

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Mental Health and Ageing

*Aged Care Act 1997*

*Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013*

The *Aged Care Act 1997* (the Act) provides for the regulation and funding of aged care services. Persons 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.

Section 96-1 of the Act allows the Minister to make Principles providing for various matters required or permitted by a Part or section of the Act. Among the Principles made under section 96-1 are the *Residential Care Subsidy Principles 1997* (the Principles).

Part 3.1 of the Act relates to residential care subsidy. Residential care subsidy is a payment by the Commonwealth to approved providers for providing residential care to care recipients. Section 44-5 of the Act provides for the payment of primary supplements. Supplements are paid to approved providers in respect of a payment period as part of residential care subsidy. Section 44-16 of the Act states that the Principles may provide for additional primary supplements.

On 20 April 2012, the Government announced the *Living Longer Living Better* aged care reform package. As part of the reform, four new supplements will be payable to providers of residential care.

The purpose of the *Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013* (the Amending Principle) is to create the new workforce supplement as an additional primary supplement. Details are set out in the Attachment.

The Amending Principle is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

### Consultation

The *Living Longer Living Better* aged care reform package was developed in close consultation with the aged care sector, including consumers, industry and professional bodies.

Consultation on the proposed changes to the Act, and to delegated legislation, commenced in November 2012, with the public release of a paper providing an overview of the proposed legislative changes.

A video presentation detailing the changes was also made available through the *Living Longer Living Better* website, to assist with public understanding of the proposed changes.

During November and December 2012, the Department of Health and Ageing (the

Department) also held briefing sessions in Melbourne, Sydney and Canberra on the proposed changes.

Stakeholders and the general community were able to provide written comments during a four-week period (21 November – 21 December 2012). The comments were made publicly available on the *Living Longer Living Better* website, unless the author requested otherwise. The Department received 54 submissions from members of the public, peak bodies and approved providers in response to the published overview of legislative amendments. Submissions received via the consultation on the overview of the proposed legislative changes were used to inform drafting of the amending bills and the delegated legislation.

In March and April 2013, the Department held industry briefing sessions across Australia to provide information and to explain, in detail, the proposed legislative changes included in the package of Bills introduced into Parliament on 13 March 2013. The briefing sessions also outlined changes to delegated legislation such as these Amending Principles. For those who were unable to attend the briefings a copy of the presentation, supporting handouts, a detailed Questions and Answers document and an information video were made available on the *Living Longer Living Better* website.

A Strategic Workforce Advisory Group was formed to assist in developing the requirements for the workforce supplement to improve the capacity of the aged care sector to attract and retain staff.

A consultation draft of guidelines on the workforce supplement was released for comment on 2 May 2013. Feedback from this consultation process has contributed to these Principles.

An exposure draft of the Amending Principle was made available on the *Living Longer Living Better* website in May 2013.

#### Regulation Impact Statement

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required (OBPR ID 14911).

#### Commencement

The Amending Principle commences on 1 July 2013.

**Details of the Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013**

**Clause 1** states that the name of the Amending Principle is the *Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013*.

**Clause 2** states that the Amending Principle commences on 1 July 2013.

**Clause 3** provides that the authority for the making of the Amending Principle is the *Aged Care Act 1997* (the Act).

**Clause 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**

**Item 1 – Subsection 21.3(1)**

Item 1 inserts a definition at subsection 21.3(1) for the Aged Care Workforce Supplement Guidelines. This definition refers to the document with that title published by the Department, as it exists on 1 July 2013.

**Item 2 – Section 21.24**

Item 3 repeals section 21.24 and replaces it with a new section.

***Section 21.24 – Purpose of Part (Act, s 44-16)***

This section provides that Part 10 deals with additional primary supplements in residential care and specifies the circumstances in which the supplements will apply to a care recipient in respect of a payment period.

**Item 3 – At the end of Part 10**

This item inserts a new Division into the Principles, Division 5 – Workforce supplement.

***Division 5 – Workforce supplement***

This Division sets out the eligibility criteria for provision of a workforce supplement in residential care and provides for a determination that an approved provider is eligible for the workforce supplement. The Division also outlines the process for revoking a determination and provides that decisions to refuse to make a determination on eligibility (or to revoke a determination of eligibility) are reviewable decisions.

***Section 21.26J - Purpose of Division***

This section notes that the Division provides for the workforce supplement.

***Section 21.26JA - Circumstances in which the workforce supplement applies***

This section provides that, from 1 July 2013, the workforce supplement that will apply to a care recipient in respect of a payment period is the sum of all the workforce supplements for the days during the period on which:

- the care recipient was provided with residential care through the residential care service; and
- a determination, by the Secretary, under section 21.26JC was in force in relation to the approved provider conducting the residential care service.

***Section 21.26JB - Application for determination that approved provider is eligible for workforce supplement***

This section states that an approved provider that is providing, or is to provide, residential care to a care recipient may apply to the Secretary for a determination of eligibility for the workforce supplement.

The application must be in the form approved by the Secretary and include the information (if any) required by the Aged Care Workforce Supplement Guidelines. These Guidelines are published by the Department and are available at [www.health.gov.au](http://www.health.gov.au).

***Section 21.26JC - Determination that approved provider is eligible for workforce supplement***

This section provides that if the Secretary receives an application from an approved provider, the Secretary may determine that the approved provider is eligible for the workforce supplement.

For the purposes of clarity, subsection 21.26JC provides that a determination is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Subsection 21.26JC(3) provides that the Secretary must not make a determination unless:

- the approved provider has advised the approved provider's staff, in writing, of the provider's intention to apply for a determination of eligibility for the workforce supplement. The information that must be included in this advice differs depending on the size of the provider. The written advice must include:
  - if the approved provider holds 50 or more residential care places (other than provisionally allocated places) - an undertaking that the approved provider will negotiate, with the staff, an enterprise agreement that meets the minimum wage requirements specified in Part B of the Aged Care Workforce Supplement Guidelines. The approved provider may negotiate a variation to an existing enterprise agreement so that the agreement meets the minimum wage requirements;
  - if the approved provider holds fewer than 50 residential care places (other than provisionally allocated places) - an undertaking that the provider will negotiate, with the staff, employment arrangements that meet the minimum wage requirements specified in Part B of the Aged Care Workforce Supplement Guidelines.
  - regardless of how many places are held by the provider, the provider must also advise staff in writing about how the approved provider intends to improve: training and education opportunities for the staff; career structures and career

development for the staff; and workforce planning in relation to the provision of residential care; and

- the approved provider has given the Secretary an undertaking that the approved provider will, if requested by the Secretary, participate in a census or survey conducted by the Department about the aged care workforce; and
- the approved provider has given the Secretary an undertaking that the approved provider will comply with the minimum wage requirements, specified in Part B of the Aged Care Workforce Supplement Guidelines, from when the workforce supplement starts applying (if the determination is made).

Subsection 21.26JC(4) provides that if the Secretary needs further information to make a decision about the application, the Secretary may (by way of written notice) request the approved provider give the Secretary the further information within 28 days after receiving the notice or such other period specified in the notice.

Subsection 21.26JC(5) provides that the application is taken to have been withdrawn if the additional information is not given within 28 days or such other period specified in the notice. The notice must include a statement setting out this effect.

Subsection 21.26JC(6) sets out when the determination takes effect. A determination takes effect on the day specified in the determination. The day may be earlier than the day on which the determination is made but not earlier than 1 July 2013.

Subsection 21.26JC(7) provides that the Secretary must notify the approved provider, in writing, of the Secretary's decision on whether to make the determination. The notice must be given within 28 days after the Secretary receives the application or, if the Secretary has requested further information, within 28 days after receiving the information.

#### ***Section 21.26JD - Revocation of Secretary's determination***

This section provides that the Secretary may revoke a determination if he or she is satisfied that the approved provider should no longer be eligible for the workforce supplement or if the approved provider has failed to comply with an undertaking made as part of the application for a determination by the Secretary.

Before deciding to revoke the determination in these circumstances, the Secretary must:

- notify the approved provider that it is being considered. The written notice must invite the approved provider to make written submissions to the Secretary (within 28 days after receiving the notice) and inform the approved provider that if no submissions are made within the period, the revocation takes effect on the day after the last day for making submissions;
- consider any submissions made within the required period; and
- have regard to the eligibility criteria specified in Part B of the Aged Care Workforce Supplement Guidelines.

The Secretary may also revoke a determination if the approved provider requests, in writing, the Secretary to revoke the determination.

Regardless of whether the revocation is at the request of the approved provider or on the Secretary's own initiative, the Secretary must notify the approved provider, in writing, of the decision. The notice must be given within 28 days after the end of the period for making submissions.

If the notice is not given within that period, the Secretary is taken to have decided not to revoke the determination.

In terms of the date of effect of revocation, a revocation has effect:

- if no submissions were made within the required period - on the day after the last day for making submissions; or
- if submissions were made within that period - on the day after the approved provider receives a notice of the Secretary's decision in relation to the notification.

### ***Section 21.26JE - Reviewable decisions***

This section provides that a decision to refuse to make a determination or to revoke a determination is a reviewable decision under the Act. This means that a person may seek reconsideration of the decision by the Secretary. If the provider continues to be dissatisfied by the decision on reconsideration, may apply to the Administrative Appeals Tribunal for review.

## **Statement of Compatibility with Human Rights**

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

### ***Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013***

The 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 *Residential Care Subsidy Amendment (Workforce Supplement) Principle 2013* (Legislative Instrument) set out the requirements for the residential care subsidy. The subsidy is a payment by the Commonwealth to approved providers for providing residential care to care recipients. Section 44-5 of the Act provides for the payment of primary supplements. Supplements are paid to approved providers in respect of a payment period as part of residential care subsidy. The purpose of the *Residential Care Subsidy Amendment (Workforce Supplement) Principles 2013* (Legislative Instrument) is to create a new primary supplement – the workforce supplement.

### **Human Rights Implications**

The Legislative Instrument is compatible with the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health as contained in article 11(1) and article 12(1) International Covenant on Economic, Social and Cultural Rights and article 25 and article 28 of the Convention on the Rights of Persons with Disabilities.

An appropriately skilled and well qualified workforce is fundamental to the delivery of quality aged care. The Aged Care Workforce Census and Survey, which is conducted every four years, has highlighted that aged care providers continue to have difficulties in attracting and retaining sufficient numbers of skilled and trained workers.

To enable the organisations providing aged care services to assist the growing number of older Australians, it is essential to build their capacity. This includes developing the workforce through better training, increased wages, changes to the workforce structure, better work practices and improved quality in the delivery of care.

This Legislative Instrument will enable, from 1 July 2013, the Australian Government to provide additional funding to residential aged care providers that apply for and meet the eligibility requirements. This initiative will provide higher wages and better conditions for aged care workers. This is an essential precursor to achieving a high standard of care for people in residential aged care, consistent with the International Covenant on Economic, Social and Cultural Rights

### **Conclusion**

This Legislative Instrument is compatible with human rights as it promotes the human right to health and the right to an adequate standard of living.

**The Hon Mark Butler MP  
Minister for Mental Health and Ageing**