

## **EXPLANATORY STATEMENT**

**Issued at the authority of the Minister for Aged Care**

***Aged Care Quality and Safety Commission Act 2018***

***Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023***

### **Purpose**

The *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023* (Amending Rules) amends the *Aged Care Quality and Safety Commission Rules 2018* (ACQSC Rules) to provide the Aged Care Quality and Safety Commissioner (Commissioner) the function to monitor, and respond to, aged care providers that are potentially at risk of insolvency. This is intended to:

- assist with reducing the risk of approved providers facing insolvency concerns to: support quality and continuity of care for care recipients; support increased stability of the aged care market; and assist with minimising unnecessary Commonwealth expenditure, including by refunding accommodation payment balances under the *Aged Care (Accommodation Payment Security) Act 2006*; and
- enable the Commissioner to better perform its existing functions as the regulator of aged care, including monitoring and responding to non-compliance with the Prudential Standards, through gaining an understanding of an approved provider's financial situation.

The Amending Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

### **Background**

The Royal Commission into Aged Care Quality and Safety (Royal Commission) in its final report made a series of recommendations intended to enhance aged care prudential regulation (recommendations 130 to 137). The recommended enhancements were to help ensure that approved providers of aged care services:

- remained financially viable to ensure continuity of care for care recipients;
- had the ongoing financial capacity to deliver high quality care; and
- could meet their obligations to repay refundable accommodation deposits and accommodation bonds as required.

Financial monitoring of approved providers of aged care services to identify viability risks has been undertaken by the Department of Health and Aged Care (the department) since 2020.

The Australian Government provided \$12.9 million for 2023-24 to commence enhancements of aged care prudential regulation. The Amending Rules will give effect to part of the enhancements by expanding the functions of the Commissioner to proactively monitor, identify and engage with aged care providers who may be facing financial viability and are potentially at risk of insolvency. In doing so, it will respond, in part, to Recommendation 134 of the final report of the Royal Commission.

## **Authority**

Section 77 of the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act) provides that the Minister may, by legislative instrument, make rules prescribing matters

- (a) required or permitted by this Act to be prescribed by the rules; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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

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

- (a) 1 July 2023; and
- (b) the day after this instrument is registered.

## **Consultation**

Consultation has been undertaken with relevant Commonwealth agencies since March 2021. This has included consultation with the Department of Finance, the Department of the Prime Minister and Cabinet, the Department of the Treasury, the Australian Prudential Regulation Authority (APRA), the Australian Government Solicitor and the Aged Care Quality and Safety Commission (ACQSC). This consultation indicated that best-practice prudential regulation (including in other sectors subject to prudential regulation in Australia by APRA) was for financial monitoring and prudential compliance to be undertaken by the same agency. Doing so will enable the agency to develop a more complete understanding of risk factors and the situation of regulated entities when formulating responses.

Consultation with approved providers on whether they would support the ACQSC taking on responsibility for monitoring and mitigation of insolvency risks did not occur because:

- The amendments will introduce best-practice components of prudential regulation in aged care, similar to the prudential regulation of industries regulated by APRA, whereby a single, independent agency is responsible for financial monitoring and prudential compliance.
- The Amending Rules will not create an additional regulatory burden for approved providers as financial monitoring is currently undertaken by the department, and the intent is for the department to cease undertaking this as the ACQSC takes on this function. Instead, the Amending Rules will simply streamline and improve the effectiveness of financial monitoring.
- Financial monitoring exists to help ensure the stability of the market and the availability of services for care recipients. The Amending Rules will help achieve the purpose of financial monitoring, which will be prioritised over the preferences of approved providers around which agency undertakes the financial monitoring function.

## **Regulation Impact Statement**

The Office of Impact Analysis was consulted and considered the amendment to be non-regulatory in nature and will not have more than minor impacts on business, individuals and community organisations. As such, an Impact Analysis is not required (reference number OBPR-44230).

**Details of the *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023***

**Section 1** provides that the name of the instrument is the *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023* (Amending Rules).

**Section 2** provides that the Amending Rules commence on the later of 1 July 2023 and the day after this instrument is registered.

**Section 3** states that the authority for making the Amendment Rules is the *Aged Care Quality and Safety Commission Act 2018* (ACQSC 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 the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

***Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023***

**Item 1 – Section 4**

Item 1 inserts a new Part 1A into the *Aged Care Quality and Safety Commission Rules 2018* (ACQSC rules). Under Part 1A there is a new section 8A, which specifies several new functions of the Commissioner relating to monitoring the financial viability of approved providers and responding to approved providers the Commissioner identifies that are potentially at risk of insolvency.

*Paragraph 8A(a)*

New paragraph 8A(a) specifies that the Commissioner has the function “to monitor the financial viability of approved providers”. In monitoring the financial viability of approved providers, the Commissioner may assess relevant information reported by approved providers to the Secretary through Aged Care Financial Reports (ACFRs), General Purpose Financial Reports (GPFRs), Quarterly Financial Reports (QFRs) and Annual Prudential Compliance Statements (APCSs).

While the Commissioner can monitor the financial viability of all approved providers, paragraph 8A(a) is intended to enable the Commissioner to prioritise resources however the Commissioner deems necessary or appropriate. In their assessment the Commissioner may have regard to:

- likely level of harm that would be experienced by care recipients, the aged care system and/or the Commonwealth if certain providers were to become insolvent; and
- potential value to care recipients, the aged care system and/or the Commonwealth.

#### *Paragraph 8A(b)*

New paragraph 8A(b) specifies that the Commissioner has the function “to identify approved providers who are potentially at risk of insolvency”. This means that the Commissioner may consider the following when identifying approved providers at risk:

- the activities the Commissioner undertakes under paragraph 8A(a); and/or
- assessment of any other information the Commissioner may access or request which the Commissioner deems relevant (for example, by requesting additional information from an approved provider under section 74GA of the ACQSC Act).

The Commissioner may determine what “potentially at risk of insolvency” means for the purpose of new section 8A. For example, the Commissioner may assess how likely or imminent it is that an approved provider will be unable to pay all its debts, as and when they become due and payable when determining the meaning of “potentially at risk of insolvency”.

#### *Paragraph 8A(c)*

New paragraph 8A(c) specifies that the Commissioner has the function “to liaise with approved providers according to their level of risk”.

The purpose of this function is to ensure that the Commissioner develops an accurate understanding of the financial situation of an approved provider at risk of insolvency and allows the Commissioner to continue to maintain an accurate understanding as the approved provider’s financial position changes over time. This will:

- enable the Commissioner to more accurately assess the risk of a particular approved provider becoming insolvent; and
- assist with the Commissioner’s the function under paragraph 8A(d).

The purpose of this new function is to provide the Commissioner the ability to liaise with approved providers according to their level of risk and to provide flexibility to liaise on a case-by-case basis. Having the ability to liaise with approved providers will enable the Commissioner, at their discretion, to share information with an approved provider so long as the information relates to that approved provider. Such information or advice may include:

- a financial risk assessment by the Commissioner, or any information included in the Commissioner’s risk assessment;
- an assessment that the approved provider has been flagged as potentially being at risk of insolvency; and/or
- advice on how the Commissioner thinks the approved provider may be able to resolve the potential risk of insolvency.

#### *Paragraph 8A(d)*

New paragraph 8A(d) specifies that the Commissioner has the function “to consider whether the Commissioner’s powers can be used to mitigate insolvency risks, and to exercise those powers where the Commissioner considers it appropriate for that purpose”.

The purpose of this function is to enable the Commissioner to consider, on a case-by-case basis, whether any of its existing powers may be used, and is appropriate to be used in the circumstances, to mitigate any insolvency risks.

In deciding whether it is appropriate to use any particular power in any particular case, the Commissioner may consider any relevant factors, including any current or recent non-compliance by the approved provider with its responsibilities under the *Aged Care Act 1997* (Aged Care Act).

Examples of powers that the Commissioner may determine are appropriate to be used to mitigate a risk of insolvency of any particular approved provider, include:

- liaising with an approved provider under paragraph 8A(c) on an ongoing or regular basis;
- requesting information from the approved provider under section 74GA of the ACQSC Act or section 9-3A of the Aged Care Act;
- requesting information from the borrower of a loan made with a refundable deposit or accommodation bond under section 52N-3 of the Aged Care Act; and
- exercising the Commissioner’s power to issue a sanction for non-compliance with an aged care responsibility under Part 7B of the ACQSC Act.

#### *Paragraph 8A(e)*

New paragraph 8A(e) specifies the Commissioner has the function to “to inform the Secretary of approved providers who are potentially at risk of insolvency.”

This function empowers the Commissioner to inform the Secretary of any approved provider the Commissioner determines as potentially being at risk of insolvency under paragraph 8A(b). Notifying the Secretary of an approved provider under paragraph 8A(e) does not have any effect on the Commissioner’s responsibilities under any other paragraphs of subsection 8A.

To provide the Commissioner with greater flexibility, the purpose of paragraph 8A(e) is to allow the Commissioner and Secretary to work together to determine any form in which the Commissioner informs the Secretary of providers who are at risk of insolvency.

## Statement of Compatibility with Human Rights

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

### *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023*

This *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023* (Amending Rules) 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 Legislative Instrument

The *Aged Care Quality and Safety Commission Amendment (Commissioner Functions) Rules 2023* (Amending Rules) amends the *Aged Care Quality and Safety Commission Rules 2018* (ACQSC Rules) to provide the Aged Care Quality and Safety Commissioner (Commissioner) the function to monitor, and respond to, aged care providers that are potentially at risk of insolvency. This is intended to:

- assist with reducing the risk of approved providers facing insolvency concerns to: support quality and continuity of care for care recipients; support increased stability of the aged care market; and assist with minimising unnecessary Commonwealth expenditure, including by refunding accommodation payment balances under the *Aged Care (Accommodation Payment Security) Act 2006*; and
- enable the Commissioner to better perform its existing functions as the regulator of aged care, including monitoring and responding to non-compliance with the Prudential Standards, through gaining an understanding of an approved provider's financial situation.

#### Human rights implications

The Amending Rules promotes:

- an adequate standard of living including adequate food, clothing, and housing and to the continuous improvement of living conditions, as contained in article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the highest attainable standard of physical and mental health, as contained in article 12(1) of the ICESCR.

The Amending Rules promote these international rights by enabling the Commonwealth to minimise the risk of approved providers of aged care services experiencing financial viability concerns and/or becoming insolvent.

The Amending Rules are intended to reduce the risk of approved providers facing insolvency risks or becoming insolvent. In doing so it will promote the right to health and an adequate standard of living by reducing the risk that current or prospective care recipients lose access to:

- adequate food, and housing; and
- appropriate care to support their physical and mental health.

### **Conclusion**

The Amending Rules are compatible with human rights because by minimising the potential risk of approved providers of aged care services being unable to provide quality care due to experiencing insolvency risks or becoming insolvent. the Amending Rules promotes the right to the highest attainable standard of physical and mental health, and an adequate standard of living.

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