

EXPLANATORY STATEMENT

Aged Care Act 1997

Aged Care Quality and Safety Commission Act 2018

Aged Care Legislation Amendment (New Commissioner Functions)
Instrument 2019

Authority

Section 96-1 of the *Aged Care Act 1997* (Aged Care Act) provides that the Minister may, by legislative instrument, make principles providing for matters required or permitted to be provided, or necessary or convenient to be provided in order to carry out or give effect to, the Aged Care Act. This provides the authority for the making of the Aged Care Principles which are amended or repealed by this Instrument.

Subsection 77(1) of *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Commission Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to, the Quality and Safety Commission Act. This provision provides the authority for the *Aged Care Quality and Safety Commission Rules 2018* (the Rules), which are amended by this Instrument.

Further to the power to make principles under section 96-1 of the Aged Care Act, and the power to make rules under subsection 77(1) of the Quality and Safety 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.

In addition, 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, when taken together, provide the authority to make this instrument.

Purpose

The *Aged Care Legislation Amendment (New Commissioner Functions) Act 2019* (the Amending Act) amends the Aged Care Act and the Quality and Safety Commission Act to transfer additional aged care regulatory functions to the Aged Care Quality and Safety Commissioner (Commissioner). These new functions include approving providers of aged care, and monitoring and enforcing their compliance with their aged care responsibilities.

The purpose of the *Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019* (the Instrument) is to make consequential changes to the *Accountability Principles 2014*, *Allocation Principles 2014* and the *Aged Care Quality and Safety Commission Rules 2018*, and to repeal the *Approved Provider Principles 2014*, to reflect the transfer of functions given effect to by the Amending Act.

Together, the Amending Act and the Instrument will enable the Aged Care Quality and Safety Commission (the Commission) to protect and enhance the safety, health, well-being and quality of life of aged care consumers; promote confidence and trust in the provision of aged care; and promote engagement with aged care consumers about the quality of care and services.

Background

The Instrument contributes to the establishment of the independent Commission as announced in the 2018-19 Budget. The Commission was established on 1 January 2019 and replaced the existing Australian Aged Care Quality Agency (Quality Agency) and Aged Care Complaints Commissioner (Complaints Commissioner) and their functions.

The Commission will be a single agency responsible for the independent accreditation, assessment, monitoring and resolution of complaints about aged care services subsidised by the Australian Government. The Commission's functions also include engagement with and education of approved providers, service providers, consumers and the public to build confidence and trust in aged care, empower consumers, support providers to comply with the Aged Care Quality Standards and promote best practice service provision.

The second stage of the establishment of the Commission involves the transfer of the aged care regulatory functions from the Secretary of the Department of Health to the Commission on 1 January 2020. The Amending Act and the Instrument give effect to this, through the transfer of responsibility for:

- the approval of providers for the delivery of residential aged care services, home care services and flexible care services under the Aged Care Act;
- compliance and enforcement actions, including revoking a provider's approval to participate in the Commonwealth subsidised aged care market; and
- the administration of the responsibility of approved providers to make compulsory reports of assaults and unexplained absences.

Consultation

As part of the Review of National Aged Care Quality Regulatory Processes (Carnell-Paterson Review) extensive public consultation took place with a range of stakeholders including aged care regulators, consumers, carers and approved providers to inform the recommendations of the Carnell-Paterson Review.

Targeted consultation with the aged care sectors on the reforms introduced by the Amending Act and this Instrument was undertaken in 2019, consisting of a briefing paper provided to selected stakeholders, including aged care peak organisations, members of the Aged Care Sector Committee and members of the Aged Care Quality and Safety Advisory Council, with an offer of follow-up face-to-face meetings and submissions.

These consultations broadly informed the structure and scope of the legislative framework within which the Instrument is made.

In relation to this Instrument itself, the Department developed the Instrument in close consultation with the Commission. These consultations were undertaken to ensure the workability of the provisions of the Instrument and identified opportunities to refine and clarify processes, where appropriate.

Given the Instrument largely reproduces the effect of the former Principles (particularly the *Approved Provider Principles 2014*) no further consultation was undertaken.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) has acknowledged that as part of the Carnell-Paterson Review a process and analysis equivalent to a Regulation Impact Statement (RIS) was undertaken. This process addressed all seven RIS questions for the purposes of examining the likely impacts of associated new policy proposals.

OBPR has published the certification letter and review on the online RIS website: <https://ris.pmc.gov.au/2018/09/19/more-choices-longer-life-package>.

The reference number for this matter is 22277.

The Instrument will commence on 1 January 2020.

This instrument is a legislative instrument for the purpose of the *Legislation Act 2003*.

Explanation of provisions for the *Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019*

The *Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019* (the Instrument) contains two main schedules:

- **Schedule 1** Sets out the amendments to the *Accountability Principles 2014*, *Aged Care Quality and Safety Commission Rules 2018* and the *Allocation Principles 2014*
- **Schedule 2** Provides for the repeal of the *Accountability Principles 2014*

Section 1 - Name of Instrument

Section 1 provides how the Instrument is to be cited, that is, as the *Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019*.

Section 2 - Commencement

This section provides for the Instrument to commence on 1 January 2020.

Section 3 - Authority

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

The powers in section 96-1 of the Aged Care Act and subsection 77(1) of the Quality and Safety Commission Act are relied upon for the making of this instrument.

This Instrument also makes amendments that will be necessary and convenient for the purposes of section 96-1 of the Aged Care Act and subsection 77(1) of the Quality and Safety Commission Act, following the commencement of the Amending Act. 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.

Further to the power to make principles under section 96-1 of the Aged Care Act, and the power to make rules under subsection 77(1) of the Quality and Safety 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.

Section 4 – Schedules

This section provides that each instrument specified in a schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item has effect according to its terms. This is a technical provision giving operational effect to the amendments contained in the Schedules.

Schedule 1 makes amendments to the *Accountability Principles 2014* (Accountability Principles), *Allocation Principles 2014* (Allocation Principles) and the *Aged Care Quality and Safety Commission Rules 2018* (the Rules) consequential to the transfer of aged care regulatory functions from the Secretary to the Commissioner under the Amending Act. Schedule 2 repeals the *Approved Provider Principles 2014* (Approved Provider Principles), as the provisions of these principles are transferred to the Rules by Schedule 1.

Schedule 1 – Amendments

Accountability Principles 2014

Items 1 and 2 – Section 4

Section 4 of the Accountability Principles provides definitions for a number of terms used elsewhere in the Accountability Principles. The note to this section advises that a number of terms used in the Principles have definitions in the Aged Care Act.

The amendments made by other items in Schedule 1 mean a number of new terms also defined in the Aged Care Act, are now used in the Accountability Principles.

These items amend the note to section 4; it will now note the terms ‘disqualified individual’, ‘key personnel’ and ‘Quality and Safety Commissioner’ have definitions in the Aged Care Act, which should be referred to when reading these provisions.

Item 3 – After Part 1

This item inserts Part 2 into the Accountability Principles to introduce new responsibilities on approved providers of residential care services to provide information to the Commissioner. Previously, approved providers had a responsibility to provide this information to the Secretary of the Department under section 25 of the Accountability Principles. These new provisions include:

New Section 5 – Purpose of this Part

Section 5 sets out that this Part of the Accountability Principles is intended to specify that approved providers of residential care services will have a responsibility to give certain information to the Commissioner.

New Section 6 – Information about unexplained absence of care recipients

Section 6 provides that an approved provider of a residential care services must provide information to the Commissioner if a care recipient is unexplainably absent from the service.

Subsection 6(1) provides where a care recipient is absent from the service, and that absence is both unexplained and reported to the police, then the provider must advise the Commissioner of this unexplained absence. Subsection 6(2) provides the provider must advise the Commissioner as soon as reasonably practicable of the absence, and no later than 24 hours after the absence is reported to the police.

Item 4 – Section 25

This item repeals section 25 of the Accountability Principles. This section currently requires approved providers to inform the Secretary of the Department of unexplained absences of care recipients. Section 25 will no longer be required, as section 6 will require this same information to be provided to the Commissioner.

Item 5 – Section 52 (paragraph (b) of the note)

This item amends the note to section 52 of the Accountability Principles, which summarises the effect of subsection 63-1AA(2) of the Aged Care Act. Subsection 63-1AA(2) of the Aged Care Act requires approved providers to report allegations and suspicions of reportable assaults within 24 hours to a relevant police officer, and the Secretary. This subsection will be amended by the Amending Act so that providers will be required to report this information to the Commissioner. This item amends the note to reflect this revised operation of section 63-1AA. This reflects the transfer of responsibility for the administration of reportable assaults from the Secretary to the Commissioner.

Item 6 – Paragraph 53(2)(b)

This item repeals paragraph 53(2)(b) of the Accountability Principles, and substitutes a provision to exempt providers from reporting allegations or suspicions of assaults, in circumstances where the allegation or suspicion is the same, or substantially the same, and the earlier allegation or suspicion was reported to the police and the Commissioner in accordance with subsection 63-1AA(2) of the Aged Care Act. This reflects the transfer of responsibility for the administration of reportable assaults from the Secretary to the Commissioner.

Item 7 – After Part 7

This item inserts a new Part 7A into the Accountability Principles and specifies, for the purpose of subsection 63-1A(2) of the Aged Care Act, reasonable steps that an aged care provider must take to ensure none of the provider's key personnel are disqualified individuals.

The provisions inserted by item 7 include:

New Section 53A – Purpose of this Part

This section provides that the purpose of Part 7A of the Accountability Principles is to specify the reasonable steps that an approved provider must take to ensure that none of its key personnel is a disqualified individual. Approved providers are required to take these steps in order to comply with their responsibility set out in subsection 63-1A(2) of the Aged Care Act.

New Section 53B – Reasonable steps to be taken by approved provider

This section sets out the steps that an approved provider must take to ensure that each person who is a key personnel of the provider is a person who meets the criteria set out in subsection (1). This includes that the provider ensures the person understands the obligations of key personnel and approved providers under the Aged Care Act and the Quality and Safety Commission Act in relation to disqualified individuals. The provider must make arrangements for a registered medical review of the key personnel if they believe that the person cannot undertake the role of key personnel due to mental incapacity.

Subsection 53B(1)(c) provides that where a provider reasonably believes a person is a disqualified individual, the provider must undertake one or more of the steps in accordance with subsection 53B(2) to determine if the person is a disqualified individual. This includes the provider obtaining with consent a police certificate, conducting a search of bankruptcy records and conducting previous employment and referee checks. Under subsection 53B(1)(d) if the provider has ascertained that the person is a disqualified individual, the provider must ensure that the person ceases being one of the key personnel of the provider.

Aged Care Quality and Safety Commission Rules 2018

The following items amend the *Aged Care Quality and Safety Commission Rules 2018* (the Rules).

Items 8, 9, 10, 11, 12, 13, 14 and 15 – Section 4

Section 4 defines a number of terms used throughout the Rules. These items together amend definitions for a number of terms used elsewhere in the Rules.

The amendments made by other items in Schedule 1 mean that a number of new terms, also defined in the Aged Care Act, are now used in the Quality and Safety Commission Act. Some definitions are repealed because the terms are now contained in the Quality and Safety Commission Act, and therefore a definition in the Rules is not necessary.

Item 16 – Subsections 13(1) and 15(2) (notes)

These items – omit the word complaints from the Note associated with subsections 13(1) and 15(2) the Note; refers to the type of officer that may enter a premises and exercise search powers in relation to the to the premises.in Accordance with Division 2 Part 8 of the Quality and Safety Commission Act. These references have been amended to reflect an authorised officer now has this power.

Item 17 – Paragraph 17(1)(d)

This item omits the notification to the to the Secretary under Part 4.4 of the Aged Care Act in Paragraph 17(1)(d) as it is no longer necessary as this function is now contained in Part 7B of the Quality and Safety Commission Act.

Item 18 – Section 21 (note 1)

This item omits the reference to the Secretary from taking action under Part 4.4 of the Act as it is no longer necessary and the function is now contained in Part 7B of the Quality and Safety Commission Act.

Item 19 – Subsection 23(1)

This item omits the reference to the Secretary from taking action under Part 4.4 of the Act as it is no longer necessary and the function is now contained in Part 7B of the Quality and Safety Commission Act.

Item 20 – After paragraph 70(1)(a)

This section inserts a reference to the approved provider notifying the Commissioner of a change of circumstance under section 9-1 of the Aged Care Act as this is now relevant information for the Commissioner in relation to their functions when arranging a review audit of an accredited service.

Item 21 – Subparagraph 70(1)(b)(i)

This section repeals this subparagraph as it has been moved to 70(1)(aa) and is no longer required. .

Items 22 to 24, and 26 to 32, and 34

These items all provide for the omission of the term ‘affected person’ and substitution with ‘interested person’. This amendment reflects that a party to a reviewable Commissioner decision may not always be an affected party to that decision. For example a family member, friend, or advocacy body may be assisting an individual in making a representation regarding the review of a reviewable Commissioner decision. These amendments ensure that such persons will have standing to seek review of a reviewable decision, increasing transparency of reconsideration processes within the Commission and opportunities for individuals to seek review of decisions.

Items 25 and 33 – Sections 98 and subsection 100(7)

These items replace the term ‘reviewable decision’ with ‘reviewable Commissioner decision’ to identify that the reviewable decisions are decisions made by the Commissioner.

Item 35 –After Part 8

This item inserts a new Part 8A into the Rules. Part A relates to instances where a person applies to be approved as a provider of aged care, and the Commissioner requests the person to provide further information to make the decision.

The provisions inserted by item 35 include:

New section 111A – Circumstances in which Commissioner may require further information to be given within a shorter period

Subsection 63C of the Quality and Safety Commission Act provides that the specified period of time in which the person must provide the requested information may be a period shorter than 28 days if the circumstances specified in the Rules apply in relation to the application. New section 111A specifies circumstances where the Commissioner may require information in less than 28 days.

These circumstances include where the Commissioner is satisfied that:

- the care for care recipients could be prejudiced by any delay in the decision to approve an applicant as a provider of aged care;
- the applicant, or one of the key personnel of the applicant, has previously been refused approved provider status in the past or had their approved provider status revoked.

The Note to section 111A provides an example of when a delay may prejudice care for care recipients.

New Part 8B – Sanctions for non-compliance with aged care responsibilities of approved provider

Item 35 also inserts a new Part 8B into the Rules, which relates to the Commissioner’s functions outlined in paragraph 16(ab) of the Quality and Safety Commission Act, i.e., the functions relating to the imposition of sanctions on approved providers that have not complied, or are not complying, with their aged care responsibilities.

New section 111B – Simplified outline of this Part

New section 111B provides an overview of the new Part 8B and specifies that the matters in this Part relate to the imposition of sanctions under section 63N of the Quality and Safety Commission Act, and the lifting of such sanctions.

Division 2 – Imposition of sanctions by the Commissioner

New section 111C – When sanctions come into effect and cease to have effect – matters to which the Commissioner must have regard

Subsection 63N of the Quality and Safety Commission Act provides that the Rules may specify matters to which the Commissioner must have regard in doing any of the following in relation to a sanction:

- specifying a day under paragraph 63N(5)(f) on which a sanction comes into effect;
- deciding whether or not to specify a day under subparagraph 63N(5)(g)(i) for cessation of a sanction;
- specifying a day under subparagraph 63N(5)(g)(i).

New section 111C provides for the matters the Commissioner must have regard to when doing any of the above things in relation to imposing a sanction on an approved provider for non-compliance with one or more of the provider's aged care responsibilities. The matters go to the nature of the non-compliance and its relationship to current or future care recipients, the seriousness of the non-compliance and the number of occurrences on which the non-compliance has occurred. The Commissioner also needs to give regard to any undertakings required under subsection 63T(2) of the Commission Act or agreements under subsection 63U(2) of that Act that relate to the provider, and if the provider has complied with these. These matters are similar to the matters previously set out in section 65-2 of the Aged Care Act.

New section 111D – Other sanctions that may be imposed on approved providers

This section provides for matters that relate to kinds of sanctions that may be imposed on approved providers under sections 63N and 63R of the Quality and Safety Commission Act. Paragraph 63R(o) of the Quality and Safety Commission Act provides that the Rules may specify other sanctions that may be imposed on an approved provider.

New section 111D specifies sanctions in relation to funding requirements of approved providers. Specifically, if an approved provider has not complied with the responsibility to make a payment in a specified time under 21F of the *User Rights Principles 2014* or the approved provider has over-charged a home care recipient under section 21M of the *User Rights Principles 2014*, the Commissioner can require the provider to make the payment or repay the overcharged amount within a specified period.

Division 3 – Notices that must, or may, be given before sanctions are imposed

New section 111E – Period to appoint eligible adviser – matters Commissioner must take into account when specifying period

This section provides for the matters the Commissioner must take into account when specifying that an approved provider must appoint an eligible adviser under subsection 63U(4) of the Quality and Safety Commission Act. These matters include:

- the location of the aged care service of the approved provider;
- the nature of the non-compliance and its relationship to current care recipients;
- the immediate and severe risk to care recipient health; safety and well-being;
- the availability of people with the appropriate skills; qualifications and experience required to assist the provider to comply with their aged care responsibilities; and
- any other matters that are relevant.

Division 4 – Lifting of Sanctions imposed on approved providers

New section 111F Lifting of sanctions – other matters to which the Commission must have regard

This section provides for the matters the commissioner must take into account when deciding if it is appropriate for the sanction imposed on an approved provider be lifted. This section relates to 63X of the Quality and Safety Commission Act, which provides the authority and sets out the timeframes that must be adhered to when considering whether to lift the sanction. The Commissioner must consider those matters listed in subsection 111C(a) to (g) which go to the nature of the non-compliance and its relationship to current or future care recipients, and the seriousness or number of occurrences on which the non-compliance has occurred. The Commissioner also needs to give regard to undertakings required under subsection 63T(2) or agreements under subsection 63U(2) that relate to the provider, and if the provider has complied with these. The Commissioner must also take into account any improvements the approved provider has made to ensure sustained compliance with their aged care responsibilities.

Paragraphs 131(2)(b), 132(2)(b), 133(2)(b), 134(2)(b) and 135(2)(b) and (c)

These items all provide for the omission of the term ‘affected person’ and substitution with ‘interested person’. This amendment will clarify that a party to a reviewable Commissioner decision may not always be an affected party to that decision. For example a family member, friend, or advocacy body may be assisting an individual in making a representation regarding the review of a reviewable Commissioner decision. This amendment ensures that the advocate is able to be an interested person to the reviewable Commissioners decision increasing transparency of reconsideration processes within the Commission.

Allocation Principles 2014

Paragraph s 51(1)(f) and 62(1)(f)

These items omit Part 4.4 of the Aged Care Act and substitute it with Part 7B of the Quality and Safety Commission Act. Part 7B provides for how the Commissioner can sanction aged care providers for non-compliance with their aged care responsibilities.

Schedule 2- Repeals

Aged Care Quality and Safety Commission Rules 2018

This provides for the whole of the *Approved Provider Principle 2014* to be repealed as the approval of provider provisions of these principles are transferred to the Rules by Schedule 1.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019

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 provides arrangements for the performance of the functions of the Aged Care Quality and Safety Commissioner from 1 January 2020.

Human rights implications

This instrument engages the following human rights:

- The right to an adequate standard of living and the right to health; and
- The right to protection from exploitation, violence, and abuse.

The legislative instrument is compatible with the right to an adequate standard of living and the right to health as contained in article 11 and article 12(1) of the *International Convention on the Economic, Social and Cultural Rights* and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities*.

The instrument engages with 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 *Convention of the Rights of Persons with Disabilities*. The provisions for reasonable steps to ensure key personnel of approved providers of aged care services are not disqualified individuals ensures protection for people receiving aged care services against potential exploitation, violence and abuse.

Conclusion

The legislative instrument is compatible with human rights to the highest attainable standard of physical and mental health and is compatible with the human rights and freedoms recognized and declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Senator, the Hon Richard Colbeck

Minister for Aged Care and Senior Australians

Minister for Youth and Sport