

## **EXPLANATORY STATEMENT**

Issued by the authority of the Secretary of the Department of Health

*Aged Care Act 1997*

*Aged Care (Conditions of Allocation) Determination 2016*

### **Purpose**

The *Aged Care Act 1997* (the Act) provides for the allocation of aged care places to a person to provide aged care services for a region. The Act allows the Secretary to allocate places, in respect of a particular type of subsidy, to a person to provide aged care services for a region. Places may be allocated to a person who is approved under section 8-1 of the Act to provide aged care in respect of which the places are allocated, or will be approved to provide aged care in respect of which the places are allocated once the allocations take effect, or begins to be in force.

Allocations of places made under the Act may be subject to conditions with which the person receiving the allocation must comply. The Secretary may make conditions in respect of a particular allocation of places (section 14-5 of the Act), or conditions that apply either to general or a specified kind of allocation (section 14-6 of the Act). Approved providers must comply with any relevant condition of allocation made under sections 14-5 and 14-6 of the Act.

Conditions of allocation made under section 14-6 are currently contained within several separate determination instruments. Some of these conditions of allocation are due to sunset in October 2016 and need to be renewed, others are no longer relevant as the programs they relate to have ceased to operate, while others needed re-drafting to reflect current legislative amendments.

The purpose of the *Aged Care (Conditions of Allocation) Determination 2016* (this instrument) and the *Aged Care (Conditions of Allocation Instruments) Repeal Determination 2016* (the repeal instrument) is to consolidate all conditions of allocations made under section 14-6 of the Act into a single determination, and ensure that relevant conditions of allocation are not automatically repealed via the sunset clause set out in section 50 of the Legislation Act 2003.

As a result of this consolidation process, any conditions of allocation that are no longer relevant will be repealed by the repeal instrument. This will assist the aged care industry to easily find the conditions of allocation that must be complied with as all section 14-6 conditions of allocations will be contained in the one instrument.

### **Background**

Section 14-6 of the Act provides that an allocation of places is also subject to such conditions as are from time to time determined by the Secretary, in writing, in respect of allocations of places generally or allocations of places of a specified kind that includes the allocation of places in question.

A number of determinations have been made under section 14-6 of the Act and have not been reviewed for some time. As a result, a number of the conditions of allocations in the determinations are no longer relevant, replicate provisions in the Principles or include information that is better located in the Principles (where the requirement is more transparent and more readily identified by approved providers).

This instrument is necessary to consolidate the relevant conditions of allocation contained in all previous section 14-6 determinations to ensure that these conditions of allocation do not sunset pursuant to section 50 of the *Legislation Act 2003*, and so that it is easier for approved providers to understand the conditions of allocations that apply to their provisionally allocated places. The *Aged Care (Conditions of Allocation Instruments) Repeal Determination 2016* repeals all section 14-6 determinations that are in force as at the day before the commencement of this instrument.

### **Consultation**

This instrument and the repeal instrument operate to repeal conditions of allocation which are no longer relevant (as the programs to which they relate have ceased operating), and will create a new determination under section 14-6 of the *Aged Care Act 1997* which renews conditions of allocations that are still in operation so that they do not sunset under section 50 of the *Legislation Act 2003*.

Neither this instrument nor the repeal instrument introduce new conditions of allocation. The instruments only consolidate existing conditions of allocation that are still in operation and make necessary updates to reflect recent legislative amendments. As there has been no impact to industry as a result of the operation of these instruments, no specific consultation was undertaken with respect to this instrument or the repeal instrument.

### **Commencement**

The instrument commences on the day of registration.

### **Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation (OBPR) has advised that no Regulation Impact Statement is required (OBPR ID 20636).

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

## **Explanation of the provisions**

### Part 1 - Preliminary

#### Section 1

This section provides how the proposed instrument is to be cited, that is, as *Aged Care (Conditions of Allocation) Determination 2016*.

#### Section 2

This section sets out the commencement of this instrument. The commencement date is the day the instrument is registered.

#### Section 3

This section provides that the authority for making this instrument. This instrument is made under subsection 14-6(1) of the *Aged Care Act 1997* (the Act).

#### Section 4

This section sets out the definitions for terms referred to in this determination. The determination also draws on expressions defined under the *Aged Care Act 1997* including but not limited to the definitions for 'flexible care subsidy', 'place' 'provisionally allocated' and 'residential care subsidy'.

In this section:

'Act' means the *Aged Care Act 1997*.

'Authorised person' means either the Secretary, or an officer in the Department authorised by the Secretary, in writing, for the purposes of this instrument.

'Flexible care place' and 'residential care place' mean a place allocated under Part 2.2 of the Act in respect of flexible care subsidy and residential care subsidy, respectively.

#### Section 5

This section outlines the purpose of this instrument. The instrument specifies the conditions of allocations of places to a person under Part 2.2 of the Act.

Subsection (2) clarifies that the conditions in this instrument applies to all allocations of places, whether they occurred before or after the commencement of this instrument. This is consistent with subsection 14-6(3) of the Act.

## Part 2 – Conditions

### Section 6

This section outlines conditions that apply to places generally. This section is in line with section 33 of the *Allocation Principles 2014*.

Subsection (2) provides that a care recipient must not be discharged from an aged care service and readmitted to an aged care service to attract an accommodation supplement under the Act, to attract either the accommodation supplement or the concessional resident supplement under the *Aged Care (Transitional Provisions) Act 1997*, or to enable an aged care service to charge the care recipient an accommodation bond or a refundable accommodation deposit.

Subsection (3) provides that an aged care service will be recognised as a new service only if the service relocates to a facility built for the service's relocation, or a location that has no part of its catchment area in common with the catchment area of the location from which it moves. The example to this subsection clarifies that an aged care service will not be recognised as a new service only due to a change of approved provider for the service, a change in the number of places to a service, a temporary relocation of the service, or an amalgamation of co-located services.

Subsection (4) provides that Part III of Determination No. ADPCA 10F 3/1995 made under the *Aged or Disabled Persons Care Act 1954*, as in force on 30 September 1997, applies to a care recipient who was a resident of an approved hostel under that Act on that date.

### Section 7

This section provides conditions of allocations relating to provisional allocations of residential care places.

Subsection (1) provides that the section applies to an approved provider who holds a provisional allocation of residential care places.

Subsection (2) provides that the approved provider must, during the first three years of the provisional allocation period, give annual reports about the approved provider's progress towards satisfying the Secretary that the approved provider is in a position to provide care, in respect of the places, for which a subsidy may be paid. A progress report is not needed at the end of the fourth 12-month period as any approved provider who is not in a position to provide care in respect of the places will be required to seek an extension under section 15-7 of the Act.

Subsection (3) provides that if an authorised person requests, in writing, the approved provider to give an additional report about the approved provider's progress towards being in a position to provide care, in respect of the places, for which residential care subsidy may be paid, the approved provider must comply with the request within 14 days of receiving the request, or by such longer period of time specified in the request.

The note to this subsection clarifies that more than one request may be made under this subsection.

Subsection (4) provides that a report under subsection (2) or (3) must be in writing, in a form approved by an authorised person and provided to the Department.

Subsection (5) provides that an approved provider must make timely progress towards being in a position to provide care, in respect of the places, for which residential care subsidy may be paid.

## Section 8

This section outlines conditions of allocation relating to the allocation of certain flexible care places.

Subsection (1) provides that the conditions in this section apply to an allocation of flexible care places for care recipients with disabilities who are being provided with flexible care in disability supported accommodation that is funded by a State or Territory, and were receiving aged care service under the Aged Care Innovated Pool Disability Aged Care Programme on 25 May 2006.

Subsection (2) provides that the care and service provided to care recipients in respect of the places must be responsive to the needs of the individual care recipients, include case management and coordination, and the development of appropriate individual care plans, and include all necessary personal care and nursing services, over and above those that are provided in respect of the care recipient's disability.

Subsection (3) provides that the approved provider must:

- (a) demonstrate a commitment to continuous improvement through participation in an externally recognised quality improvement cycle; and
- (b) ensure that the care and services provided are of a high quality and adequately address safety and security issues in relation to the provision of care and services to care recipients; and
- (c) inform care recipients, their families, advocates or guardians of the details of the care and services provided in respect of the places; and
- (d) ensure that the care recipients, their families, advocates or guardians are made aware of the implications of leaving the State or Territory funded disability supported accommodation; and
- (e) participate in research concerning people with disabilities who are ageing, if requested to do so by an authorised person; and
- (f) give an authorised person relevant associated data and information as requested by an authorised person.

## Statement of Compatibility with Human Rights

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

### ***Aged Care (Conditions of Allocation) Determination 2016***

The *Aged Care (Conditions of Allocation) Determination 2016* 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) Act 2011*.

#### **Overview of Legislative Instrument**

This legislative instrument and the *Aged Care (Conditions of Allocation Instruments) Repeal Determination 2016* together operate to consolidate conditions of allocation made under section 14-6 of the *Aged Care Act 1997* (the Act).

As at the date immediately before commencement, the conditions of allocation made under section 14-6 of the Act were contained in several determinations which made it difficult for the aged care industry to understand what conditions they were required to comply with. Further, as these conditions of allocation were not reviewed regularly, many are no longer relevant as the programs they relate to have ceased to operate, while some conditions of allocation that are still relevant are due to sunset in October 2016 due to section 50 of the *Legislation Act 2003*.

This instrument creates the new consolidated section 14-6 determination containing all the relevant conditions of allocation made under section 14-6 of the Act that are in force at the day before the commencement of this instrument, while the *Aged Care (Conditions of Allocation Instruments) Repeal Determination 2016* will repeal all existing section 14-6 determinations.

#### **Human Rights Implications**

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 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.

This legislative instrument creates a new consolidated section 14-6 determination setting out conditions of allocation which are still relevant to programs in operation, and extends the life of these conditions of allocation so they are not affected by default sunset provision set out at section 50 of the *Legislation Act 2003*. The *Aged Care (Conditions of Allocation Instruments) Repeal Determination 2016* repeals conditions of allocations made under section 14-6 of the *Aged Care Act 1997* that are no longer relevant as the programs they relate to have ceased to operate. These instruments will operate to ensure that care recipients receive appropriate care pursuant to specified conditions. Further, these conditions will ensure that care recipients enjoy an adequate standard of living and the highest attainable standards of physical and mental health and ensure that they are protected from exploitation, violence and abuse.

**Conclusion**

This legislative instrument is compatible with human rights as it promotes the human right to an adequate standard of living and the highest attainable standard of physical and mental health.

**[Delegate of the Secretary of the Department of Health, Kerrie Westcott]**