

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997

Aged Care Quality and Safety Commission Act 2018

Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022

Purpose

The purpose of the *Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022* (Instrument) is to prescribe how the Aged Care Quality and Safety Commissioner (Commissioner) may deal with reportable incidents notified by a service provider of a Commonwealth-funded aged care service (as defined in section 8 of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act), being a service provider who provides services under the Commonwealth Home Support Programme (CHSP) or the National Aboriginal and Torres Strait Islander Flexible Aged Care Program NATSIFACP)) for the purposes of subsection 21(8) of the Commission Act. The Instrument also makes minor consequential amendments to the equivalent arrangements for approved providers for consistency with the arrangements for service providers of Commonwealth-funded aged care services and to improve readability and clarity.

The Instrument also amends the *Quality of Care Principles 2014* (Quality of Care Principles) to expand the definition of the type of reportable incidents that must be reported to the Commissioner within 24 hours.

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

Background

The arrangements relating to the Serious Incident Response Scheme (SIRS) in residential aged care (including flexible care delivered in a residential care setting) commenced on 1 April 2021. The purpose of the SIRS is to ensure incidents of abuse and neglect of older Australians receiving aged care services are appropriately dealt with and prevented. Under the existing SIRS arrangements, approved providers of residential aged care and flexible care provided in a residential aged care setting are required to establish incident management systems, take reasonable steps to prevent incidents and manage incidents.

From 1 December 2022, the SIRS will extend to home care, in-home aged care services, and flexible care services delivered in home and community settings. This includes services provided through CHSP and NATSIFACP. The *Quality of Care Principles 2014* (Quality of Care Principles) will be amended to provide further detail regarding the extension of the SIRS to home care and flexible care delivered in home and community settings. These amendments will be made in a separate legislative instrument.

Residential aged care and home care package providers are referred to as ‘approved providers’ within the meaning of the *Aged Care Act 1997* (Cth) and have statutory obligations and responsibilities. CHSP and NATSIFACP are administered through Commonwealth-funded grant arrangements. Providers of CHSP and NATSIFACP are referred to as a “service provider of a Commonwealth-funded aged care service” in the Commission Act. The obligations of CHSP and NATSIFACP providers are set out in the relevant program manuals, which form part of the providers’ grant agreements.

The NATSIFACP Program Manual currently includes SIRS obligations for service providers of NATSIFACP delivered in residential settings, and the Program Manuals for CHSP and NATSIFACP service providers will be updated to specify that from 1 December 2022, these service providers will be required to comply with the SIRS obligations in respect of services delivered in home or community settings, including notifying the Commissioner of a reportable incident.

To ensure the Commissioner is able to deal with a notification regarding a reportable incident received from a CHSP or NATSIFACP service provider, Schedule 4 of the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Royal Commission Response Act) amended the Commission Act to provide that the *Aged Care Quality and Safety Commission Rules 2018* (Rules) can specify the Commissioner’s powers to deal with reportable incidents notified by service providers of a Commonwealth-funded aged care (CFAC) service.

Accordingly, the Instrument amends the Rules to set out how the Commissioner can deal with a reportable incident notified by a CFAC service provider. On receipt of a notification of a reportable incident by a CFAC service provider, the Commissioner will have the power to require additional information, request the service provider give a final report, or request the service provider to undertake an inquiry or remedial action in relation to the incident. The Commissioner will also be able to refer the incident to police or another person or body with responsibility in relation to the incident or take any other action to deal with the incident, if the Commissioner considers it reasonable to do so in the circumstances.

The Instrument also amends the Quality of Care Principles to specify that reportable incidents of unlawful sexual contact or inappropriate sexual conduct inflicted on a care recipient will be a priority 1 reportable incidents. This means that all reportable incidents of unlawful sexual contact or inappropriate sexual conduct must be notified to the Commissioner within 24 hours of the approved provider becoming aware of the incident.

Authority

Section 96-1 of the Aged Care Act provides the Minister the power to, by legislative instrument, make Principles 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 Quality of Care Principles are made under section 96-1 of the Aged Care Act, and set out matters for the purposes of Part 4.1 of the Aged Care Act. Paragraph 54-1(1)(e) of the Aged Care Act provides that an approved provider has a responsibility to manage incidents and take reasonable steps to prevent incidents, including through implementing and maintaining an incident management system that

complies with any requirements specified in the Quality of Care Principles. Paragraph 54-3(1) of the Aged Care Act provides that the Quality of Care Principles must make provisions for dealing with reportable incidents. The Instrument amends the Quality of Care Principles to specify these matters.

The Rules are made by the Minister under section 77 of the Commission Act. Subsection 21(1) of the Commission Act provides that the Rules may make provision for, or in relation to, the performance of a function conferred on the Commissioner by section 16 of the Commission Act. The functions of the Commissioner under section 16 include protecting and enhancing the safety, health and well-being and quality of life of aged care consumers and promoting the provision of quality care and services by CFAC service providers.

Subsection 21(7) of the Commission Act provides that the Rules may provide for matters in relation to how the Commissioner deals with reportable incidents notified by approved providers, Subsection 21(8) of the Commission Act provides that the Rules may make provision for, or in relation to, how the Commissioner deals with a reportable incident for a CFAC service provider. This includes action that may be taken by the Commissioner in dealing with a reportable incident, including requiring the service provider to do something, the circumstances in which the Commissioner may authorise or carry out an inquiry in relation to a reportable incident and how information given to the Commissioner about such a reportable incident may be dealt with. The Instrument amends the Rules to specify these matters for the purposes of subsection 21(1), (7) and (8) of the Commission Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue an 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

Schedule 1 of the Instrument will commence on 3 October 2022. Schedule 2 of the Instrument will commence on 1 December 2022.

Consultation

The Department of Health and Aged Care (Department) consulted with key stakeholders in relation to extending the SIRS to in-home aged care and flexible care services delivered in a home or community setting. In late 2020 the Department engaged KPMG to undertake a study on extending the SIRS to in-home aged care services. This included a prevalence and options study, which was completed in June 2021. As part of the options component of the study several virtual workshops were conducted with different groups of stakeholders, including consumers, advocates, providers, government agencies and peak bodies. Views were sought on the role of the Commissioner at these workshops. The study informed a consultation paper that was used as a basis for public consultation through an online survey and virtual workshops from July to August 2021.

The consultation paper also sought views in relation to the Commissioner's powers. The consensus from the consultation was that the Commissioner's powers under the SIRS arrangements in residential care settings are appropriate and that similar arrangements should be extended to in-home services.

The Department consulted and worked closely with the Commission in response to sector feedback that incidents involving unlawful sexual contact or inappropriate sexual conduct should be reported to the Commission as a priority 1 incident (that is, required to be reported to the Commissioner within 24 hours). The sector raised concerns that aged care providers may inappropriately assess the level of harm caused as a result of an incident of unlawful sexual contact or inappropriate sexual conduct, and therefore incorrectly categorise the priority of the incident.

Regulation Impact Statement

In relation to extending the SIRS to in-home aged care services from 1 December 2022, the Department has certified that a package of independent reviews undertook a process and analysis equivalent to a Regulatory Impact Statement (OBPR Reference 25927). The certification and list of reviews are available on the Office of Best Practice Regulation's website: <https://obpr.pmc.gov.au/published-impact-analyses-and-reports/aged-care-reforms>.

The amendment requiring approved providers to report incidents involving unlawful sexual contact or inappropriate sexual conduct as priority 1 will have a minor regulatory impact for approved providers.

Details of the *Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022*

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022*.

Section 2 provides that Sections 1 to 4 and anything in the Instrument not elsewhere covered by the table in Section 2 commence the day after the Instrument is registered. Schedule 1 to the Instrument commences on 3 October 2022, and Schedule 2 commences on 1 December 2022.

Section 3 provides that the authority to make this Instrument is under the Aged Care Act and the Commission Act.

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 that Schedule, and any other item in that Schedule has effect according to its terms.

Schedule 1 – Amendments commencing 3 October 2022

Quality of Care Principles 2014

Item 1 inserts new paragraph (ba) after paragraph 15NE(2)(b) of the Quality of Care Principles.

Subsection 15NE(2) defines what types of reportable incidents are ‘priority 1 reportable incidents’.

New paragraph 15NE(2)(ba) provides that reportable incidents of the kind covered by paragraph 54-3(2)(b) of the Aged Care Act (that is, those about unlawful sexual contact or inappropriate sexual conduct, inflicted on a care recipient) are priority 1 reportable incidents.

This amendment expands the existing definition of a ‘priority 1 reportable incident’ to include reportable incidents involving unlawful sexual contact or inappropriate sexual conduct inflicted on a care recipient. This means that if an approved provider becomes aware of a reportable incident that involves unlawful sexual contact or inappropriate sexual conduct, and the provider has reasonable grounds to believe that the incident is a priority 1 reportable incident, then the approved provider must report the incident to the Commissioner within 24 hours of becoming aware of the incident, in accordance with subsection 15NE(1) of the Quality of Care Principles.

Item 2 inserts new Part 6 after Part 5 of the Quality of Care Principles.

Part 6 – Application, saving and transitional provisions

Division 1 – Amendments made by the *Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022*

Section 19

New section 19 provides that paragraph 15NE(2)(ba), as inserted by the Instrument applies in relation to incidents that are alleged to have occurred or are suspected of having occurred on or after 3 October 2022.

The effect of this provision is that if an approved provider to whom Part 4B of the Quality of Care Principles applies, becomes aware of a reportable incident involving unlawful sexual contact or inappropriate sexual conduct inflicted on a care recipient, the provider will need to report this incident to the Commissioner within 24 hours if the incident is alleged to have occurred or is suspected to have occurred on or after 3 October 2022.

Schedule 2 – Amendments commencing 1 December 2022

Aged Care Quality and Safety Commission Rules 2018

Item 1 repeals and replaces section 95A of the Rules, which provides a simplified outline of Part 6A. This amendment specifies how the Commissioner may deal with reportable incidents notified by an approved provider as well as a CFAC service provider. This amendment is consequential to the amendments made by Item 8 of Schedule 2 to the Instrument.

Item 2 inserts the words “for approved providers” at the end of the heading ‘Reportable incidents’ of Division 2 of Part 6A of the Rules. This amendment clarifies that the arrangements under Division 2 of Part 6A only apply to approved providers (and not CFAC service providers). This amendment is consequential to the amendments made by Item 8 of Schedule 2 to the Instrument.

Item 3 inserts new subsection 95E(3) at the end of section 95E of the Rules. Currently, under section 95E, the Commissioner may require the approved provider to give the Commissioner a final report about a reportable incident notified under section 15NE or 15NF of the Quality of Care Principles. New subsection 95E(3) provides that following the receipt of a final report about a reportable incident, the Commissioner may take any action in response to the report that the Commissioner considers appropriate. The effect of this amendment is intended to cover action taken by the Commissioner under this Part of the Rules and as permitted elsewhere in the Commission Act or Rules.

This new subsection is included for consistency with the new arrangements for service providers of a Commonwealth-funded aged care service under new subsection 95M(5) inserted by Item 8 of Schedule 2 of this Instrument.

When deciding whether to take any actions in response to a final report, the Commissioner may consider a number of factors, including the circumstances of the case, the seriousness of the incident, whether effective remedies have been put in place and the overall quality of care provided by the approved provider.

In addition, if the Commissioner considers that a final report may indicate that there are issues with the provision of quality care and services by the approved provider, or that the safety, health and well-being or quality of life of care recipients is at risk, the

Commissioner may take appropriate enforcement action against the approved provider to address the risk(s).

Item 4 repeals paragraph 95G(1)(a) of the Rules and substitutes new paragraphs 95(1)(a) and (aa).

New paragraph 95G(1)(a) provides that upon receiving a notice about a reportable incident given by an approved provider, the Commissioner may refer the incident to the Australian Federal Police, or the police force or police service of a State or Territory, whichever the Commissioner considers appropriate.

New paragraph 95G(1)(aa) provides that the Commissioner may also refer a reportable incident notified by an approved provider to a person or body with responsibilities in relation to the incident. This may include a relevant State or Territory agency, such as the Disability Services and Aboriginal and Torres Strait Islander Partnerships or a Commonwealth agency such as the National Disability Insurance Scheme Quality and Safeguards Commission if they have responsibilities in relation to the incident.

The amendments clarify who the Commissioner may refer a reportable incident to and improve readability. These amendments also ensure consistency with the actions the Commissioner may take in relation to a reportable incident notified by CFAC service providers under new subsections 95M(2)(a) and (b) inserted by Item 8 of Schedule 2 to the Instrument discussed below.

Item 5 amends subparagraphs 95G(1)(c)(ii) and 95G(1)(d)(ii) of the Rules

Paragraph 95G(1)(c) provides that if the Commissioner is notified of a reportable incident by an approved provider, the Commissioner may require an internal investigation into the incident be carried out by the approved provider, and a report of the investigation be given to the Commissioner. The amendments will now require the approved provider to give the Commissioner a report on the investigation in the manner and within the period specified by Commissioner.

Similarly, paragraph 95G(1)(d) provides that if the Commissioner is notified of a reportable incident by an approved provider, the Commissioner may require that an investigation into the incident be carried out by an appropriately qualified and independent expert, engaged by and at the expense of the approved provider. The amendments will now require the approved provider to give the Commissioner a report on the investigation in the manner and within the period specified by the Commissioner.

These amendments make clear that the Commissioner can specify the manner and time in which a report under paragraphs 95G(1)(c) and (d) must be given to the Commissioner and ensure consistency with the actions the Commissioner may take in relation to a reportable incident notified by CFAC service providers under new subparagraph 95M(2)(d)(ii) inserted by Item 8 of Schedule 2 to the Instrument.

Item 6 adds the words “for an approved provider” at the end of paragraph 95H(1)(a) of the Rules. The amendment made by this item clarifies that the Commissioner may

inquire into a reportable incident for approved providers. This amendment is consequential to the arrangements inserted by Item 8 of Schedule 2 to the Instrument to reflect that Division 2 relates only to approved providers.

Item 7 repeals section 95J of the Rules and substitutes a new section 95J.

Section 95J – Taking of other action not prevented by this Division

New section 95J provides that nothing in Division 2 of Part 6A of the Rules prevents the Commissioner from taking action under the Commission Act in relation to a reportable incident for an approved provider, or information, or documents given to the Commissioner under Division 2 or Part 4B of the Quality of Care Principles (regarding the incident management and prevention arrangements for approved providers).

This provision clarifies that information given to the Commissioner, such as through a reportable incident notification or a final report, may be used by the Commissioner to take other action under the Commission Act, for example, to impose sanctions where appropriate.

Item 8 inserts new Division 3 at the end of Part 6A of the Rules.

Division 3 – Reportable incidents for service providers of a Commonwealth-funded aged care service

New Division 3 outlines how the Commissioner may deal with reportable incidents for a CFAC service provider.

Subdivision A

Section 95K – Purpose of this Division

New section 95K provides that new Division 3 is made for the purposes of subsections 21(1) and (8) of the Commission Act, which provide that the Rules may make provision for, or in relation to, the performance of the Commissioner's functions and how the Commissioner deals with a reportable incident for a CFAC service provider.

Subdivision B

Section 95L – Commissioner may require further information in relation to a reportable incident

New section 95L provides that if, in accordance with their funding agreement, a CFAC service provider notifies the Commissioner of a reportable incident, and the Commissioner requires further information in order to deal with the incident, then the Commissioner may, by written notice, require that information to be given to them by the CFAC service provider. The written notice must specify the information requested and a period within which it is required to be provided to the Commissioner.

When specifying the period within which this information must be provided, the Commissioner will assess what is an appropriate timeframe on a case-by-case basis, taking into consideration the impact that timing may have on those affected by the

incident. For example, the Commissioner may decide on a shorter timeframe if there is a high risk of harm to care recipients if this information is not received and acted upon quickly.

New section 95L does not displace the privilege against self-incrimination or legal professional privilege.

Section 95M – Commissioner may deal with a reportable incident by taking certain action

New section 95M(1) specifies that section 95M applies if the Commissioner is notified of a reportable incident by a CFAC service provider in accordance with the funding agreement that relates to the service.

Subsection 95M(2) specifies the actions the Commissioner may take in response to a reportable incident notified by a CFAC service provider. This includes but is not limited to referring a reportable incident to the Australian Federal Police, or the police force or service of a State and Territory, whichever the Commissioner considers appropriate (new paragraph 95M(2)(a)); referring the reportable incident to a person or body with responsibilities in relation to the incident, such as the Australian Health Practitioner Regulation Agency (new paragraph 95M(2)(b)); requiring or requesting the service provider undertake specified remedial action (new paragraph 95M(2)(c)) or carry out an internal investigation and provide a report of the investigation to the Commissioner in relation to the reportable incident (new paragraph 95M(2)(d)) within a specified period.

New paragraph 95M(2)(e) provides that if the Commissioner is notified of a reportable incident by a service provider of a CFAC service, the Commissioner may require the service provider to provide a final report on the reportable incident that includes information specified by the Commissioner.

New paragraph 95M(2)(f) makes clear that the Commissioner may take any other action to deal with the reportable incident that the Commissioner considers reasonable in the circumstances. For example, this may include undertaking quality reviews and monitoring in accordance with Parts 4 and 5 of the Rules.

New subsection 95M(3) provides that the period within which a CFAC service provider must provide a final report under new paragraph 95M(2)(e) is the period of 84 days starting on the day after the requirement under that paragraph is made or such other period as specified by the Commissioner.

New subsection 95M(4) specifies that if the Commissioner is given a report of an internal investigation of a reportable incident carried out by a service provider, the Commissioner may take any action to deal with the outcome of the investigation that the Commissioner considers appropriate.

New subsection 95M(5) provides that if the Commissioner is given a final report about a reportable incident, the Commissioner may take any action in response to the report that the Commissioner considers appropriate.

Such actions referred to in new subsections 95M(4) and (5) are not limited to action available to be taken by the Commissioner under this new Division 3 of Part 6A of the Rules. When deciding whether to take any other actions to deal with reportable incidents, or in response to a final report about a reportable incident, the Commissioner may consider factors such as the circumstances of the case, the seriousness of the incident, whether effective remedies have been put in place and the overall quality of care and safety of care recipients. The Commissioner will take a reasonable and proportionate response based on the circumstances of each individual case.

If information is received through the process of the Commissioner dealing with reportable incidents, and it indicates that there are issues with the provision of quality care and services by the CFAC service provider or the information indicates that the safety, health and well-being and quality of life of care recipients is at risk, the Commissioner may provide a recommendation to the Secretary that action be taken under the terms of the relevant funding agreement.

Section 95N – Taking of other action not prevented by this Division

New section 95N provides that nothing in new Division 3 of Part 6A of the Rules prevents the Commonwealth from taking action under the funding agreement that relates to a CFAC service, or the Commissioner from taking action under the Commission Act, in relation to:

- a reportable incident for a service provider of the service;
- information or documents given to the Commissioner under Division 3; or
- information or documents relating to such a reportable incident given to the Commissioner or the Commonwealth under the funding agreement.

This provision clarifies that information given to the Commissioner, such as through a response to an additional information request or a final report in accordance with the Rules, may be used by the Commonwealth to take other action under the funding agreement that relates to a Commonwealth-funded aged care service (for example, for a failure to comply with its SIRS obligations under the funding agreement) or the Commissioner under the Commission Act.

Item 9 inserts new Division 4 at the end of Part 9 of the Rules.

Division 4 – Amendments made by the Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022

New Division 4 includes application provisions for the arrangements introduced through the Instrument.

Section 166 – Final report about reportable incident

New section 166 provides that new subsection 95E(3) inserted by Item 3 of Schedule 2 to the Instrument (explained above) applies in relation to a final report given to the Commissioner by an approved provider before, on or after 1 December 2022.

The effect of this provision is that the Commissioner may take any action in relation to a final report that was given by an approved provider under section 95E before, on or after 1 December 2022.

Section 167 – Action by Commissioner to deal with a reportable incident

New section 167 provides that new paragraphs 95G(1)(a) and (aa) inserted by Item 4 of Schedule 2 to the Instrument (explained above), apply in relation to a reportable incident notified by an approved provider before, on or after 1 December 2022.

The effect of this provision is that the Commissioner may refer a reportable incident that was notified by an approved provider before, on or after 1 December 2022, to the Australian Federal Police, the police force or police service of State or Territory, or to a person or body with responsibilities in relation to the incident.

Section 168 – Reportable incidents for a service provider of a Commonwealth-funded aged care service

New section 168 provides that new Division 3 of Part 6A inserted by Item 8 of Schedule 2 to the Instrument applies in relation to a reportable incident notified by a CFAC service provider on or after 1 December 2022.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Reportable Incidents) Instrument 2022

This legislative instrument is compatible with 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 (Reportable Incidents) Instrument 2022* (Instrument) amends the *Aged Care Quality and Safety Commission Rules 2018* (Rules) to specify how the Aged Care Quality and Safety Commissioner (Commissioner) can deal with a reportable incident notified by a service provider of a Commonwealth-funded aged care service (CFAC service provider) (that is, service providers of the Commonwealth Home Support Programme (CHSP) or the National Aboriginal and Torres Strait Islander Flexible Aged Care Program (NATSIFACP)). On receipt of a notification of a reportable incident by a CFAC service provider, the Commissioner may be able to take a number of actions, including request additional information, request a final report about the reportable incident be given by the service provider, request that the service provider carry out an investigation, or undertake remedial action in relation to the incident. The Commissioner will also be able to refer the incident to police or another person or body with responsibility in relation to the incident or take any other action to deal with the incident the Commissioner considers reasonable in the circumstances.

The Instrument makes minor consequential amendments to the existing arrangements that allow the Commissioner to deal with reportable incidents notified by approved providers. These amendments are made for consistency with the new arrangements for CFAC service providers and to improve readability and clarity of the existing provisions.

The Instrument also makes amendments to the *Quality of Care Principles 2014*, to expand the definition of a ‘priority 1 reportable incident’, so that in accordance with existing reporting obligations, approved providers will have to notify the Commissioner within 24 hours of becoming aware a reportable incident that involves unlawful sexual contact or inappropriate sexual conduct

Human rights implications

The Instrument engages the following rights:

- the right to privacy – Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 22 of the *Convention on the Rights of Persons with Disabilities* (CRPD);
- the right to an adequate standard of living – Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 28 of the CRPD;
- the right to health – Article 12 of the ICESCR and Article 25 of the CRPD;

- the right not to be subjected to cruel, inhuman or degrading treatment – Article 7 of the ICCPR, Article 15 of the CRPD, and Articles 1 and 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); and
- the right to protection from exploitation, violence and abuse in Article 20(2) of the ICCPR and Article 16(1) of the CRPD.

Right to privacy

The Instrument engages the right to privacy under Article 17 of the ICCPR, which state that no person should be subject to interference with their privacy. Article 22 of the CRPD contains a similar provision in relation to persons with disability. From 1 December 2022, CFAC service providers will be required to provide information about reportable incidents which may include personal information, including sensitive information (e.g. health information), to the Commissioner. The Instrument amends Rules to specify how the Commissioner may deal with reportable incidents notified by a service provider. This includes the power to refer reportable incidents to other bodies where it is appropriate to their functions, for example, to the police if the incident may potentially be criminal in nature, or the Australian Health Practitioner Regulation Agency if the incident may involve a breach of registration standards for a health practitioner. As the Instrument deals with the collection, use and disclosure of personal information, the right to privacy is engaged.

The right to privacy under Article 17 of ICCPR and Article 22 of the CRPD can be permissibly limited to achieve a legitimate objective and where the limitations are lawful and not arbitrary. The term ‘unlawful’ in Article 17 of the ICCPR means that no interference can take place except as authorised under domestic law. Additionally, the term ‘arbitrary’ in Article 17(1) of the ICCPR means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

The objective of these amendments is to ensure appropriate actions are taken to address and prevent serious incidents affecting care recipients. This is a legitimate objective that falls within the permissible purposes of protecting the rights and reputations of people and protecting public health.

These amendments are also reasonable, necessary and proportionate to achieving this objective since they ensure personal information acquired is protected information under Part 7 of the *Aged Care Quality and Safety Commission Act 2018*, as well as being subject to the general protections relating to personal information, including sensitive information, under the *Privacy Act 1988*. The existing penalties for misuse or unauthorised disclosure of protected information, including personal information, will protect and ensure safe handling of the information collected and, in this way, promote a person’s right to privacy.

Right to an adequate standard of living

The Instrument engages the right to an adequate standard of living under Article 11(1) of ICESCR and Article 28 of the CRPD. The Instrument introduces arrangements that promote the right to an adequate standard of living by taking steps to reduce the instances of abuse occurring in aged care settings. This is achieved by introducing

strengthened measures to allow the Commissioner to respond to incidents notified by CFAC service providers, which aim to reduce the occurrence of incidents.

Right to health

The Instrument also engages the right to health under Article 12 of the ICESCR and Article 25 of the CRPD. These articles refer to the right of individuals, including persons with disability, to the highest attainable standard of physical and mental health. The Instrument promotes the right to health by providing greater protections in respect of the physical and mental health of individuals, including persons with disability, receiving aged care services from approved providers and CFAC service providers. The Instrument reinforces the requirements under the Serious Incident Response Scheme (SIRS) by introducing powers for the Commissioner to respond to reportable incident notified by CFAC service providers. This is intended to ensure compliance with the SIRS requirements by service providers, which aim to improve the health, safety and well-being of aged care recipients.

Right not to be subjected to cruel, inhuman or degrading treatment

The Instrument also engages the right not to be subjected to cruel, inhuman and degrading treatment in Article 15 of the CRPD, Article 7 of the ICCPR, and Articles 1 and 2 of the CAT. The amendments made in this Instrument allow the Commissioner to take appropriate action to manage and appropriately resolve instances of abuse or neglect of aged care recipients, including care recipients with disability. Therefore, the Instrument promotes Article 15 of the CRPD, Article 7 of the ICCPR, and Articles 1 and 2 of the CAT by taking measures to reinforce the requirements under the SIRS that ensure care recipient are not subjected to cruel, inhuman or degrading treatment.

Right to protection from exploitation, violence and abuse

The Instrument engages the right to protection from exploitation, violence and abuse, in Article 16 of the CRPD and Article 16(1) of the CRPD. The Instrument promotes this right by requiring that approved providers of residential care to notify the Commissioner about incidents of unlawful sexual contact, or inappropriate sexual conduct, within 24 hours as per the existing priority 1 reporting requirements under the SIRS, as set out in the Quality of Care Principles. This will enable the Commissioner to respond to these incidents promptly, therefore promoting the protection of aged care recipients from exploitation, violence or abuse.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of the human rights of aged care recipients. To the extent that aspects of the Instrument may limit the right to privacy, those limitations are reasonable, necessary, and proportionate.

**Circulated by the authority of the Minister for Aged Care,
the Hon Anika Wells MP**