

SUPPLEMENTARY 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

Purpose

The *Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022* (Amending Principles) commenced on 23 July 2022. The Amending Principles inserted sections 27 and 27A into the *Accountability Principles 2014* (Accountability Principles), which provide that an approved provider of a residential care service must provide the Secretary of the Department of Health and Aged Care (Department) with:

- 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; or
- where requested by the Secretary, information or documents of the kind specified in the request in relation to a care recipient assessed as having palliative care status under subsection 36(2) of the *Classification Principles 2014*.

This supplementary explanatory statement addresses the Senate Scrutiny of Delegated Legislation Committee's request for further information on: why it is necessary and appropriate for the Amending Principles to provide for the disclosure of personal information; to whom, or to which entities, can the information be disclosed; the nature, scope and extent of personal information that may be collected under sections 27 and 27A of the Accountability Principles; and what safeguards apply to protect the use, collection or disclosure of this personal information.

This supplementary explanatory statement should be read in conjunction with the initial explanatory statement for the Amending Principles.

Amendments to the explanatory statement

Amendment 1

After the first paragraph under the heading "Section 27" in *Item 1 – After section 26*, add:

The information collected under section 27 of the Accountability Principles through the Palliative Care Status Form includes: the care recipient's personal details; life expectancy and Australia-modified Karnofsky Performance Score (AKPS); details of the medical practitioner or nurse practitioner who diagnosed the life expectancy and assessed the AKPS score; and declarations by the medical practitioner or nurse practitioner, by a representative of the relevant approved provider and by the relevant care recipient (or the care recipient's representative) that the care recipient intends to enter a specific residential care service to receive palliative care. No other personal

information (including sensitive information) is intended to be collected under this section.

This information, and information collected under section 27A of the Accountability Principles, may initially only be disclosed to the Secretary of the Department and officers in the Department with the relevant delegation from the Secretary. The information may only be used and disclosed in accordance with the *Privacy Act 1988* (Privacy Act) and the secrecy provisions under Division 86 of the *Aged Care Act 1997* (the Act). Information may be used by, and disclosed to, other officers within the Department and the Aged Care Quality and Safety Commissioner in accordance with these legislative provisions.

In particular, the following safeguards apply to protect the personal information collected under sections 27 and 27A of the Accountability Principles:

1. Privacy Act: As the Department is an agency for the purposes of the Privacy Act, the Privacy Act (including the Australian Privacy Principles (APPs) set out in Schedule 1 of that Act) will apply to the Department's handling of personal information collected under sections 27 and 27A. As the information collected will also likely include sensitive information that is health information, the Department will be subject to the additional requirements on the handling of this information imposed under the Privacy Act (including the APPs).

2. Aged Care Act secrecy provisions: The Accountability Principles are made under section 96-1 of the Act. Relevantly, this means that to the extent personal information collected under sections 27 and 27A of the Accountability Principles is personal information, it will also be 'protected information' for the purposes of section 86-1 of the Act. There are limits to the use and disclosure of protected information under Division 86 of the Act. Relevantly, under section 86-2 of the Act, it is an offence if a person makes a record of, discloses, or otherwise uses protected information, unless an exception applies. This offence applies to persons who acquire protected information in the course of performing duties or exercising powers or functions under the Act or the *Aged Care (Transitional Provisions) Act 1997* (which includes the Secretary and other officers within the Department).

Amendment 2

After the first paragraph under the heading "Section 27A" in *Item 1 – After section 26*, add:

The information collected under section 27A of the Accountability Principles will include information relating to the approved provider's planning and/or delivery of palliative care to the care recipient with palliative care status. This may include information about matters such as whether:

- there has been a discussion with the care recipient and their representative/s to explain that the care recipient is in the last months of their life;
- the care recipient and, if applicable, their representative/s want to be involved in decision making;
- there is anticipatory prescribing in place in relation to the care recipient;

- any representative/s of the care recipient have been provided with information about how to access bereavement support services and information about loss and grief should they need it in future;
- an in-reach specialist palliative care referral or consultation been made in respect of the care recipient;
- the palliative needs of the care recipient have been assessed and planned for in alignment with the care recipient's and any representative/s' preferences in domains such as: physical symptom assessment and management; psychological support; family and social support; and cultural and spiritual support;
- the types of health professionals who should be involved in delivering and monitoring the care recipient's care plan have been appropriately identified; and
- the care recipient has been asked about their preference for place of death.

The use and disclosure of this information by the Department is safeguarded by the operation of the Privacy Act and the secrecy provisions under Division 86 of the Act as discussed above. By allowing the disclosure of personal information from approved providers to the Secretary, sections 27 and 27A of the Accountability Principles help to strike the appropriate balance between providing funding in a timely way and ensuring that funding is appropriately used for the purposes it is provided.

It is necessary and appropriate for the Amending Principles to provide for the disclosure of personal information to the Secretary (or delegate) under sections 27 and 27A of the Accountability Principles. This is because this information will assist the Secretary or delegate to:

- assess whether an individual has palliative care status for the purposes of classification and funding purposes; and
- confirm that care recipients with palliative care status do, in fact, receive palliative care. This is important for safeguarding individual care recipients' wellbeing and enables the Secretary (or delegate) to properly evaluate if this process improves direct access to high quality palliative care through residential care services.