

# Explanatory Statement

*Aged Care Act 1997*

## ***User Rights Amendment (Charter of Aged Care Rights) Principles 2019***

### **Authority**

Section 96-1 of the *Aged Care Act 1997* (**Aged Care Act**) provides the Minister may, by legislative instrument, make User Rights Principles providing for matters required or permitted by Part 4.2 of the Act, or necessary or convenient to give effect to Part 4.2 of the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that 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.

### **Purpose**

The *User Rights Amendment (Charter of Aged Care Rights) Principles 2019* (**Amending Principles**) amends the *User Rights Principles 2014* (**User Rights Principles**) and the *Records Principles 2014* (**Records Principles**) to:

- introduce a single 'Charter of Aged Care Rights' (**the Charter**); and
- vary the responsibilities of approved providers to be consistent with the Charter.

### **Background**

Implementing the Charter contributes to the establishment of a single consolidated and streamlined quality framework for all aged care services as announced in the 2015-16 Budget.

The Amending Principles consolidate the four aged care charters, into one Charter. The previous four charters included:

- Charter of care recipients' rights and responsibilities—residential care;
- Charter of care recipients' rights and responsibilities—home care;
- Charter of care recipients' rights and responsibilities—short-term restorative care provided in a residential care setting; and
- Charter of care recipients' rights and responsibilities—short-term restorative care provided in a home care setting

As there was a separate charter for each type of care, there was considerable duplication between the charters.

Approved providers delivering care and services across the continuum of aged care must ensure they comply with all relevant charters.

In order for care recipients to understand which charter relates to them, they need to be able to identify the program under which they are receiving care, which in itself can be a complex task.

A single Charter across aged care makes rights clearer for care recipients, regardless of the care type they receive, and supports the development of a single aged care system.

The Charter helps to create a shared understanding about the rights of people receiving Commonwealth subsidised aged care. Having a shared understanding between people receiving care, their family, friends and carers, and aged care providers and their staff, helps everyone work together to achieve safe and high quality aged care.

The rights described in the Charter sit alongside other laws that inform the delivery and quality of aged care, for example the Aged Care Act, the consumer outcomes in the new Aged Care Quality Standards, and rights under the Australian Consumer Law and anti-discrimination laws.

## **Consultation**

Public consultation was held between 5 September and 10 October 2018, and included a consultation paper, a draft single Charter, and an online survey. The Department of Health received 553 submissions through the public consultation process, of which approximately 40% were from aged care recipients, including families and carers, and approximately 48% were from aged care providers, aged care workers and peak bodies.

Overall, respondents supported a single Charter and the rights described in the draft Charter. They also considered that the rights were easy to understand.

The main concerns that emerged from the consultation included: differing expectations of the role and scope of the Charter; concerns about the enforceability or effectiveness of the Charter in practice; a lack of understanding about the relationship between the Charter and other legislation; a desire to have care recipient responsibilities in the Charter; and, a desire to highlight certain care recipient groups within the Charter.

To address these concerns and ensure that the Charter is a short, concise and easy to read document which focuses on high-level care recipient rights, care recipients and providers support the development of a range of resources to support the sectors' understanding of the Charter.

The details of the Amending Principles are set out in the Attachment.

The Amending Principles commence on 1 July 2019.

The Amending Principles is a legislative instrument for the purpose of the *Legislation Act 2003*.

## ATTACHMENT A

### Details of the *User Rights Amendment (Charter of Rights) Principles 2018*

#### 1. Name

Section 1 provides for the instrument to be referred to as the *User Rights Amendment (Charter of Aged Care Rights) Principles 2019 (the Amending Principles)*.

#### 2. Commencement

This section provides that the Amending Principles commence on 1 July 2019.

#### 3. Authority

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

#### 4. Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Amending Principles is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amending Principles has effect according to its terms.

### Schedule 1—Charter of Aged Care Rights

#### Part 1—Charter of Aged Care Rights

##### *User Rights Principles 2014*

#### Item 1. Section 4

Item 1 inserts a definition for 'authorised person'. An 'authorised person' of a care recipient means a person authorised to act on the care recipient's behalf.

#### Item 2. Paragraph 5(1)(c)

Section 5 of the *User Rights Principles 2014 (User Rights Principles)* specifies the purpose of Part 2. The purpose of Part 2 is to specify the responsibilities an approved provider of a residential care service has to care recipients.

Paragraph 5(1)(c) previously stated that a purpose of Part 2, is to specify that an approved provider of a residential care service has responsibilities not to act inconsistently with the rights and responsibilities of care recipients. As care recipient responsibilities were repealed from the Charter by the Amending Principles, item 2 removed the reference to care recipient responsibilities from this paragraph.

#### Item 3. Section 9

Section 9 provides that the rights of care recipients are set out in the Charter. This item removes the reference to the 'Charter of care recipients' rights and

responsibilities—residential care’ and replaces it with the ‘Charter of Aged Care Rights’ (**the Charter**).

#### **Item 4. Section 11**

Section 11 provides details of the information that approved providers of residential care must give to new care recipients. Item 4 requires approved providers give new care recipients:

- a copy of the Charter;
- information about their rights under the Charter;
- information about their rights and responsibilities in relation to the residential care service (for example, the care recipient’s responsibility not to intentionally cause serious damage to the service under subparagraph 6(2)(e)(i) of the User Rights Principles); and
- if the care recipient has not entered into a resident agreement, the provider must also give information about:
  - the care and services provided at the service;
  - the policies and practices used to set the fees;
  - the circumstances in which the care recipient may be asked to leave the service;
  - the assistance that the provider will give to the care recipient to find alternative accommodation if they are asked to leave;
  - the provider’s complaints resolution mechanism;
  - the care recipient’s responsibilities as a resident in the residential care service; and
  - if the care recipient is receiving respite care – the period of the respite care, and any respite care booking fee.

The provider must assist the care recipient to understand this information, and the Charter. The provider must also ask and encourage the care recipient or an authorised person to sign a copy of the Charter. The provider must give the information, and encourage the care recipient to sign the Charter before they enter the service.

The Charter given to the care recipient must:

- be signed by a staff member of the approved provider;
- set out the date on which the copy of the Charter was given to the care recipient;
- include the care recipient’s (or the authorised person’s) full name;
- include the care recipient’s (or the authorised person’s) signature (if the Charter is signed by the care recipient or an authorised person); and
- include the date on which the care recipient was given a reasonable opportunity to sign the Charter (if the care recipient or authorised person did not sign the Charter).

The Charter must be signed by a staff member of the approved provider. A 'staff member of the approved provider' is a concept defined in subsection 63-1AA(9) of the Aged Care Act. A staff member means an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services. While the legislation does not prescribe the qualifications the staff member must possess to sign the Charter, such a staff member must be acting within the scope of their duties and permitted to act in this capacity by the approved provider.

The Amending Principles also require the approved provider to give the care recipient (or an authorised person) a 'reasonable opportunity' to sign the Charter. The purpose of the signature is to allow the care recipient to acknowledge that they have received, had explained, and understood the Charter.

The Charter may be signed by a person authorised to act on behalf of the care recipient where a care recipient is unable, due to physical or mental incapacity, to sign the Charter. However, the approved provider must still give the care recipient information about their rights in relation to the service and a copy of the Charter, even if the Charter is signed by a person authorised to act on behalf of the care recipient. The approved provider must assist the care recipient to understand the information and the Charter.

In relation to existing care recipients (care recipients receiving care on 30 June 2019 as defined in item 1 to Schedule 3 of the Amending Principles), it will be a matter for the approved provider to determine the best approach to encourage the care recipient to sign the Charter. This may be on an individual basis or in a group setting. For example the approved provider may ask the care recipient to sign the Charter, at the same time as they review the care recipient's home care fees (as required by section 18F in item 4 to Schedule 1 of the Amending Principles). Alternatively, providers may consider it suitable to give information sessions on the Charter, and seek care recipients' signature at the conclusion of the information session.

All approved providers are eligible to access Commonwealth Government-funded interpreting services from the Translating and Interpreting Service (**TIS National**) to assist care recipients from non-English speaking backgrounds to understand the Charter.

Under this arrangement, TIS National provides onsite and phone interpreting services to Australian Government subsidised home care and residential aged care providers at no cost to the approved provider. This subsidised arrangement is an approved provider entitlement but is not directly linked to individual care recipients.

Approved providers access services through a non-transferable TIS National code issued to the individual provider. The department is subsequently billed for those services by TIS National.

The *Electronic Transactions Act 1999* (**the Electronic Transactions Act**) provides that a staff member of the approved provider, or the care recipient can sign the Charter electronically. The method used must identify the person and indicate their approval of the information communicated. The Electronic Transactions Act is 'technologically neutral' so it does not set out a particular electronic signature technology to be used, providing flexibility for people and businesses to determine the signature technology that is appropriate to their particular needs. However, the choice of a particular method must be as 'reliable as appropriate in the circumstances'. Electronic signatures range from a digitised version of a written signature to a PIN or biometric technology.

**Item 5. Paragraph 14(2)(a)**

Section 14 specifies the requirements that a resident agreement must comply with in relation to the way in which, and the process by which, it is entered into.

Item 5 requires the approved provider to inform the care recipient, and help them to understand, the terms of the resident agreement that are about the Charter.

**Item 6. Paragraph 16(1)(c)**

Section 16 of the User Rights Principles specifies the purpose of Part 3. The purpose of Part 3 is to specify the responsibilities an approved provider of a home care service has to care recipients.

Paragraph 16(1)(c) stated that a purpose of Part 3, is to specify that an approved provider of a home care service has responsibilities not to act inconsistently with the rights and responsibilities of care recipients. As care recipient responsibilities were repealed from the Charter by the Amending Principles, item 6 removed the reference to care recipient responsibilities from this paragraph.

**Item 7. Paragraph 17(2)(e)**

Section 17 sets out the circumstances in which an approved provider may cease to provide home care to the care recipient.

Item 7 repeals paragraph 17(2)(e), which provided the approved provider may cease to provide home care to the care recipient if the care recipient did not meet his or her responsibilities under the 'Charter of care recipients' rights and responsibilities—home care'. As care recipients do not have responsibilities under the Charter, this ground is no longer applicable.

Item 7 also inserts an additional two circumstances in which an approved provider may cease to provide home care to a care recipient:

- if the care recipient has not paid any home care fee specified within the home care agreement, for a reason within the care recipient's control; or
- the care recipient has intentionally caused serious injury to staff or intentionally infringed the right of staff to work in a safe environment.

### Home care fees

A care recipient must pay any 'home care fee specified in the home care agreement' as and when the fee is payable. If the care recipient does not pay the home care fee when it is due, for a reason within the care recipient's control, an approved provider may cease to provide home care to the care recipient.

### Intentionally causing serious injury

A provider may cease providing home care to a care recipient, if the care recipient intentionally inflicts serious injury on a staff member of the approved provider. The care recipient must have caused a serious injury, and intended to cause serious injury. It is not sufficient that the care recipient merely intended to do an act which resulted in serious injury.

A 'serious injury' is not defined, and whether an injury amounts to a 'serious injury' is a matter to be determined on a case-by-case basis. However, in broad terms it is understood as an injury (or cumulative effect of multiple injuries) that endanger life or is substantial and protracted.

### Intentionally infringing on the right of staff to work in a safe environment

A provider may cease providing home care to a care recipient, if the care recipient intentionally infringes on the right of a staff member to work in a safe environment. The care recipient must have intended to cause infringe on the staff member's right to work in a safe environment, it is not sufficient that the care recipient merely intended to do an act which resulted in an infringement of this right.

The phrase the 'right to work in a safe environment' is not defined, and whether an act infringes on this right is a matter to be determined on a case-by-case basis. However, it is understood in broad terms as the right of staff members to have a workplace that is safe and without risks to their health.

### Resolution of security of tenure disputes

If an approved provider ceased providing home care to a care recipient, the care recipient would have the avenues of assistance and appeal outlined below, which include recourse to the Aged Care Quality and Safety Commissioner (**the Commissioner**). In interpreting the Charter, the Commission officers adopt a reasonable person test.

The Commonwealth pays advocacy grants under section 81-1 of the Aged Care Act to organisations in each state and territory to provide free, independent and confidential advocacy services to care recipients in relation to their rights, including the security of tenure provisions.



In accordance with section 56-4 of the Aged Care Act, an approved provider of a home care service must establish a complaints resolution mechanism for the service and use the mechanism to address any complaints made by or on behalf of a person to whom care is provided through the service. The approved provider must also advise the person of any other mechanisms that are available to address complaints, such as aged care advocacy services and the Aged Care Quality and Safety Commission (**the Commission**), and provide such assistance as the person requires to use those mechanisms.

A care recipient, or another person on the care recipient's behalf, can lodge a complaint with the Commission regarding any issue relating to an approved provider's responsibilities under the Aged Care Act, which include responsibilities in relation to security of tenure. If the Commissioner were to find that the loss of a home care recipient's security of tenure was an unreasonable and disproportionate response to the actions of the care recipient, the Commissioner could give a direction to the approved provider requiring the approved provider to take stated actions, such as requiring the approved provider to resume the provision of home care services to the care recipient, to comply with their responsibilities. Failure by the approved provider to comply with a direction given by the Commissioner could result in compliance action under Part 4.4 of the Aged Care Act, including the imposition of sanctions on the approved provider.

#### **Item 8. Section 19**

Section 19 provides that the rights of care recipients are set out in the Charter. This item removes the reference to the 'Charter of care recipients' rights and responsibilities—home care' and replaces it with the 'Charter of Aged Care Rights'.

#### **Item 9. Section 20**

Section 20 provides details of the information that approved providers of home care must give to prospective care recipients. Item 9 requires approved providers to give prospective care recipients:

- a copy of the Charter;
- information about their rights under the Charter; and
- information about the rights and responsibilities of the care recipient and the approved provider, including the care recipient's rights and responsibilities in relation to payment of fees.

The provider must assist the care recipient to understand this information, and the Charter. The provider must also ask and encourage the care recipient or an authorised person to sign a copy of the Charter. The provider must give the information, and encourage the care recipient to sign the Charter before they enter the service.

The Charter given to the care recipient must:

- be signed by a staff member of the approved provider;
- set out the date on which the copy of the Charter was given to the care recipient;
- include the care recipient's (or the authorised person's) full name;
- include the care recipient's (or the authorised person's) signature (if the Charter is signed by the care recipient or an authorised person); and
- include the date on which the care recipient was given a reasonable opportunity to sign the Charter (if the care recipient or authorised person did not sign the Charter).

As discussed in relation to item 4 to Schedule 1 of the Amending Principles, the Charter must be signed by a staff member of the approved provider.

The Amending Principles also require the approved provider to give the care recipient (or an authorised person) a 'reasonable opportunity' to sign the Charter.

The Charter may also be signed by a person authorised to act on behalf of the care recipient where a care recipient is unable, due to physical or mental incapacity, to sign the Charter.

All approved providers are eligible to access Commonwealth Government-funded interpreting services from the Translating and Interpreting Service (**TIS National**) to assist care recipients from non-English speaking backgrounds to understand the Charter.

Home care providers are able to access TIS for interpreting services as part of their operational requirements under the Home Care Packages Programme. A provider can, free of charge, use TIS to negotiate the Home Care Agreement, co-design the care plan and individualised budget. TIS can also be used each month to discuss the care recipient's monthly income and expenses statement, so the care recipient knows how their budget is being expended. TIS assists providers with ensuring care recipients can fully participate in the assessment, care planning and review of their home care package.

For home care providers who require an onsite interpreter for their care recipient outside of the operational requirements for the programme, for example, when care recipients are receiving personal care and services that have been agreed through the development of the care plan, all costs incurred should be borne by the care recipient through their home care package funds.

#### **Item 10. Paragraph 22(3)(a)**

Section 22 specifies the requirements that a home care agreement must comply with in relation to the way in which, and the process by which, it is entered into.

Item 10 requires the approved provider to inform the care recipient, and help them to understand, the terms of the home care agreement that are about the Charter, if any such terms are included in the agreement.

**Item 11. Paragraph 23AA(c)**

Section 23AA of the User Rights Principles specifies the purpose of Part 3A. The purpose of Part 3A is to specify the responsibilities an approved provider of a flexible care service has to care recipients.

Paragraph 23AA(c) previously stated that a purpose of Part 3A, is to specify that an approved provider of a flexible care service has responsibilities not to act inconsistently with the rights and responsibilities of care recipients. As care recipient responsibilities were repealed from the Charter by the Amending Principles, item 11 removed the reference to care recipient responsibilities from this paragraph.

**Item 12. Section 23AD**

Section 23AD provides that the rights of care recipients are set out in the Charter. This item removes the reference to the 'Charter of care recipients' rights and responsibilities—short-term restorative care' and replaces it with the 'Charter of Aged Care Rights'.

**Item 13. Section 23AE**

Section 23AE provides details of the information that approved providers of a flexible care service through which short-term restorative care is provided must give to prospective care recipients. Item 13 requires approved providers to give prospective care recipients:

- a copy of the Charter;
- information about their rights under the Charter; and
- information about the rights and responsibilities of the care recipient and approved provider.

The provider must assist the care recipient to understand this information, and the Charter. The provider must also ask and encourage the care recipient or an authorised person to sign a copy of the Charter. The provider must give the information, and encourage the care recipient to sign the Charter before they enter the service.

The Charter given to the care recipient must:

- be signed by a staff member of the approved provider;
- set out the date on which the copy of the Charter was given to the care recipient;
- include the care recipient's (or the authorised person's) full name;
- include the care recipient's (or the authorised person's) signature (if the Charter is signed by the care recipient or an authorised person); and
- include the date on which the care recipient was given a reasonable opportunity to sign the Charter (if the care recipient or authorised person did not sign the Charter).

As discussed in relation to item 4 to Schedule 1 of the Amending Principles, the Charter must be signed by a staff member of the approved provider.

The Amending Principles also require the approved provider to give the care recipient (or an authorised person) a 'reasonable opportunity' to sign the Charter.

The Charter may also be signed by a person authorised to act on behalf of the care recipient where a care recipient is unable, due to physical or mental incapacity, to sign the Charter.

All approved providers are eligible to access Commonwealth Government-funded interpreting services from the Translating and Interpreting Service (**TIS National**) to assist care recipients from non-English speaking backgrounds to understand the Charter.

#### **Item 14. Paragraph 23AF(2)(a)**

Section 23AF specifies the requirements that a flexible care agreement must comply with in relation to the way in which, and the process by which, it is entered into.

Item 14 requires the approved provider to inform the care recipient, and help them to understand, the terms of the resident agreement that are about the Charter, if any such terms are included in the agreement.

#### **Item 15. Schedules 1 to 3**

Item 15 repeals the 4 aged care charters, and replaces them with the 'Charter of Aged Care Rights'.

Under clause 2, care recipients have the right to:

- safe and high quality care and services;
- be treated with dignity and respect;
- have my identity, culture and diversity valued and supported;
- care recipients have the right to be treated in a way that values them as a person. This includes respect for their culture, values, beliefs, religion, spirituality and sexuality;
- live without abuse and neglect;
- be informed about my care and services in a way I understand;
- access all information about myself, including information about my rights, care and services;
- have control over and make choices about my care, and personal and social life, including where the choices involve personal risk;
- have control over, and make decisions about, the personal aspects of my daily life, financial affairs and possessions;
- my independence;
- be listened to and understood;
- have a person of my choice, including an aged care advocate, support me or speak on my behalf;

- complain free from reprisal, and to have my complaints dealt with fairly and promptly;
- personal privacy and to have my personal information protected; and
- exercise my rights without it adversely affecting the way I am treated

## **Part 2—Record-keeping requirements**

### ***Records Principles 2014***

#### **Item 16. Section 4**

Item 16 inserts a definition for the 'Charter of Aged Care Rights'. It means 'Charter of Aged Care Rights' set out in Schedule 1 to the User Rights Principles.

#### **Item 17. After section 8**

Item 17 inserts a new section 8A in the Records Principles. Section 8A requires an approved provider to keep a record relating to each copy of the Charter given to a care recipient (including existing care recipients).

Providers are not required to keep the record if the care recipient does not enter the service.

## **Schedule 2—Responsibilities of approved providers**

### **Part 1—Approved providers of residential care**

#### ***User Rights Principles 2014***

#### **Item 1. After paragraph 5(1)(c)**

Section 5 specifies the purpose of Part 2. The purpose of this Part is to specify the responsibilities of an approved provider of a residential care service.

Item 1 inserts an additional paragraph, which provides that these responsibilities include: not acting inconsistently with the legal and consumer rights of care recipients.

#### **Item 2. After section 9**

Item 2 inserts an additional responsibility of approved providers.

Section 9A specifies that an approved provider of residential care must not act in a way which is inconsistent with the legal and consumer rights of a care recipient.

## **Part 2—Approved providers of home care**

### ***User Rights Principles 2014***

#### **Item 3. After paragraph 16(1)(c)**

Section 16 specifies the purpose of Part 3. The purpose of this Part is to specify the responsibilities of an approved provider of a home care service.

Item 3 inserts six additional paragraphs, which provide that these responsibilities include:

- not acting inconsistently with the legal and consumer rights of care recipients;
- preventing the provider from causing damage to the care recipient's home and other property;
- providing such information as is reasonably necessary to assist care recipients to choose the best possible care and services;
- the written plan of care and services that the provider must give care recipients within a specified period of time;
- the provision of invoices that are clear and in a format that is understandable; and
- the review of home care fees, both periodically and on request by a care recipient

#### **Item 4. At the end of Division 2 of Part 3**

This item inserts six responsibilities of approved providers.

Section 19AA specifies that an approved provider of a home care service must not act in a way which is inconsistent with the legal and consumer rights of a care recipient.

Section 19AB specifies that an approved provider of home care must take reasonable steps to prevent the provider, or a person employed or otherwise engaged by the provider, from causing damage to a care recipient's home and other property in the course of providing home care. The approved provider's responsibility to prevent damage applies in connection to the provision of care and services to the care recipient. To comply with this responsibility the provider must undertake its due diligence when engaging staff members or subcontractors.

Section 19AC specifies that an approved provider of a home care service must provide such information as is reasonably necessary to assist a care recipient to choose the care and services that best meet his or her goals and assessed needs and preferences, within the limits of the resources available.

Under the framework of Consumer Directed Care (**CDC**), a provider is to support care recipients to choose the care and services that best meet his or her goals. These amendments are designed to enable providers to be more explicit about what care and services would best support the assessed care needs of a person. It puts the responsibility on the provider to inform the care recipient about the care and services needed when developing and reviewing the care plan, within the resources available.

CDC provides care recipients with clear information about what funding is available for their care and services and how those funds are spent through an individualised budget and monthly available funds and expenditure statement. These tools ensure that providers and care recipients have a shared understanding of available resources and how those resources are being expended in order to meet the care recipient's needs.

The 'resources available' within a home care package are usually made up of:

- care recipient contributions;
  - the basic daily fee;
  - plus the income-tested care fee;
  - plus any 'top-up' services.
- home care subsidies:
  - the basic subsidy amount
  - plus any primary supplements (oxygen supplement, enteral feeding supplement, dementia and cognition supplement, veterans' supplement);
  - less any reductions in subsidy;
  - plus any other supplement (hardship supplement, viability supplement).

The approved provider must give information to the care recipient, to allow the care recipient to select the best care and services that meet his or her needs. However, the requirement is limited by the available resources. That is, the provider and care recipient should make decisions on which care and services are most appropriate, taking into account the resources available to the individual care recipient.

Section 19AD specifies that an approved provider of a home care service must give to a care recipient a written plan of the care and services that the care recipient will receive before, or within 14 days after, the care recipient commences receiving home care.

Section 19AE specifies that an approved provider of a home care service must provide a care recipient with invoices that are clear and in a format that is understandable.

Section 19AF specifies that an approved provider of a home care service must:

- periodically review the home care fees that each care recipient is liable to pay; and
- if requested by a care recipient on the grounds that the care recipient's financial circumstances have changed—review the home care fees that the care recipient is liable to pay.

### **Part 3 — Approved providers of flexible care in the form of short-term restorative care**

#### ***User Rights Principles 2014***

##### **Items 5. After paragraph 23AA(c)**

Section 23AA of the User Rights Principles specifies the purpose of Division 1, Part 3A, of the User Rights Principles. The purpose of this Division is to specify the responsibilities of an approved provider of a flexible care service, in the form of short-term restorative care.

Item 5 inserts six additional paragraphs, which provide that these responsibilities include:

- not acting inconsistently with the legal and consumer rights of care recipients;
- preventing the provider from causing damage to the care recipient's home and other property;
- providing such information as is reasonably necessary to assist care recipients to choose the best possible care and services;
- the written plan of care and services that the provider must give care recipients within a specified period of time;
- the provision of invoices that are clear and in a format that is understandable; and
- the review of fees on request by a care recipient.

##### **Item 6. After section 23AD**

Item 6 inserts six new responsibilities of approved providers.

Section 23ADA specifies that an approved provider of a flexible care service through which short-term restorative care is provided, must not act in a way which is inconsistent with the legal and consumer rights of a care recipient.



Section 23ADB specifies that an approved provider of a flexible care service through which short-term restorative care is provided in a home care setting, must take reasonable steps to prevent the provider, or a person employed or otherwise engaged by the provider, from causing damage to a care recipient's home and other property in the course of providing the flexible care service. The approved provider's responsibility to prevent damage applies in connection to the provision of care and services to the care recipient. To comply with this responsibility the provider must undertake its due diligence when engaging staff members or subcontractors.

Section 23ADC specifies that an approved provider of a flexible care service through which short-term restorative care is provided in a home care setting must provide such information as is reasonably necessary to assist a care recipient to choose the care and services that best meet his or her goals and assessed needs and preferences, within the limits of the resources available.

As noted in the context of section 18C, an individualised budget and monthly available funds and expenditure statement ensure that providers and care recipients understand what resources are available and how they are being expended to meet the care recipient's needs.

Section 23ADD specifies that an approved provider of a flexible care service in which short-term restorative care is provided in a home care setting must give to a care recipient a written plan of the care and services that the care recipient will receive before, or within 7 days after, the care recipient commences receiving short-term restorative care.

Section 23ADE specifies that an approved provider of a flexible care service in which short-term restorative care is provided in a home care setting must provide a care recipient with invoices that are clear and in a format that is understandable.

Section 23ADF specifies that an approved provider of a flexible care service in which short-term restorative care is provided in a home care setting must, if requested by a care recipient on the grounds that the care recipient's financial circumstances have changed, review the short-term restorative care fees that the care recipient is liable to pay.

### **Schedule 3—Transitional provisions**

#### ***User Rights Principles 2014***

##### **Item 1. At the end of Part 5**

Item 1 makes transitional provisions which provide details of the information that approved providers must give to existing care recipients. An 'existing care recipient' means a care recipient who is being provided with care on 30 June 2019.

Subsection 33(1) requires an approved provider of residential care, or flexible care through which short-term restorative care is provided in a residential care setting to give all existing care recipients a copy of the Charter no later than 30 September 2019.

It requires an approved provider of home care, or flexible care through which short-term restorative care is provided in a home care setting to give all existing care recipients a copy of the Charter no later than 31 December 2019.

The provider must assist existing care recipients to understand the Charter. The provider must also ask and encourage the care recipient or an authorised person to sign a copy of the Charter.

The Charter given to the care recipient must:

- be signed by a staff member of the approved provider;
- set out the date on which the copy of the Charter was given to the care recipient;
- include the care recipient's (or the authorised person's) full name;
- include the care recipient's (or the authorised person's) signature (if the Charter is signed by the care recipient or an authorised person); and
- include the date on which the care recipient was given a reasonable opportunity to sign the Charter (if the care recipient or authorised person did not sign the Charter).

## Statement of Compatibility with Human Rights

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

### ***User Rights Amendment (Charter of Aged Care Rights) Principles 2019***

*The 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 *User Rights Amendment (Charter of Aged Care Rights) Principles 2019* (**the Amending Principles**) will amend the *User Rights Principles 2014* (**the User Rights Principles**) and the *Records Principles 2014*.

The Australian population is ageing, and the expectations of older people and the community are changing. In recognition of this, the Australian Government is making fundamental reforms to the aged care system. The reforms aim to ensure high-quality services that meet care recipient needs and preferences.

The Amending Principles repeal the four aged care charters in Schedules 1, 2 and 3 of the User Rights Principles, and replace them with a single 'Charter of Aged Care Rights' (**the Charter**). Previously, the separate charters for different types of care resulted in considerable duplication.

The Charter helps to create a shared understanding about the rights of people receiving Commonwealth subsidised aged care. Having a shared understanding between people receiving care, their family, friends and carers, and aged care providers and their staff, helps everyone work together to achieve safe and high quality aged care.

The rights described in the Charter complement other laws that inform the delivery and quality of aged care, for example, through the *Aged Care Act 1997* (**the Aged Care Act**), the consumer outcomes in the new Aged Care Quality Standards, and rights under the *Competition and Consumer Act 2010* and Commonwealth anti-discrimination laws.

The Charter is intended to provide the same rights for care recipients, regardless of the care type they receive. Any rights which were previously only applicable to a specific type of care and are now not reflected in the Charter are set out as general responsibilities of approved providers.

## Human rights implications

The Amending Principles engage the following rights:

- Right to freedom of thought, conscience and religion or belief;
- Prohibition on arbitrary and unlawful interference with privacy;
- Right to an adequate standard of living;
- Right to health; and
- Rights of people with disabilities.

### Right to freedom of thought, conscience and religion or belief

The right to freedom of thought, conscience and religion or belief is contained in Article 18 of the International Covenant on Civil and Political Rights (ICCPR). It requires that all persons have the right to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs.

The Amending Principles promote the right to freedom of thought, conscience and religion or belief, by setting out the right of each recipient to have their identity, culture and diversity valued and supported. This right ensures care recipients will be treated in a way that values them as a person. This includes respect for their culture, values, beliefs, religion and spirituality.

Additionally, the Charter includes a right to be treated with dignity and respect. Being treated with respect includes: being treated as an individual; having opinions sought; and having preferences, needs and values responded to. Care recipients must be provided with care and services in a way that ensures their dignity. The Charter promotes and supports the rights in Article 18.

### Prohibition on arbitrary and unlawful interference with privacy

The prohibition on arbitrary and unlawful interference with privacy is contained in Article 17(1) of the ICCPR. Article 17(1) that persons have the right to the protection of the law against such interference or attacks.

The Amending Principles promote and support the prohibition on arbitrary and unlawful interference with privacy, by setting out the right of each care recipient to personal privacy and to have their personal information protected in the Charter. The intent of this right to give care recipients the right to be alone or with others and to privacy when they need and want it. It ensures sensitive information about care recipients' personal life, health and relationships will be respected and properly handled.

### Right to an adequate standard of living

The right to an adequate standard of living is contained in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). It requires that everyone has the right to an adequate standard of living including adequate food, water and housing and to the continuous improvement of living conditions.

The Amending Principles engage the right to an adequate standard of living, including adequate food, water and housing by providing care recipient with specific protections when approved providers seek to cease the provision of home care for them (security of tenure provisions).

The framework in which the security of tenure operates (section 17 of the User Rights Principles) balances the rights of care recipients to health and to an adequate standard of living with the rights of others, such as care workers. The avenues of appeal, outlined above, allow for a proportionate consideration and response to a care recipient's failure to pay agreed home care fees, or intentionally causing serious injury to staff of the approved provider, or their right to work in a safe environment.

Before a care recipient begins receiving home care, the User Rights Principles require that a home care agreement must be offered to the prospective care recipient and the approved provider must provide the prospective care recipient with guidance (and, if appropriate, interpreter services) to understand the terms and effect of the proposed agreement (see section 22 of the User Rights Principles). The home care agreement must include, among other matters, conditions under which either party may terminate the home care services (see paragraph 23(2)(g) of the User Rights Principles).

The approved provider must also give the prospective care recipient a copy of the Charter and assist them to understand their rights (see item 8 to Schedule 1 of the Amending Principles). These provisions are designed to ensure that a care recipient is made aware of his or her rights and responsibilities and understands the circumstances in which an approved provider may cease the provision of home care services.

If an approved provider were to cease the provision of home care for one of the reasons provided in the security of tenure provisions, the care recipient would have the avenues of assistance and review outlined below, which include recourse to the Aged Care Quality and Safety Commissioner (**the Commissioner**). In responding to a complaint, the Aged Care Quality and Safety Commission (**the Commission**) treat each concern or complaint on its own merits and carefully assess the information they receive and obtain.

The Commonwealth pays advocacy grants under section 81-1 of the Aged Care Act to organisations in each state and territory to provide free, independent and confidential advocacy services to care recipients in relation to their rights.

In accordance with section 56-4 of the Aged Care Act, an approved provider of a home care service must establish a complaints resolution mechanism for the service and use the mechanism to address any complaints made by or on behalf of a person to whom care is provided through the service. The approved provider must also advise the person of any other mechanisms that are available to address complaints, such as aged care advocacy services and the Commission, and provide such assistance as the person requires to use those mechanisms.

A care recipient, or another person on the care recipient's behalf, can lodge a complaint with the Commission regarding any issue relating to an approved provider's responsibilities under the Aged Care Act, which include responsibilities in relation to security of tenure (see section 11 of the *Aged Care Quality and Safety Commission Rules 2018* made under the *Aged Care Quality and Safety Commission Act*). If the Commissioner receives a complaint, the Commission must, in relation to each issue:

- decide to take no further action in relation to the issue;
- quickly resolve the issue to the satisfaction of the complainant or
- decide to undertake a resolution process.

When a complainant first contacts the Commissioner, Commission staff may support the complainant to manage the concern themselves through 'early resolution'. Many concerns can be resolved quickly and directly between the complainant and the provider at this stage. Alternatively, Commission staff may use a resolution process, and select one or more approaches to resolve the complaint, including conciliation, investigation, service provider resolution or mediation.

When the complaint is finalised, Commission staff will advise the complainant and provider of the outcome. Where the Commissioner believes the provider is not meeting their responsibilities, the Commissioner can direct them to make changes, including a direction to comply with their security of tenure responsibilities. Failure by the approved provider to comply with a direction given by the Commissioner could result in compliance action under Part 4.4 of the Aged Care Act, including the imposition of sanctions on the approved provider.

If an approved provider were to endanger the safety, health and wellbeing of a care recipient by withdrawing home care services peremptorily, without making an effort to assist the care recipient to make other arrangements, such a breach of the provider's common law duty of care would call into question the provider's suitability to be an approved provider of aged care. Action can be taken under section 10-3 of the Aged Care Act if the Secretary is satisfied that a provider has ceased to be suitable to provide aged care.

## Right to health

The right to health is contained in Article 12(1) of the ICESCR. The right to health is the right to the enjoyment of the highest attainable standard of physical and mental health.

The Amending Principles promote and support the right to health, by setting out the right of each care recipient to safe and high quality care and services in the Charter. This right ensures that care recipients will have safe, quality care and services, provided with professional care, skill and competence. It requires providers to act promptly on matters that might have an impact on the quality and safety of care recipients' care and services.

## Rights of people with disabilities

The Amending Principles promote the right to protection from exploitation, violence and abuse as contained in Article 20(2) of the Convention on the Rights of Persons with Disabilities (**CRPD**). The CRPD requires that positive measures be taken to prevent exploitation, violence and abuse of people with disabilities.

The Amending Principles are intended to promote and support the delivery of quality aged care services by approved providers. The Charter sets out the right to live without abuse and neglect. This right provides that care recipients must get safe and dignified care and services, and be able to share concerns about safety with their provider. Additionally, providers must take all reasonable steps to prevent and respond to all forms of violence, exploitation, neglect and abuse.

## **Conclusion**

The Amending Principles are 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*. It promotes the care recipient's rights to an adequate standard of living and personal privacy, and optimises each care recipient's physical and mental health, without prohibiting or restricting the right to freedom of thought, conscience and religion. The Amending Principles will assist in promoting a key object of the Aged Care Act, namely to protect the health and well-being of recipients of aged care services.

**The Hon Ken Wyatt**  
**Minister for Senior Australians and Aged Care**