

## **EXPLANATORY STATEMENT**

**Issued at the authority of the Minister for Aged Care**

*Aged Care Act 1997*

*Aged Care Quality and Safety Commission Act 2018*

*Aged Care Legislation Amendment (Transition Care) Instrument 2022*

### **Purpose**

The *Aged Care Legislation Amendment (Transition Care) Instrument 2022* (Amendment Instrument) amends the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules), the *Subsidy Principles 2014* (Subsidy Principles) and the *Quality of Care Principles 2014* (Quality of Care Principles) to allow the Aged Care Quality and Safety Commissioner (Commissioner) to:

- conduct quality reviews of flexible care services through which transition care is provided in home care settings; and
- monitor the quality of flexible care services through which transition care is provided in residential care settings and home care settings.

The Amendment Instrument also amends the Quality of Care Principles to specify that the Aged Care Quality Standards apply to flexible care in the form of transition care. Further consequential amendments mainly relate to ensuring relevant definitions include transition care.

### **Background**

Flexible care provided as transition care (the Transition Care Programme (TCP)) seeks to optimise the functioning and independence of older people post-hospitalisation, and where possible, delay their entry into residential aged care or alternatively, provide them with additional time to decide on their longer-term care arrangements. It can be delivered in a residential care setting, a person's home, or a combination of both.

The TCP is jointly funded by the Australian and State/Territory governments, which provides short-term therapy focussed care and services to older people for up to 12 weeks (with the possibility of a six-week extension) following discharge from hospital. There are eight State and Territory health authorities who are approved providers of transition care.

While the Commissioner can receive complaints about an approved provider who provides transition care under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act), the Commissioner is currently unable to comprehensively accredit, review and monitor transition care services. The Amendment Instrument will provide the Commissioner the power to monitor and review flexible care services through which transition care is provided in a residential care and home care setting.

The Amendment Instrument is not intended to cover transition care services provided directly by State and Territory government run services.

As the approved providers of transition care, State and Territory health authorities provide some transition care services themselves, while subcontracting other transition care services out to approved providers of home care, accredited residential aged care facilities and other providers. The Amendment Instrument will allow the Commissioner to monitor the quality of transition care services provided by the subcontracted services.

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

### **Authority**

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

Accordingly, the Quality of Care Principles are made under section 96-1 of the Aged Care Act and set out matters for the purpose of Part 4.1 of the Aged Care Act (or matters necessary or convenient to carry out and give effect to the matters set out in that Part). Further, the Subsidy Principles are made under section 96-1 of the Aged Care Act and set out matters for the purpose of Chapter 3 of the Aged Care Act (or matters necessary or convenient to carry out and give effect to the matters set out in that Chapter).

The Commission Rules are made under section 77 of the Commission Act. Section 77 of the Commission Act provides the Minister with the power to make instruments providing for matters required or permitted by, or necessary or convenient for carrying out or giving effect to, the Commission Act to be prescribed by the Commission Rules. Section 19(b)(ii) of the Commission Act provides that the Commission Rules may specify any other aged care services in which the Commission is able to conduct a quality review of. Section 19(c)(iii) of the Commission Act provides that the Commission Rules may specify any other aged care service in which the Commissioner is able to monitor the quality of care and services. Section 21 of the Commission Act provides that the Commission Rules may make provisions for, or in relation to, the performance of a function of the Commissioner.

### **Reliance on subsection 33(3) of the *Acts Interpretation Act 1901***

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

### **Commencement**

The Amendment Instrument will commence on 1 December 2022.

### **Consultation**

The Department of Health and Aged Care (Department) has consulted with the Commission and eight State and Territory health authorities, who are approved providers of transition care.

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

The Office of Best Practice Regulation (OBPR) was consulted on 12 October 2022 and confirmed that no Regulatory Impact Statement would be required (OBPR reference OBPR22-03541).

Details of the instrument are set out in the **Attachment**.

**Details of the *Aged Care Legislation Amendment (Transition Care) Instrument 2022***

**Section 1** provides that the name of this instrument is the *Aged Care Legislation Amendment (Transition Care) Instrument 2022*.

**Section 2** provides that the Amendment Instrument commences on 1 December 2022.

**Section 3** states that the authority for making the Amendment Instrument is the *Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018*.

**Section 4** states 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**

***Aged Care Quality and Safety Commission Rules 2018***

**Item 1 –Section 4, definition of *flexible care place***

This item inserts “or transition care” after “restorative care” in the definition of flexible care place to ensure that references in the Commission Rules to a flexible care place extends to a service that provides flexible care in the form of transition care.

**Item 2 –Section 4, paragraph (b) of the definition of *home service***

This item inserts “or transition care” after “restorative care” in the definition of home service to ensure that references in the Commission Rules to ‘home service’ includes a service through which transition care is provided in a home care setting.

**Item 3 –Section 4, paragraph (a) definition of a *home service provider***

This item inserts “or transition care” after “restorative care” in the definition of home service provider to ensure that references in the Commission Rules to a home service provider extends to the approved provider of a flexible care service through which transition care is provided in a home care setting.

**Item 4 –Section 4**

This item inserts a definition of ‘transition care’ which has the same meaning as in the *Subsidy Principles 2014* to ensure transition care is consistently referred to in the Commission Rules.

**Item 5 –Section 50**

This item repeals the current Section 50 and replaces it with:

“For the purposes of subparagraph 19(b)(ii) of the Commission Act, the following aged care services are specified:

- (a) flexible care services through which short-term restorative care is provided in a home care setting;
- (b) flexible care services through which transition care is provided in a home care setting by a person other than the approved provider in respect of the flexible care service, on the approved provider's behalf, under a contract or arrangement entered into between the approved provider and the other person."

For the purposes of section 19(b)(ii) of the Commission Act, this section specifies the types of aged care services in which the Commissioner can conduct quality reviews. This will now include flexible care services through which transition care is provided in a home care setting by a person other than the approved provider, on the approved provider's behalf, under a contract or arrangement. This allows the Commissioner to conduct quality reviews of flexible care services provided by a third-party entity on behalf of the approved provider, that is, on behalf of a State or Territory health authority. This is in addition to being able to conduct quality reviews of flexible care services through which short-term restorative is provided in a home care setting.

**Item 6 – after paragraph 52(2)(b)**

This item inserts the following text after paragraph 52(2)(b) of the Commission Rules:

- (ba) a flexible care service through which transition care is provided in a home care setting by a person other than the approved provider in respect of the flexible care service, on the approved provider's behalf, under a contract or arrangement entered into between the approved provider and the other person;

The purpose of this section is to provide the Commissioner the power to conduct a quality review of flexible care services through which transition care is provided in a home care setting by a person other than the approved provider, on the approved provider's behalf, under a contract or arrangement. This allows the Commissioner to conduct quality reviews of flexible care services provided by a third-party entity on behalf on the approved provider, that is, on behalf of a State or Territory health authority.

**Item 7 – end of section 60**

This item inserts the following text at the end of section 60:

- ; (c) flexible care services through which transition care is provided in a residential care setting;
- (d) flexible care services through which transition care is provided in a home care setting by a person other than the approved provider in respect of the flexible care service, on the approved provider's behalf, under a contract or arrangement entered into between the approved provider and the other person.

For the purposes of section 19(c)(iii) of the Commission Act, this section specifies the types of aged care services which the Commissioner can monitor in relation to the quality of care and services provided.

The new section 60(c) and (d) of the Commission Rules will allow the Commission to monitor the quality of care and services provided in a flexible care service through which transition care is provided in a residential care setting.

The Commissioner will also be able to monitor the quality of care and services provided in flexible care services through which transition care is provided in a home care setting by a person, other than the approved provider on the approved provider's behalf, under a contract or arrangement. This allows the Commissioner to conduct quality reviews of flexible care services provided by a third-party entity on behalf of the approved provider of transition care, that is, on behalf of a State or Territory health authority.

### ***Quality of Care Principles 2014***

#### **Item 8 - Section 4**

This item inserts “***transition care*** has the meaning given by section 4 of the *Subsidy Principles 2014*” to ensure transition care is consistently referred to in the Quality of Care Principles.

#### **Item 9 – At the end of section 18(1)**

This item amends section 18(1) of the Quality of Care Principles so that the Aged Care Quality Standards will now apply to flexible care provided in the form of transition care.

### ***Subsidy Principles 2014***

#### **Item 10 –Section 4 – definition of *home care setting***

This item amends the definition of ‘home care setting’ so that it also includes transition care that is provided in a home care setting. This means that references to ‘home care setting’ in the Subsidy Principles will also include transition care provided in a home care setting.

#### **Item 11 –Section 4 – definition of *residential care setting***

This item amends the definition of ‘residential care setting’ so it also includes transition care provided in a residential care setting. This means that references to ‘residential care setting’ in the Subsidy Principles will also include transition care provided in a residential care setting.

#### **Item 12 –Section 7B**

This item amends section 7B of the Subsidy Principles to specify that flexible care in the form of transition care is also a type of care that does not constitute residential care.

#### **Item 13 –Section 70B**

This item amends section 70B of the Subsidy Principles to specify that flexible care in the form of transition care is also a type of care that does not constitute home care.

## Statement of Compatibility with Human Rights

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

### *Aged Care Legislation Amendment (Transition Care) Instrument 2022*

The *Aged Care Legislation Amendment (Transition Care) Instrument 2022* (Amendment 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 instrument**

The Amendment Instrument amends the *Aged Care Quality and Safety Commission Rules 2018*, the *Subsidy Principles 2014* and the *Quality of Care Principles 2014* to allow the Aged Care Quality and Safety Commissioner to:

- conduct quality reviews of flexible care services through which transition care is provided in home care settings; and
- monitor the quality of transition care and services provided in residential care settings and home care settings.

It also amends the Quality of Care Principles to clarify that the Aged Care Quality Standards apply to flexible care provided in the form of transition care.

The Amendment Instrument ensures that transition care services provided on behalf of an approved provider providing transition care are appropriately monitored by the Aged Care Quality and Safety Commission, which will provide certainty to recipients of transition care and their families that their care is being provided consistently with a core framework of requirements around safety and quality.

#### **Human rights implications**

The Amendment Instrument engages the following human rights as contained in article 11 and article 12(1) of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities* (CRPD) which generally require:

- the right to an adequate standard of living, including with respect to food, clothing, and housing, and to the continuous improvement of living conditions; and
- the right to the enjoyment of the highest attainable standard of physical and mental health.

The United Nations Committee on Economic Social and Cultural Rights (Committee) has stated that the right to health is not a right for each individual to be healthy but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

Under the Charter of Aged Care Rights, all people receiving Australian Government funded aged care services have the right to be treated with dignity and respect and be able to make their own choices about their care.

The Amendment Instrument ensures the appropriate monitoring of the quality of care provided to transition care recipients who may be concerned about their care, or the safety of their living environment, to exercise their right to enjoy the highest attainable level of health and access to an adequate standard of living. Strengthening monitoring of the quality of care provided will also reduce the likelihood of adverse events or poor care causing physical, mental or economic burden and adversely impacting the attainable level of health and adequate standard of living for transition care recipients.

### **Conclusion**

The Amendment 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* as it promotes the human rights of everyone, including those with a disability, to the enjoyment of the highest attainable standard of physical and mental health and the right to an adequate standard of living, including with respect to food and housing and continuous improvement of living conditions.

**The Hon Anika Wells MP  
Minister for Aged Care**