

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Senior Australians, Aged Care Services

Aged Care Act 1997

Aged Care Quality and Safety Commission Act 2018

Aged Care Legislation Amendment (Transition Care) Instrument 2021

The *Aged Care Act 1997* (Aged Care Act) and the Principles made under the Aged Care Act provide for the funding and regulation of aged care services. The Aged Care Act establishes different types of aged care, including residential care, home care and flexible care. The Aged Care Act provides that the *Subsidy Principles 2014* (Subsidy Principles) may specify kinds of flexible care. One of the kinds of flexible care specified in the Subsidy Principles is transition care.

The Aged Care Quality and Safety Commission's (Commission) role is to protect and enhance the safety, health, well-being and quality of life of people receiving aged care. The Commission is the national end-to-end regulator of aged care services, and the primary point of contact for consumers and providers in relation to quality and safety. The Commission has a range of responsibilities including the approval of providers; complaint handling; educating providers, consumers and the public; accrediting, undertaking quality reviews and monitoring the quality of care and services; and undertaking compliance and enforcement action.

Purpose

The *Aged Care Legislation Amendment (Transition Care) Instrument 2021* (Amending Instrument) amends the *Approval of Care Recipients Principles 2014* (Approval of Care Recipients Principles), the Subsidy Principles, and the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules).

The purpose of the amendments are to:

- a) confirm that a person accessing a state or territory 'hospital-in-the-home' program may be eligible to receive transition care;
- b) allow care recipients who are receiving transition care to take up to 7 days leave during an episode of transition care; and
- c) amend and clarify provisions in the Commission Rules:
 - i. relating to which decisions by the Aged Care Quality and Safety Commissioner (Commissioner) are 'reviewable Commissioner decisions' under Part 7 of the Commission Rules, and
 - ii. in relation to a reconsideration decision, to require the Commissioner to publish a performance report in relation to the reconsideration decision, rather than any site

audit report or review audit report considered in making the decision (this aligns with publication requirements for other performance assessment decisions).

Background

Transition Care

Transition care provides care recipients with a package of services including low intensity therapy and nursing support or personal care at the conclusion of a hospital episode. Transition care can be characterised as goal-oriented, time-limited, therapy focused, targeted towards older people and designed to assist a care recipient's restorative process, optimise their functional capacity and assist them and their family or carer to make long-term arrangements for their care.

Depending on a care recipient's needs, transition care may be provided in a hospital, residential or home care setting. It is also possible for a care recipient to receive transition care across settings during an episode of transition care, such as commencing initially in a residential care setting before moving to a home care setting, or vice versa.

Hospital-in-the-Home

State and territory governments have established a range of hospital-in-the-home programs. Broadly, these provide patients with a range of acute and/or subacute care and services in home or other community settings which are equivalent to the treatment that they would receive when admitted as an 'in-patient' to a hospital.

The Amending Instrument clarifies that a person accessing a hospital-in-the-home program may be eligible to receive transition care.

Leave provisions

A review of the Transition Care Programme (TCP review) included a range of findings aimed at improving program access and delivery in order to enhance the TCP for consumers, including the need for greater flexibility around transition care leave provisions. Specifically, recommendations 2 and 3 of the TCP review recommended:

- a) extending leave provisions to align to practices in the Short-Term Restorative Care (STRC) programme (i.e. allowing transition care clients to take a maximum of 7 days leave, including for social purposes); and
- b) extending the time period that a transition care client can be in hospital without needing to exit the TCP from 24 hours to 72 hours.

The Amending Instrument implements these recommendations by amending the Approval of Care Recipients Principles and the Subsidy Principles to allow a transition care client to take a break in their care to be re-admitted to hospital or to take social leave.

The Amending Instrument creates one category of leave for both hospital re-admissions and social leave that will permit clients to take a break in their care of up to 7 days.

Correction and clarification of provisions in the Commission Rules

The *Aged Care Legislation Amendment (New Commissioner Functions) Instrument 2019* amended the Commission Rules and a number of additional Aged Care Principles from 1 January 2020 to integrate the Commissioner's complaints and regulatory functions, with functions which were transferred to the Commissioner under the *Aged Care Legislation Amendment (New Commissioner Functions) Act 2019*.

The amendments included a new requirement for the Commissioner to prepare a performance report following site audits, review audits, quality audits and assessment contacts made to assess performance.

Currently, subsection 104(1) of the Commission Rules provides that within 28 days after making a reconsideration decision that relates to a regulatory reviewable decision, the Commission must publish on the Commission's website:

- (a) the reconsideration decision; and
- (b) any site audit report or review audit report considered in making the reconsideration decision.

The Amending Instrument removes the requirement for the Commissioner to publish site audit or review audit reports, and provides that the Commissioner must instead publish a performance report.

The notes in sections 41, 44 and 77 of the Commission Rules have also been updated to provide clarity around which decisions an approved provider of a residential care service may request the Commissioner to reconsider under Part 7 of those Rules. Amendments to sections 45 and 78 have been made for similar purposes.

Additionally, the table in section 98 of the Commission Rules has been amended to provide clarity around which decisions by the Commissioner are reviewable decisions.

Authority

The Approval of Care Recipients Principles and the Subsidy Principles are made under section 96-1 of the Aged Care Act. Section 96-1 of the Aged Care Act provides that the Minister has the power to make instruments providing for matters required or permitted, or necessary or convenient, in order to give effect to the relevant Part or section of the Aged Care Act.

The Commission Rules are made under section 77 of the *Aged Care Quality and Safety Commission Act 2018* (Aged Care Quality and Safety Commission Act). Section 77 of the Aged Care Quality and Safety Commission Act provides that the Minister has the power to make instruments providing for matters required or permitted by, or necessary or convenient for carrying out or giving effect to, this Act to be prescribed by the rules.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

Commencement

Sections 1 to 4, Division 1 of Part 1 to Schedule 1, and Part 2 to Schedule 1 of the Amending Instrument commence on the day after the instrument is registered. Division 2 of Part 1 to Schedule 1 of the Amending Instrument (relating to the continuity of transition care) will commence on 1 July 2021.

Consultation

As part of the TCP review, consultations were conducted with numerous stakeholders including all state and territory government health departments (as the approved providers of transition care), Aged Care Assessment Teams, peak bodies and advocacy groups (Council of the Ageing, Dementia Australia, Federation of the Ethnic Communities Councils of Australia, the Australian and New Zealand Society for Geriatric Medicine, the Australian Aged Care Quality Agency and the Aged Care Complaints Commission (now the Commission), hospital staff, and transition care recipients and their carers.

Information obtained through these consultations informed the relevant recommendations of the TCP review which are implemented by the Amending Instrument.

The Commission has been consulted in respect of the amendments that the Amending Instrument makes to the Commission Rules.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted on 21 April 2021 and confirmed that a Regulatory Impact Statement would not be required (OBPR reference 44019).

Details of the Aged Care Legislation Amendment (Transition Care) Instrument 2021

Section 1 provides that the name of this instrument is the *Aged Care Legislation Amendment (Transition Care) Instrument 2021*.

Section 2 provides that sections 1 to 4, Division 1 of Part 1 to Schedule 1, and Part 2 to Schedule 1 of the Amending Instrument commence on the day after the instrument is registered. Division 2 of Part 1 to Schedule 1 of the Amending Instrument (relating to the continuity of transition care) will commence on 1 July 2021.

Section 3 states that the authority for making the instrument is the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018*.

Section 4 states that each instrument that is 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 in a Schedule to this instrument has effect according to their terms.

Schedule 1 – Amendments

Part 1 – Transition care

Division 1 – Hospital in the home

Approval of Care Recipients Principles 2014

Items 1 and 2 – Section 4

Item 1 amends section 4 of the Approval of Care Principles by repealing the definition of ‘in-patient hospital episode’. Item 2 replaces that definition with a new definition of ‘hospital episode’, which has the meaning given by section 4 of the Subsidy Principles (see item 6 below).

The new definition of ‘hospital episode’ expands the previous definition of ‘in-patient hospital episode’ by replacing the requirement of being an ‘in-patient of hospital’ to being ‘admitted to a hospital’. This will clarify that a person receiving care and services under a hospital-in-the-home program may be eligible to receive transition care.

Item 3 – Subparagraph 8(a)(i)

This item amends subparagraph 8(a)(i) of the Approval of Care Principles by replacing the words ‘in-patient hospital episode’, with ‘a hospital episode’.

Item 4 – Paragraph 8(b)

This item repeals the existing paragraph 8(b) of the Approval of Care Principles and substitutes a new paragraph 8(b). New paragraph 8(b) provides that a person is eligible to receive transition care if (among other requirements) the person is, at the time the assessment is undertaken, admitted to hospital.

This amendment intends to address circumstances in which a person who is receiving care and services under a state or territory hospital-in-the-home program, who would be admitted into a hospital before receiving a range of acute and/or subacute treatment in a non-hospital

setting (such as their home), to ensure they would be able to meet the eligibility requirements in paragraph 8(b) Approval of Care Principles.

Put another way, this amendment clarifies that a person does not need to be physically located in a hospital facility at the time of their assessment for transition care.

People who are admitted as in-patients of a hospital facility will continue to meet the eligibility requirement in paragraph 8(b) of being admitted to a hospital at the time of their assessment.

Subsidy Principles 2014

Items 5 and 6 – Section 4

Item 5 amends section 4 of the Subsidy Principles by repealing the definition of an ‘in-patient hospital episode’.

Item 6 inserts a new definition of a ‘hospital episode’. It provides that ‘hospital episode’, in relation to a care recipient, means a continuous period during which the care recipient is admitted to a hospital, and is provided with acute care or subacute care, or both.

In effect, this will ensure a person who is receiving care and services under a state or territory hospital-in-the-home program, who would be admitted into a hospital before receiving a range of acute and/or subacute treatment in a non-hospital setting (such as their home), may meet the eligibility requirements in subparagraph 8(a)(i) and paragraph 8(b) of the Approval of Care Recipients Principles. Similarly, people who are in-patients of a hospital may also continue to meet those eligibility requirements.

The definition of a ‘hospital episode’ will ensure that the requirement in subparagraph 106(a)(i) of the Subsidy Principles, as amended by item 7, that defines transition care as care provided to a care recipient at the conclusion of a hospital episode, will apply to care provided to people admitted to a hospital as part of hospital-in-the-home care. It will also continue to apply to care provided to people who are admitted as in-patients of a hospital facility.

Item 7 – Subparagraph 106(a)(i)

This item amends subparagraph 106(a)(i) of the Subsidy Principles by repealing the existing requirement that transition care is a form of flexible care provided to a care recipient at the conclusion of an ‘in-patient hospital episode’, and substitutes a new requirement that transition care be provided to a care recipient after the conclusion of a ‘hospital episode’. This item is a consequential amendment as a result of repealing the definition of ‘in-patient hospital episode’ and the insertion of the new definition of a ‘hospital episode’ (see item 6 above).

Item 8 – Paragraph 106 (note)

This item amends the note after paragraph 106 by omitting the words ‘in-patient hospital episode’, and substituting the words ‘hospital episode’. This is a consequential amendment which reflects the new definition of ‘hospital episode’.

Division 2 – Continuity of transition care

Approval of Care Recipients Principles 2014

Item 9 – Section 4

This item amends section 4 of the Approval of Care Recipients Principles by inserting a new definition of ‘episode of transition care’. The new definition has the meaning given by section 4 of the Subsidy Principles (see items 14 and 18 below).

Item 10 – Paragraph 8A(c)

This item amends paragraph 8A(c) of the Approval of Care Recipients Principles by replacing the words ‘or flexible care in the form of transition care’ with ‘, or is not in an episode of transition care’. This item is a consequential change to the amendment made to the Subsidy Principles by item 18. Specifically, the requirement in new section 111AA that allows care recipients who are receiving transition care to take up to 7 days leave during an episode of transition care.

Paragraph 8A(c) provides that a person is only eligible to receive flexible care in the form of a single episode of short-term restorative care if the person is not receiving flexible care in the form of transition care. This item will clarify that transition care will also include circumstances where a care recipient is taken to be receiving flexible care in the form of transition care, but is not actually being provided with care in accordance with new section 111AA (item 18).

Item 11 – Paragraph 8A(f)

This item amends paragraph 8A(f) of the Approval of Care Recipients Principles by replacing the words ‘received flexible care in the form of transition care’ with ‘been in an episode of transition care’. This item is, similar to item 10, a consequential change as a result of the amendment made to the Subsidy Principles by item 18 (see below).

This item has the effect of clarifying that transition care in paragraph 8(f) will now include circumstances where the person is taken to have received flexible care in the form of transition care, but has not actually been provided with care because the circumstances outlined in new subsection 111AA(2) apply (see item 18) .

Item 12 – Subsection 16(1)

This item amends subsection 16(1) of the Approval of Care Recipients Principles by inserting the words ‘or is not taken to be provided for the purposes of subparagraph 50-1(1)(b)(iii) of the Act’ after ‘is not provided’. This item is a consequential change to the amendment made to the Subsidy Principles by item 18, specifically the requirement in new subsection 111AA(2) which allows care recipients who are receiving transition care to take up to 7 days leave during an episode of transition care.

Item 13 – After subsection 16(1)

This item inserts a note after subsection 16(1) of the Approval of Care Recipients Principles which provides that section 102B of the Subsidy Principles sets out when an approved provider is taken to provide transition care to a care recipient for the purposes of

subparagraph 50-1(1)(b)(iii) of the Aged Care Act. This is a consequential amendment which reflects the insertion of a new subsection 102B in the Subsidy Principles through item 16.

Subsidy Principles 2014

Item 14 – Section 4 (definition of *episode of transition care*)

This item amends section 4 of the Subsidy Principles by repealing the definition of ‘episode of transition care’ and substituting a new definition which refers to new section 111AA (see item 18).

Item 15 – Subsection 9(2)

This item repeals previous subsection 9(2) of the Subsidy Principles, including the note, and replaces it with a new subsection 9(2) that provides that a care recipient must be in an episode of transition care, and a new note that provides that an episode of transition care is defined in section 111AA of the Subsidy Principles. This item is a consequential change required by the insertion of a new definition of ‘episode of transition care’ in section 111AA (see item 18).

Item 16 – After section 102A

This item inserts a new section 102B after section 102A of the Subsidy Principles. Section 102B provides that, for the purposes of subparagraph 50-1(1)(b)(iii) of the Aged Care Act, an approved provider is taken to provide flexible care to a care recipient on any day which is disregarded for the purposes of new subsection 111AA(1) (see item 18).

The new note in section 102B clarifies that certain days are to be disregarded when working out whether a care recipient is provided with a period of transition care as part of an episode of transition care under new subsections 111AA(1) and (2) of the Subsidy Principles.

Item 17 – Subsection 111(5) (note)

This item repeals the note after subsection 111(5) of the Subsidy Principles and substitutes it with a new note that provides that ‘further transition care needs’ are defined in section 4.

This item updates the note to remove the reference to an episode of transition care. This reflects the amendments in item 14 of the Amending Instrument that repeals the definition of ‘episode of transition care’ and new section 111AA that provides the new definition of an ‘episode of transition care’ as set out in item 18.

Item 18 – At the end of Division 4 of Part 2 of Chapter 4

This item inserts a new section 111AA at the end of Division 4 of Part 2 of Chapter 4 of the Subsidy Principles, which defines an episode of transition care. Subsection 111AA(1) provides that an episode of transition care, in relation to a care recipient and an approved provider, means a continuous period during which the care recipient is provided with flexible care in the form of transition care by the approved provider.

Subsection 111AA(2) provides that any day during which transition care is not provided, up to a total of seven days, is to be disregarded when working out whether a period is a continuous period of transition care for the purpose of an ‘episode of transition care’.

The intent of this item is to allow care recipients who are receiving transition care to temporarily cease receiving care for up to a total of seven days in a single episode of transition care, thereby providing greater flexibility around the delivery of transition care and implementing recommendations 2 and 3 of the TCP review. A care recipient may elect to cease the delivery of care, for example, in order to be re-admitted to hospital, or to take leave from the program to visit family and friends.

Part 2 – Reconsideration and review of decisions

Aged Care Quality and Safety Commission Rules 2018

Items 19, 20, 21, 23, 24, and 25

Items 19, 20, 21, 23, 24 and 25 add, or repeal and substitute as the case may be, a clarifying note to subsections 41(1), 41(3), 44(2), 77(1), 77(3) and 77(4) of the Commission Rules respectively. This note provides that the approved provider may request the Commissioner to reconsider the decision, made under the relevant provision, under Part 7.

Items 22 and 26

Items 22 and 26 amend paragraphs 45(d) and 78(d), respectively, by omitting the words ‘the reconsideration of the decision’ and substituting them with the words ‘reconsideration of the decision to revoke the accreditation, or the decision regarding the day the revocation is to take effect’.

These amendments clarify that the specific decisions referred to in paragraph 45(d) and 78(d) include decisions by the Commissioner to revoke the accreditation of an accredited service, or the day the revocation is to take effect.

Item 27 28, 29 and 31

Items 27, 28, 29, and 31 amend various items in column 1 in the table to section 98 of the Commission Rules by replacing the words:

- ‘section 41’ in table item 4 with ‘subsection 41(1)’;
- ‘paragraph 41(3)(a)’ in table item 5 in with ‘subsection 41(3)’;
- ‘section 44 or 77’ in table item 6 with ‘subsection 44(1)’; and
- ‘paragraph 77(4)(a)’ in table item 7 with ‘subsection 77(4)’.

These are minor amendments that correct typographical errors in the table.

Item 30 – Section 98 (after table item 6)

This item inserts new table items 6A, 6B and 6C after item 6 in the table to section 98. This is a minor amendment which clarifies that decisions by the Commissioner made under subsections 44(2), 77(1) and 77(3) are reviewable Commissioner decisions.

Item 32 – Paragraph 104(1)(b)

This item amends paragraph 104(1)(b) by replacing the words ‘site audit report or review audit report’ with ‘performance report’. This amendment reflects that, in practice, the Commissioner would publish performance reports rather than site audit reports or review audit reports.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Transition Care) Instrument 2021

The *Aged Care Legislation Amendment (Transition Care) Instrument 2021* 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 instrument

The *Aged Care Legislation Amendment (Transition Care) Instrument 2021* (Amending Instrument) is a legislative instrument made under subsection 96-1 of the *Aged Care Act 1997* and section 77 of the *Aged Care Quality and Safety Commission Act 2018* to:

- a) enable a person accessing a state or territory ‘hospital-in-the-home’ program to be eligible to receive transition care;
- b) allow care recipients who are receiving transition care to take up to 7 days leave during an episode of transition care; and
- c) amend and clarify provisions in the Commission Rules:
 - i. relating to which decisions by the Aged Care Quality and Safety Commissioner (Commissioner) are ‘reviewable Commissioner decisions’ under Part 7 of the Commission Rules, and
 - ii. in relation to a reconsideration decision, to require the Commissioner to publish a performance report in relation to the reconsideration decision, rather than any site audit report or review audit report considered in making the decision (this aligns with publication requirements for other performance assessment decisions).

Human rights implications

The Amending Instrument engages the following human rights as contained in article 11 and article 12(1) of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities* (CRPD):

- a) the right to an adequate standard of living, including with respect to food, clothing and housing, and to the continuous improvement of living conditions; and
- b) the right to the enjoyment of the highest attainable standard of physical and mental health.

The UN Committee on Economic Social and Cultural Rights has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Amending Instrument promotes the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health. Amendments to the *Approval of Care Recipients Principles 2014* and the *Subsidy Principles 2014* will allow care recipients receiving transition care greater flexibility to temporarily cease the delivery of their transition care where their own circumstances require it, without potentially needing to be discharged from the program. Similarly, amendments to these Principles will clarify that people receiving care through state or territory hospital-in-the-home programs will be eligible to receive transition care (subject to all other eligibility requirements being met). These changes will ensure improved access and continuity of care for care recipients receiving transition care, which will lead to improved consumer outcomes.

Conclusion

The Amending Instrument is compatible with the human rights as it promotes the human rights of care recipients receiving transition care to an adequate standard of living, and the highest attainable standard of physical and mental health.

Senator the Hon Richard Colbeck

Minister for Senior Australians, Aged Care Services