

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Ageing

Aged Care Act 1997

Allocation Amendment (People with Special Needs) Principles 2012

The *Aged Care Act 1997* (the Act) provides for the funding of aged care services. Persons who are approved under the Act to provide aged care services (approved providers) can be eligible to receive subsidy payments in respect of the care they provide to approved care recipients.

Section 96-1 of the Act allows the Minister to make Principles providing for various matters required or permitted by a Part or section of the Act. One set of Principles made under the Act is the *Allocation Principles 1997* (the Allocation Principles).

The purpose of the *Allocation Amendment (People with Special Needs) Principles 2012* (the Amending Principles) is to specify a further class of people, namely people who are Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) as people with special needs within the Allocation Principles. The Amending Principles is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Allocation Amendment (People with Special Needs) Principles 2012

An approved provider can only receive subsidy under Chapter 3 of the Act for providing aged care in respect of which a place has been allocated. The Commonwealth plans the distribution between regions of the available places in respect of types of subsidies. In doing so, it takes account of ‘people with special needs’.

Section 11-3 of the Act defines ‘people with special needs’ as follows:

- (a) people from Aboriginal and Torres Strait Islander communities;
- (b) people from non-English speaking backgrounds;
- (c) people who live in rural or remote areas;
- (d) people who are financially or socially disadvantaged; and
- (e) people of a kind (if any) specified in Allocation Principles.

Currently the Allocation Principles specify veterans, people who are homeless or at risk of becoming homeless and care-leavers as groups of people who have special needs for the purposes of the Act.

These Amending Principles specify a further class of people, namely people who are Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI).

All approved providers have a responsibility not to act in a way that is inconsistent with the rights of care recipient that are specified in the *User Rights Principles 1997*. These rights include the right to be treated with dignity and respect and without discrimination. An approved provider must act in a way that is consistent with such rights when dealing with a person to whom the approved provider provides, or is to provide, care whether or not the approved provider has an allocation of places in respect of which care must be provided to people with special needs.

Consultation

As part of the living longer living better aged care reform package extensive consultation was undertaken with relevant Commonwealth Departments, the aged care industry, consumer groups, unions, older Australians their families and carers, and the broader community.

Details of the amendments to the Allocation Principles are listed in the Attachment.

These Amending Principles commence on 1 July 2012.

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

NOTES ON CLAUSES

Clause 1 – Name of Principles

Clause 1 states that the name of the Amending Principles is the *Allocation Amendment (People with Special Needs) Principles 2012*.

Clause 2 - Commencement

Clause 2 states that the Principles commence on 1 July 2012.

Clause 3 – Amendment of Allocation Principles

Clause 3 states that Schedule 1 amends *Allocation Principles 1997* (Allocation Principles).

Schedule 1 Amendments

Item 1

This item inserts a new definition of intersex people into section 4.3 of the Allocation Principles. The term is used in the definition of LGBTI and makes it clear that intersex people are neither wholly male nor wholly female because of physical, hormonal or genetic features. Further, it does not matter whether the person identifies as male, female or neither.

Item 2

This item inserts a new definition of LGBTI in section 4.3 of the Allocation Principles. The definition is inclusive and recognizes the diversity of sexuality and gender identity-based cultures.

Item 3

This item inserts a new definition of transgender into section 4.3 of the Allocation Principles. This term is used in the definition of LGBTI and refers to people who identify, affirm or live as a gender other than the gender assigned in infancy.

Item 4

This item inserts a new section (section 4.4E LGBTI) in the Allocation Principles. The effect of the amendment is to include people who are LGBTI within the definition of “people with special needs” in section 11-3 of the *Aged Care Act 1997* (the Act). Other people defined as “people with special needs” for the purposes of the Act are:

- people from Aboriginal and Torres Strait Islander communities;
- people from non-English speaking backgrounds;
- people who live in rural or remote areas;
- people who are financially or socially disadvantaged;
- veterans;
- people who are homeless or at risk of becoming homeless; and
- people who are care-leavers.

Statement of Compatibility with Human Rights

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

Allocation Amendment (People with Special Needs) Principles 2012

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*.

Overview of the Legislative Instrument

The *Aged Care Act 1997* (the Act) provides for the funding of aged care services. Persons who are approved under the Act to provide aged care services (approved providers) can be eligible to receive subsidy payments in respect of the care they provide to approved care recipients.

An approved provider can only receive subsidy under Chapter 3 of the Act for providing aged care in respect of which a place has been allocated. The Commonwealth plans the distribution between regions of the available places in respect of types of subsidies. It then invites applications and allocates the places to approved providers. In doing so, it takes account of ‘people with special needs’.

Section 11-3 of the Act defines ‘people with special needs’ as follows:

- (a) people from Aboriginal and Torres Strait Islander communities;
- (b) people from non-English speaking backgrounds;
- (c) people who live in rural or remote areas;
- (d) people who are financially or socially disadvantaged; and
- (e) people of a kind (if any) specified in *Allocation Principles 1997* (the Allocation Principles).

Currently Part 2A of the Allocation Principles specifies veterans, people who are homeless or at risk of becoming homeless and care-leavers as groups of people who have special needs for the purposes of the Act. The *Allocation Amendment (People with Special Needs) Principles 2012* (the Amending Principles) specify a further class of people, namely people who are LGBTI. LGBTI is defined as ‘*lesbians, gay men, bisexual, transgender and intersex people (including people who are perceived or imputed to be, or have in the past lived as such)*’. The definition is inclusive and recognizes the diversity of sexuality and gender identity-based cultures.

Human Rights Implications

This legislative instrument engages Articles 1 and 11 of the International Covenant on Economic, Social and Cultural Rights. Article 1 guarantees the right to self-determination (and to freely determine their economic, social and cultural development), while Article 11 guarantees the provision of an adequate standard of living including, amongst other things, adequate housing. This legislative instrument also engages Article 26 of the International Covenant on Civil and Political Rights which provides for effective protection against discrimination on any grounds, including sex. The provision of subsidies under the Act

assists with the advancement of these human rights by providing that all approved providers of aged care have a responsibility not to act in a way that is inconsistent with the rights of care recipient that are specified in the User Rights Principles. These rights include the right to be treated with dignity and respect and without discrimination.

Conclusion

This Legislative Instrument is compatible with human rights because it advances the protection of human rights.

Mark Butler

Minister for Mental Health and Ageing