

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Ageing

Aged Care Act 1997

Allocation Amendment Principles 2008 (No. 2)

The *Aged Care Act 1997* (the Act) provides for the funding of aged care services. Persons who are approved under the Act to provide aged care services (approved providers) can be eligible to receive subsidy payments in respect of the care they provide to approved care recipients.

Subsection 96-1(1) of the Act allows the Minister to make Principles providing for various matters required or permitted by a Part or section of the Act.

One set of Principles made under the Act is the *Allocation Principles 2007* (the Allocation Principles).

The purpose of the *Allocation Amendment Principles 2008 (No. 2)* (the Amending Principles) is detailed below. The Amending Principles are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Allocation Amendment Principles 2008 (No. 2)

The purpose of these Amending Principles is to make consequential changes flowing from changes made to the Act through the *Aged Care Amendment (2008 Measures No. 2) Act 2008* in relation to:

- allowing approved providers to apply to the Secretary to transfer provisionally allocated places in certain exceptional circumstances; and
- the regulation of approved providers.

Consultation

The policies reflected in the Amending Principles were the subject of consultation with the aged care sector through the Ageing Consultative Committee, which comprises peak industry, professional and consumer bodies. Sector feedback was considered in the development and fine tuning of the complex legislative and policy reform process.

Regulation Impact Statement

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required (OBPR ID **9978**).

Details of the amendments to the Allocation Principles are listed at Attachment A.

NOTES ON CLAUSES

Clause 1 states that the name of the Amending Principles is the *Allocation Amendment Principles 2008 (No. 2)*.

Clause 2 states that the Amending Principles commence on the commencement of the *Aged Care Amendment (2008 Measures No. 2) Act 2008*.

Clause 3 states that Schedule 1 amends the Allocation Principles.

Schedule 1 Amendments

Items 1, 3, 4 and 13

Prior to the commencement of the *Aged Care Amendment (2008 Measures No. 2) Act 2008*, an entity could be an ‘approved provider’ despite not yet having been allocated any Australian Government funded aged care places. This gave rise to concern including because care recipients and their families may not be aware of the limitations of the protections afforded under the Act in the absence of allocated places.

In order to address this situation, the *Aged Care Amendment (2008 Measures No. 2) Act 2008* made amendments to the Act to ensure that approved provider status does not take effect until such time as the successful applicant has an allocation of places. The approved provider status then only takes effect in respect of services in relation to which an allocation has been granted.

To achieve this policy intent, many minor amendments were made throughout the Act in order to make it clear that a provider will only be an approved provider in respect of those services for which they have an allocation of places (be they provisional or operational, allocated directly to the entity or acquired by transfer).

Similarly, changes are required to the Principles to make it clear when certain provisions apply to entities regardless of whether or not they are yet approved providers.

In a general sense, this means that certain sections in the Principles that relate to sections in the Act in which the term “approved provider” has been replaced with the word “person”, require corresponding changes.

Items 1, 3, 4 and 14 make these consequential changes to the Principles as follows:

- item 1 amends the note before Part 1 to remove the reference to approved providers;
- item 3 amends paragraphs 4.49(2)(a) and (b) to replace references to the approved provider with references to “the person”. The opportunity has also been taken to improve the grammatical construction of the paragraphs;
- item 4 amends paragraph 4.49(2)(e) to remove the reference to a provider so that the provision is relevant to both approved providers and entities who will become approved providers when an allocation of places takes effect; and
- item 13 amends sections 4.42, 4.44, 4.45, 4.48 and 4.49 to replace references to approved provider with references to “a person” (or “person” or “the person” as the case may be).

Item 2

The *Aged Care Amendment (2008 Measures No. 2) Act 2008* amended the definition of key personnel within the *Aged Care Act 1997* (the Act). As part of these amendments there was a reordering of sections within the Act and the term key personnel is now defined in section 8-3A of the Act (rather than in sections 8-3(3) and 9-1(2) as was previously the case).

This item makes a consequential amendment to the definition of key personnel within section 4.3 of the Allocation Principles so that key personnel has the same meaning as in section 8-3A of the Act.

Items 5 to 13

Item 66 of the *Aged Care Amendment (2008 Measures No. 2) Act 2008* inserted a new Division 16-B in the Act, dealing with the transfer of provisionally allocated places.

Previously the process for the allocation of places transferred from one person to another only applied to the transfer of operational places, and not to the transfer of provisional places. The Australian Government's goal in relation to provisional allocations is that they should be made operational quickly and to the benefit of the community. A change of ownership does not necessarily compromise this objective and, in some cases, may be the most effective way of bringing a particular parcel of provisional allocations into operation.

On the other hand, as provisional allocations are made following a highly competitive process involving detailed proposals, and in which the applicant's record as a provider carries significant weight, the transfer of provisional allocations should be scrutinised to ensure the integrity of the allocation process.

In order to address this issue, a new Subdivision was inserted in the Act to expressly deal with the transfer of provisionally allocated places. Provisionally allocated places will not be able to be transferred unless exceptional circumstances exist.

Most of the new provisions relating to transfer of provisionally allocated places, mirror those relating to transfer of other places. However, there are some differences.

Consistent with the proposed changes to the Act, the Principles also need to be amended. In summary, the changes detailed in these Amending Principles:

- amend Part 7 of the Allocation Principles so that it only applies to transfer of places other than provisionally allocated places. This is consistent with the structure and wording of the Act amendments;
- insert a new Part 7A to deal specifically with the transfer of provisionally allocated places. The provisions within Part 7A are based on those within Part 7 but with certain exceptions to reflect differences between transfer of operational and provisionally allocated places.

Item 5

This item amends the heading of Part 7 so that it applies only to the transfer of places other than provisionally allocated places.

This item also inserts a new section in Part 7 (section 4.55A) which describes the application of Part 7. New section 4.55A provides that Part 7 applies to the transfer of places other than provisionally allocated places.

Items 6 and 8

These items make minor changes to sections 4.58 and 4.60 to remove the redundant reference to the provision of documents as well as information. The purpose of the Divisions is simply to specify additional information to be included in an application for the transfer of places. The provision of additional information includes all relevant documents.

Items 7 and 9

Sections 4.59 and 4.61 are currently entitled “The information and document” and describe information to be included with an application for transfer of places.

The opportunity has been taken to improve the language in the sections. Rather than refer to information and documents (the distinction between which is unnecessary), the section headings for 4.59 and 4.61 are being amended to read “Additional information to be submitted with application”.

Item 10

Currently subparagraph 4.61(2)(f)(ii) requires an application for transfer of places to include, if the transferee proposes to construct or develop premises to accommodate the transferred places, an estimate of the total cost.

This item amends this requirement such that the application must include both the estimated total cost and the means by which the transferee proposes to meet that cost. In practice, the Secretary seeks information from the transferee about how they will meet costs and this amendment makes it clear that this information is required as part of the application.

Item 11

This item removes subparagraph 4.61 (2) (f) (viii) and replaces it with two new subparagraphs, the effect of which is to require an application for transfer of places to include, if the transferee proposes to construct or develop premises to accommodate the transferred places:

- a detailed timetable for calling tenders, planning and construction and development of the service, the factors likely to affect the achievement of the timetable and an indication of the transferee’s ability to meet the timetable; and
- how the transferee intends to comply with any conditions of allocation attached to the original allocation and conditions that are varied as part of the application to transfer the places.

Provision of information associated with the construction of a proposed service is relevant to the Department’s assessment of any proposed variation of the service’s location.

Item 12

This item inserts a new Part 7A entitled “Transfer of provisionally allocated places”.

Division 1 When applications must be made

4.66C Purpose of Division (Act, s 16-14)

This section describes the purpose of the Division. The Division sets out the matters that the Secretary must consider in:

- deciding whether to determine another period before a proposed transfer day within which an application to transfer a provisionally allocated place from one person to another must be made; and
- determining another period.

This section mirrors section 4.55 in relation to transfer of places other than provisionally allocated places.

4.66D Deciding whether to determine different application period - transferee is approved provider

This section provides that the Secretary must, in deciding whether to determine another application period, consider the reasons why the different period has been requested and also any conditions relevant to the places proposed to be transferred. The Secretary may also consider any other relevant matter.

This section is based on section 4.56 that applies to transfer of places other than provisionally allocated places. Many of the matters that the Secretary considers in the context of section 4.56 are not relevant in relation to the transfer of provisionally allocated places because there are no care recipients in respect of whom Commonwealth subsidy is payable associated with provisionally allocated places. Therefore matters relating to existing care recipients are not relevant in relation to the transfer of provisionally allocated places.

4.66E Determining different application period

This section states that if the Secretary has decided to determine another application period, the Secretary must consider the following matters in determining the other application period;

- any conditions relevant to the places that are proposed to be transferred; and
- whether the period is too short or long to allow for an efficient transition, or will be adequate to allow for the normal processing of the transfer.

The Secretary may also consider any other relevant matters.

This section is based on section 4.57 that applies to transfer of places other than provisionally allocated places. Some of the matters that the Secretary considers in the context of section 4.57 are not relevant in relation to the transfer of provisionally allocated places because there are no care recipients in respect of whom Commonwealth subsidy is payable associated with provisionally allocated places. Therefore matters relating to existing care recipients have not been included as relevant considerations in relation to determining a different application period for the transfer of provisionally allocated places.

Division 2 Information to be included in an application

4.66F Purpose of Division (Act, s 16-14)

This sections sets out the purpose of Division 2 which is to specify additional information to be included in an application for the transfer of provisionally allocated places.

4.66G Additional information to be submitted with application

This section provides that an application by an approved provider applying to transfer provisionally allocated places must include the following additional information:

- why the approved provider has not been able to apply to the Secretary to have the provisional allocations take effect under section 15-1 of the Act, and therefore seeks to have the provisional allocations transferred;
- the exceptional circumstances that the transferor considers will justify the transfer in the interests of meeting the needs of the aged care community in the region

The proposed transferee must also include the following information in the application:

- how the transferee proposes to undertake the responsibilities of an approved provider under Parts 4.1 and 4.2 of the Act;
- what the transferee proposes to do to ensure the service is financially viable;
- details of other aged care services through which the transferee provides residential care and community care services (including the target area for the community care services);
- how the transferee proposes:
 - to protect the rights of individual care recipients; and
 - to ensure the quality of care for care recipients; and
 - to maintain the independence of care recipients; and
 - to provide continuing assessment services and evaluation programs for care recipients; and
 - to support the social functioning of care recipients, including maintaining contact with family, friends and the community; and
 - to provide accommodation and care that meet the needs of individual care recipients; and
 - to provide accommodation and care for care recipients with special needs; and
 - to provide a non-institutional environment in which care recipients will be encouraged to keep personal possessions; and
 - to provide varying levels of care relevant to the needs of individual care recipients; and
 - to decide criteria for admission to the proposed aged care service (for example, whether the transferee would only admit people from a particular area);
- if the transferee proposes to complete construction or development of the premises at which the places are located:
 - a description of the project; and
 - an estimate of the total cost and the means by which the transferee proposes to meet that cost; and
 - a detailed timetable for the project, the factors likely to affect the achievement of the timetable, and an indication of the transferee's ability to meet the timetable; and
 - the ownership arrangements of the site and premises; and
 - how the land around the site is being used; and
 - whether there are any proposals before an authority in the State or Territory concerned about the use of the site; and
 - how the transferee intends to ensure that the places become operational in a timely manner; and

- how the transferee intends to comply with any existing conditions of allocation and any conditions that are varied as part of the application to transfer the places.

As part of the application, the approved provider applying to transfer the provisionally allocated places must also provide the last audited company statements of the proposed transferee's aged care services.

These requirements are based on the requirements detailed in section 4.61 which relates to transfer of places other than provisionally allocated places.

Division 3 Consideration of whether transfer justified

4.66H Purpose of Division (Act, s 16-16)

This section summarises the purpose of the Division which is to set out additional matters that the Secretary must consider in deciding whether the transfer of a provisionally allocated place is justified in the circumstances. It is important to note that a number of matters that the Secretary must consider are detailed in the Act and are not repeated in the Principles. The Principles simply detail additional matters for the Secretary to consider.

4.66I Additional matters

In addition to the Secretary being able to consider any other relevant matter, this section requires the Secretary to specifically consider:

- the effect of the proposed transfer on the need for the provision of residential care by the transferee in the region and whether the residential care needs of the region have changed since the original allocation of the provisional allocations;
- how far the service development has progressed;
- the capacity of the transferee to complete the service so that the transferee will be able to apply to the Secretary to have the provisional allocations take effect under section 15-1;
- the extent to which the care needs of the region are better met by the transfer of the provisional allocations to the transferee than by not allowing the transfer.

In considering the effect of the proposed transfer on future care recipients, the Secretary must take into account:

- whether the transfer would increase or lessen the diversity of choice available to care recipients in the region, having regard to the different kinds of services available in the region. In considering choice, kinds of services available in the region may include Extra Service services, ageing in place services, services for those affected by dementia and services for care recipients belonging to ethnic or indigenous communities;
- whether the transfer will increase the likelihood of care recipients receiving continuity of care in a region. The Secretary may, for example, take into account whether the service has demonstrated its long-term financial and organisational viability. The Secretary may also wish to consider, for example, whether the application is for places in a region that, at the time of consideration, has a low proportion of certified services;

- any issue raised by the transferor or transferee in the application to transfer places; and
- if, after the transfer, the places would relate to the same aged care service:
 - the suitability of the premises being used by the transferor, and proposed to be used by the transferee, to provide care through the aged care service, in particular whether the premises would meet the Accreditation Standards or the criteria for certification under the Act; and
 - for a transferee who owns the premises being used by the transferor, and proposed to be used by the transferee, to provide care through the aged care service and the premises would not meet the Accreditation Standards or the criteria for certification under the Act — the failure of the transferee to have improved the premises.

A note at the end of the section reminds readers of the effect of paragraph 16-13(2)(e) of the Act that makes it clear that the Secretary cannot approve the transfer of a provisionally allocated place to another location.

Division 4 Information to be given to transferee

4.66J Purpose of Division (Act, s 16-21)

This section describes the purpose of Division 4 which is to specify information that may be given to the transferee and a time for giving the information.

4.66K Information to be given to transferee

This section provides that the Secretary may give the transferee information about:

- the amount of respite care (if any) to be provided by the transferor's aged care service;
- matters relating to certification, accreditation and grants;
- compliance by the transferor with the transferor's responsibilities under Chapter 4 of the Act in relation to that aged care service, including any action that has been taken or is proposed to be taken, under Part 4.4, for that aged care service;
- the conditions to which the places being transferred are subject;
- any other matters about the transferor's aged care service of which the Secretary considers the transferee should be informed.

4.66L When information is to be given

This section requires the Secretary to give the information to the transferee at least 28 days before the transfer day. The transfer day is the day when the transfer of an allocated place from one person to another takes effect. The day is set under section 16-7 of the Act.

If the transferor asks the Secretary, in writing, to give the information to the transferee within 28 days after making the request, the Secretary should comply with the request.

Item 13

The effect of this item is described in the context of item 1.