

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997

Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022

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 in respect of the care they provide to approved care recipients. The Act provides that for each type of aged care, the Minister may determine the amount of subsidy payable to an approved provider for the provision of that type of aged care.

Purpose

The *Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022* (the Amending Instrument) amends the *Accountability Principles 2014* (the Accountability Principles) and the *Classification Principles 2014* (the Classification Principles).

The Amending Instrument modifies, for the purposes of Part 2.4A of the Act, an existing process for classifying non-respite (“permanent”) care recipients who enter a residential care service to receive palliative care. The amended process will require approved providers to submit an approved form after the new care recipient enters care that contains information that is necessary for the Secretary to determine whether the care recipient is eligible for the palliative care class. The Amending Instrument also requires approved providers to provide to the Secretary, other information or documents relating to the care recipient, on request.

The Amending Instrument also modifies what is deemed to constitute a significant change in the needs of a care recipient, for the purpose of the Secretary deciding to reclassify a non-respite care recipient.

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

Background

The purpose of amending the existing care recipient classification process, for permanent care recipients who enter a residential care service to receive palliative care, is to collect the minimum amount of information required for the Secretary to assess whether the person has *palliative care status*. If palliative care status is assessed, the Secretary must classify the care recipient as having palliative care status without them having to undergo any further assessment, for the purposes of classification, for the duration of their time at that residential care service.

The previous process required the approved provider to give the Secretary a palliative care plan in relation to the care recipient. It also required the provision of information that was not relevant to the assessment or to the care recipient’s classification level decision. The modified process and the new responsibility for an approved provider to give the Secretary a

document in an approved form that contains the necessary information about the care recipient required to assess palliative care status is intended to reduce compliance costs and to better protect the care recipient's privacy.

The purpose of introducing a new approved provider responsibility to, on request, provide the Secretary with further information or documents relating to a care recipient with palliative care status, is to provide additional integrity through assurance checks of the relevant information that relates to the care recipient's palliative care status where appropriate. This will enable the Secretary to obtain from the approved provider, documentary evidence regarding how palliative care is actually being provided to the care recipient.

Subsection 29D-1(2) of the Act specifies that the Secretary must not reclassify a care recipient unless the Secretary is satisfied that the care needs of the care recipient have changed significantly. Section 43 of the Classification Principles specifies the circumstances in which the care needs of a non-respite care recipient are taken to have changed significantly.

The purpose of amending the specified circumstances, is to respond to aged care sector feedback that certain existing circumstances are too narrow. In addition, it is necessary to ensure that, each time a care recipient enters a residential care service to receive non-respite care in the form of palliative care, that it is considered to be a significant change in circumstances. Therefore, the approved provider of the receiving service must go through the process required to demonstrate the care recipient's palliative care status, and to declare that the care recipient will receive palliative care through the residential care service.

Authority

Section 96-1 of the Act provides that the Minister may, by legislative instrument, make Principles specified in the table in that section providing for matters required or permitted, or necessary or convenient, in order to give effect to the relevant Part or section of the Act.

The Accountability Principles provide for matters set out in Part 4.3 of the Act. The Classification Principles provide for matters set out in Parts 2.4 and 2.4A, section 85-6 and subsection 96-2(15) of the Act.

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

The Amending Instrument commences on 23 July 2023 and will be registered on the Federal Register of Legislation prior to that time.

Consultation

The aged care sector and the general public were consulted extensively between 2017 and 2020 on the development of the Australian National Aged Care Classification (AN-ACC) residential care funding model, including assessment and classification elements embodied in Part 2.4A of the Act, in the Classification Principles, the Accountability Principles and in the

Amending Instrument. The AN-ACC model, including its assessment and classification elements, is consistent with Recommendation 120 (‘Casemix-adjusted activity based funding in residential aged care’) of the 1 March 2021 *Final Report* of the Royal Commission into Aged Care Quality and Safety.

These particular changes, to assessment and classification of care recipients entering residential care services to receive palliative care and to reclassification decision tests, have been presented to representatives of care providers, care recipients and health professions in AN-ACC implementation workshops.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted during development of the *Aged Care Amendment (Aged Care Recipient Classification) Act 2020* on the regulatory costs of implementing the assessment and classification elements of the AN-ACC model that this Amending Instrument will further enable. OBPR advised that a RIS was not required (OBPR ID 25927).

The Department of Health acknowledged this advice by letter to the OBPR, accessible at https://ris.pmc.gov.au/sites/default/files/posts/2020/11/m_lye_correspondence_-_shadow_assessment_-_8_october_2020.pdf at the date the Amending Instrument commences.

Details of the Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022

Section 1 states that the name of the instrument is the *Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022*

Section 2 states that the instrument commences on 23 July 2022.

Section 3 provides that the authority for the making of the instrument is the *Aged Care Act 1997*.

Section 4 provides 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 its terms.

Schedule 1 – Amendments

Accountability Principles 2014

Item 1 – After section 26

This item inserts new sections 27 and 27A into the Accountability Principles.

Section 27

Subsection 27(1) sets out a new responsibility for the purposes of paragraph 63-1(1)(m) of the Act for an approved provider to give the Secretary a document in relation to a care recipient who enters the service to be provided with non-respite care in the form of palliative care (to be known informally as the “Palliative Care Status Form”).

Subsection 27(2) sets out that the document under subsection (1) must be in a form approved by the Secretary, contain the information required by the form, and be provided within 14 days (or such longer period as the Secretary allows) after the approved provider notifies the Secretary of the entry of a care recipient into the service (by submitting a notice required under section 63-1B of the Act) to receive non-respite care as palliative care.

Section 27A

New subsection 27A(1) sets out a new responsibility for an approved provider to give to the Secretary, on request, information and documents as specified in a request in relation to a care recipient who has been assessed as having palliative care status under subsection 36(2) of the Classification Principles 2014. Subsection 27A(2) provides that the approved provider must comply with such a request within 7 days after the request was made.

This power will enable the Secretary to obtain from the approved provider documentary evidence regarding how palliative care is being provided to the care recipient.

Item 2 – In the appropriate position in Part 8

This item inserts new section 59 into the Accountability Principles, which is an application provision for section 27, as inserted by the Amending Instrument, and provides that the

requirement to provide the approved form, specified in section 27, applies to a care recipient who enters a residential care service to be provided with non-respite care in the form of palliative care from 23 July 2022.

Classification Principles 2014

Item 3 – Section 4 (definition of *medical practitioner*)

This item repeals the definition of “medical practitioner” from section 4 of the Classification Principles. This definition was previously only referred to in section 4B of the Classification Principles, which is to be repealed (see Item 4).

Item 4 – Section 4B

This item repeals section 4B, which set out the form and content of a palliative care plan that was referenced in subsections 36(2) and 36(3) (see Item 5). The information required to establish a care recipient’s palliative care status, previously captured by the palliative care plan, will be contained in the approved form specified under new section 27 of the Accountability Principles (see Item 1).

Item 5 – At the end of subsection 36(1)

This item adds, at the end of subsection 36(1), the words “through a residential care service”. This clarifies the existing legislation in that care recipients being assessed under this subsections 36(2) and (3) are only those being provided with non-respite care through a residential care service.

Item 6 – Subsections 36(2) and (3)

This item repeals and replaces the content of subsections 36(2) and 36(3) in order to simplify the requirements for the Secretary to be satisfied that a care recipient has or does not have palliative care status.

Subsection 36(2), as amended, provides that the Secretary must assess a care recipient as having palliative care status if:

- a document was given to the Secretary in relation to the care recipient in accordance with section 27 of the Accountability Principles (see Item 1), and
- according to the document, the care recipient had:
 - an approximate life expectancy of 3 months or less on the day the care recipient entered the residential care service to be provided with non-respite (“permanent”) care in the form of palliative care; and
 - an AKPS score of 40 or less.

An AKPS score is a score on the Australia- modified Karnowski Performance Status assessment which is an item of the AN- ACC Assessment Tool (see section 4, definitions, of the Classification Principles).

Subsection 36(3) provides that, if the Secretary does not assess the care recipient as having palliative care status, the Secretary must require the care recipient to be assessed through the completion of the AN-ACC Assessment Tool in accordance with the AN-ACC Reference Manual.

Item 7 – Paragraph 43(a)

This item repeals and replaces the wording of paragraph 43(a) of the Classification Principles.

Subsection 29D-1(2) of the Act specifies that the Secretary must not reclassify a care recipient unless the Secretary is satisfied that the care needs of the care recipient have

changed significantly. Section 43 of the Classification Principles specifies the circumstances in which the care needs of a non-respite care recipient are taken to have changed significantly.

This item broadens one category of what constitutes circumstances where the care needs of a non-respite care recipient are taken to have changed significantly. Paragraph 43(a) previously specified that certain changes in mobility constituted a significant change in care needs, whereas amended paragraph 43(a) recognises that a change in the care recipient's mobility, cognitive ability, compounding factors, function or pressure sore risk (all terms defined in section 4 of the Classification Principles) constitute a significant change in care needs.

This amendment recognises and responds to aged care sector feedback that the previous formulation too narrowly focused on mobility alone. Changes in the other factors the amendment introduces are, under the existing classification rules, set out in section 32 of the Classification Principles, equally indicative of a change in care needs that may warrant a change in classification level that is more appropriate for the care recipient and their needs.

Item 8 – At the end of section 43

This item adds new paragraph (f) to section 43 of the Classification Principles.

Subsection 29D-1(2) of the Act specifies that the Secretary must not reclassify a care recipient unless the Secretary is satisfied that the care needs of the care recipient have changed significantly. Section 43 of the Classification Principles specifies the circumstances in which the care needs of a non-respite care recipient are taken to have changed significantly.

This item adds a new category of circumstance in which care needs are taken to have changed significantly for care recipients receiving non-respite residential care. The circumstance is that a care recipient who has an existing non-respite AN-ACC classification enters another care service to receive non-respite care in the form of palliative care.

The effect of this amendment is that each time a care recipient enters a residential care service to receive non-respite care in the form of palliative care, the approved provider of the receiving service must go through the process, in accordance with section 27 of the Classification Principles, required to demonstrate the care recipient's palliative care status and to declare that the care recipient will receive palliative care through the residential care service.

Statement of Compatibility with Human Rights

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

*Aged Care Legislation Amendment (Palliative Care Classification and Other Measures)
Instrument 2022*

The *Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022* 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) Act 2011*.

Overview of the legislative instrument

The *Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022* (the Amending Instrument) amends the *Accountability Principles 2014* and the *Classification Principles 2014* to amend the the entry and classification processes for residential aged care recipients requiring immediate palliative care.

The Amending Instrument also modifies what is deemed to constitute a significant change in the needs of a care recipient, for the purpose of the Secretary deciding to reclassify a non-respite (“permanent”) care recipient.

Human rights implications

The Amending 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 Articles 11(1) and 12(1) of the *International Covenant on Economic, Social and Cultural Rights*, and Articles 25 and 28 of the *Convention on the Rights of Persons with Disabilities*, by simplifying the process to access palliative care in a residential aged care service and by better recognising what constitutes significant changes in care needs.

These changes seek to enable the more timely reclassification of care recipients under the *Aged Care Act 1997*, which will mean they will be able to access the care they need as soon as possible. This promotes a person’s right to an adequate standard of living by facilitating entry into a residential care service for care recipients in need of palliative care. Similarly, the Amending Instrument promotes a person’s right to the highest attainable standard of physical and mental health by seeking to facilitate the provision of appropriate care through the efficient payment of appropriate subsidies and supplements based on a person’s needs.

Conclusion

The Amending 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.

**The Hon Anika Wells MP
Minister for Aged Care**