

# EXPLANATORY STATEMENT

## *Aged Care Act 1997*

### *Approval of Care Recipients Amendment (Younger Persons) Principles 2023*

#### **Purpose and operation**

The *Approval of Care Recipients Amendment (Younger Persons) Principles 2023* (Amending Instrument) amends the *Approval of Care Recipients Principles 2014* (Approval of Care Recipients Principles) to strengthen the evidence requirements for persons under the age of 65 (younger persons) who are applying to become approved as a recipient of residential care under the *Aged Care Act 1997* (Act).

The Amending Instrument will require younger persons to provide specific evidence when applying to be approved as a recipient of residential care under section 22-3 of the Act. The application for younger persons must be accompanied by either an ‘Exploration of Home & Living Supports for National Disability Insurance Scheme (NDIS) Participants Form’ completed in collaboration with the person by the National Disability Insurance Agency (NDIA); or a ‘Summary Report: Younger People at Risk of Entering Residential Aged Care’ completed in collaboration with the person by Ability First Australia (AFA) if they are not NDIS participants.

The NDIA and AFA provide assistance to identify all alternative options to meet the younger person’s needs and document the outcomes of this exploration with the consent of the younger person, or their representative. Once completed, the form will be provided to the younger person or their representative. The provision of additional evidence will assist in assessing the eligibility criteria in section 21-2 of the Act and section 6 of the Approval of Care Recipients Principles.

Persons who are at least 65 years old; or aged at least 50 years old and who are either from an Aboriginal or Torres Strait Islander community; or who are homeless or at risk of becoming homeless, are not required to include the specified evidence with their application seeking approval to receive residential care.

In addition, if a younger person applies to be approved as a recipient of residential respite care on the basis that the person urgently needed the care when it started, and it was not practicable to apply for approval beforehand, the person’s application will not be required to include the forms from NDIA or AFA. This enables younger persons at significant risk of harm to be supported through urgent, temporary accommodation without providing the abovementioned evidence to be approved for residential respite care.

The Amending Instrument does not diminish or negate the requirement for any younger persons to meet the eligibility criteria under subsection 6(1) of the Approval of Care Recipients Principles, particularly paragraph 6(1)(b) which applies to a person who is not an aged person.

## **Background**

The Act is the principal law that covers government-funded aged care. The Act and the Approval of Care Recipients Principles set out the eligibility criteria for approval of care recipients, including for persons under the age of 65 years (younger persons).

The amendments to the Approval of Care Recipients Principles are consistent with the intent of recommendation 74(d) of the Final Report of the Royal Commission into Aged Care Quality and Safety that provides any younger person who is at risk of entering residential care is referred for assessment by the agency most appropriate for the assessment of the person concerned, and not an Aged Care Assessment Team (ACAT or Aged Care Assessment Services in Victoria). This supports the sentiment that residential care is targeted at meeting the needs of individuals aged 65 years and over who have particular care needs and are incapable of living in the community without support. The new arrangement supports the younger person, or their representative, to explore and consider more age-appropriate care options in accordance with their individual circumstances.

Younger persons that accessed urgent respite care must provide specific evidence when applying to become approved as recipients of permanent residential care in accordance with new subsection 11A(1). The provision of additional evidence will assist in assessing the eligibility criteria in section 21-2 of the Act and section 6 of the Approval of Care Recipients Principles.

## **Authority**

Section 96-1 of the Act provides that the Minister may, by legislative instrument, make Approval of Care Recipients Principles, providing for matters required or permitted by Part 2.3 of the Act (Approval of care recipients); or necessary or convenient to be provided in order to carry out or give effect to that Part.

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

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

## **Commencement**

The Amending Instrument commences on 1 May 2023.

## **Consultation**

This approach is consistent with consultation and feedback received on the Principles and Guidelines for a Younger Person's access to Commonwealth Funded Aged Care Services that these amendments align with. The approach is supported by the Younger People in

Residential Aged Care (YPIRAC) Stakeholder Reference Group who advocate for stronger measures to divert younger persons from residential care and limiting entry to aged care.

## **General**

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

Details of the Amending Instrument are set out in **Attachment A**.

The Amending Instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

## ***Approval of Care Recipients Amendment (Younger Persons) Principles 2023***

### **Section 1 – Name**

This section provides that the name of the instrument is the *Approval of Care Recipients Amendment (Younger Persons) Principles 2023*.

### **Section 2 – Commencement**

This section provides that the instrument commences on 1 May 2023.

### **Section 3 – Authority**

This section provides that the instrument is made under the *Aged Care Act 1997 (Act)*.

### **Section 4– Schedules**

This section provides that each instrument that is specified in a Schedule to this Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in that Schedule has effect according to its terms.

## **Schedule 1 – Amendments**

### ***Approval of Care Recipients Principles 2014***

#### **Item 1 – After Part 3**

This item inserts a new section 11A under new Part 3A after Part 3 of the *Approval of Care Recipients Principles 2014*. Section 11A requires certain persons (below the age of 65) to provide additional evidence to accompany their application to be approved as a recipient of residential care under section 22-3 of the Act. Applications without the specified evidence will not be progressed further.

New subsection 11A(1) clarifies the application of new section 11A. The requirements set out in new section 11A will apply to a person who makes an application under section 22-3 of the Act to be to be approved as a recipient for residential care and is under the age of 65 years old.

However, new section 11A will not apply to persons who are applying to be approved as a recipient of residential care and who are aged at least 65 years of age; or are at least 50 years of age and are from an Aboriginal or Torres Strait Islander community, or are homeless or at risk of becoming homeless. This is to eliminate administrative burden and potential barriers to access for younger persons who are prematurely aged, and arguably, could be considered to be in the same position of others aged 65 or others in terms of required access to residential care services (i.e. it is accepted that aged care services on the whole is likely to be appropriate to them, it is a more a question of what services are appropriate). It is noted that

‘people whose life experience – such as active military service, homelessness or substance abuse – have seen them age more quickly than other people’.

It is intended that ‘people who are from an Aboriginal or Torres Strait Islander community’ refers to persons who are:

- a. are of Aboriginal and/or Torres Strait Islander descent;
- b. identify as Aboriginal and/or Torres Strait Islander; or
- c. are accepted by the community they live in or come from.

It is intended that ‘people who are homeless or at risk of becoming homeless’ refers to persons who are:

- a. without any acceptable roof over their head e.g. living on the streets, under bridges, in deserted buildings etc. (absolute homelessness or ‘sleeping rough’);
- b. moving between various forms of temporary or medium-term shelter such as hostels, refuges, boarding houses or friends;
- c. constrained to living permanently in single rooms in private boarding houses; or
- d. housed without conditions of home e.g. security, safety, or adequate standards (includes squatting).

While the requirement to provide specific evidence will not apply to younger persons aged at least 50 years old from an Aboriginal or Torres Strait Islander community, or who are homeless or at risk of becoming homeless, during the aged care assessment, aged care assessors will confirm whether these cohorts are aware that there may be alternative age-appropriate option(s) available. These cohorts will be able to access support through the NDIA and AFA to explore these alternatives if they wish to do so. An assessment of an Aboriginal and/or Torres Strait Islander person should be carried out in a culturally safe, sensitive and appropriate manner.

New subsection 11A(2) specifies that the application in relation to residential care for younger persons must be accompanied by either an ‘Exploration of Home & Living Supports for NDIS Participants Form’ completed in collaboration with the person by the National Disability Insurance Agency; or a ‘Summary Report: Younger People at Risk of Entering Residential Aged Care’ completed in collaboration with the person by Ability First Australia.

New subsection 11A(3) specifies that the documentation mentioned in subsection 11A(2) is not required if the application is in relation to the provision of respite care and made on the basis that the person urgently needed the care when it started and it was not practicable to apply for approval beforehand. This enables younger persons at significant risk of harm to be supported through urgent, temporary accommodation without needing to first have an assessment done by the National Disability Insurance Agency or Ability First Australia and therefore avoiding a potential delay of care.

Situations where a younger person may need urgent care include: the younger person is at risk of significant harm, the death of a family member or close friend, if the younger person or another dependent family member are ill or injured, or an urgent situation that makes it difficult for a carer to fulfil their role. It is not intended that younger persons awaiting hospital discharge would meet this requirement as this cohort will receive significant benefits from a full exploration of alternative options to inform their decision to receive residential care.

## ATTACHMENT B

### Statement of Compatibility with Human Rights

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

#### ***Approval of Care Recipients Amendment (Younger Persons) Principles 2023***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Amending Instrument**

The *Approval of Care Recipients Amendment (Younger Persons) Principles 2023* (Amending Instrument) amends the *Approval of Care Recipients Principles 2014* (Approval of Care Recipients Principles) made under the *Aged Care Act 1997* (Act) to require the provision of specified evidence to accompany applications in relation to residential care for certain younger persons.

The Amending Instrument will require younger persons to provide specific evidence when applying to be approved as a recipient for residential respite or permanent residential care under section 22-3 of the Act. The provision of additional evidence will assist in assessing the eligibility criteria in section 21-2 of the Act and section 6 of the Approval of Care Recipients Principles. The evidence must be either an ‘Exploration of Home & Living Supports for National Disability Insurance Scheme (NDIS) Participants Form’ completed for the person by the National Disability Insurance Agency (NDIA); or a ‘Summary Report: Younger People at Risk of Entering Residential Aged Care’ completed for the person by Ability First Australia (AFA). The abovementioned documentation is not required if the application is in relation to the provision of respite care and made on the basis that the person urgently needed the care when it started and it was not practicable to apply for approval beforehand.

The amendments to the Approval of Care Recipients Principles are consistent with the intent of recommendation 74(d) of the Final Report of the Royal Commission into Aged Care Quality and Safety that provides any younger person who is at risk of entering residential care is referred for assessment by the agency most appropriate for the assessment of the person concerned, and not an ACAT.

The amendments support the sentiment that residential care is targeted at meeting the needs of individuals aged 65 years and over who have particular care needs and are incapable of living in the community without support. The new arrangement supports the younger person, or their representative, to explore and consider more age-appropriate care options in accordance with their individual circumstances. The consent of the younger person, or their representative, to enter a care facility or care service will be accepted and respected, including for entry into aged care if the eligibility requirements are met in accordance with the Act and Approval of Care Recipients Principles.

## **Human rights implications**

The Amending Instrument is consistent with human rights as it promotes the rights of everyone to the right to social security and adequate standard of living and health.

The Amending Instrument engages the following human rights:

- the right to an adequate standard of living in article 11(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR) and articles 25 and 28 of the Convention on the Rights of Persons with Disabilities (CRPD); and
- the right to health in article 12 of the ICESCR and article 25 of the CRPD.

### *Right to an adequate standard of living*

The right to an adequate standard of living, including adequate food, water and housing, and to the continuous improvement of living conditions is contained in article 11(1) of ICESCR. Articles 25 and 28 of the CRPD also require countries to take appropriate measures to ensure clean water services and public housing programs for people with disability.

The Amending Instrument advances the right to an adequate standard of living by ensuring equitable access to residential care or residential respite care for younger persons. It does this by supporting a more robust application process for younger persons to be approved to be a recipient of residential care.

### *Right to Health*

The right to health 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 Amending Principles promote the right to health by ensuring that younger persons receive optimal age-appropriate care.

## **Conclusion**

The Amending Instrument is compatible with human rights because it promotes the protection of human rights.

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