

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Social Services

Aged Care Act 1997

Sanctions Principles 2014

The *Aged Care Act 1997* (the Act) provides for the regulation and 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.

Among the Principles made under section 96-1 are the *Sanctions Principles 2014* (the Principles).

The purpose of the *Sanctions Principles 2014* is to:

- specify steps that an approved provider must take to ensure that none of its key personnel is a disqualified individual. Key personnel include members of the group of people responsible for the executive decisions of an approved provider, or any other person who has authority or responsibility for, or significant influence over, planning, directing or controlling the activities of the approved provider;
- specify requirements in relation to the appointment of advisers and administrators to assist approved providers to comply with their responsibilities under the Act;
- in relation to sanctions, specify:
 - the matters to which the Secretary must have regard in deciding on the length of a sanction period where a sanction has been imposed on an approved provider for non-compliance with its responsibilities under the Act;
 - matters to which the Secretary must have regard in deciding whether to lift a sanction; and
 - the requirements for applications to the Secretary to lift a sanction.

From 1 July 2014, these Principles will replace the existing *Sanctions Principles 1997*. The main difference between the principles is that the new Principles have been renumbered and some provisions have been re-drafted to reflect contemporary drafting practice (and for consistency with other aged care principles). No policy changes have been made to the Principles.

Consultation

In April 2012, the former Government launched a major program of aged care reforms. The reform agenda was developed in close consultation with the aged care sector, including consumers, industry and professional bodies.

As part of the consultation on the proposed changes to the Act, and to delegated legislation,

arising from the reforms, the former Government communicated its intention to examine the delegated legislation and, where possible, simplify the delegated legislation.

This intent was communicated in November 2012, with the public release of a paper providing an overview of the proposed legislative changes. A video presentation detailing the proposed reforms was also made available online to assist members of the public to understand these changes.

During late 2012 and in the first half of 2013, briefing sessions were held across Australia to provide information and to explain, in detail, the proposed legislative changes included in the package of Bills introduced into Parliament on 13 March 2013. As part of these consultations, the intention to make related changes to delegated legislation was again discussed. For those interested members of the public unable to attend the briefings, the presentation, supporting handouts, a detailed Question and Answer document and an information video were made available online.

In early 2014 consultation was undertaken on those aged care principles that reflected significant policy changes. As the *Sanctions Principles 2014* do not substantially differ from the *Sanctions Principles 1997*, an exposure draft of these Principles was not released for public comment.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that no RIS is required (OBPR ID 16682).

Commencement

The Principles commence on 1 July 2014.

Details of the Sanctions Principles 2014

Part 1 – Preliminary

Section 1 – Name of principles

This section states that the name of the principles is the *Sanctions Principles 2014* (the Principles).

Section 2 – Commencement

This section provides that the Principles commence on 1 July 2014.

Section 3 – Authority

This section provides that the authority for making the Principles is section 96-1 of the *Aged Care Act 1997* (the Act).

Section 4 – Definitions

This section defines certain terms used in the Principles.

Accreditation Standards means the Accreditation Standards specified in the *Quality of Care Principles 2014*.

Act means the *Aged Care Act 1997*.

Home Care Standards means the Home Care Common Standards specified in the *Quality of Care Principles 2014*.

non-compliance means a failure by an approved provider to comply with 1 or more of the approved provider's responsibilities under Part 4.1, 4.2 or 4.3 of the Act.

A *police certificate* is a written statement of a person's criminal convictions prepared by the police or CrimTrac, which outlines the particulars of any such conviction. The CrimTrac Agency works together with Australia's police agencies to deliver the National Police Checking Service.

A number of other expressions used throughout the Principles are defined in Schedule 1 of the Act.

Part 2 – Reasonable steps to ensure suitability of key personnel

Section 5 – Purpose of this Part

This section describes the purpose of Part 2. Part 2 sets out the reasonable steps that an approved provider must take to ensure that none of its key personnel is a disqualified individual.

Section 6 – Reasonable steps to be taken

This section provides that for all existing key personnel, the approved provider must:

- ensure that each person who is one of the provider's key personnel understands

the obligations of key personnel and of approved providers under the Act in relation to disqualified individuals;

- if the approved provider reasonably believes that the person may be mentally incapable of performing his or her duties as a key personnel, make arrangements for the person to be examined by a registered medical practitioner; and
- if the approved provider has ascertained that the person is a disqualified individual, ensure that the person ceases to be one of the approved provider's key personnel.

The section also provides that if a person is proposing to become (or becomes) one of the approved provider's key personnel, the provider must:

- obtain (with the person's written consent) a police certificate for the person;
- conduct a search of bankruptcy records; and
- conduct previous employment and referee checks.

If the approved provider reasonably believes that one of the provider's key personnel may be a disqualified individual, the provider may take steps to ascertain whether the person is a disqualified individual. These steps may include:

- obtaining (with the person's written consent) a police certificate for the person;
- conducting a search of bankruptcy records;
- conducting previous employment and referee checks; and
- taking any other appropriate steps.

If the Secretary seeks information from the approved provider as to the steps taken to ensure that a person who is one of the approved provider's key personnel is not a disqualified individual, the approved provider must provide that information to the Secretary.

Part 3 – Administration of sanctions

Division 1 – Appointment of adviser instead of revoking approval

Section 7 – Purpose of this Division

The purpose of this Division is to set out the requirements concerning the appointment of a person as an adviser to assist an approved provider to comply with its responsibilities in relation to care and services, in circumstances where a sanction notice has been issued by the Secretary under section 67-5 of the Act.

Section 8 – Secretary must decide whether to appoint nominated adviser

This section describes arrangements relating to the appointment of an adviser to assist an approved provider to comply with its responsibilities under the Act.

In summary:

- the Secretary must approve, or refuse to approve, the appointment of a proposed adviser within 14 days after receiving a nomination from the approved provider;
- before making a decision, the Secretary may ask the proposed adviser to give a summary or description of the advice (or type of advice) that he or she intends to give to the approved provider to assist the approved provider to comply with its responsibilities. The summary can be provided either in writing or at a personal

- interview;
- the Secretary may approve the appointment only if he or she is satisfied that:
 - the proposed adviser meets the eligibility criteria for appointment as outlined in Section 66A-2 of the Act;
 - the proposed adviser has a sufficient understanding of the issues that need to be addressed to remedy the non-compliance;
 - there would be no conflict, affecting the delivery of care or other services, between the proposed adviser’s obligations as adviser and any other obligations of the proposed adviser; and
 - the proposed adviser has complied with any requirements to give the Secretary a summary of advice (as described above); and
 - the approved provider must be notified of the Secretary’s decision, in writing, within 7 days of the Secretary making a decision. If the Secretary’s decision is to refuse to approve the appointment, the Secretary must also give the approved provider a written statement of the reasons for the decision. A decision to refuse to approve the proposed appointment is a reviewable decision under section 85-1 of the Act.

Section 9 – Nomination of another adviser

This section states that if the Secretary refuses to approve the appointment of an adviser, the Secretary may ask the approved provider, in writing, to nominate someone else as an adviser.

If the approved provider agrees to nominate someone else, the approved provider must, within 5 days after receiving the invitation:

- nominate, in writing, another proposed adviser to the Secretary; and
- give the Secretary written information about the proposed adviser to allow the Secretary to decide whether the proposed adviser meets the eligibility criteria for appointment.

A note at the end of the section reminds the reader that section 8 also applies to the alternative person nominated as an adviser.

Division 2 – Appointment of administrator instead of revoking approval

Section 10 – Purpose of this Division

This Division sets out requirements concerning the appointment of a person as an administrator to assist an approved provider to comply with its responsibilities in relation to governance and business operations.

Section 11 – Secretary must decide whether to appoint nominated administrator

This section describes arrangements relating to the appointment of an administrator to assist an approved provider to comply with its responsibilities in relation to business operations and governance.

In summary:

- the Secretary must approve, or refuse to approve, the appointment of the proposed administrator within 14 days after receiving a nomination from the approved provider;
- before making a decision, the Secretary may ask the proposed administrator to

- give a summary or description of the action that he or she proposes to take to remedy the approved provider's non-compliance with its responsibilities under the Act. The summary can be provided either in writing or at a personal interview;
- the Secretary may approve the appointment only if the Secretary is satisfied that:
 - the proposed administrator meets the eligibility criteria for appointment as outlined in Section 66A-3 of the Act;
 - the proposed administrator has a sufficient understanding of the issues that need to be addressed to remedy the non-compliance;
 - there would be no conflict, affecting the delivery of care or other services, between the proposed administrator's obligations as administrator and any other obligations of the proposed administrator;
 - the proposed administrator has complied with any requirements to give the Secretary a summary of advice (as described above); and
 - the approved provider must be notified of the Secretary's decision, in writing, within 7 days of the Secretary making a decision. If the Secretary's decision is to refuse to approve the appointment, the Secretary must also give the approved provider a written statement of the reasons for the decision. A decision to refuse to approve the proposed appointment is a reviewable decision under section 85-1 of the Act.

Section 12 – Nomination of another administrator

This section states that if the Secretary refuses to approve the appointment of an administrator, the Secretary may ask the approved provider, in writing, to nominate someone else as an administrator.

If the approved provider agrees to nominate someone else, the approved provider must, within 5 days after receiving the invitation:

- nominate, in writing, another proposed administrator to the Secretary; and
- give the Secretary written information about the proposed administrator to allow the Secretary to decide whether the proposed administrator meets the eligibility criteria for appointment.

A note at the end of the section reminds the reader that section 11 also applies to the alternative person nominated as an administrator.

Part 4 – When sanctions cease to apply

Section 13 – Purpose of this Part

This section describes the purpose of the Part which is to specify:

- matters the Secretary must consider in deciding the length of a sanction period where a sanction has been imposed on an approved provider for non-compliance with its responsibilities under Part 4.1, 4.2 or 4.3 of the Act;
- other matters the Secretary must consider in deciding whether it is appropriate to lift a sanction; and
- the requirements that an application to lift a sanction must meet.

Section 14 – Matters to which Secretary must have regard in deciding on sanction period

This section describes the matters that must be considered by the Secretary in deciding the length of a sanction period. The matters are:

- whether the non-compliance is of a minor or serious nature;
- whether the non-compliance has happened before, and, if so, how often;
- whether the non-compliance threatens or threatened the health, welfare or interests of care recipients;
- whether the non-compliance would threaten the health, welfare or interests of future care recipients;
- whether the approved provider has failed to comply with any undertaking to remedy the non-compliance; and
- the period likely to be needed to establish whether any improvement in compliance can be sustained.

Section 15 – Other matters to which Secretary must have regard in deciding whether to lift sanction

In deciding whether it is appropriate for a sanction to be lifted, the Secretary must have regard to whether the approved provider is complying with its responsibilities under Parts 4.1, 4.2 and 4.3 of the Act and any other matters specified in the Sanctions Principles.

This section specifies some other matters that need to be considered by the Secretary. The other matters are:

- the matters referred to in section 14 of these Principles - specifically:
 - whether the non-compliance is of a minor or serious nature;
 - whether the non-compliance has happened before, and, if so, how often;
 - whether the non-compliance threatens or threatened the health, welfare or interests of care recipients;
 - whether the non-compliance would threaten the health, welfare or interests of future care recipients;
 - whether the approved provider has failed to comply with any undertaking to remedy the non-compliance;
 - the period likely to be needed to establish whether any improvement in compliance can be sustained; and
- whether any changes made by the approved provider are likely to result in a sustained improvement in the approved provider’s compliance with its responsibilities under Part 4.1, 4.2 or 4.3 of the Act.

Section 16 – Application for sanction to be lifted

This section sets out the information that must be provided by the approved provider in an application for a sanction to be lifted. Details of the following matters must be provided:

- what the approved provider has done to remedy the non-compliance for which the sanction was imposed;
- any assessment, carried out while the sanction has been in effect:
 - against the Accreditation Standards of the approved provider’s management systems, staffing and organisational development; or
 - against the Home Care Standards of the home care services (if any) provided by the approved provider;
- any consultations with staff, care recipients, or care recipients’ relatives about the non-compliance;
- the approved provider’s proposals for sustaining its compliance with its

responsibilities under Part 4.1, 4.2 or 4.3 of the Act.

Statement of Compatibility with Human Rights

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

Sanctions Principles 2014

The *Sanctions Principles 2014* (the Principles) are 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 Principles describe:

- the steps that an approved provider must take to ensure that none of its key personnel is a disqualified individual. Key personnel include members of the group of people responsible for the executive decisions of an approved provider, or any other person who has authority or responsibility for, or significant influence over, planning, directing or controlling the activities of the approved provider;
- requirements in relation to the appointment of advisers and administrators to assist approved providers to comply with their responsibilities under the *Aged Care Act 1997* (the Act) if sanctions have been imposed because of non-compliance;
- in relation to sanctions:
 - the matters to which the Secretary must have regard in deciding on the length of a sanction period in relation to a sanction that has been imposed on an approved provider for non-compliance with its responsibilities under the Act;
 - matters to which the Secretary must have regard in deciding whether to lift a sanction; and
 - the requirements that an application to lift a sanction must meet.

Human Rights Implications

The Principles are compatible with the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health as contained in article 11(1) and article 12(1) of the International Covenant on Economic, Social and Cultural Rights, and article 25 and article 28 of the Convention on the Rights of Persons with Disabilities.

The Principles are designed to protect the safety, health and well-being of care recipients and the security of their accommodation bonds, refundable accommodation deposits and refundable accommodation contributions by requiring an approved provider to take specified steps to ensure that none of its key personnel is a disqualified individual. A person is a disqualified individual if the person has been convicted of an indictable offence, is an insolvent under administration or is of unsound mind.

The Principles also protect the safety, health and well-being of care recipients by specifying the matters in respect of which the Secretary must be satisfied before approving the appointment of an adviser or administrator to assist an approved provider to meet its responsibilities under the Act. The Secretary must be satisfied, amongst other matters, that the proposed adviser or administrator has sufficient

understanding of the issues that need to be addressed to remedy the non-compliance by the approved provider.

The Principles also specify the matters to which the Secretary must have regard in deciding on the length of a sanction period.

These provisions are compatible with the right of care recipients to an adequate standard of living and their right to the enjoyment of the highest attainable standard of physical and mental health as the matters to which the Secretary must have regard include whether the non-compliance threatens or would threaten the health, welfare or interests of current and future care recipients and the period likely to be needed to establish whether any improvement in compliance on the part of the approved provider can be sustained.

Conclusion

This legislative instrument is compatible with human rights as it promotes the human right to an adequate standard of living and the highest attainable standard of physical and mental health.

**Senator the Hon Mitch Fifield
Assistant Minister for Social Services**