

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997

Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) Principles 2023

Purpose

The purpose of the *Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) Principles 2023* (Amending Principles) is to amend the *Accountability Principles 2014* (Accountability Principles) to give effect to matters specified by paragraphs 63-1(1)(hb) and (hc) of the *Aged Care Act 1997* (Aged Care Act).

The Amending Principles set out provisions relating to two new responsibilities of approved providers of residential care with effect from the day after this instrument is registered. The new responsibilities are to provide access to residential care services and to provide all reasonable facilities and assistance necessary to persons performing activities under paragraph 131A(1)(c) of the *National Health Reform Act 2011* (NHR Act) for the purposes of assisting the Independent Health and Aged Care Pricing Authority (Pricing Authority) to perform its aged care pricing and costing advice functions under paragraph 131A(1)(a) of the NHR Act.

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

Background

Schedule 8 to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Amending Act) amended the NHR Act to, amongst other things, create a new function of the Pricing Authority to provide advice to each relevant Commonwealth Minister in relation to one or more aged care pricing or costing matters, including in relation to methods for calculating amounts of subsidies to be paid under the Aged Care Act or the *Aged Care (Transitional Provisions) Act 1997* (see paragraph 131A(1)(a) of the NHR Act).

To support the performance of this function, paragraph 131A(1)(c) of the NHR Act provides that the Pricing Authority also has the function to conduct, or arrange for the conduct of, one or more of the following activities for the purpose of performing a function mentioned in paragraph 131(1)(a):

- the collection and review of data;
- costing and other studies;
- consultations.

Schedule 8 of the Amending Act also made complementary amendments to the Aged Care Act to create two new responsibilities of approved providers of residential care. This was to enable the effective exercise of the Pricing Authority's functions under paragraph 131A(1)(c) of the NHR Act, specifically the responsibilities:

- to allow persons performing an activity mentioned in paragraph 131A(1)(c) of the NHR Act access to the service, as required under the Accountability Principles, for the purposes of the Pricing Authority performing the function mentioned in paragraph 131A(1)(a) of the NHR Act (see paragraph 63-1(1)(hb) of the Aged Care Act);
- to provide persons performing an activity mentioned in paragraph 131A(1)(c) of the NHR Act with all reasonable facilities and assistance necessary, as required under the Accountability Principles, for the purposes of the Pricing Authority performing the function mentioned in paragraph 131A(1)(a) of the NHR Act (see paragraph 63-1(1)(hc) of the Aged Care Act).

The Amending Principles give effect to paragraphs 63-1(1)(hb) and (hc) of the Aged Care Act by specifying the requirements in relation to access to residential care services and requirements to provide all reasonable facilities and assistance necessary. These requirements will enable the Pricing Authority to conduct costing studies, engage in consultation and collect and review data from approved providers that will directly inform their advice on aged care pricing and costing matters.

Implementing the amendments is also consistent with Recommendation 116 (‘Requirement to participate in Pricing Authority activities’) of the 1 March 2021 *Final Report* of the Royal Commission into Aged Care Quality and Safety.

Authority

Section 96-1 of the Act provides that the Minister has the power to make instruments 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. Item 1 in the table to section 96-1 of the Act provides that the Minister may make Accountability Principles providing for matters in Part 4.3 of that 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 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.

Consultation

The Pricing Authority has conducted a pilot costing study with voluntary participation of approved providers and their care recipients and has taken the feedback from those participating approved providers and care recipients to ensure the scope of access and assistance requirements included in the Amending Principles are reasonable and do what is necessary to enable the Pricing Authority to fulfill its aged care pricing and costing advice function.

The Department of Health and Aged Care consulted with the Pricing Authority in conducting the pilot costing studies and throughout the drafting of the Amending Principles. Feedback from the Pricing Authority was taken into account in finalising the details in the Amending Principles.

Commencement

The Amending Principles commence on the day after the Amending Principles are registered.

Impact Assessment

The estimated additional regulatory burden of participating in Pricing Authority activities was measured in the Impact Assessment (formerly known as a Regulatory Impact Statement (RIS)) for the Amending Act. See <https://oia.pmc.gov.au/published-impact-analyses-and-reports/aged-care-reforms> (particularly the attachment Residential Aged Care Funding Arrangements RIS May 2021).

Incorporation by reference

The Amending Principles incorporate by reference paragraph 131A(1)(c) of the NHR Act, as in force from time to time. The NHR Act can be accessed free of charge on the Federal Register of Legislation (<https://www.legislation.gov.au>).

ATTACHMENT

Details of the Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) Principles 2023

Section 1 states that the name of the amending instrument is the *Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) Principles 2023*.

Section 2 states that the Amending Principles commence on the day after this instrument is registered.

Section 3 states that the Amending Principles are made under the *Aged Care Act 1997* (Aged Care Act).

Section 4 states 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 amends the Accountability Principles.

Schedule 1—Amendments

Accountability Principles 2014

Item 1 – Section 4 (note)

This item repeals the note to Section 4 and substitutes a new note which provides that a number of expressions used in the Accountability Principles are defined in the Aged Care Act, including the following:

- approved provider;
- disqualified individual;
- flexible care;
- home care;
- key personnel;
- Pricing Authority;
- Quality and Safety Commissioner;
- residential care.

The effect of this amendment is to include a reference to the Pricing Authority into the existing list of expressions used in the Accountability Principles that are noted as being defined in the Aged Care Act, and to renumber the items in the list to accommodate the new reference.

Item 2 – Section 4

This item inserts two new definitions in Section 4: ***participating care recipient*** and ***Pricing Authority advice activity***.

A care recipient is a ***participating care recipient*** for a Pricing Authority advice activity if:

- consent for the care recipient to participate in the activity has been given by:
 - the care recipient; or
 - if the care recipient lacks capacity to give consent to participate in the activity—a representative of the care recipient; and
- that consent has not been withdrawn by:
 - the care recipient; or
 - if the care recipient lacks capacity to withdraw consent to participate in the activity—a representative of the care recipient.

The term participating care recipient appears in new section 4D of the Accountability Principles, specifically in subsection (2) deals with requirements for approved providers to allow the Pricing Authority access to specified areas of the residential care service, as required, for them to perform their pricing and costing activities. This definition has been included to ensure that only care recipients who have provided consent to participate in these activities conducted by the Pricing Authority are those who approved providers must allow access to for the purpose of the performance of those activities. Approved providers are not required to provide access to care recipients who are not participating care recipients for the purposes of the Pricing Authority performing their pricing and costing activities.

The definition provides that consent for the care recipient to participate in the activity must be given by either the care recipient themselves, or their representative (if the care recipient lacks capacity to give consent to participate in the activity). The language in the provision of “consent to participate in the activity” has been included specifically to clarify that the care recipient or their representative are only giving their consent with respect to the specific activities undertaken by the Pricing Authority under paragraph 131A(1)(c) (that is, costing and other studies, consultations and the collection and review of data).

The definition also provides that in addition to the initial seeking of consent for the care recipient to participate in the Pricing Authority activities, the care recipient will only be a participating care recipient if that consent has not been withdrawn by either the care recipient themselves, or their representative (if the care recipient lacks capacity to withdraw consent to participate in the activity). This is intended to make clear that care recipients and their representatives can withdraw their consent to participate in the Pricing Authorities activities at any time prior to, or during, the activities.

The definition is intended to align with the Pricing Authority’s current consent model for care recipient participation in their pricing and costing activities.

Pricing Authority advice activity is defined as an activity mentioned in paragraph 131A(1)(c) of the *National Health Reform Act 2011* (NHR Act) conducted for the purpose of performing a function mentioned in paragraph 131A(1)(a) of that Act.

The Pricing Authority function in paragraph 131A(1)(a) of the NHR Act is to provide advice to each relevant Commonwealth Minister in relation to one or more aged care pricing or costing matters, including in relation to methods for calculating amounts of

subsidies to be paid under the Aged Care Act or the *Aged Care (Transitional Provisions) Act 1997*.

The Pricing Authority function in paragraph 131A(1)(c) of the NHR Act is to:

- to conduct, or arrange for the conduct of, one or more of the following activities for the purpose of performing a function mentioned in paragraph 131A(a) or (b) of the NHR Act:
 - the collection and review of data;
 - costing and other studies;
 - consultations.

The inclusion of Pricing Authority advice activity as a defined term will assist in user readability where the relevant provisions are intended to describe the requirements of approved providers in relation to access and assistance for the Pricing Authority when performing or conducting any of the three activities mentioned in paragraph 131A(1)(c) of the NHR Act.

Item 3 – After Part 1A

This item inserts new Part 1B— Access, facilities and assistance for Pricing Authority advice activities—residential care services, after Part 1A of the Accountability Principles. New Part 1B comprises new sections 4C, 4D, 4E and 4F.

Section 4C

New section 4C states the purpose of new Part 1B. This provides that, for the purposes of paragraph 63-1(1)(hb) and (hc) of the Aged Care Act, new Part 1B requires an approved provider of a residential care service to:

- allow persons performing Pricing Authority advice activities access to the service; and
- provide such persons with all reasonable facilities and assistance necessary for the performance of those activities.

Pricing Authority advice activity is defined in Section 4 as amended (see item 2 above).

Section 4D

New section 4D provides for the general requirements of approved providers of residential services to allow persons performing Pricing Authority advice activities access to their residential care services and to provide reasonable facilities and assistance necessary.

New subsection 4D(1) provides that section 4D applies if two requirements are met. The first is that the Pricing Authority has given the approved provider of the residential care service written notice that access to the service is required, on a day specified in the notice for the conduct of a Pricing Authority advice activity. The second requirement is that the notice is given at least 14 days before the specified day.

This provision will ensure that approved providers have sufficient notice that the Pricing Authority intends to access their residential care services for the purpose of performing any of their pricing and costing advice activities.

Access

New subsection 4D(2) outlines further details of the timely access that an approved provider must allow to the persons performing the activity on the specified day, which involves access to:

- all areas of the premises of the service, other than the personal rooms of care recipients who are not participating care recipients for the activity;
- service staff in relation to the service who are on the premises of the service on the specified day;
- the care recipients who are provided with residential care through the service and are participating care recipients for the activity;
- records kept by the approved provider.

Participating care recipient is defined in Section 4 as amended (see item 2 above).

The inclusion of paragraph 4D(2)(a) makes clear that while approved providers must allow persons performing a Pricing Authority advice activity access to all areas of the service, this does not include the personal rooms of care recipients who have not provided their consent to participate in the activity.

Paragraph 4D(2)(c) makes clear that approved providers must allow persons performing the relevant activity access to care recipients who are participating care recipients for the activity. Paragraph 4D(2)(b) provides for similar access to service staff, which has the meaning given by section 4 of the *Quality of Care Principles 2014* (see section 4 of the *Accountability Principles*). This will ensure that the Pricing Authority can, for example, conduct a costing study onsite at a residential care service by monitoring and recording data on care time spent between staff and participating care recipients. This will enable the Pricing Authority to prepare and provide advice regarding aged care pricing and costing in accordance with paragraph 131A(1)(a) of the NHR Act.

Paragraph 4D(2)(d) provides that approved providers must also allow access to records kept by the provider. The note to this paragraph provides a list of examples of records kept by the approved provider that may be required for the persons to perform the activity, which include the following:

- records relating to the care needs of care recipients who are provided with residential care through the service;
- records relating to the costs of providing residential care.

These examples are not intended to be an exhaustive list of the types of records to which the Pricing Authority may require for the purpose of their functions. Access to relevant records kept by the approved provider is necessary to enable the Pricing Authority to perform its functions. Using the example of a costing study, access to relevant records, such as records relating to the cost of providing residential care, will ensure the Pricing Authority has all relevant information to inform the costing study and to provide its advice in relation to aged care pricing and costing.

All records accessed about care recipients and approved providers by persons performing Pricing Authority advice activities will become protected Pricing Authority information and be subject to the protections in Part 4.14 of the NHR Act. Any personal information obtained by the Pricing Authority will also need to be collected, used and disclosed in accordance with the *Privacy Act 1988*.

Facilities and assistance—general

New subsection 4D(3) outlines the reasonable facilities and assistance necessary that an approved provider must provide to the persons performing the activity on the specified day, which include but are not limited to any of the following:

- site orientation, including guidance on how to safely navigate the premises of the service;
- dissemination of information to service staff in relation to the service and care recipients and their families or representatives;
- access to facilities at the premises of the service for working onsite at the premises;
- instructions necessary for accessing records of the service.

This provision assists in clarifying what facilities and assistance an approved provider may need to provide to persons performing a Pricing Authority advice activity. Assistance with things such as site orientation or providing information to staff, care recipients and their families where reasonable and necessary having regard to the activity will ensure the Pricing Authority can effectively and efficiently perform Pricing Authority activities at residential care services as required.

Section 4E

New section 4E deals with providing assistance with respect to the provision of data to the Pricing Authority.

New subsection 4E(1) provides that the section applies if three requirements are met. The first requirement is that the Pricing Authority gives the approved provider of the residential care service written notice of data that is necessary for the conduct of a Pricing Authority advice activity. The second requirement is that the notice specifies a day for providing the data. The third requirement is that the notice is given at least 14 days before the specified day.

This provision will ensure approved providers have sufficient notice where certain data is required for the purpose of the Pricing Authority performing any of their pricing and costing advice activities.

New subsection 4E(2) provides that the notice may specify requirements for the form or quality of the data or the manner for providing the data. This is intended to allow for the Pricing Authority to specify certain requirements or standards for which data must be provided. This will ensure data is, as much as possible, complete and received from approved providers in a consistent format. This will enable the effective and efficient performance of the Pricing Authority's functions, in particular the collection and review of data.

New subsection 4E(3) provides that the approved provider must provide the data in accordance with the notice.

This is reasonable and necessary as for the Pricing Authority to perform effective cost data analysis that the same types of data must be submitted by approved providers in the same form or quality, as appropriate, to ensure comparability.

Section 4F

New section 4F deals with providing assistance with respect to access to relevant persons.

New subsection 4F(1) provides that the section applies if three requirements are met. The first requirement is that the Pricing Authority gives the approved provider of the residential care service written notice that access to a person mentioned in subsection 4F(2) (a relevant person) is required for the conduct of a Pricing Authority advice activity. The second requirement is that the notice specifies a day by which arrangements must be made for the access. The third requirement is that the notice is given at least 14 days before the specified day.

This provision will ensure that approved providers have sufficient notice where access to relevant persons is required for the purpose of the Pricing Authority performing any of their pricing and costing advice activities.

New subsection 4F(2) provides that, for the purposes of subsection 4F(1)(a), the relevant persons are the following:

- a specified member of the key personnel of the provider;
- a member of the key personnel of the provider who is responsible for a specified matter for the provider;
- a specified member of the service staff in relation to the service;
- a member of the service staff in relation to the service who is responsible for a specified matter for the service.

The difference in language in the above provision of a “specified member” compared to “a member” of either the key personnel or the service staff of an approved provider is intended to capture both particular individuals and those occupying particular positions.

For example, access may be required simply to the CEO of the approved provider or the Head of Nursing Services at the residential care service. However, in other circumstances access may be required to a specific individual, for example a particular member of the service staff who was present at the service on a particular day.

New subsection 4F(3) provides that the approved provider must:

- before the end of the specified day, make arrangements to allow the persons performing the activity timely access to the relevant person; and
- facilitate the access in accordance with the arrangements.

This is reasonable and necessary for the Pricing Authority to perform effective cost data analysis when undertaking a Pricing Authority advice activity. For example, persons performing a Pricing Authority advice activity must be able to seek

information from the approved provider's relevant persons to understand the significance of and any issues in relation to provided cost information or data.

Statement of Compatibility with Human Rights

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

Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) 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 legislative instrument

The purpose of the *Accountability Amendment (Access and Assistance for Independent Health and Aged Care Pricing Authority) Principles 2023* (Amending Principles) is to amend the *Accountability Principles 2014* (Accountability Principles) to give effect to matters specified by paragraphs 63-1(1)(hb) and (hc) of the *Aged Care Act 1997* (Aged Care Act).

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Human rights implications

The Amending Principles engages the human right to privacy in article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 22 of the *Convention of the Rights of Persons with Disabilities* (CRPD).

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks. Article 22 of the CRPD outlines a similar right with respect to persons with disability.

The right to privacy under Article 17 can be permissibly limited to achieve a legitimate objective and where the limitations are lawful and not arbitrary. The term ‘unlawful’ in Article 17(1) of the ICCPR means that no interference can take place except as authorised under domestic law. Additionally, the term ‘arbitrary’ in Article 17(1) 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 United Nations Human Rights Committee has interpreted ‘reasonableness’ to mean that any limitation must be proportionate and necessary in the circumstances.

The Amending Principles limit the right to privacy under article 17(1) of the ICCPR and Article 22 of the CPRD by making it a responsibility of approved providers to provide persons performing Pricing Authority advice activities with access to participating care recipients, which may include the personal rooms of those care recipients. However, for a person to be a participating care recipient, they or their representative must have consented to participate in the Pricing Authority advice activities. A care recipient who has previously consented to be a participating care recipient can also withdraw consent at any time. Approved providers must also provide the Pricing Authority with access to records kept by the approved provider, which may include records relating to the care needs of care recipients.

These arrangements support the legitimate objective of enabling the Pricing Authority to perform its aged care pricing and costing advice functions. The performance of these functions by the Pricing Authority will aim to ensure that aged care funding is directly informed by the actual costs of delivering aged care. The provisions in the Amending Principles are reasonable, necessary and proportionate to achieving this objective, as access to participating care recipients and care records will ensure the Pricing Authority's advice is adequately informed by relevant data and information about the cost of delivering aged care

Further, any personal information (including sensitive information) about care recipients that is recorded, used or disclosed by persons performing Pricing Authority advice activities will be protected Pricing Authority information and be subject to the protections in Part 4.14 of the NHR Act, as well as the general protections under the *Privacy Act 1988*. The existing penalties for misuse of protected information will protect and ensure safe handling of the information collected.

Conclusion

The Amending Principles are 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*. To the extent that aspects of the Amending Principles limit the right to privacy, those limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

The Hon Anika Wells MP
Minister for Aged Care