with the requirements of the Legislation Act and the Acts Interpretation Act, the references to these terms are taken to be incorporated as in force from time to time. The Acts referred to in this instrument are freely available to the general public on the Federal Register of Legislation website at <https://www.legislation.gov.au/>.

Commencement

This instrument commences on 20 December 2019. This aligns the instrument's commencement with the commencement date of relevant provisions of the Amendment Act.

Section 4 of the Acts Interpretation Act provides for the exercise of powers between enactment and commencement of an Act. Under subsection 4(2) of the Acts Interpretation Act, where an Act confers power to make a legislative instrument, the power may be exercised in the period between the Act being enacted (that is, receiving the Royal Assent) and the commencement date of that Act. For the purposes of this instrument, subsection 4(2) enables this instrument to be made ready for commencement at the same time as the Amendment Act commences.

Consultation

The Department of Foreign Affairs and Trade was consulted in the preparation and drafting of this instrument, as well as Services Australia as the department responsible for processing proof of life certificates.

Regulation Impact Statement (RIS)

A Regulation Impact Statement is not required. The instrument gives effect to the proof of life certificate requirements enacted in the Amendment Act, and any regulatory impact is addressed in the explanatory materials for the Amendment Act (OBPR ID 23652).

Explanation of the provisions

Section 1

This section provides that the name of the instrument is the *Social Security (Administration) (Authorised Certifier) Determination 2019*.

Section 2

This section states that the instrument commences on 20 December 2019.

Section 3

This section provides that the authority for making this instrument is subsection 63A(9) of the Act.

Section 4

This section provides definitions for terms used in the instrument.

Act means the *Social Security (Administration) Act 1999*.

social security recipient is defined as a person required by section 63 of the Act to provide a proof of life certificate (as defined in section 63A of the Act).

Section 5

Subsection 5(1) provides that the classes of persons specified in subsections 5(2) and 5(3) are determined by the Secretary to be authorised certifiers for the purposes of subsection 63A(9) of the Act. The note in this subsection directs the reader to subsection 63A(8) of the Act and clarifies that any person included in any of the classes specified in this instrument is an authorised certifier for the purposes of section 63A. Classes of persons fall into one of two categories: persons recognised under Australian law and persons recognised in the social security recipient's place of residence.

Subsection 5(2) outlines that the following classes of persons recognised under Australian law are determined as authorised certifiers:

- (a) a person who:
 - (i) is admitted to the legal profession by a Supreme Court of a State or Territory under a law of a State or Territory; and
 - (ii) holds a certificate to practise as a legal practitioner under a law of a State or Territory.

Paragraph 5(2)(a) has been drafted to correspond with the existing concept of 'Australian Legal Practitioner' in the *Evidence Act 1995*. For the purposes of this instrument, the term 'Australian Legal Practitioner' has not been incorporated by reference. The intention is that, from commencement of this instrument, a lawyer, a solicitor or a barrister who holds a practising certificate is able to be an authorised certifier;

- (b) a Registrar or Deputy Registrar of a federal court or of a court of a State or Territory;
- (c) a person who is the holder of an office of a judge, magistrate or justice of a federal court or of a court of a State or Territory, or a person appointed under an Act of the Commonwealth, State or Territory with the same status as a judge, magistrate or justice of a federal court or a court of a State or Territory;
- (d) a justice of the peace;
- (e) a notary public;
- (f) a police officer, which includes:
 - (i) a member of the Australian Federal Police (within the meaning of the AFP Act);
 - (ii) a special member within the AFP Act; or
 - (iii) a member of a police force or police service of a State or Territory.

The intention is that only sworn members of the Commonwealth, State or Territory police force will be authorised certifiers for the purposes of verifying a social security recipient's proof of life certificate;

- (g) an Australian Consular Officer or Australian Diplomatic Officer (as defined in section 2 of the Consular Fees Act);
- (h) a person who is located outside of Australia and authorised by the Secretary of the Department of Foreign Affairs and Trade to perform consular acts within the meaning of paragraphs 3(c) or 3(d) of the Consular Fees Act.

This applies to Commonwealth employees and employees of the Australian Trade and Investment Commission who have been authorised in writing by the Secretary to perform consular acts. Consular act is defined in the Consular Fees Act as 'an act specified in the regulations as being a consular act for the purposes of the Consular Fees Act'; and

- (i) a medical practitioner (within the meaning of the Health Insurance Act), that is, 'a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners'. However, it does not include a person whose registration or licence to practise has been suspended or cancelled following an inquiry relating to the person's conduct and who has not been reinstated to practise as a medical practitioner in that State or Territory.

Subsection 5(3) outlines the following classes of persons, however described in their respective jurisdictions, are determined as authorised certifiers in the social security recipient's place of residence:

- (a) a person who, under the law of, or applying at, that place, is currently authorised or entitled to practise in that place as:

- (i) a legal practitioner. The intention is that the person's qualification and registration to practise as a legal practitioner (that is, a lawyer, solicitor or barrister) should be up-to-date;
 - (ii) a notary public; or
 - (iii) a medical practitioner. The intention is that this category of persons will, in addition to medical doctors or specialists, also include allied health practitioners (such as nurses, physiotherapists etc.), currently be authorised or entitled to practise in their field of speciality; or
 - (iv) a police officer;
- (b) a person who holds any of the following offices of a court of, or having jurisdiction at, that place:
- (i) a judge, magistrate or justice; or
 - (ii) a registrar or deputy registrar.

Kathryn Campbell AO CSC, Secretary of the Department of Social Services

Statement of Compatibility with Human Rights

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

Social Security (Administration) (Authorised Certifier) Determination 2019

The 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 legislative instrument

This instrument facilitates administration of the requirement for social security recipients who live overseas to provide a proof of life certificate. This was introduced by the *Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Act 2019* (the **Amendment Act**).

The Amendment Act strengthens the integrity of social security payments by requiring certain overseas pension recipients to provide proof of life certificates. This is designed to ensure that Australian social security payments are only paid to those who are alive. These certificates must be verified by an *authorised certifier*, that is, a person included in a class of persons that the Secretary has determined, under section 63A(9) of the Act, to be an authorised certifier. This instrument is made by the Secretary specifying the classes of persons that are authorised certifiers.

Human rights implications

The instrument engages Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises *‘the right of everyone to social security, including social insurance’*. The ICESCR requires a country to, within its maximum available resources, provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

This instrument also engages Article 11 of the ICESCR, which recognises the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

This instrument does not change a person’s entitlement to social security or their ability to maintain an adequate standard of living. The instrument facilitates the administration of the proof of life requirements introduced by the Amendment Act.

The Amendment Act is designed to help ensure that Australian pensions are not paid to people who are no longer alive. The arrangements introduced by the Amendment Act people are similar to the life certificates or proof of life requests that are commonly used to confirm eligibility for pensions by many other countries, and have been in use in some countries for more than a decade. The human rights

implications of these arrangements are addressed in the Explanatory Memorandum to the Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019.

As overseas pensioners will need to have their proof of life certificates verified by an 'authorised certifier', this Instrument provides a range of options to allow pensioners to complete this requirement. This will allow the process to be as easy as possible for pensioners, while safeguarding the integrity of the verification process.

The options include, amongst other classes of persons, a judge or magistrate of a law court, a medical practitioner or legal practitioner who is registered or licensed to practice in that country, or an Australian official at an embassy, consulate or high commission.

The instrument provides flexibility to add additional classes of persons to the instrument as necessary if other appropriate classes are identified in the future.

Conclusion

The instrument only operates to give effect to the proof of life certificate requirements in the Amendment Act, by identifying classes of persons who can verify a social security recipient's proof of life certificate. It does not limit a person's ability to access social security payments or maintain an adequate standard of living.

Kathryn Campbell AO CSC, Secretary of the Department of Social Service