

## EXPLANATORY STATEMENT

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

*Aged Care Act 1997*

*Allocation Amendment (Various Measures) Principle 2013*

The *Aged Care Act 1997* (the Act) provides for the regulation and 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.

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 *Allocation Principles 1997* (the Principles).

Part 2.2 of the Act is about the allocation of places through which aged care is provided. An approved provider can receive subsidy under Chapter 3 of the Act for providing aged care only if a place has been allocated to the approved provider for provision of the care. Places are distributed between regions, after which applications for allocation are called for and the places are allocated to applicants following competitive assessment of applications. An explanation of the allocation process can be found in section 11-4 of the Act. The Principles deal with a number of matters relating to the allocation process.

On 20 April 2012, the Government announced the *Living Longer Living Better* aged care reform package. Included in the package of reforms was the creation of a new type of aged care – home care. From 1 August 2013, home care will replace community care and some forms of flexible care. There will be four levels of home care packages to provide for a seamless continuum of care at home. Existing care packages currently delivered in the form of Community Aged Care Packages (CACP) (community care under the Act) and Extended Aged Care at Home (EACH) and Extended Aged Care at Home-Dementia (EACH-D) (flexible care under the Act) will transition to home care packages.

The purpose of the *Allocation Amendment (Various Measures) Principle 2013* (the Amending Principle) is to replace references to community care with references to home care in relation to the allocation of places and to provide for transitional arrangements for places allocated for the provision of community care or flexible care in the form of EACH or EACH-D. The Amending Principle also makes minor technical changes to the Principles.

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

A number of the proposed amendments set out in this Amending Principle rely on amendments described in the *Aged Care (Living Longer Living Better) Act 2013* which commence on 1 August 2013. This Amending Principle is being made in advance of this commencement date. This is possible in accordance with section 4 of

the *Acts Interpretation Act 1901*, which allows for the exercise of powers between enactment and commencement of an Act including, for example, the power to make changes to delegated legislation which flow from changes made to the primary legislation (in this case, changes to the *Aged Care Act 1997*).

### 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.

As part of the reform, changes are needed to the Act. The changes to the Principles flow from the changes to the Act.

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.

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 14985).

### Commencement

The Amending Principle commences on 1 August 2013.

**Details of the Allocation Amendment (Various Measures) Principle 2013**

**Clause 1** states that the name of the Amending Principle is the *Allocation Amendment (Various Measures) Principle 2013*.

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

**Clause 3** that this principle is made under the *Aged Care Act 1997* and the *Aged Care (Living Longer Living Better) Act 2013*.

**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 - Section 4.3**

This item repeals definitions for: care-leaver; institutional care; intersex people; key personnel; LGBTI; and person with financial hardship. These terms are no longer necessary because Part 2A of the Principles is repealed by item 7 of the Amending Principle, with the specification of all people with special needs moving from the Principles into the Act.

**Item 2 - Section 4.3 (at the end of the definition of planning objectives)**

This item moves the existing note at the end of section 4.3 so that it appears under the definition of planning objectives. The note provides that the planning objectives relate to providing an open and clear planning process, identifying community needs and allocating places in a way that best meets the identified needs of the community. There are no changes to the note itself, only the location of the note.

**Item 3 - Section 4.3**

This item removes the definitions of transgender and veteran as these terms are no longer needed in the Principles. The terms had been used to specify certain groups of people with special needs but these groups of people are now specified in subsection 11-3 of the Act rather than in the Principles.

**Item 4 - Section 4.3 (note after the definition of veteran)**

This item repeals the note that appears after the definition of veteran as the definition of veteran has been removed from the Principles. From 1 August 2013, Veterans will be listed in section 11-3 of the Act which specifies people with special needs for the purposes of the Act.

**Item 5 - Section 4.3**

The boxed note at the end of section 4.3 lists a number of terms that are defined in the Act. Consistent with current drafting conventions, terms that are used regularly within all aged care principles, such as ‘aged care’ and ‘approved provider’, have been removed. These terms continue, for the purposes of the Principles, to have the

meaning set out in the Dictionary in Schedule 1 to the Act. Terms used less commonly, such as ‘people with special needs’ and ‘relinquish’, are specified in the note as expressions that are defined in the Act.

#### **Item 6 - Section 4.4**

Section 4.4 defines a person with financial hardship for the purposes of the Principles. As the provision which uses this definition is being repealed (section 4.8) this definition is no longer needed.

#### **Item 7 - Part 2A**

Part 2A specifies kinds of people who are people with special needs for the purposes of the Act. This item repeals the Part because all of the kinds of people who are people with special needs will, from 1 August 2013, be listed in section 11-3 of the Act instead of some being listed in the Act and some in the Principles. The Part is therefore redundant.

#### **Item 8 - Division 2 of Part 3**

Division 2 of Part 3 specifies kinds of people for whom the Secretary may determine, for the places available for allocation, the proportion of care that must be provided. Section 4.8 specifies people with financial hardship.

This provision is not necessary because section 11-3 of the Act provides that for the purposes of the Act (including provisions relating to allocation of places) people who are financially or socially disadvantaged are people with special needs.

Division 2 of Part 3 is therefore redundant and is being repealed.

#### **Items 9 and 10**

Section 4.18 describes the qualifications the Secretary must consider in appointing members of the Aged Care Planning Advisory Committee. Subsection 4.18(2C) describes the areas that the Secretary must ensure members of the committee have knowledge of, or experience in.

Paragraphs 4.18(2C)(d) to (g) refer to members having knowledge of, or experience in, the delivery of aged care to different types of people with special needs. This item repeals these paragraphs (which lists each of the different types of people with special needs separately but incompletely) and replaces them with one paragraph which provides that the Secretary must ensure, as far as practicable, that members of the committee who are government officers, between them, have knowledge of, or experience in, the delivery of aged care services to people with special needs.

Item 10 makes similar changes to subsection 4.18(3) which refers to the knowledge and experience required of non-government members of the committee. Specifically item 10 repeals paragraphs 4.18(3)(c) to (f) and replaces them with one paragraph which provides that the Secretary must ensure, as far as practicable that non-government members of the committee, between them, have knowledge of, or experience in, the delivery of aged care services to people with special needs.

### **Item 11 - Section 4.35**

Section 4.35 describes the purpose of Division 1, Part 5 of the Principles. The purpose of the Division is to set out the additional matters to be considered by the Secretary in deciding which allocation of residential and community care places would best meet the needs of the aged care community in a region.

This item removes the reference to ‘additional matters that the Secretary must consider in relation to each application for the allocation of places for community care’ and replaces it with reference to ‘the matters that the Secretary must consider, in relation to each application for the allocation of places for home care’. This reflects the change from community care to home care that takes effect on 1 August 2013.

### **Item 12 - Before section 4.38**

This item inserts a new section to provide for the competitive assessment of applications for allocation of places by the Secretary. These provisions have been moved from the Act into the Principles, to provide for flexibility over time in relation to matters to be considered by the Secretary when considering applications for allocation of places.

#### ***Section 4.37 – Competitive assessment of applications for allocations***

Subsection 4.37(1) provides that in considering applications for allocations the Secretary must consider:

- whether the people who manage, or propose to manage, the aged care service that is providing, or would provide, the care to which the places relate have the necessary expertise and experience to do so;
- if applicable, whether the premises used (or intended to be used) to provide the care are suitably planned and located for the provision of aged care;
- the ability of the applicant to provide the appropriate level of care;
- if the applicant has been a provider of aged care, the applicant’s conduct as a provider and compliance with its responsibilities as a provider and its obligations arising from the receipt of any payments from the Commonwealth for providing that aged care;
- if the applicant has relevant key personnel in common with a person who is or has been an approved provider, that person’s conduct as a provider of aged care and compliance with its responsibilities as a provider and its obligations arising from the receipt of any payments from the Commonwealth for providing that aged care. Subsection 4.37(3) further provides that, for the purposes of this provision, the applicant has relevant key personnel in common with a person who is (or has been) an approved provider (the other provider) if at the time the other provider provided aged care, another person was one of the other provider’s key personnel and that other person is one of the key personnel of the applicant;
- the measures that the applicant proposes to implement to protect the rights of care recipients and for the provision of appropriate care for care recipients who are people with special needs.

Subsection 4.37(2) provides that a reference to aged care in the section includes a reference to any care for the aged, whether provided before or after the commencement of the section, in relation to which any payment was or is payable under a law of the Commonwealth.

### **Item 13 - Division 3 of Part 5**

Division 3 of Part 5 currently outlines the conditions of allocation that the Secretary must determine for allocations of community care places. Section 4.45 in Division 3 requires the Secretary to determine conditions that a person to whom an allocation of community care places is made must enter into an agreement with the Secretary and must comply with that agreement. This condition creates undue administrative burden and is not a necessary requirement given that approved providers of community care are subject to the quality framework set out in the Act and the *Quality of Care Principles 1997*. This item repeals this Division to remove mandatory conditions of allocation.

Relevant conditions of allocation for home care places, as for all aged care places allocated under the Act, will continue to be specified in accordance with sections 14-5 and/or 14-6 of the Act.

### **Item 14 - Section 4.49**

Section 4.49 currently describes the matters the Secretary must consider in deciding whether to determine that a person (an approved provider) is in a position to provide care in respect of places that have been allocated to the person. In relation to community care places, subsection 4.49(1) currently provides that the Secretary must have regard to whether the person has entered into an agreement with the Secretary, for the Commonwealth, containing provisions for the management of the places. Item 13 (described above) repeals the provision that requires the person to enter into an agreement with the Commonwealth. Therefore subsection 4.49(1) is repealed and a new section inserted which only deals with the Secretary's determination that an approved provider is in a position to provide care in respect of an allocation of places for the provision of residential care.

#### ***Section 4.49 – Matters to which the Secretary must have regard***

Subsection 4.49(1) provides that in deciding whether a person is in a position to provide care in respect of an allocation of places for the provision of residential care, the Secretary must have regard to:

- whether the person has received, from authorities in the State or Territory where the residential care service is located, authorisation that the service's premises can be occupied; and
- whether the person has applied for accreditation of the service, and has paid all application fees; and
- whether the person has made arrangements for the efficient management and operation of the service; and
- the results of any inspection of the premises by officers of the Department.

Subsection 4.49(2) provides that the Secretary may also have regard to any other relevant matter.

### **Items 15 - 29**

These items make consequential amendments to provisions in the Principles which relate to community care. The following provisions have been amended to replace references to community care with references to home care, given the establishment of home care from 1 August 2013:

- Division 2 of Part 7 (heading);

- Section 4.58;
- Paragraph 4.59(2)(d);
- Section 4.60;
- Paragraph 4.61(2)(d);
- Section 4.63 (example for paragraphs (2)(a) and (b));
- Paragraph 4.65(e);
- Paragraph 4.66G(2)(d);
- Subparagraphs 4.68(1)(b)(i) and (d)(iii);
- Section 4.70 (example for paragraph (2)(a));
- Section 4.71;
- Section 4.73 (heading);
- Sections 4.73 and 4.74;
- Section 4.76 (heading); and
- Subsection 4.76(1).

### **Item 30 - At the end of the Principles**

This item adds a new Part to the Principles outlining the transitional provisions applicable to the Principles. The transitional provisions provide for the continuation of services to people receiving community care or EACH and EACH-D packages with the introduction of home care on 1 August 2013. This item sets out how community care places and flexible care places for the provision of EACH and EACH-D will transfer to home care places and the conditions that will apply to these places.

### ***Part 10 – Transitional provisions***

#### ***Division 1 - Definitions for Part 10***

##### ***Section 4.80 - Definitions for Part 10***

This section defines terms which are referred to in the transitional provisions. These definitions include:

- ‘commencement time’ which relates to the time that the Part commences being 1 August 2013;
- ‘extended aged care at home’ (EACH) which has the meaning given by section 15.6 of the *Flexible Care Subsidy Principles 1997* as in force immediately before 1 August 2013;
- ‘extended aged care at home - dementia’ (EACH-D) which has the meaning given by section 15.8 of the *Flexible Care Subsidy Principles 1997* as in force immediately before 1 August 2013;
- ‘multi-purpose service’ which has the meaning given by section 15.3 of the *Flexible Care Subsidy Principles 1997*; and
- ‘old law’ which means the Act as in force immediately before the commencement time.

#### ***Division 2 - Allocation of places***

Division 2 provides transitional arrangements for the allocation of certain flexible care places.



**Section 4.81 - Transition of certain flexible care places to home care places**

Section 4.81 provides that allocations of places in respect of EACH and EACH-D are specified for subitem 197(2) of Schedule 1 to the *Aged Care (Living Longer Living Better) Act 2013*. This means that an allocation of flexible care places for the provision of EACH or EACH-D is taken to be an allocation of places for the provision of home care.

**Division 3 - Transition of certain allocated places to home care places**

Division 3 provides transitional arrangements for the transition of certain allocated places to home care places.

**Section 4.82 - Purpose of Division 3**

Section 4.82 outlines the purpose of the Division. The purpose of the Division is to provide for the transition of places allocated in respect of community care or flexible care to places allocated in respect of home care. This Division also outlines matters relating to the transition of these places.

**Section 4.83 - Transition of community care, and certain flexible care, places to home care places**

Section 4.83 provides for the transition of an allocation of community care places and an allocation of certain flexible care places to an allocation of home care places.

The purpose of subsection 4.83(1) is to provide for allocated community care places to transition to the appropriate level of home care. The subsection provides that for the purposes of the transitional arrangements described in the *Aged Care (Living Longer Living Better) Act 2013*, an allocation of community care places of a kind or level mentioned in an item of the following table is taken, from 1 August 2013, to be an allocation of home care places of the level mentioned in that item of the table.

<b>Transition of allocated places—community care</b>		
<b>Item</b>	<b>Kind or level of community care place</b>	<b>Level of home care place</b>
1	Level 1	Level 1
2	Level 2	Level 2
3	Level 3	Level 3
4	Level 4	Level 4
5	Community care (other than a place mentioned in items 1 to 4)	Level 2

Subsection 4.83(2) relates to the transition of flexible care places allocated for the provision of EACH and EACH-D to home care level 4. Subsection 4.83(2) provides that, for the purposes of the transitional provisions in the *Aged Care (Living Longer Living Better) Act 2013*, an allocation of flexible care places mentioned in an item of the following table is taken, from 1 August 2013, to be an allocation of home care places of the level mentioned in that item of the table.

<b>Transition of allocated places—flexible care</b>		
<b>Item</b>	<b>Kind of flexible care place</b>	<b>Level of home care place</b>
1	Extended aged care at home	Level 4

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**Transition of allocated places—flexible care**

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Item	Kind of flexible care place	Level of home care place
2	Extended aged care at home—dementia	Level 4

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***Section 4.84 - Agreements in force immediately before commencement time***

Section 4.84 deals with agreements that were in force immediately before 1 August 2013 between the Secretary (for the Commonwealth) and an approved provider that holds an allocation of community care places or flexible care places allocated for the provision of EACH and EACH-D.

Currently, providers of community care and certain types of flexible care must enter into and comply with an agreement with the Secretary. However, from 1 August 2013, this agreement will no longer be needed because all conditions of allocation will be determined in accordance with the Act rather than through a separate agreement. This reduces unnecessary red tape and increases transparency and clarity.

This section therefore provides for the existing agreements to cease to be in force. The exception is where the agreement contains matters that would otherwise be a condition of allocation under the Act. Subsection 4.84(3) states that these conditions continue to apply.

In summary this section provides that:

- if immediately before 1 August 2013, there was an agreement between the Secretary and a person who was allocated a community care place (and the agreement was required to be entered into as a condition of the allocation of the place under section 14-6 of the Act) the agreement ceases to be in force on 1 August 2013;
- if immediately before 1 August 2013, there was an agreement between the Secretary and a person who was allocated a flexible care place (and the agreement is a payment agreement under section 15.12 of the *Flexible Care Subsidy Principles 1997* as in force immediately before 1 August 2013) the agreement ceases to be in force on 1 August 2013;
- a condition included in an agreement relating to a community care place or a flexible care place continues in force after 1 August 2013 as a condition of allocation of the corresponding home care place if it relates to any of the following:
  - the proportion of care to be provided to a specified group or groups of people;
  - the location of the aged care service through which the care must be provided;
  - the period within which the aged care service must be operational.

In this case, the condition continues in force, from 1 August 2013, as if the Secretary had specified the condition as a condition under section 14-5 of the Act.

***Section 4.85 - Conditions relating to transitioned places***

Section 4.85 outlines the conditions of allocation relating to community care and flexible care places that become home care places on 1 August 2013.

This section applies if, immediately before 1 August 2013, an allocation of community care places or flexible care places allocated for the provision of extended aged care at home or extended aged care at home-dementia was subject to a condition under section 14-5 or 14-6 of the Act or a condition mentioned in paragraph 4.84(3)(a), (b) or (c) that was included in an agreement between the approved provider of the allocated places and the Secretary.

If the condition related to an allocation of community care places, the condition continues in force after 1 August 2013 as if a reference to:

- community care were a reference to home care; and
- a community aged care package or CACP were a reference to home care level 2; and
- a place allocated in respect of community care, or a community care place, were a reference to a level 2 home care place.

If the condition related to an allocation of flexible care places, the condition continues in force after 1 August 2013 as if a reference to:

- flexible care were a reference to home care; and
- extended aged care at home or EACH were a reference to home care level 4; and
- extended aged care at home-dementia or EACH-D were a reference to home care level 4; and
- a place allocated in respect of extended aged care at home or EACH were a reference to a level 4 home care place; and
- a place allocated in respect of extended aged care at home-dementia or EACH-D were a reference to a level 4 home care place.

This section also provides that if the condition was that there must be an agreement, relating to the allocation of places, between the person who was allocated a community care place or a flexible care place and the Secretary, that condition is taken to be revoked on 1 August 2013.

***Division 4—Transition of certain flexible care (multi-purpose service) places***

***Section 4.86 - Purpose of Division 4***

This section outlines the purpose of Division 4. The purpose of the Division is to provide for the transition of certain flexible care places allocated in respect of a multi-purpose service. This Division also outlines matters relating to the transition of these places.

***Section 4.87 - Transition of certain flexible care (multi-purpose service) places***

This section applies to a flexible care place allocated in respect of a multi-purpose service for the provision of care equivalent to community care if the allocation was made under Part 2.2 of the old law and was in force immediately before 1 August 2013.

In these circumstances, the place is taken, after 1 August 2013, to be a flexible care place allocated in respect of a multi-purpose service for the provision of care equivalent to home care.

***Section 4.88 - Conditions relating to transitioned places***

This section applies if, immediately before 1 August 2013, an allocation of places in respect of a multi-purpose service for the provision of care equivalent to community care was subject to a condition of allocation under section 14-5 or 14-6 of the Act.

The condition continues in force after 1 August 2013 as if a reference to community care were a reference to home care.

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

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

### ***Allocation Amendment (Various Measures) 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**

This instrument makes amendments to the *Allocation Principles 1997* (the Principles) to support the *Living Longer Living Better* aged care reform package. The Principles set out a number of matters relating to the allocation of aged care places.

The purpose of the *Allocation Amendment (Various Measures) Principle 2013* (the Legislative Instrument) is to reflect the introduction of home care, by replacing references to community care with references to home care, and providing transitional arrangements to support the transition of allocated community care places and certain kinds of flexible care places to home care places at the specified level. This Principle also repeals redundant provisions and makes amendments that are consequential to the commencement of Schedule 1 to the *Aged Care (Living Longer Living Better) Act 2013*, which amends the *Aged Care Act 1997*.

#### **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) of the International Covenant on Economic, Social and Cultural Rights, and article 25 and article 28 of the Convention on the Rights of Persons with Disabilities.

The Legislative Instrument replaces references to community care with references to home care and provides transitional arrangements for allocated places. The legislative instrument also repeals provisions that have been moved from the Principles to the Act, such as the specification of certain kinds of people as people with special needs, and inserts provisions that have been moved from the Act to the Principles, such as provisions relating to the competitive assessment of applications for allocations of places.

#### **Conclusion**

This 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 it does not alter any human rights safeguards that are currently in place.

**Senator the Hon Jacinta Collins  
Minister for Mental Health and Ageing**