

## EXPLANATORY STATEMENT

### *Veterans' Entitlement (Family Law Affected Income Streams) Principles Amendment (Military Invalidity Payments) Instrument 2024*

#### Empowering Provision

*Veterans' Entitlements Act 1986* (the **Act**) section 46ZC.

#### Purpose

The *Veterans' Entitlements (Family Law Affected Income Streams) Principles Amendment (Military Invalidity Payments) Instrument 2024* (the **Instrument**) amends the *Veterans' Entitlements (Family Law Affected Income Streams) Principles 2022* (the **Principles**) to reflect changes by the *Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Act 2024* (the **Amendment**).

The Amendment's purpose is to address the unintended consequences of the decision of a Full Court of the Federal Court of Australia in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (4 December 2020) (the **Douglas decision**). In the Douglas decision, military invalidity payments were considered "superannuation lump sums" rather than "superannuation income streams" as previously considered. The consequence of this was that affected payments no longer met the definition of a "defined benefit income stream" which was necessary for these payments to be regarded as "asset-test exempt income streams". The Amendment provides a clear legal foundation for the assessment of the affected payment by inserting a new income stream classification and assessment regime, restoring the previous treatment of these payments before the Douglas decision.

The Instrument gives effect to the intention of the Amendment by amending the Principles so the Repatriation Commission (the **Commission**) must comply with the decision-making principles set out in Schedule 1 of the Principles in making a determination under new paragraph 46ZA(1)(c) of the Act.

#### Consultation

In preparing the Instrument, the Department of Veterans' Affairs (the **Department**), on behalf of the Commission, consulted with the Department of Social Services and Services Australia on an ongoing basis. The Department of Social Services specifically consulted the Attorney-General's Department to confirm the amending Act did not interfere with the way the affected military invalidity payments are treated for family law purposes. Each Department was supportive of the changes contained in the Instrument.

The Department did not consult directly with individuals likely to be affected by the consequential amendments to the Principles. This was not considered necessary given the consultation that occurred in relation to the Amendment, and that the amendments to the Principles are consequential to the Amendment, and maintain the same policy intent and treatment of affected invalidity payments as prior to the Douglas decision.

Department of Social Services and Services Australia did not raise any concerns with the Department's intention to amend the Principles consequent to the amendments made by the Amendment.

## Explanation of provisions

**Section 1** states the name of the Instrument.

**Section 2** provides that the Instrument commences at the start of the day after the day of registration.

**Section 3** sets out the authority for the Commission making the Instrument – section 46ZC of the Act.

**Section 4** is a standard provision used in instruments that amend or repeal other instruments. It gives effect to Schedule 1.

### Schedule 1 – Amendments

**Item 1** inserts paragraph (ja) “*military invalidity pension income stream*” as a term defined by the Act. This amendment is consequential of the creation of a new classification known as the military invalidity pension income stream.

**Item 2** corrects a reference to the Secretary in section 5. The Commission is the entity that must comply with the principles in Schedule 1, not the Secretary.

**Item 3** inserts paragraph 5(ba) “paragraph 46ZA(1)(c)” after paragraph 5(b) as a consequence of the insertion of new section 9A by item 7.

**Item 4** adds “**or military invalidity pension income stream**” at the end of the heading for section 8. This amendment is consequential of the Amendment.

**Item 5** repeals subsection 8(1) and replaces it with the following:

- (1) This section applies if the family law affected income stream is not:
  - (a) a defined benefit income stream; or
  - (b) a military invalidity pension income stream.

The effect of this change is to confirm that family law affected income stream that is not a military invalidity pension income stream must not be dealt with under section 8. It is to be dealt with under the new section 9A instead.

**Item 6** corrects a reference to the decision maker. The Commission is the decision maker under section 46ZA of the Act, not the Secretary.

**Item 7** adds the following to the end of part 2:

### **9A Income stream that is a military invalidity pension income stream**

- (1) This section applies if the family law affected income stream is a military invalidity pension income stream.
- (2) For the purposes of paragraph 46ZC(ba) of the Act, the Commission must have regard to the following matters in making a decision under paragraph 46ZA(1)(c) of the Act:
  - (a) the matters mentioned in items 1 to 12 and 14 to 23 of Schedule 1;
  - (b) any other matter that the Commission considers relevant in the circumstances.

- (3) If payments are being made from the income stream under more than one payment split, the Commission must have regard to each matter mentioned in subsection (2) that applies to each payment split.

New section 9A is added to ensure that the Commission will comply with the principles set out in Schedule 1 (other than item 13) in making a decision under new paragraph 46ZA(1)(c) of the Act.

**Item 8** repeals the note to the Schedule heading for Schedule 1 and substitutes with the following:

(paragraphs 8(2)(a), 9(2)(a), 9A(2)(a), 11(2)(a), 12(2)(a), 14(2)(a), 15(2)(a), 17(1)(a) and 19(1)(a))

The note the Schedule heading directs the reader to the provisions in the Principles that mention Schedule 1. The note is updated here as a consequence of the new section 9A.

## Statement of Compatibility with Human Rights

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

### ***Veterans' Entitlement (Family Law Affected Income Streams) Principles Amendment (Military Invalidity Payments) Instrument 2024***

This 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*.

This Instrument engages and promotes the right to social security under article 9 of the *International Covenant on Economic Social and Cultural Rights (ICESCR)*.

This Instrument brings the current principles in line with the amendments made by the *Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Act 2024* (the **Amendment**). The Amendment addresses the unintended consequences of the decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (4 December 2020) (**Douglas**) and introduces a new classification for military invalidity payments, which restores these payments to their former treatment, not as “superannuation lump sums”.

The right to social security is contained in article 9 of the ICESCR. The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must 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.

The Instrument ensures that military invalidity payments are treated as they were before the unintended consequences of the decision in *Douglas*. The amendments to the Principles ensure *Douglas*-affected veterans and former partners can continue to receive appropriate social security benefits to support an adequate standard of living, consistent with their means of self-support.

Therefore, the Instrument is compatible with the human rights listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.