

EXPLANATORY STATEMENT

Aged Care Act 1997

Aged Care Legislation Amendment (Single Quality Framework Consequential Amendments and Transitional Provisions) Instrument 2019.

Authority

Section 96-1 of the *Aged Care Act 1997* (Aged Care Act) provides that the Minister may make Principles providing for matters required or permitted by, or necessary or convenient to give effect to, the Aged Care Act.

The Amending Instrument amends the *Aged Care Quality and Safety Commission Rules 2018* (the Commission Rules) made under the Commission Act. Consequential amendments and transitional provisions are required to the Commission Rules to implement the Aged Care Quality Standards.

Amendments are required to certain Principles made under the Aged Care Act to implement the Aged Care Quality Standards. The *Aged Care Legislation Amendment (Single Quality Framework Consequential Amendments and Transitional Provisions) Instrument 2019* (the Amending Instrument) amends the following Principles:

- *Allocation Principles 2014* (Allocation Principles), to make consequential amendments, removing references to the previous standards, and setting out the transitional arrangements for matters that the Secretary must consider in relation to the transfer of places and provisionally allocated places.
- *Sanctions Principles 2014* (Sanctions Principles), to make consequential amendments, removing references to the previous standards, and setting out transitional provisions in relation to applications for sanctions to be lifted.

Section 77 of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) provides that the Minister may make rules prescribing matters necessary or convenient for carrying out, or giving effect to, the Commission Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subsection 4(2) of the *Acts Interpretation Act 1901* provides that a power may be exercised before the start time of an enactment, as if commencement had occurred. Subsection 4(5) provides that an instrument made under subsection 4(2) takes effect at the start time or a later time specified in that instrument.

These powers provide the authority to make the amendments set out in this instrument.

Purpose

This Amending Instrument amends the Commission Rules, the Allocation Principles and the Sanctions Principles to provide:

- transitional rules for the implementation of the new Aged Care Quality Standards from 1 July 2019
- consequential amendments to give effect to the Aged Care Quality Standards.

Background

On 1 July 2019 the *Aged Care (Single Quality Framework) Reform Act 2018* (the SQF Act) and the *Quality of Care Amendment (Single Quality Framework) Principles 2018* (the SQF Principles) will commence operation.

The SQF Act and SQF Principles will effectively replace, from 1 July 2019, the Accreditation Standards, Home Care Standards and Flexible Care Standards with the Aged Care Quality Standards.

From 1 July 2019, the SQF Act amends subsection 54-1 (contained in Part 4.1) of the Aged Care Act. Providers will be required to comply with the Aged Care Quality Standards, instead of the Accreditation Standards, Home Care Standards or Flexible Care Standards (as applicable to the care provided by the provider). The Amending Instrument provides for the consequential and transitional rules that will apply from 1 July 2019 as a result of this change.

The Commission Act provides for the establishment of the Aged Care Quality and Safety Commission (the Commission).

The Commission Rules give operational effect to the processes of the Commission in relation to accreditation, assessment and monitoring of aged care services and Commonwealth-funded aged care services, as well as complaint management and resolution.

The Commission Rules establish the arrangements for the accreditation (Part 3), quality review (Part 4) and monitoring (Part 5) of aged care services and Commonwealth-funded aged care services, as well as for reconsideration and review of certain decisions made under the Commission Rules (Part 7), and for the sharing of certain information (Part 8).

Consultation

No public consultation was undertaken on the making of the Amending Instrument as the changes are merely technical in nature and are consequential to the changes made by the *Aged Care (Single Quality Framework) Reform Act 2018* and the *Quality of Care Amendment (Single Quality Framework) Principles 2018*

The Aged Care Quality Standards, introduced by the SQF Principles, were developed through an extensive co-design process with the aged care sector. Details of this consultation process are set out in the Explanatory Statement to the SQF Principles.

Details

The details of the Amending Instrument are set out in Attachment A to this explanatory statement.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) considered the reforms addressed in the SQF Principles and advised the Department of Health that a Regulatory Impact Statement would not be required (OBPR ID: 21855).

The Amending Instrument commences on 1 July 2019.

The Amending Instrument is a legislative instrument for the purpose of the *Legislation Act 2003*.

ATTACHMENT A

Section 1 Name

Section 1 specifies how the Amending Instrument is to be cited, that is, as the *Aged Care Legislation Amendment (Single Quality Framework Consequential Amendments and Transitional Provisions) Instrument 2019*.

Section 2 Commencement

This section provides for the Amending Instrument to commence on 1 July 2019.

Section 3. Authority

Section 3 provides that the Amending Instrument is made under the authority of the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018*.

Section 4 Schedules

Section 4 provides that each instrument specified in a Schedule to the Amending Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Instrument has effect according to its terms.

Schedule 1—Amendments

Aged Care Quality and Safety Commission Rules 2018

Item 1. Section 4 (definition of Accreditation Standards)

This item repeals the definition of *Accreditation Standards*.

Item 2. Section 4

This item inserts into the Commission Rules the definition *Aged Care Quality Standards*, meaning the Aged Care Quality Standards set out in the *Quality of Care Principles 2014*.

Item 3. Section 4 (definition of Flexible Care and Home Care Standards)

This item repeals the definitions of Flexible Care Standards and Home Care Standards.

Item 4. Section 4 (definition of plan for continuous improvement)

This item removes the reference to subsection 63(2) from section 4 of the Commission Rules.

Items 5, 7 to 11, and 20 to 23. Paragraphs 5(1)(a), 28(1)(c), 29(2)(a)(iii), 29(3)(b), 30(1)(c), 36(2)(a), 40(2)(a), 41(2)(a)(v), 41(3)(b), and 42(1)(d), 70(1)(a), 73(2)(a), 76(2)(a), 77(2)(a)(v), 77(4)(b), 79(1)(d)

These items omit references to “Accreditation Standards or Flexible Care Standards (as applicable)”, and substitute them with “Aged Care Quality Standards”.

Items 6, and 12 to 15. Paragraph 5(2)(a), Subsection 53(5), Paragraph 54(a), Paragraph 56(2)(a), and Paragraphs 57(2)(a) and (b)

These items omit references to “Home Care Standards or Flexible Care Standards (as applicable)”, and substitute them with “Aged Care Quality Standards”.

Items 16 and 17. Section 59

Section 59 provides a simplified outline of Part 5, which concerns the monitoring of Aboriginal and Torres Strait Islander services.

Items 16 and 17 amend the simplified outline.

Item 16 omits references to the “Accreditation Standards, Home Care Standards or Flexible Care Standards (as applicable)” and substitutes “Aged Care Quality Standards” in the paragraph of the provision relating to a provider’s obligations to have a plan for continuous improvement.

It also directs providers to elements that must be set out in a plan for continuous improvement in order to demonstrate how a provider will assess, against the Aged Care Quality Standards, the quality of the care and services they provide and how they will monitor and improve the care and services provided.

Item 17 omits references to the “Accreditation Standards, Home Care Standards or Flexible Care Standards (as applicable)” and substitutes “Aged Care Quality Standards” in the paragraph of the outline regarding action taken by the Commissioner if the Aged Care Quality Standards are not complied with.

Item 18. Sections 62 and 63

This item repeals sections 62 and 63 and substitutes a new provision requiring approved providers of an accredited service and home service providers to have a plan for continuous improvement.

It also directs providers to elements that must be set out in a plan for continuous improvement in order to demonstrate how a provider will assess, against the Aged Care Quality Standards, the quality of the care and services they provide and how they will monitor and improve the care and services provided.

The new section provides that if improvements are required, the plan should also set out how the provider would make those improvements.

The section also compels an approved provider of an accredited service or a home service provider of a home service to give a copy of the plan for continuous improvement of the service to the Commissioner, should the Commissioner request it.

Items 19 and 30. Paragraph 68(a), Subsection 85(1)

These items omit references to “Accreditation Standards, Home Care Standards or Flexible Care Standards (as applicable)”, and substitute “Aged Care Quality Standards”.

Items 24, 26 to 27, 29. Division 7 of Part 5 (heading), Subdivision B of Division 7 of Part 5 (heading), Section 84 (heading), Section 85 (heading)

These items omit references to “relevant Standards”, and substitute “Aged Care Quality Standards”.

Item 25. Sections 81 and 82

This item repeals sections 81 and 82, and substitutes a new provision that applies if:

a) one of the following applies:

- approved provider of an accredited service is notified of a timetable for improvement in relation to the service under section 30, 42, 68 or 79;
- home service provider of a home service is notified of a timetable for improvement in relation to the service under section 68;
- home service provider of a home service is given a final report under section 57 that specifies a timetable for improvement in relation to the service; and

b) at the end of the improvement period set out in the timetable or as extended under section 83, the Commissioner is not satisfied that the level of care and services provided through the service complies with the Aged Care Quality Standards.

In these circumstances, the Commissioner must, as soon as practicable, but not later than 14 days, after the end of the improvement period, give the provider and the Secretary a written notice that sets out the reasons why the Commissioner is not satisfied the level of care and services provided through the service complies with the Aged Care Quality Standards. The Commissioner must also give the provider a copy of any other relevant information.

Item 28. Subsection 84(1)

This item omits all references in the subsection to “Accreditation Standards, Home Care Standards or Flexible Care Standards (as applicable),” and substitutes “Aged Care Quality Standards”.

Items 31 and 32. Section 109 (heading), Subsection 109(1)

These items omit references to “Home Care Standards”, and substitute “Aged Care Quality Standards”.

Item 33. Division 1 of Part 9 (heading)

This item repeals the heading of Division 1 of Part 9, and substitutes:

“Division 1—Transitional, application and saving provisions relating to the commencement of this instrument.

Subdivision A—Preliminary”

Item 34. Section 112

This item omits “In this Part”, and substitutes “In this Division”.

Item 35. Division 2 of Part 9 (heading)

This item repeals the heading of Division 2 of Part 9, and substitutes:

“Subdivision B—Complaints”.

Item 36. Division 3 of Part 9 (heading)

This item repeals the heading of Division 3 of Part 9, and substitutes:

“Subdivision C—Accreditation of residential aged care services”.

Item 37. Division 4 of Part 9 (heading)

Repeals the heading of Division 4 of Part 9, and substitutes: “Subdivision D—Quality reviews of services”.

Item 38. Division 5 of Part 9 (heading)

Repeals the heading of Division 5 of Part 9, and substitutes: “Subdivision E—Monitoring of services”.

Subdivision E—Monitoring of services

Item 39. Division 6 of Part 9 (heading)

Repeals the heading of Division 6 of Part 9, and substitutes: “Subdivision F—Registration of quality assessors”.

Item 40. Division 7 of Part 9 (heading)

Repeals the heading of Division 7 of Part 9, and substitutes: “Subdivision G—Reconsideration and review of decisions”

Item 41. Division 2—Amendments made by the Aged Care Legislative Amendment (Consequential Amendments and Transitional provisions) Instrument 2019

138 Definitions

This provision defines the Accreditation Standards, Flexible Care Standards and the Home Care Standards as the standards in force immediately prior to the SQF commencement time.

The provision also defines the amending instrument as the *Aged Care Legislation Amendment (Single Quality Framework Consequential Amendment and Transitional Provisions) Instrument 2019* and the SQF commencement time as the start of 1 July 2019.

139 Pending applications for the accreditation of a commencing service.

This provision applies when a provider's application for accreditation of a new service is made before the SQF commencement time and a decision has not been made by the Commissioner before that time.

In that event the Commissioner can still take into account a provider's performance against the Accreditation Standards or Flexible Care Standards when considering whether there are areas of improvement required at the service and deciding whether to grant accreditation.

140 Pending applications for re-accreditation of an accredited service or a previously accredited service.

This section applies when a service has applied for re-accreditation prior to the SQF commencement time and the decision on whether to accredit has not been made by that time.

When making the decision about re-accreditation after the SQF commencement time, the Commissioner will do so in accordance with the Rules at that time.

Additionally, the provision deals with the conduct of site audits that commenced before the SQF commencement time but which have not been completed prior to that time. In that situation, the site audit would be completed with reference to the Accreditation Standards or Flexible Care Standards.

The provision also allows the Commissioner to take into account a provider's performance against the previous standards when determining whether a provider is likely to undertake continuous improvement and when deciding whether to re-accredit the service.

This accommodation is necessary to ensure continuity of the site audit process and fairness in decision making. Interruptions of site audits occur for a range of reasons (for example when an audit has to be suspended due to an infectious disease outbreak such as influenza at a residential aged care service).

This provision delivers certainty for the provider about how the site audit will be conducted and clarity about the standards to which the Commissioner will refer when deciding whether to re-accredit the service.

141 Quality reviews of Home services

This provision allows for quality reviews of Home Services that commenced before the SQF commencement time but which have not been completed prior to that time, to be completed with reference to the Home Care Standards or Flexible Care Standards.

When preparing the final report, after the SQF commencement time, the Commissioner may take into account the provider's performance against the Home Care Standards or Flexible Care Standards.

Visits to a Home Service or the premises where services are being delivered undertaken after the SQF commencement time, will be conducted with reference to the Aged Care Quality Standards.

142 Assessment contacts initiated but not completed before the SQF commencement time

In cases where the Commission first made an assessment contact with an approved provider or a home service provider before the SQF commencement time and before that time did not give the provider a written notice under s 68 of the Rules, then the provisions that applied before the SQF commencement time will continue to have effect.

In practice this will enable the Commission to give a notice to providers, after the SQF commencement time, about areas in which improvements to a service are required and to set a timetable for making those improvements, while taking into account information from the assessment contact about the provider's performance against the standards that applied before the SQF commencement time.

143 Assessment contacts initiated after the SQF commencement time in relation to timetables for improvement notified before the SQF commencement time

This provision allows for the Commission to conduct an assessment contact with a Residential or Home service provider after the SQF commencement time in relation to a timetable for improvement notified to the provider or extended before that time, where that timetable for improvement has not ended.

In those cases, the definition of an assessment contact is to be read to include references to the Accreditation Standards, Home Care Standards or Flexible Care Standards as applicable to the particular service.

The Commission will also be able to give a notice to providers, after the SQF commencement time, about areas in which improvements to a service are required taking into account information from the assessment contact about the provider's performance against the standards applicable before the SQF time.

144 Review audits

Review audits are conducted at Residential Aged Care services, usually over a period of days, when the Commissioner considers there are reasonable grounds for conducting such an audit, or the Secretary requests the Commissioner to do so. Commonly review audits are conducted when the Commissioner considers the provider may not be complying with the Standards.

It is foreseeable that review audits commenced in the period immediately prior to the SQF commencement time may not be completed until after that time. This

could occur because the review audit is scheduled for several days or a week and spans the SQF commencement date.

Following a Review audit, the Commissioner must decide whether to revoke a service's Accreditation. Given the potential consequence of the Review Audit for the provider's business and continuity of care for care recipients, it is important that there be continuity of the audit process against the standards that existed when the Review audit commenced.

The Commissioner may also arrange a Review audit in relation to a request for reconsideration of a reviewable decision (to revoke a services' Accreditation). Where the reviewable decision is made before the SQF commencement time, this provision allows for a Review audit conducted after the SQF commencement time to be conducted against the Accreditation Standards which applied when the reviewable decision was made.

Enabling Review audits to continue or be conducted in this way affords providers procedural fairness and clarity about the standards the Commissioner will refer to when deciding whether to revoke a service's Accreditation or conducting a reconsideration.

145 Revocation following a review audit

This provision deals with a decision made by the Commissioner after the SQF commencement time, to revoke a service's accreditation.

When making a decision whether to revoke a service's accreditation, one of the considerations the Commissioner must have regard to is whether the provider is likely to undertake continuous improvement.

In cases where section 144 applies, that is a Review Audit commenced before but finished after the SQF commencement time, this provision allows the Commissioner to take into account the provider's compliance, with the Accreditation Standards or Flexible Care Standards before the SQF commencement time when making that consideration.

146 Timetables for improvement

The provision affirms that a Timetable for Improvement given to a Residential or Home Service provider, after the SQF commencement time, will be given with reference to the Aged Care Quality Standards.

This provision is included for the avoidance of doubt and deals with circumstances that may arise when notice is given to a provider after the SQF commencement time in relation to findings prior to that time. It confirms that the provider is required to undertake improvements with reference to the Aged Care Quality Standards.

147 Direction to revise plan for continuous improvement if there is failure to comply with relevant Standards

When the Commissioner finds that the provider has failed to comply with the Accreditation, Flexible Care Standards or the Home Care Standards, the Commissioner may give a Residential or Home service provider a notice directing the provider to revise its plan for continuous improvement for a service.

In circumstances where the Commissioner has made a finding but has not, before the SQF commencement time, given the provider such a notice the Commissioner can, after that time, give the provider a notice directing it to revise its plan for continuous improvement to ensure compliance with the Aged Care Quality Standards.

148 Failure to comply with the relevant standards that places safety, health or well-being of aged care consumers at serious risk

This section applies when the Commissioner finds, either before or after the SQF commencement time, that a provider of a residential or home service has not complied, before that time, with the Accreditation Standards, Flexible Care Standards or the Home Care Standards.

The Commissioner must decide if the failure has or may place the safety, health or well-being of an aged care consumer at serious risk. If the Commissioner so finds, a notice must be given to the provider as soon as practicable setting out the findings and the reasons for the findings including reasons why the Commissioner considers a consumer or consumers have been placed, or may be placed, at serious risk.

The Commissioner must also give a copy of the notice to the Secretary of the Department, as soon as practicable.

In effect, this provision enables the Commissioner to, after the SQF commencement time, make findings and give notices to providers in respect of failures against the Accreditation Standards, Flexible Care Standards or the Home Care Standards detected before or after the SQF commencement time, as if those standards still applied.

A practical example could arise from a report of possible serious risk identified during an audit conducted immediately prior to the SQF time, for which the Commissioner does not make a finding until after that time. In that circumstance the Commissioner needs to be able to refer to the failure against the relevant standards that applied prior to the SQF commencement time.

149 Information about the failure to comply with Home Care Standards by service providers of home support services.

This provision allows the Commissioner to inform the Secretary after the SQF commencement time, in respect of a provider's failure to comply with the Home Care Standards before the SQF commencement time, regardless of whether the Commissioner became aware of the information before or after that time.

Allocation Principles 2014

Item 42. Section 4

This item omits “In these principles unless a contrary intention appears, an expression that is used in the *Aged Care Act 1997* has the same meaning, when used in this Principle, as in the *Aged Care Act 1997*, and:”, and substitutes:

“Note: A number of expressions used in these principles are defined in the Act, including the following:

- (a) key personnel;
- (b) people with special needs;
- (c) region;
- (d) relinquish;
- (e) subsidy.

In these principles:”

Item 43. Section 4 (definition of Accreditation Standards)

This item repeals the definition of “Accreditation Standards”.

Item 44. Section 4

This item inserts “*Aged Care Quality Standards* means the Aged Care Quality Standards set out in the *Quality of Care Principles 2014*.” which provides a definition of the Aged Care Quality Standards in the *Allocation Principles 2014*.

Item 45. Section 4 (note)

This item repeals the note in Section 4.

Items 46 and 47. Subparagraphs 48(2)(g)(i) and (ii), 59(2)(d)(i) and (ii)

These items omit the phrase “meet the Accreditation Standards”, and substitute “comply with the Aged Care Quality Standards”.

48 At the end of the instrument add

Part 10—Application, savings and transitional provisions

Item 56 specifies that sections 48 and 59 of the Allocation Principles, as amended by the Amending Instrument, apply in relation to a transfer notice that is received by the Secretary on or after the day the Amending Instrument commences.

Sanctions Principles 2014

Item 49. After the heading to section 4

This item inserts the following note after the heading to section 4:

“Note: A number of expressions used in these principles are defined in the Act, including the following:

- (a) disqualified individual;
- (b) key personnel.”

Item 50. Section 4 (definition of Accreditation Standards)

This item repeals the definition of “Accreditation Standards”.

Item 51. Section 4

This item inserts: “*Aged Care Quality Standards* means the Aged Care Quality Standards set out in Schedule 2 to the *Quality of Care Principles 2014*.”

Item 52. Section 4 (definition of Home Care Standards)

This item repeals the definition of “Home Care Standards”.

Item 53. Section 4 (note)

This item repeals the note.

Item 54. Paragraph 16(b)

This item repeals paragraph 16(b) and substitutes:

- (b) any assessment of the quality of care and services provided by the provider through a residential service, home service or accredited service that has been carried out against the Aged Care Quality Standards while the sanction has been in effect;

Item 55. At the end of the instrument add

Part 5—Application, savings and transitional provisions

Section 17 defines the term: ‘amending instrument’.

Section 18 applies where an application by an approved provider for a sanction to be lifted is made after the transition time; and the sanction was in effect before the transition time. In this circumstance, from the transition time, the amendments made to section 16 of the *Sanction Principles 2014* by the amending instrument apply to the application, along with the additional requirements that the application must include:

- any assessment, carried out against the Accreditation Standards while the sanction has been in effect, of the approved provider’s management systems, staffing and organisational development; and
- any assessment, carried out against the Home Care Standards while the sanction has been in effect, of the home care services (if any) provided by the approved provider.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Aged Care Legislation Amendment (Single Quality Framework Consequential Amendments and Transitional Provisions) Instrument 2018.

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 legislative instrument enables the implementation of the Aged Care Quality Standards that will apply to residential, home and flexible aged care services.

Human rights implications

The instrument engages the following human rights:

- the right to an adequate standard of living;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to protection from exploitation, violence and abuse; and
- the right to not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The instrument is 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 Convention on Economic, Social and Cultural Rights*, and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities*.

The Aged Care Quality Standards (the Standards) focus on achieving quality outcomes for consumers by enabling consumers and carers to influence the design and delivery of the services in order to ensure that they are consistent with the consumer's needs, goals and preferences. The Standards support consumers to achieve an adequate standard of living and to optimise consumers' physical and mental health.

The legislative instrument engages the right to protection from exploitation, violence and abuse as contained in article 20(2) of the *International Covenant on Civil and Political Rights* and article 16 of the *Convention of the Rights of Persons with Disabilities*. The Standards are intended to promote the delivery of quality aged care services by approved providers. The legislative

instrument is intended to increase protection for aged care consumers against potential exploitation, violence and abuse.

The legislative instrument engages the right to not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation contained in article 17 of the *International Covenant on Civil and Political Rights*.

Conclusion

The 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*. The instrument promotes the consumer's rights to an adequate standard of living and personal privacy, and optimises each consumer's physical and mental health, without prohibiting or restricting the right to freedom of thought, conscience and religion and the right to work.

The Hon Ken Wyatt

Minister for Senior Australians and Aged Care