

## **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 (Incident Management and Reporting)*

*Instrument 2022*

### **Purpose**

The purpose of the *Aged Care Legislation Amendment (Incident Management and Reporting) Instrument 2022* (Instrument) is to extend current incident management and reporting arrangements under the Serious Incident Response Scheme (SIRS) to approved providers of home care and flexible care provided in a home or community setting. The Instrument amends the *Quality of Care Principles 2014* (Quality of Care Principles) to incorporate the new arrangements, simplify relevant provisions and to improve readability and clarity of existing provisions.

The Instrument also amends the *Aged Care Quality and Safety Commission Rules 2018* (Rules) by removing references to “residential” in certain provisions. These amendments extend the powers of the Aged Care Quality and Safety Commissioner (Commissioner) in relation to reportable incidents to approved providers of home care and flexible care delivered in a home or community setting.

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

### **Background**

The arrangements relating to the 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 subsidised by the Commonwealth 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 and take reasonable steps to prevent and manage incidents.

On 1 March 2021, the Royal Commission into Aged Care Quality and Safety (Royal Commission) released its Final Report. The Final Report recommended that the SIRS be extended to cover all actual, suspected or alleged serious incidents perpetrated by aged care workers against people receiving aged care in home settings (Recommendation 100).

In response to the Final Report, the Australian Government committed to extending the SIRS to in-home aged care services as a matter of priority. The *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (the Amendment Act) enables the extension of the SIRS obligations to approved providers of home care and flexible care delivered in home and community settings from 1 December 2022.

Schedule 4 to the Amendment Act amends subparagraph 54-1(1)(e) of the *Aged Care Act 1997* (Aged Care Act), which has the effect of requiring all approved providers, including those that provide home care and flexible care delivered in home and community settings, to comply with the incident management and reporting requirements set out in the Quality of Care Principles.

Accordingly, the Instrument amends the Quality of Care Principles to remove certain references to residential care and flexible care provided in residential settings, thereby extending the relevant incident management and reporting requirements to approved providers of home care and flexible care delivered in a home or community setting. For certain categories of reportable incidents, the current incident management and reporting obligations are adjusted to reflect the specific nuances of delivering aged care services in home and community settings compared to residential aged care settings.

Extending the SIRS to home care aims to protect the health, safety and well-being of older Australians receiving aged care services in their home and in the community.

### **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.

The Rules are made by the Minister under section 77 of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act). Under subsection 77(1), the Minister may, by legislative instrument make rules prescribing matters required or permitted, or necessary or convenient, for carrying out or giving effect to 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**

The Instrument will commence on 1 December 2022.

## **Consultation**

The Department of Health and Aged Care (Department) consulted with key stakeholders on 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 proposed model of SIRS for in-home aged care services at these workshops. KPMG's final report on the study informed a consultation paper and accompanying survey developed by the Department that was used as a basis for public consultation through an online survey and virtual workshops from July to August 2021.

The report on the outcomes of this consultation concluded that SIRS for in-home aged care services should align with the SIRS requirements for residential aged care as much as possible. The majority of participants were generally supportive of the three components of the SIRS, that is, the incident management and prevention requirements, the incident management system requirements and the reportable incident requirements (including timeframes) being consistent across both residential settings and home or community settings. However, participants were supportive of the scope of incidents for the incident management and prevention and incident management system requirements being modified to acknowledge the difference in a home or community setting compared to a residential care setting. Similarly, participants were generally supportive of the same kinds of reportable incidents being extended to in-home aged care services, although noted that some definitions and clarifications may need to be adjusted to acknowledge the differences in settings. Differences to take into consideration include home care providers having limited control over the care recipient's environment and much more limited interaction with care recipients.

The Department undertook further consultation on the Instrument in February 2022 with a group of key consumer and sector stakeholders who broadly indicated support for these measures. The Department also published an exposure draft of the Instrument, and an accompanying draft explanatory statement, on its website for a 14 day period which ended on 13 November 2022.

## **Regulation Impact Statement (RIS)**

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>.

## **Details of the Aged Care Legislation Amendment (Incident Management and Reporting) Instrument 2022**

**Section 1** provides that the name of the Instrument is the *Aged Care Legislation Amendment (Incident Management and Reporting) Instrument 2022*.

**Section 2** provides that the whole of this Instrument commences on 1 December 2022.

**Section 3** states 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**

#### ***Aged Care Quality and Safety Commission Rules 2018***

**Item 1** repeals the definition of “residential care recipient” from section 4 of the Rules. The definition of “residential care recipient” is not required, as the amendment at Item 2 of Schedule 1 to the Instrument removes the word “residential” from all references to “residential care recipient” in the Rules.

**Item 2** amends paragraphs 95D(a), (b), 95G(1)(b) and 95H(4)(c) of the Rules to omit the word “residential” from those provisions.

The effect of this amendment is to extend the powers of the Commissioner under paragraphs 95D(a), (b), 95G(1)(b) and 95H(4)(c) of the Rules with respect to reportable incidents notified by approved providers of home care and flexible care services delivered in a home or community setting.

As amended, paragraphs 95D(a) and (b) provide that the Commissioner may decide that an approved provider is not required to give a notice about a specified reportable incident if the Commissioner is satisfied the same incident has been repeatedly alleged by a care recipient to have occurred and the allegation is the result of a delusion of the care recipient.

As amended, paragraph 95G(1)(b) provides that upon receiving a notice from an approved provider about a reportable incident under sections 15NE and 15NF of the Quality of Care Principles, the Commissioner may require or request the provider to undertake specified remedial action in relation to the incident, including remedial action to ensure the safety, health and well-being of care recipients affected by the incident.

As amended, paragraph 95H(4)(c), which prescribes actions the Commissioner may take in inquiring into reportable incidents, provides that the Commissioner may provide opportunities for care recipients to participate in the inquiry.

## *Quality of Care Principles 2014*

**Items 3 and 4** amend sections 1 and 3, and the note to section 4 of the Quality of Care Principles by substituting the phrases “These principles are” and “these principles” with the phrases “This instrument is” and “this instrument”. These amendments are included to provide consistency in the terminology used throughout the Quality of Care Principles and to improve clarity in the interpretation of the Quality of Care Principles.

**Item 5** repeals paragraph (d) of the note under the heading of section 4 of the Quality of Care Principles. Paragraph (d) of the note provided that “residential care recipient” is an expression that is defined in the Aged Care Act. This is a consequential amendment to the repeal of the definition of “residential care recipient” from the Aged Care Act (see Item 8 of Schedule 4 to the Amendment Act).

**Item 6** amends section 4 of the Quality of Care Principles by substituting the phrase “In these principles”, with the phrase “In this instrument”. This amendment is included to provide consistency in the terminology used throughout the Quality of Care Principles and to improve clarity in the interpretation of the Quality of Care Principles.

**Item 7** omits the word “residential” from the note at section 15F of the Quality of Care Principles. The note at section 15F of the Quality of Care Principles clarified that the use of a restrictive practice in relation to a residential care recipient of an approved provider other than in the circumstances set out in section 15F is a reportable incident. The effect of this amendment is intended to clarify that the use of a restrictive practice in relation to an aged care recipient of an approved provider in residential, home or community settings, other than in the circumstances set out in section 15F of the Quality of Care Principles, is a reportable incident.

**Items 8 and 9** amend subsection 15K(2) of the Quality of Care Principles. Subsection 15K(2) of the Quality of Care Principles provides for the kinds of incidents to which Part 4B of the Quality of Care Principles applies. Part 4B of the Quality of Care Principles sets out the responsibilities of approved providers to manage and take reasonable steps to prevent incidents.

Item 8 amends paragraph 15K(2)(a) of the Quality of Care Principles by replacing the words “residential care, or flexible care provided in a residential setting, to a residential”, with the words “aged care to a”. The effect of this amendment is to extend the scope of the application of Part 4B of the Quality of Care Principles to include incidents that occur in connection with the provision of home care or flexible care provided in a home or community setting by an approved provider (that also fall within the scope of paragraph 15K(2)(b)).

The phrase “in connection with” in paragraph 15K(2)(a) is broad and includes incidents that may have occurred during the course of providing care and services to a care recipient by an approved provider. Incidents that fall within the incident management and prevention requirements in Part 4B of the Quality of Care Principles are not confined to incidents that occur in a care recipient’s home. This also means that the location in which the incident occurred alone is not sufficient to amount to

“connection” – the incident must be in connection with the provision of care to a care recipient by the approved provider.

The effect of this amendment is that the obligations under Part 4B of the Quality of Care Principles do not apply in relation to incidents that happen within a care recipient’s home or in the community that are not connected to the provision of care and outside the provider’s control. Workers in a home and community setting may witness or suspect elder abuse by virtue of their close or regular contact with a care recipient. For example in a home care setting, a staff member becoming aware that a family member has used excessive force against the care recipient outside of providing care when the staff member is not present, or a family member who is not a carer for the care recipient injuring their back when trying to move the care recipient’s bed would not be an incident that occurs “in connection with” the provision of care by the approved provider.

Item 9 amends subparagraphs 15K(2)(b)(i) and (ii) by omitting the word “residential” in these provisions. Paragraph 15K(2)(b) specifies what effect (or potential effect) incidents consisting of acts, omissions, events or circumstances must have in order to fall within the scope of Part 4B of the Quality of Care Principles. The effect of this amendment is that Part 4B applies to incidents covered by paragraph (a) that either have caused harm, or could reasonably have been expected to cause harm, to the care recipient or another person. By removing the reference to residential care, the scope of this provision extends to approved providers of home care and flexible care delivered in a home or community setting.

**Item 10** amends paragraphs 15K(3)(a) and (b) of the Quality of Care Principles, which provide for further incidents not covered by subsection 15K(2) to which Divisions 2 and 3 of Part 4B of the Quality of Care Principles apply. This amendment omits the words “residential care recipient” and substitutes the words “care recipient”. The substitution is consequential to the amendment made by Item 5 of Schedule 1 to the Instrument, which removes the definition of “residential care recipient”.

However, it should be noted that the reference to the provision of residential care, or flexible care provided in a residential setting, is retained in subsection 15K(3), and incidents that an approved provider becomes aware of in connection with the provision of care are only relevant to an approved provider who delivers residential care or flexible care provided in a residential setting. The intended effect of this amendment is that the requirements under Divisions 2 and 3 of Part 4B of the Quality of Care Principles do not extend to incidents that occur in connection with the provision of home care or flexible care provided in a home or community setting.

This is based on feedback received through consultation that care recipients receiving home care, or flexible care in a home or community setting are generally more autonomous than residential aged care recipients and are not in the full-time care of the provider, making it difficult for the approved provider to respond to such incidents. For example, in a home care setting, a staff member becoming aware that a family member has used excessive force against the care recipient would not be required to report, respond and manage this incident under the SIRS requirements, as it was not in connection with the provision of residential care, or flexible care provided in a residential setting. However, the staff member would still need to

comply with the approved provider's policies and procedures, such as reporting the matter to management and where appropriate to refer the matter to other agencies such as the police.

**Item 11** amends subsection 15LA(1) of the Quality of Care Principles by omitting the word “residential” from this provision. This amendment has the effect of extending the requirement that approved providers’ management of incidents must be focused on the safety, health, well-being and quality of life of care recipients to include recipients of home care and flexible care delivered in a home or community setting.

**Item 12** amends subsection 15M(1) of the Quality of Care Principles by omitting the words “who provides residential care, or flexible care provided in a residential setting.”. Subsection 15M(1) provides that it is a responsibility of an approved provider to implement and maintain an incident management system. The effect of this amendment is to extend this responsibility to approved providers of home care and flexible care delivered in a home or community setting.

**Item 13** amends subparagraphs 15MC(1)(b)(i) and (iii) of the Quality of Care Principles by omitting the word “residential” where it occurs in these provisions. Section 15MC sets out the requirements of approved providers in relation to incident management record keeping and procedures. Paragraph 15MC(1)(b) specifies the persons to whom the approved provider must make their documented incident management system procedures available in an accessible form. The intent of this amendment is to require approved providers to make these procedures available to all care recipients to whom they provide care (in all settings), as well as the care recipients’ family members, carers, representatives, advocates and any other significant persons.

**Item 14** amends the note following section 15N of the Quality of Care Principles by omitting the words “who provides residential care, or flexible care provided in a residential setting.”. The note clarifies that approved providers have responsibilities under Chapter 4 of the Aged Care Act to implement and maintain an incident management system, referring to section 54-1 of the Aged Care Act. This amendment clarifies that approved providers of residential care, home care and flexible care provided in residential and community settings have a responsibility to implement and maintain an incident management system under Chapter 4 of the Aged Care Act.

**Items 15 and 16** amend note 1 following subsection 15NA(1) of the Quality of Care Principles. Note 1 clarified that under subsection 54-3(2) of the Act a *reportable incident* is an incident that has occurred, is alleged to have occurred, or is suspected of having occurred, in connection with the provision of residential care or flexible care in a residential setting, to a residential care recipient of an approved provider, and is any of the incidents in paragraphs 54-3(2)(a) to (h) of the Aged Care Act. The note also refers to subsection 15K(2) for incidents to which Part 4B of the Quality of Care Principles applies.

Item 15 amends note 1 by substituting the words “residential care, or flexible care provided in a residential setting, to a residential”, with “aged care to a”. This amendment is consequential to the amendment of subsection 54-3(2) of the Aged Care Act through item 2 of Schedule 4 to the Amendment Act, which extended

the meaning of “reportable incident” to include incidents that occur, are alleged to have occurred, or are suspected of having occurred, in connection with the provision of aged care to a care recipient of an approved provider of residential care, home care and flexible care provided in a community setting.

Item 16 amends note 1 by inserting the words “of this instrument” after the words “subsection 15K(2)”. This amendment is included for clarification that the reference to subsection 15K(2) is intended to refer to subsection 15K(2) of the Quality of Care Principles.

**Item 17** amends note 2 following subsection 15NA(1) of the Quality of Care Principles by omitting the word “residential”. Note 2 of subsection 15NA(1) clarifies that the use of a restrictive practice in relation to the residential care recipient (other than in the circumstances set out in the Quality of Care Principles) is a reportable incident, referring to paragraph 54-3(2)(g) of the Aged Care Act, and Part 4A of the Quality of Care Principles. The effect of this amendment is to clarify that the use of restrictive practices in relation to a care recipient of home care or flexible care provided in a home or community setting, other than in the circumstances set out in the Quality of Care Principles, is also a reportable incident under paragraph 54-3(2)(g) of the Aged Care Act.

**Item 18** amends note 3 following subsection 15NA(1) of the Quality of Care Principles by substituting the words “section 15NB of this instrument which is”, with “sections 15NAA and 15NB of this instrument which are”. Note 3 clarifies that subsection 54-3(5) of the Aged Care Act allows the Quality of Care Principles to provide that specified acts, omissions or events are, or are not, reportable incidents, and that the Quality of Care Principles can override subsection 54-3(2) of the Aged Care Act in this regard, referring to section 15NB of the Quality of Care Principles. Section 15NAA, as inserted by item 24 of this Instrument, provides for a new type of reportable incident regarding a care recipient going missing in the course of an approved provider providing home care or flexible care provided in a home or community setting and is made for the purposes of subsection 54-3(5) of the Aged Care Act.

**Item 19** amends subsections 15NA(2) to (8) of the Quality of Care Principles by omitting the word “residential” wherever it occurs in these provisions. Section 15NA is made for the purposes of subsection 54-3(4) of the Aged Care Act, and defines or clarifies the meaning of expressions used in subsection 54-3(2) of the Aged Care Act, which lists the kinds of incidents which are covered by the definition of “reportable incident”. Subsections 15NA(2) to (8) clarify the meaning of the following expressions:

- unreasonable use of force (15NA(2) and (3));
- unlawful sexual contact, or inappropriate sexual conduct (15NA(4) and (5));
- psychological or emotional abuse (15NA(6) and (7)); and
- unexpected death (15NA(8)).

These amendments are consequential to the amendment of paragraphs 54-3(2)(e) and (f) through item 3 of Schedule 4 to the Amendment Act. By removing the reference to “residential”, the effect of this amendment is to extend the current definitions of these categories of incidents from residential care to include incidents that occur in relation



to care recipients of approved providers of home care or flexible care delivered in a home or community setting.

**Item 20** amends paragraph 15NA(8)(a) of the Quality of Care Principles by inserting the words “the care recipient was provided with residential care, or flexible care provided in a residential setting, and”, before the words “reasonable steps”. Subsection 15NA(8) clarifies the meaning of the expression “unexpected death” in paragraph 54-3(2)(d) of the Aged Care Act by providing that this includes death in circumstances where:

- (a) reasonable steps were not taken by the approved provider to prevent the death;
- or
- (b) the death is a result of:
  - (i) care or services provided by the approved provider; or
  - (ii) a failure of the approved provider to provide care or services.

The effect of this amendment, together with the amendment at Item 16 of Schedule 1 to the Instrument, is to clarify that paragraph 15NA(8)(a) applies only in relation to care recipients of residential care or flexible care provided in a residential setting, while paragraph 15NA(8)(b) will apply with respect to care recipients of residential care, home care and flexible care provided in residential, home or community settings. Given the lack of control and visibility over a care recipient’s day-to-day living circumstances when compared to service delivery in residential settings, it would be impractical to impose an obligation on approved providers of home care or flexible care provided in a community setting to take reasonable steps to prevent the death of a care recipient.

**Item 21** amends paragraph 15NA(8)(b) of the Quality of Care Principles by substituting the words “death is”, with “care recipient’s death was”. This amendment aligns the tense of paragraphs (a) and (b), to improve readability and ease of interpretation.

**Item 22** amends subsections 15NA(9) and (10) of the Quality of Care Principles by omitting the word “residential” wherever it occurs in these provisions. Subsections 15NA(9) and (10) clarify the expressions “stealing or financial coercion” and “neglect” referenced in paragraphs 54-3(2)(e) and (f) of the Aged Care Act respectively. These amendments are consequential to the amendment of paragraphs 54-3(2)(e) and (f) through Item 3 of Schedule 4 to the Amendment Act, and extends the current definitions of these reportable incidents in the Quality of Care Principles to include incidents that occur in relation to all care recipients of home care or flexible care delivered in a home or community setting.

**Item 23** amends subsection 15NA(11) of the Quality of Care Principles by substituting the words “residential care recipient” with “care recipient” wherever they occur in this provision. Subsection 15NA(11) provided that the expression “unexplained absence” in paragraph 54-3(2)(h) of the Aged Care Act means an absence of the residential care recipient from the residential care services in circumstances where there are reasonable grounds to report the absence to police. This is a consequential amendment to the repeal of the definition of “residential care recipient” from the Aged Care Act (see Item 8 of Schedule 4 to the Amendment Act).

**Item 24** inserts new section 15NAA after section 15NA of the Quality of Care Principles. New section 15NAA is made for the purposes of paragraph 54-3(5)(a) of the Aged Care Act which states that the Quality of Care Principles may provide that a specified act, omission or event involving a care recipient is a reportable incident. Specifically, new section 15NAA provides that, despite subsection 54-3(2) of the Aged Care Act (which sets out the various categories of reportable incidents), it is a reportable incident if:

- (a) a care recipient goes missing in the course of an approved provider providing home care, or flexible care provided in a community setting, to the care recipient; and
- (b) there are reasonable grounds to report that fact to the police.

The phrase “in the course of an approved provider providing” is intended to capture situations where an approved provider has the care recipient in their physical care immediately prior to their absence. For example, where a care recipient goes missing while receiving transport services, while at a day therapy centre, in overnight respite or on a scheduled outing with the approved provider. The intended effect of section 15NAA is not to require approved providers of home care or flexible care delivered in a home or community setting to report incidents where the approved provider arrives for a scheduled visit and the care recipient is not present, as this would not be “in the course of” the provision of care. This recognises the limited control of approved providers of home care or flexible care delivered in a home or community setting over their care recipients’ movement, living environment and safety, outside of when care is being provided.

Paragraph (2)(b) of section 15NAA replicates the equivalent arrangements applying to residential care, in that for the incident to be a reportable incident, there must be reasonable grounds to report the absence to the police. For example, where a care recipient who is receiving home care is not able to be located and does not have sufficient cognition to care for themselves or would miss a dose of essential medication as a result of them being missing. In this situation, this may be reasonable grounds for the provider to report the absence to the police given the potential risk to the care recipient’s health and safety.

**Item 25** amends subsection 15NB(2) of the Quality of Care Principles by omitting the first occurring word “residential” within the provision. Subsection 15NB(2) provides for where the use of a restrictive practice is not a reportable incident, despite paragraph 54-3(2)(g) of the Aged Care Act. This amendment is consequential to the repeal of the definition of “residential care recipient” from the Aged Care Act (see Item 8 of Schedule 4 to the Amendment Act) and to the amendment to subsection 54-3(2) of the Aged Care Act (see Item 3 of Schedule 4 to the Amendment Act).

**Item 26** amends subsection 15NB(2) of the Quality of Care Principles by repealing the words “reportable incident” and substituting the words “***reportable incident***”. This amendment is included to improve readability and consistency in formatting with subsections 15NB(1) and (3), where the words “reportable incident” are in bold and italicised font.

**Item 27** amends paragraph 15NB(2)(b) of the Quality of Care Principles by omitting the phrase “these principles (assuming that that Part applied to the residential” and substituting the phrase “this instrument (assuming that that Part applied to the”. This amendment is consequential to the repeal of the definition of “residential care recipient” from the Aged Care Act (see Item 8 of Schedule 4 to the Amendment Act) and to the amendment to subsection 54-3(2) (see Item 3 of Schedule 4 to the Amendment Act). This amendment also replaces the reference to “these principles” to “this instrument” to improve clarity and readability.

**Item 28** inserts new subsection 15NB(2A) after subsection 15NB(2) of the Quality of Care Principles. Section 15NB is made for the purposes of paragraph 54- 3(5)(b) of the Aged Care Act which provides that the Quality of Care Principles may set out that a specified act, omission or event involving a care recipient is not a reportable incident.

New subsection 15NB(2A) provides for where the use of a restrictive practice in relation to a care recipient is not a reportable incident, despite paragraph 54-3(2)(g) of the Aged Care Act. Paragraph 54-3(2)(g) provides that it is a reportable incident for an approved provider to use a restrictive practice in relation to a care recipient, other than in the circumstances set out in the Quality of Care Principles.

The new subsection 15NB(2A) outlines the circumstances in which the use of a restrictive practice in relation to a care recipient in the course of providing home care or flexible care in a home or community setting is not a reportable incident. Firstly, before the restrictive practice is used, the care recipient’s care and services plan must detail the circumstances in which the restrictive practice may be used and the behaviours it is seeking to address (subparagraph 15NB(2A)(b)(i)).

For example, the care and services plan sets out that the care recipient has a restless sleep pattern and walks around the home in the dark and has previously fallen down the stairs. A clinical assessment recommends the safest and best strategy is to affix a bed rail to the care recipient’s bed in their home at night. Secondly, the care and services plan must outline how the restrictive practice is to be used, including its duration, frequency and intended outcome (subparagraph 15NB(2A)(b)(ii)). For example, a bed rail being placed on the bed between 9.00pm at night and removed by 7.00am the next day in order to prevent the care recipient from injuring themselves. Thirdly, the restrictive practice must actually be used in the circumstances and manner set out in the care and services plan, and in accordance with any other provisions of the plan that relate to the use of the restrictive practice. For example, in addition to the information in the care and services plan regarding the circumstances or manner the restrictive practice is to be used, the plan may set out that the bed rail must be limited to a height of 90 cm centimetres and, before the rail is affixed to the bed each night, the care recipient must have their personal alarm and mobile phone placed on the shelf next to their bed.

In the example above, the approved provider would only be able to use the bed rail in relation to the care recipient in a way that is consistent with all the above-mentioned requirements as set out in the care and services plan. The approved provider must ensure details about the actual use of the restrictive practice are documented and consistent with the care and services plan as soon as practicable after its use. For

example, after each occurrence of the bed rail being used, the provider must document what time the bed rail was raised at night and then removed in the morning to demonstrate that the restrictive practice was used in accordance with the care and services plan, and must do so as soon as practicable after its use. It is intended that this provision strengthens the record keeping obligations of approved providers relating to the provision of care, and the way such care is provided.

Approved providers who do not meet all of the above requirements in subsection 15NB(2A) when using a restrictive practice in home care or flexible care delivered in home and community settings must notify the Commission of the incident in accordance with the SIRS reporting requirements. This includes where the use of a restrictive practice has occurred in an emergency situation (and the use is not consistent with the requirements in subsection 15NB(2A)).

Part 4A of the Quality of Care Principles does not extend to approved providers of home care or flexible care provided in home or community settings. Part 4A provides for the use of restrictive practices in residential care and flexible care delivered in a residential setting and requires, amongst other things, that the use of a restrictive practice must be documented in a behaviour support plan. The residential care environment is different to the operating environment of home care or flexible care provided in home or community settings whereby care recipients generally have greater autonomy and less complex requirements, meaning a behaviour support plan is not required. Home care and flexible care are broad terms and are types of aged care that encompass a range of different services (for example, personal care, cleaning, gardening, meal preparation). Approved providers of home care and flexible care delivered in a home or community setting are likely to spend limited time with care recipients in comparison to residential settings and have differing responsibilities based on the types of services provided to the care recipient. However, approved providers must have an appropriate care and services plan in place for each care recipient that satisfies the requirements set out in Aged Care Quality Standards, including the requirement to regularly review the care and services for effectiveness and in response to incidents that impact on the needs, goals or preferences of the care recipient (see Standard 2(3) of the Aged Care Quality Standards).

**Item 29** inserts new subsection (4) at the end of section 15NB of the Quality of Care Principles. Section 15NB is made for the purposes of paragraph 54-3(5)(b) of the Aged Care Act and provides for circumstances in which certain incidents are not reportable incidents under the SIRS, despite subsection 54-3(2) of the Aged Care Act.

Subsection 15NB(4) provides that, despite neglect being a reportable incident under subsection 54-3(2)(f) of the Aged Care Act, it is not a **reportable incident** if:

- (a) the incident occurred, is alleged to have occurred, or is suspected of having occurred, in connection with the provision of home care, or flexible care provided in a community setting, to a care recipient by an approved provider; and
- (b) apart from this subsection, the incident would be a reportable incident under paragraph 54-3(2)(f) of the Act (which deals with neglect of care recipients), but would not otherwise be a reportable incident; and
- (c) the incident results from a choice made by the care recipient about the care or services the approved provider is to provide to the care

- recipient, or how the care or services are to be provided by the approved provider; and
- (d) before the incident occurred, is alleged to have occurred, or is suspected of having occurred, the choice had been communicated by the care recipient to the approved provider, and the approved provider had recorded the choice in writing.

This amendment gives effect to feedback received through consultation that recipients of home care or flexible care should be able to maintain choice and autonomy about their living situation. For example, if a care recipient chooses not to shower on a regular basis, or if a care recipient chooses to live in squalor or a hoarding situation preventing adequate cleaning services from being provided. The word “choice” in the provision is broad and includes directions, requests or instructions given by care recipients to the provider. The approved provider of home care and flexible care provided in a home or community setting must have recorded the choice about the care or services that the care recipient communicated to them in writing before the incident occurred and must also be satisfied that the care recipient has the capacity to make this decision.

It is intended that subsection 15NB(4) only applies to incidents that, but for this subsection, would constitute neglect. Incidents that fall within a different reportable incident category must still be reported as per the SIRS reporting requirements.

The provision only releases the provider from the obligation to report the neglect as a serious incident under the SIRS reporting requirements, it does not release the provider from other duties and obligations in relation to the care and support of the care recipient. This includes the Aged Care Quality Standards, for example recognising and responding to the deterioration or change in a care recipient’s capacity or referring the care recipient to other organisations and providers of other care and services (see Standard 3(3) of the Aged Care Quality Standards).

**Item 30** amends paragraphs 15NE(2)(a) and (ba) of the Quality of Care Principles by removing the word “residential” from the provision. The intended effect of this amendment is to extend the definition of a priority 1 reportable incident to include incidents that have caused, or could reasonably have been expected to have caused, physical or psychological injury or discomfort to recipients of home care or flexible care delivered in a home and community setting that requires medical or psychological treatment to resolve.

**Item 31** inserts new subsection (d) at the end of subsection 15NE(2) of the Quality of Care Principles. Subsection 15NE(2) defines a priority 1 reportable incident, including detailing the types of reportable incidents that are a priority 1 reportable incident.

Paragraph 15NE(2)(d) provides that a reportable incident covered by the new subsection 15NAA(2) of the Quality of Care Principles involving a care recipient going missing in the course of an approved provider providing home care, or flexible care provided in a home or community setting is a priority 1 incident (see above Item 24 of Schedule to this Instrument).

**Item 32** amends subparagraph 15NE(3)(c)(i) of the Quality of Care Principles by omitting the word “residential” from the provision. Subsection 15NE(3) specifies the information about a reportable incident that must be included in a priority 1 notice to be provided to the Commissioner. By removing the reference to “residential” in paragraph 15NE(3)(c), this amendment has the effect of requiring approved providers to include information about any immediate actions taken in response to a reportable incident to ensure the safety, health and well-being of the care recipients affected by the priority 1 incident, regardless of whether they are receiving residential care, home care or flexible care delivered in a home or community setting.

**Item 33** amends paragraph 15NE(3)(h) of the Quality of Care Principles to omit the word “residential” from the provision. Subsection 15NE(3) provides for the information about a reportable incident that must be included in a priority 1 notice provided to the Commissioner. By removing the reference that specifies “residential” in paragraph 15NE(3)(h), this amendment has the effect of requiring approved providers to include information, if known, about the level of cognition of the care recipients directly involved in the priority 1 incident, regardless of whether they are receiving residential care, home care or flexible care delivered in a home or community setting.

**Item 34** amends subparagraph 15NF(2)(c)(i) of the Quality of Care Principles by omitting the word “residential” from the provision. Subsection 15NF(2) provides for the information about a reportable incident that must be included in a priority 2 notice to the Commissioner. By removing the reference specifying “residential” in subparagraph 15NF(2)(c)(i), this amendment has the effect of requiring approved providers to include information about the actions taken in response to the reportable incident to ensure the safety, health and well-being of the care recipients affected by the priority 2 incident, regardless of whether they are receiving residential care, home care or flexible care delivered in a home or community setting.

**Item 35** amends paragraph 15NF(2)(h) of the Quality of Care Principles by omitting the word “residential” from the provision. By removing the reference specifying “residential” in paragraph 15NF(2)(h), this amendment has the effect of requiring approved providers to include information, if known, about the level of cognition of the care recipients directly involved in the priority 2 incident, regardless of whether they are receiving residential care, home care or flexible care delivered in a home or community setting.

**Item 36** inserts new sections 20 and 21, which are application provisions, at the end of Division 1 of Part 6 of the Quality of Care Principles.

#### Section 20 – Application—certain incidents in a residential care setting

Section 20 provides that subsection 15NA(8), which relates to unexpected death as a reportable incident, and subsection 15NB(2), which relates to restrictive practices as a reportable incident, apply in relation to incidents that occur, are alleged to have occurred or are suspected of having occurred before, on or after 1 December 2022. This amendment is intended to clarify the relevant existing obligations for approved providers to report incidents involving unexpected death of a care recipient that occurred within residential care settings prior to the commencement of this

Instrument. The amendments do not have the effect of imposing any additional obligations retrospectively.

Section 21 – Application—certain incidents in a home care setting

Section 21 provides that section 15NAA, subsection 15NB(4) and paragraph 15NE(2)(d) as inserted by the Instrument, which relate to unexplained absences and neglect as reportable incidents apply only in relation to incidents that occur within a home care setting, or flexible care in a community setting 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 (Incident Management and Reporting) 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 (Incident Management and Reporting) Instrument 2022* (Instrument) amends the *Aged Care Quality and Safety Commission Rules 2018* (Rules) and the *Quality of Care Principles 2014* (Quality of Care Principles) to extend the current incident management and reporting requirements under the Serious Incident Response Scheme (SIRS) that applies to approved providers of residential care and flexible care provided in a residential setting, to approved providers of home care and flexible care provided in a home or community setting.

The Instrument amends the Quality of Care Principles to remove certain references to residential care and flexible care provided in a residential setting, thereby extending the relevant incident management and reporting requirements to approved providers of home care and flexible care provided in a home or community setting. For certain categories of reportable incidents, the Instrument adjusts current incident management and reporting obligations for the purposes of reflecting the specific nuances of delivering aged care services in-home and community settings. The Instrument also makes minor consequential amendments to the current arrangements for approved providers of residential or flexible care delivered in a residential setting to incorporate the extended arrangements.

The Instrument also amends the Rules by repealing references to “residential” in certain provisions. These amendments, enabled by the amendments to the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) as set out in the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*, extend the powers of the Aged Care Quality and Safety Commissioner (Commissioner) in relation to reportable incidents to approved providers of home care, and flexible care delivered in a home or community setting.

#### **Human rights implications**

The Instrument engages the following human rights:

- the right to protection from hostility, exploitation, violence and abuse in Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 16(1) of the *Convention on the Rights of Persons with Disabilities* (CRPD);



- the right to health in Article 12 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) and Article 25 of the CRPD;
- the right not to be subjected to cruel, inhuman, or degrading treatment in 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 privacy in Article 17 of the ICCPR and Article 22 of the CRPD.

#### Right to protection from exploitation, violence and abuse

The Instrument engages the right to protection from hostility, exploitation, violence and abuse, which is contained in Article 20(2) of the ICCPR and Article 16 of the CRPD.

The Instrument promotes this right by requiring approved providers of home care and flexible care delivered in a home or community setting to respond to and manage incidents, and to implement appropriate measures to facilitate appropriate incident management and response. The actions required of approved providers of home care or flexible care provided in a home or community setting under these amendments include the provision of support and assistance to ensure the safety, health and well-being of persons affected by reportable incidents, which may involve instances of hostility, exploitation, violence or abuse.

#### Right to health

The Instrument engages the right to health, which is contained 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 a disability, that receive aged care services from approved providers in home and community settings. The Instrument supports and extends the requirements under the SIRS by introducing reporting requirements for approved providers of home care and flexible care provided in a home or community setting in relation to serious incidents, including instances of abuse and neglect. The Instrument establishes more robust requirements for governance systems of approved providers to ensure better reporting, management and prevention of instances of abuse and neglect in home and community aged care settings.

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

The Instrument engages the right not to be subjected to cruel, inhuman or degrading treatment, which is contained under Article 15 of the CRPD, Article 7 of the ICCPR, and Articles 1 and 2 of the CAT.

The amendments made by the Instrument have the effect of requiring approved providers of home care or flexible care delivered in a home or community setting to identify, manage and resolve incidents involving aged care recipients, including care recipients with a disability. The reporting, incident management and follow-up actions that are required of approved providers as part of the SIRS are designed to improve the quality and safety of the care provided and to reduce the risk of such incidents occurring.

Therefore, the Instrument promotes Article 15 of the CRPD, Article 7 of the ICCPR, and Articles 1 and 2 of the CAT by implementing measures to reinforce requirements to ensure care recipients are not subjected to cruel, inhuman or degrading treatment.

### Right to privacy

The Instrument engages the right to privacy, which is contained under Article 17 of the ICCPR and states 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, approved providers of home care and flexible care provided in a home or community setting are required to comply with the incident management and reporting requirements under the SIRS. This includes the recording and storing of personal information, including health information, and the provision of that information as it relates to a reportable incident to the Commissioner and other persons or bodies that must be notified of the incident (e.g. family members or representatives).

In accordance with the Commissioner's powers under the Rules, the Commissioner may also collect information from approved providers for the purposes of the Commissioner's compliance and monitoring functions and disclose relevant information to other bodies where it is appropriate to do so. For example, the Commissioner may disclose information to police if the incident may be criminal in nature or to the Australian Health Practitioner Regulation Agency if the incident may involve a breach of health practitioner professional standards. 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 from occurring in relation to 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 reasonable, necessary and proportionate to achieving this objective. Any personal information acquired by the Commissioner for the purpose of the SIRS is protected information. Personal information acquired under or for the purposes of the SIRS by the Commissioner is subject to the protected information provisions under Part 7 of the Commission Act, as well as the general protections relating to the collection, use and disclosure of personal information (including sensitive information) under the *Privacy Act 1988*. The existing penalties for misuse or unauthorised disclosure of protected information, which includes personal information, are designed to protect and ensure safe handling of information that is collected, used or disclosed under the SIRS.

### **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.

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