

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Social Services

Aged Care Act 1997

Extra Service 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 *Extra Service Principles 2014* (the Principles).

The *Extra Service Principles 2014* replace the *Extra Service Principles 1997*. Similar to the 1997 principles, the new Principles:

- describe the criteria that needs to be met for a grant of extra service status;
- describe some of the conditions of a grant of extra service status including the matters that the Secretary must take into account if varying the conditions of a grant of extra service status; and
- describe matters relating to the content of extra service agreements including provisions that must be included in extra service agreements between an approved provider and a care recipient.

A key distinction between the 1997 principles and these Principles is the inclusion of the newly established Aged Care Pricing Commissioner who will make decisions about extra service fees. The new Principles include a description of the matters that the Aged Care Pricing Commissioner will take into account when deciding applications for extra service fees.

The new Principles also:

- remove other requirements from the meaning of a distinct part (of a service). These requirements are no longer relevant now that extra service status may be granted for an individual room (in accordance with changes to the Act);
- include references to a new class of care recipients (low-means care recipients);
- make changes in relation to the consideration of an applicant's record, to better align with the language of the Act, and to remove the more subjective elements; and
- remove redundant provisions that repeat sections of the Act.

The Principles are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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 it.

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.

During March and April 2014, an exposure draft of these Principles was made available for comment on the Department of Social Services' website, along with an explanatory document entitled *Overview: Proposed changes from 1 July 2014 to the Aged Care Principles made under the Aged Care Act 1997 - April 2014*. Comments on the draft Principles were invited and taken into account in the finalisation of these Principles.

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 Extra Service Principles 2014

Part 1 – Preliminary

Section 1 – Name of principles

This section states that the name of the Principles is the *Extra Service 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.

Act means the *Aged Care Act 1997*.

assisted resident is defined in clause 1 of Schedule 1 to the *Aged Care (Transitional Provisions) Act 1997* as a person who meets the conditions described in section 44-8 of the *Aged Care (Transitional Provisions) Act 1997*. The criteria for determining assisted resident status are the same as for concessional resident status except that, at the time of entry to a residential care service, an assisted resident had assets of between 2.5 and 4 times the annual single basic age pension amount if they entered before 1 July 2005, or between 2.25 and 3.61 times the annual single basic age pension amount if they entered on, or after, 1 July 2005.

concessional resident is defined in clause 1 of Schedule 1 to the *Aged Care (Transitional Provisions) Act 1997* as a person who meets the conditions described in section 44-7 of the *Aged Care (Transitional Provisions) Act 1997*. These conditions include that the person entered a residential care service before 20 March 2008 and, at the time the person entered the residential care service:

- the person was receiving an income support payment;
- the person was not a home owner (or the person's home was occupied by a protected person such as a partner or a dependent child); and
- the value of the person's assets was less than 2.5 times the annual single basic age pension amount if the person entered residential care prior to 1 July 2005, or less than 2.25 times the basic age pension amount if the person entered residential care on, or after, 1 July 2005.

extra service amount is defined by section 58-5 of the *Aged Care (Transitional Provisions) Act 1997* and means the sum of the extra service fee in force for the place, on the day in question, and an amount equal to 25% of that extra service fee.

GST means a tax that is payable under the GST law and imposed as a goods and services tax (as defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*).

low-means care recipient has the meaning given by section 5.

supported resident is defined in clause 1 of Schedule 1 to the *Aged Care (Transitional Provisions) Act 1997* as a person who meets the conditions described in section 44-5B of the *Aged Care (Transitional Provisions) Act 1997*. A person is a supported resident if they entered a residential care service as a permanent resident for the first time on, or after, 20 March 2008 and their assets at the time of entry were valued at, or below, a threshold determined by the Secretary by legislative instrument.

This section also notes that a number of expressions used in these Principles are defined in Schedule 1 of the Act.

Section 5 – Meaning of low-means care recipient

This section states that a care recipient is a low-means care recipient on a day if the care recipient is being provided with residential care and is eligible for an accommodation supplement under section 44-28 of the Act or, upon entry to the service, the care recipient's means tested amount was less than the maximum accommodation supplement amount for the entry day.

Part 2 – Criteria for grant of extra service status

Section 6 – Purpose of this Part

Section 6 states that Part 2 specifies the matters the Secretary must have regard to when considering whether the criteria for granting extra service status has been met. The Part also outlines other matters that must be satisfied before the Secretary can grant an application for extra service status.

Section 7 – Unreasonable reduction of access

Paragraph 32-4(1)(a) of the Act requires the Secretary to be satisfied that granting the extra service status would not unreasonably reduce access to residential care by people living in the State, Territory or region concerned who are included in a class of people specified in these Principles.

For the purposes of this paragraph, this section provides that the Secretary must have regard to:

- the proportion (if any) determined under section 12-5 of the Act, as the proportion of residential care that must be provided to low-means care recipients, supported, concessional and assisted residents in the State, Territory or region concerned;
- the number of allocated places in the State, Territory or region;
- the number of extra service places in the State, Territory or region; and
- the estimated number of places in the State, Territory or region providing care mainly or exclusively to people with special needs.

The Secretary may also have regard to any other relevant matter.

Section 8 – Standard of accommodation, services and food

Paragraph 32-4(1)(b) of the Act requires the Secretary to be satisfied that the proposed standard of accommodation, services and food in respect of each place to be covered by the extra service status is significantly higher than the average standard in residential care services that do not have extra service status.

For the purposes of this paragraph, this section provides that the Secretary must have regard to:

- the proposed standard of accommodation, services and food in the relevant residential care service, taken as a whole;
- in relation to accommodation, the nature of the accommodation including the size of care recipients' rooms and communal areas, the quality of the fixtures, fittings and furnishings, the availability of in-room amenities (including ensuite bathrooms), the availability of communal facilities, the extent of choice of accommodation features (such as choice of sitting areas) and the extent of choice of amenities offered to care recipients; and
- in relation to services and food, the range, quality, and quantity or frequency of items offered, including the extent of choice offered to care recipients.

The Secretary may also have regard to any other relevant matter.

Section 9 – Applicant's record of conduct as a provider of aged care

This section only applies in relation to an application for extra service status if the applicant has been a provider of aged care.

Paragraph 32-4(1)(c) of the Act requires the Secretary to be satisfied that the applicant has a very good record of conduct as a provider and compliance with its responsibilities as such a provider (including meeting its obligations arising from the receipt of any payments from the Commonwealth for providing aged care).

For the purposes of this paragraph, this section provides that the Secretary must have regard to:

- whether the applicant has complied with its responsibilities under the Act during the 3 years prior to the application for extra service status;
- if the applicant failed to comply with its responsibilities within the 3 years prior to the application, the nature and extent of the non-compliance, the impact of the non-compliance on care recipients, the action taken and outcomes of any action taken in rectifying the non-compliance.

The Secretary may also have regard to any other relevant matter.

Section 10 – Assessment of person with whom applicant has relevant key personnel in common

This section only applies in relation to an application for extra service status if the applicant has relevant key personnel in common with a person (the associated person) who is, or has been, an approved provider.

Paragraph 32-4(1)(ca) of the Act requires the Secretary to be satisfied that if the applicant has relevant key personnel in common with a person who is, or has been, an

approved provider, the person has a very good record of conduct as a provider and compliance with its responsibilities as such a provider (including meeting its obligations arising from the receipt of any payments from the Commonwealth for providing aged care).

For the purposes of this paragraph, this section provides that the Secretary must have regard to:

- whether the associated person failed to comply with any responsibilities or obligations to the Commonwealth for the receipt of any payments, within the 3 years before the application was made; and
- if so, the nature and extent of the non-compliance, the role of the key personnel in the non-compliance, and the role of the key personnel in rectifying the non-compliance.

The Secretary may also have regard to any other relevant matter.

Section 11 – Other criteria that must be satisfied

Paragraph 32-4(1)(e) of the Act enables these Principles to specify other matters with which the Secretary must be satisfied in relation to an extra service status application. This section details those other matters.

The Secretary must be satisfied that if the application is granted:

- the diversity of choice for current and future care recipients and their carers and families will be significantly increased in relation to the kinds of extra services offered in the region, or the different groups of care recipients who are offered extra services. For example, choice in kinds of service may relate to the type, frequency, variety and quality of services and food available and the applicable fee structures. Examples of different groups of care recipients who are offered extra service include care recipients affected by dementia, couples and people with special needs; and
- the extra service status would provide current and future care recipients in the region with better access to continuity of care. For the purpose of this criteria, the Secretary may also take into account whether the service has made suitable arrangements for continuity of care for existing care recipients during the transition to extra service status.

Part 3 – Conditions of grant of extra service status

Division 1 – Additional conditions

Section 12 – Purpose of this Division

This section states that Division 1 of Part 3 specifies the additional conditions that are automatically included as conditions on a grant of extra service status for residential care.

This section notes that any additional conditions of a grant are taken to be included in the written notice given to the applicant for the grant, under section 32-9 of the Act.

Section 13 – Additional conditions

This section provides that the accommodation, services and food specified in the notice given to a provider who has been successful in an application for extra service status must be provided to care recipients, without any additional charge other than:

- if the care recipient is a continuing residential care recipient, the provider may charge the extra service amount. The extra service amount is the sum of the extra service fee in force for the place on the day in question, and an amount equal to 25% of that extra service fee;
- if the care recipient is not a continuing residential care recipient, the extra service fee approved under Division 35 of the Act for the care recipient's place in the service; and
- the amount of GST payable, if any, on the supply of a service that is not a service specified in Schedule 1 to the *Quality of Care Principles 2014* and that is provided to the care recipient on an extra service basis.

The section also states that if extra service status has not become effective and conditions are included in the notice that must be met before it becomes effective, the approved provider must, at least the required number of days before the extra service status will become effective, notify the Secretary, in writing, that the provider considers that the service, or the distinct part of the service, will be able to meet the conditions from that day.

The required number of days is:

- 7 days, if the extra service status is proposed to become effective less than 60 days after the notice is given; or
- 28 days in any other case.

Each care recipient who is receiving care in the service, or the distinct part of the service, on a non-extra service basis immediately before the extra service status becomes effective:

- must be offered the choice to occupy his or her place on an extra service basis; and
- may continue to receive care on a non-extra service basis, and must be treated as a non-extra service care recipient, if the care recipient does not choose to receive care on an extra service basis.

Division 2 – Variation of conditions

Section 14 – Purpose of this Division

This section states that Division 2 of Part 3 sets out a requirement that the Secretary must consider, in deciding whether to agree to a variation of the conditions to which a grant of extra service status is subject.

Section 15 – Extent of change in accommodation, food and services must be considered

This section provides that, in deciding whether to agree to a variation of the conditions to which a grant of extra service status is subject, the Secretary must consider the extent of any change in the level of accommodation, food and services that would result from the proposed variation to the conditions of the grant of extra service status. The Secretary may also have regard to any other relevant matter.

Part 4 – Extra service fees

Division 1 – Approval of extra service fees

Section 16 – Purpose of this Division

This section states that Division 1 of Part 4 sets out the requirements that must be met by proposed extra service fees, of certain applications for approval of proposed extra service fees, for places that have (or are proposed to have) extra service status.

Section 17 – Requirements that must be met by proposed extra service fees

This section provides that the Aged Care Pricing Commissioner must be satisfied that the accommodation, food and services proposed to be provided to a care recipient for the proposed extra service fee, have not been included in any other fees or amounts that may be charged by way of an accommodation payment, or with the agreement of the care recipient.

In considering this, the Aged Care Pricing Commissioner must have regard to:

- the proposed amount of the fee;
- the food and services that will be provided for the proposed fee. For example, food and entertainment options, enhanced personal services, specific products or organised outings; and
- any accommodation benefits that will be provided for the proposed fee.

The Aged Care Pricing Commissioner may also have regard to any other relevant matter.

Section 18 – Requirements for certain applications for approval of extra service fees

This section provides that if an application for extra service fees is made other than in connection with an application for extra service status, the application for approval of the extra service fees must be made at least 60 days before the day on which it is proposed that the extra service fees are to take effect. This ensures that there is adequate time for consideration of the application by the Aged Care Pricing Commissioner, and notification to care recipients prior to any changes to fees that may result from the application to the Aged Care Pricing Commissioner.

Division 2 – Amount of extra service fee

Section 19 – Purpose of this Division

Section 19 states that Division 2 of Part 4 provides the methods for determining the maximum amount by which an extra service fee may be increased.

Section 20 – Maximum amount by which extra service fee may be increased

Section 20 states that the method for determining the maximum amount an extra service fee can be increased is, the sum of 20% of the current fee, and the amount by which the current fee would change if it were indexed for the 12 months ending before the application to increase the fee was made. Indexation is in accordance with the percentage change in the All Groups Consumer Price Index (that is, the weighted average of the 8 capital cities).

Division 3 – Other matters

Section 21 – Purpose of this Division

This section states that Division 3 of Part 4 outlines an additional function of the Aged Care Pricing Commissioner.

Section 22 – Disclosure of information to Secretary

Section 21 states that the Aged Care Pricing Commissioner must disclose the following information to the Secretary:

- the amount of any extra service fee approved by the Aged Care Pricing Commissioner;
- the residential care service in respect of which the extra service fee was approved;
- a description of the accommodation, food and services to be provided to a care recipient for the approved fee;
- the date of the approval; and
- any other related information required by the Secretary to assist the Secretary to perform a function or duty, or exercise a power, under the Act, or the *Aged Care (Transitional Provisions) Act 1997*.

The purpose of this section is to ensure that the Secretary has adequate information from the Aged Care Pricing Commissioner to enable him or her, to perform his or her functions, including functions relating to complaints, and functions that require the calculation of fees and subsidy.

Part 5 – Extra service agreements

Division 1 – Entering extra service agreements

Section 23 – Purpose of this Division

Division 1 of Part 5 outlines the requirements that must not be contravened in entering into an extra service agreement with a care recipient.

Section 24 – Requirements that must not be contravened

Section 24 provides that the care recipient must be informed of, and helped to understand, the terms of an extra service agreement, and the agreement must be expressed in plain English and be readily understandable to the care recipient. These conditions must not be contravened.

Division 2 – Contents of extra service agreements

Section 25 – Purpose of this Division

Division 2 of Part 5 sets out the provisions that must be contained in an extra service agreement.

Section 26 - Provisions that must be contained in extra service agreements

This section provides that extra service agreements must contain provisions that are in accordance with the following policy:

- that if the extra service status is revoked or suspended, then the care recipient cannot be charged the extra service amount for any period after the revocation, or during the suspension;

- that an extra service agreement may be varied by the approved provider if it is necessary to implement the *A New Tax System (Goods and Services Tax) Act 1999*, and reasonable notice has been given, in writing, to the care recipient;
- that an extra service agreement may be varied in any other case by the mutual consent of the care recipient and the approved provider, expressed in writing, and signed by the parties. However, the agreement must not be varied in any way that is inconsistent with the *A New Tax System (Goods and Services Tax) Act 1999*, the *Aged Care Act 1997*, the *Aged Care (Transitional Provisions) Act 1997*, or these Principles;
- that an extra service fee cannot be increased unless the care recipient is notified in writing at least 30 days prior to the proposed increase taking effect; and
- that an extra service agreement is terminated if the care provided to the care recipient ceases (other than because the care recipient is on leave) or the extra service status ceases to have effect.

This section includes a note reminding the reader that, as stated in the Act, residential care may not be provided other than on an extra service basis to a care recipient through a residential care service, or a distinct part of a residential care service, that has extra service status except if:

- the care recipient was being provided with care through the service, or the distinct part of the service, immediately before the extra service status became effective; and
- the care recipient does not enter into an extra service agreement, or terminates an extra service agreement, within 3 months after the date of effect of the agreement.

Statement of Compatibility with Human Rights

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

Extra Service Principles 2014

The *Extra Service 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

Part 2.5 of the Act is about the process of allowing places in a residential care service to become extra service places. Extra service places involve providing a significantly higher standard of accommodation, food and services to care recipients. Extra service places can attract higher resident fees.

The Principles deal with various aspects of extra service places.

The purpose of the *Extra Service Principles 2014* is to reflect amendments made to the Act in relation to extra service, to reflect that the Aged Care Pricing Commissioner will make decisions on extra service fees, to remove redundant provisions, and to make other minor technical amendments.

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 set out the criteria for granting extra service status to a residential care service. The criteria includes whether the proposed standard of accommodation, services and food would be significantly higher than the average standard in residential care services that do not have extra service status and whether granting extra service status would unreasonably reduce access to residential aged care, and therefore, to the enjoyment of the highest attainable standard of physical and mental health, by people in the region who cannot afford to pay extra service fees.

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