



**Australian Government**

**Department of Health and Ageing**

# **GUIDE TO CHANGES TO THE REGULATORY FRAMEWORK FOR AGED CARE**

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## About this Guide

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This Guide has been prepared to assist approved providers to understand the changes to the regulatory framework for aged care detailed in the *Aged Care Amendment (2008 Measures No. 2) Act 2008* (the Amending Act).

In summary, the proposed changes provide greater certainty for care recipients and providers about their respective rights, obligations and protections. The package improves protection for residents and will promote public confidence in the aged care industry, through:

1. improved regulation of approved providers;
2. enhanced protection for aged care residents (including better protection of lump sums and bonds);
3. other changes to enhance protections for aged care recipients; and
4. reduction of unnecessary assessments by Aged Care Assessment Teams.

The purpose of this Guide is to provide general guidance on the new legislative requirements.

The Guide does not constitute legal advice and users are encouraged to seek their own professional advice about the application of the legislation to their own particular circumstances, and to exercise their own skill and care in considering the appropriate approach in meeting the legislative requirements.

As this Guide has been written in plain English,

some aspects of the legislation and policy have been simplified. In cases of discrepancy between the Guide and the legislation, the legislation should be relied on.

### Additional Information

Additional information can be access through the:

- ▶ Department of Health and Ageing website under legislation in the aged care section for health professionals at [www.health.gov.au](http://www.health.gov.au).
- ▶ Aged Care Information Line 1800 500 853

### Legislation

*The Aged Care Amendment (2008 Measures No. 2) Act 2008* and updated Aged Care Principles can be downloaded from [www.health.gov.au](http://www.health.gov.au).

## Overview of the new arrangements

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The purpose of the *Aged Care Amendment (2008 Measures No. 2) Act 2008* (the Amending Act) is to amend the *Aged Care Act 1997* (the Act) and the *Aged Care (Bond Security) Act 2006* (the Bond Security Act) to address current legislative inadequacies and maintain effective regulatory safeguards for ensuring high quality care for older Australians.

Through the Amending Act the Government has identified and addressed the obvious weaknesses and critical issues with the aged care legislative framework.

### Will the changes increase regulation and costs for approved providers?

The changes do not increase the overall regulation of approved providers and will, in fact, lead to an overall decrease in regulation.

In terms of impact, some of the changes described below will have a low impact on some providers and no impact on others. Other measures will only impact providers with a poor track record.

While there may be some additional implementation costs for providers associated with some of the measures, these are likely to be minimal. Other measures will lead to efficiency savings for providers, resulting in no net impact overall for approved providers.

### Did the Government consult with the aged care industry about the changes?

Yes, consultation was undertaken to inform the Amending Act.

Initially, the Department developed a Consultation Paper and met with the Ageing Consultative Committee on 26 June 2008 to discuss the proposed changes. As a result of feedback from Committee Members, the Consultation Paper was revised and provided to the Committee along with a communiqué to distribute to their members. The Paper was also provided to Aged Care Assessment Program officials.

In response to the Consultation Paper, 13 submissions were received from a range of aged care stakeholders. Ten of the submissions were from Ageing Consultative Committee Members or State and Territory Governments and three were from other aged care stakeholders.

The Department considered the feedback, and as a result, did not pursue or amended some of the proposals outlined in the Consultation Paper.

The Department again met with Ageing Consultative Committee on 10 October 2008 to discuss the outcome of the consultation process and of particular proposals.

The changes outlined in the Amending Act and this Guide are consistent with what was outlined in the Consultation Paper and discussed with the Committee.

## Why are the changes necessary?

When the aged care legislation was developed ten years ago, the typical business model in the for-profit sector was one whereby the owner of the facility also operated the aged care service.

In recent years a model of aged care has emerged, whereby the owner and operator of a facility have distinct roles and responsibilities and may function quite separately. The last decade has also seen a significant increase in the level of investment in the sector from large corporate entities. The regulatory framework had not kept pace with this shift in business practice. This lack of consistency between the regulatory framework and contemporary business practice means that the legislation had not been able to be applied equally to all approved providers regardless of their corporate structure.

The shortcomings of the regulatory framework were varied, impacting upon care providers, care recipients and the broader community. Under the legislation, there was limited capacity for the Department of Health and Ageing (the Department) to consider the record of 'related entities' when making decisions about approvals. This unnecessarily, and inappropriately, limited the ability of the Department to make an informed assessment of a company's record in service delivery and suitability to deliver care. Changes, which begin to take effect as of 1 January 2009, address this issue and will provide better protection for residents.

Similarly, prior to these changes, those ultimately responsible for financial decisions may not have been considered 'key personnel' for the purposes of regulatory scrutiny. Amendments to the range of people considered to be an approved provider's

'key personnel' enable an examination of all relevant people, and ensure that the legislation applies consistently to all approved providers.

Increasingly for-profit developers are putting aged care, retirement villages and sometimes disability or step down care all in the same development, giving rise to uncertainty relating to the regulatory reach of the Act. Changes to the regulatory and administrative framework clarify that only the aged care services are regulated under the Act.

In recent years there has been significant growth in the value of accommodation bonds held by aged care providers. As at 30 June 2008, around 970 approved providers (75% of all approved providers) held accommodation bonds, with a total value of nearly \$8 billion. It is very important in terms of consumer confidence, and to maintain and increase the level of corporate investment into the sector, that the regulatory framework that governs these financial arrangements is as robust as possible. Amendments ensure that accommodation bonds (or like payments) that have been paid by care recipients for entry into aged care services are fully protected under the Accommodation Bond Guarantee Scheme (the Guarantee Scheme) and that residents in similar circumstances are accorded similar protections.

Since the introduction in 2006 of the Guarantee Scheme (which guarantees the refund of bonds in the event that an approved provider becomes insolvent), experience has highlighted some areas in which the protections for residents could be clarified. The Amending Act amends both the Act and the Bond Security Act to improve the operation of the Guarantee Scheme.

In addition, feedback from the sector reflected a level

of dissatisfaction with the complexity and number of assessments required of an individual's care needs, by Aged Care Assessment Teams. Some assessment points required in the existing process were identified as being unnecessary or administrative in nature. The amendments contained in the Amending Act streamlines assessments of older people so as to enable timelier, consistent and quality assessments for aged care. These changes will take effect as of 1 July 2009.

The changes also clarify one of the key responsibilities of the Department when considering the imposition of sanctions on an aged care provider is to protect the health, welfare and interests of current and future care recipients.

Finally, the opportunity has been taken to make some technical amendments. Given the minor nature of these changes, they have not been described in detail in this guide.

## How do I get further information about the changes?

If, after reading this Guide, you require further information about the new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which begin to take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Linking approved provider status to allocations of places

One of the changes to the Act is to directly link approved provider status to the allocation of aged care places. As a result, a service provider will not be an approved provider in respect of a service unless they have provisional or operational aged care places for that service (either as the result of allocation by the Department or a transfer from another provider).

This change ensures that there is clarity regarding the rights and obligations of residents and providers under the Act. Each service operated by approved providers for which there is an allocation of places will be fully regulated under the Act. Generally speaking this means that all Commonwealth funded aged care services will be fully regulated under the Act, along with services for which a provisional allocation has been granted in the expectation that these places will be made operational as soon as possible.

Services that are not operated by approved providers will not be regulated under the Act and services for which there is no allocation of places (for example, non-aged care related services such as disability services) will also not be regulated under the Act.

These changes ensure that non-aged care services are not inadvertently captured under the Act and also ensures that all residents of Commonwealth funded aged care services are afforded equal protections.

## What will this mean for applicants seeking to be an approved provider?

Approved provider status will not take effect for new applicants who are successful in their approved provider application until the service receives places (either provisional or operational places) through transfer or allocation.

Approved provider status will only take effect in respect of each service for which the service provider has an allocation of places.

Approved entities will have two years to receive an allocation of places. If an applicant does not receive places within that period, it will need to re-apply for approved provider status if they wish to become an approved provider (refer Section 9-1 and 9-2 of the Act).

The approved entity will have certain obligations prior to 'approved provider' status taking effect, including:

- To notify the Department, within 28 days, of any change of circumstances that affects the entity's suitability to be a provider of aged care or any change of key personnel.
- To comply with any request from the Department to give information relevant to the entity's suitability to be a provider of aged care.

If an entity is operating an aged care service and successfully applies for approved provider status, the approved provider status will not take effect until the entity receives an allocation of Commonwealth funded places in respect of the service. Until approval takes effect the **will not** be fully regulated under the Act and residents of the service will not

have access to protections of the Act (eg Complaints Investigation Scheme, guarantee scheme). Such entities should make this clear to any residents.

## What will this mean for existing approved providers without an allocation of places?

Entities that are approved providers without any allocations (as at the date the changes take effect on 1 January 2009) will cease being approved providers six months after the changes take effect (1 July 2009) unless they receive an allocation of places during that time.

Most of these entities will not be providing care to care recipients (and without an allocation of places, the care would not be funded by the Commonwealth). However, there will be a limited number of providers that are approved providers, do not have any allocations but do have care recipients.

An entity that is currently an approved provider without an allocation of places should advise residents if it does not receive an allocation of aged care places before 1 July 2009, as it will no longer be an approved provider under the Act.

It is important that providers of care make it clear to both existing and new residents, whether they are approved providers in respect of the service and whether the residents are therefore protected under the Commonwealth legislation. This also affects whether any payments made to service providers are protected as bonds under the Guarantee Scheme operated by the Commonwealth.

A resident may wish to move from a service that is operated by an entity that is no longer an approved provider from 1 July 2009. All refund obligations

would apply as usual if the resident decides to leave the former approved provider's facility and the bond must be repaid.

If residents choose to stay in their current home, bonds paid to the approved providers who cease to be approved at 1 July 2009 would continue to be covered by the Guarantee Scheme for a further 12 months. This strikes a balance between protecting the resident and recognising that they and their care provider have moved outside of the Commonwealth aged care regulatory framework.

### What will this mean for existing approved providers with allocations of places?

There will be very little immediate impact on existing approved providers with allocations of places. The major advantage to such providers is that there will be greater clarity within the industry about which services are regulated under the Act and which are not. This will also benefit providers that operate both Commonwealth funded aged care services and also other non-aged care or non-Commonwealth funded services.

It is also important to note that if an entity is an approved provider in respect of at least one service then as the provider acquires allocations in respect of other new services, they will automatically become approved providers in respect of those new services of the same care type. They will not have to keep re-applying for approved provider status. The approved provider status will automatically expand (by virtue of the operation of section 8-1) to encompass all of those services for which the approved provider has an allocation of places (be they provisional or operational).

However, if a company with approved provider status sets up a new approved provider entity, the new entity will need to seek approved provider status and the approved provider status will only take effect upon an allocation of aged care places. Its approval will only be in respect of the service for which it has an allocation of places.

Providers will still need to gain approvals for different care types. If, for example, a provider is only approved (as an approved provider) to provide residential aged care it will need to apply for approval to provide aged care services in the community, such as Extended Aged Care at Home (EACH) or Community Aged Care Packages (CACAP) before it can be considered for an allocation of EACH or CACAP places. However, providers will also continue to be able to apply for approval (as an approved provider) across all care types.

### References

#### **Section 8-1 of the Act**

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Clarifying the range of people who are key personnel

As some organisational structures have changed it has become more likely that control may be exercised over an approved provider by a variety of individuals and organisations that may be outside the immediate organisation that constitutes the approved provider. For example, an approved provider 'entity' may form part of a collection of companies managed by Directors of another company. Such people may not have previously been notified to the Department as key personnel despite them having a significant impact on the operations of the approved provider. For example, there may be individuals outside the approved provider structure who directly influence such things as the quality of care and the financial viability of the provider (directly impacting on the security of accommodation bonds and security of tenure). This presented a risk to care recipients and the Commonwealth, as certain business structures potentially escaped the scrutiny applied to key personnel in other business structures.

Approved providers are required to identify their key personnel as part of establishing suitability to provide aged care, and must notify the Department about changes in key personnel. The Act provides that an applicant's/approved provider's key personnel includes any person who is concerned in, or takes part in, the management of the organisation. This has been supplemented with an explicit requirement that key personnel includes any person having authority or responsibility for (or significant influence

over) planning, directing or controlling the activities of the applicant. This general wording is based on the accounting standard, AASBI 24 'Related Party Disclosures,' which is familiar to approved providers through current financial reporting requirements associated with the Conditional Adjustment Payments.

The new provision also makes it clear that all directors (in the case of bodies corporate) and members of the governing body (in the case of entities that are not bodies corporate) are key personnel.

This amendment will not inadvertently capture people who should not be notified to the Department (including, for example, religious leaders), unless they are actively involved in making financial or managerial decisions which affect the executive decisions of the aged care service.

A prescriptive approach (whereby individual positions within an organisation would be named in the legislation) was not considered practical for this measure, given the complexity and diversity of some of the modern organisational structures and roles within aged care.

To clarify, the policy intention behind this measure is to capture those making the overall financial or managerial decisions which impact the aged care service. If, for example, a person was **only** providing advice to a manager (such as an advisor or accountant) and had not previously been considered key personnel of the service, they **would not** now be considered key personnel. However, if a person had the capacity to make decisions about the service or services overall (such as the power to make the decision to sell a service) they would be considered

key personnel under the new arrangements.

Each case, however, needs to be considered on its merits. Under the new arrangements, providers will need to identify those responsible for decisions as the approved provider is in the best position to identify those persons. Only those who should be accountable will need to be notified to the Department.

## What will this mean for existing approved providers?

Approved providers will need to:

- Identify the people within or outside their direct approved provider organisation that have authority, responsibility for, or significant influence over the activities of the provider (including decision making for the overall management or financial arrangements of the service).
- Undertake relevant checks on those people to make sure they are not disqualified individuals and that they know the responsibilities of key personnel.
- Notify the Department within 28 days of 1 July 2009 (but may notify before) of these people if they are in addition to those already notified
- keep undertaking regular checks (as required by section 63-1A and related Principles) to make sure key personnel continue to be suitable as key personnel

Please note that the Department will be updating the key personnel notification form to reflect the changes to the legislation.

## What will this mean for entities applying for AP status for the first time from 1 Jan 2009?

From 1 Jan 2009 new applicants will have to notify the Department of **all** key personnel under the new arrangements as part of their approved provider application.

### References

#### Sections 8-3 of the Act

## Considering the record of entities with common key personnel

Many of the approvals under the Act (such as approval of extra service places or allocation or transfer of places) require that the Department consider the record of the approved provider. However, some business entities have separate approved provider entities for each service. Despite the fact that all of the approved providers of all of the services may have the same, or predominately the same key personnel, the Department has been constrained in its ability to take into account the performance record of other, related approved providers.

The changes will allow the Department to take into account whether a service provider that is, or has been, an approved provider has relevant key personnel in common with the applicant, in relation to all decision making points in the Act. In this case, the Department can look at the conduct of the other service provider as a provider of aged care, and its compliance with its responsibilities as a provider (i.e. the conduct of the approved provider/former approved provider with whom the applicant/service provider under consideration shares key personnel).

### What will this mean for existing providers?

This will only affect existing providers if they are applying for a new approval under the Act (for example, for extra service places, certification etc). This is not expected to have a significant impact – the applicant for approval would simply need to

identify any of its key personnel who:

- have been key personnel for other approved providers; or
- are currently still key personnel for other approved providers.

This would be notified to the Department in the relevant application. The Department would then have the opportunity to consider the record of the entities with common key personnel. It is important to note that a poor record of performance by another entity does not necessarily adversely impact the application of the approved provider under consideration.

For example, if a Director of Aged Care Company A is Ms Jones (one of the key personnel) and she is also one of the key personnel for Aged Care Company B, the Secretary must have regard to the compliance record of Aged Care Company B, when considering the application for approved provider status by Aged Care Company A.

If Aged Care Company B has a poor compliance record, this will not necessarily adversely affect Aged Care Company A's application. In considering the record of the other entities, the Secretary would have regard to matters such as how closely the entities are related. Each case would be considered on its merits and, where there have been compliance issues, the Secretary would take into account the seriousness of the compliance issue, the nature of the provider's response to the issue, and the roles and responsibilities of the key personnel under consideration.

### References Sections 8-3 of the Act

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at **[www.health.gov.au](http://www.health.gov.au)**

## Changes relating to the ongoing suitability of approved providers

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It has become the business practice of a number of approved providers to engage another company to manage the delivery of care services (for example, a management company).

If an applicant for approved provider status is entirely reliant on a management company to demonstrate that it has skills and experience in aged care, any changes to the use of that management company could have significant impacts on the organisation's capacity to provide aged care and in some instances could pose risks for the care recipients and also for the Commonwealth.

To ensure that an applicant continues to be suitable to provide care in these circumstances, amendments have been made so that, as part of an entity's approval as a provider of aged care, the Department may, by written notice given to the applicant at the time the applicant is notified of the approval, specify limited circumstances that the Department is satisfied materially affects the applicant's suitability to provide aged care. The Department would then specify the steps to be taken by the applicant to notify the Department and obtain agreement before there is any change to that circumstance.

### What will this mean for existing approved providers?

This will have no impact on existing approved providers.

However, new entities applying for approved provider status may be impacted. This will depend on a case by case consideration of the circumstances of the applicant for approved provider status. If the Secretary considers that the suitability of the applicant is dependent on a particular circumstance (e.g. the ongoing use of a particular management company) then at the time of granting qualified applicant status, the Secretary may choose to specify that the management company should not be changed unless the provider has done all things reasonably practicable to first notify, and seek the agreement of, the Secretary.

## References

### **Sections 8-5 and 63-1C of the Act**

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Transfer of provisionally allocated places under exceptional circumstances

Previously the process for transferring aged care places from one person to another only applied to the transfer of operational places, and not the transfer of provisionally allocated places.

The Government's goal is that provisional allocations should be made operational in the shortest possible time. A change of ownership would not necessarily compromise this objective and, in some exceptional cases, may be the most effective way of bringing a particular provisional allocation into operation. Yet provisional allocations were previously unable to be transferred even when it was in the interests of the aged community for the transfer to occur so that beds could come 'on-line' more quickly.

The Act has been amended to enable the transfer of provisionally allocated places (those already in existence as well as those to be allocated in the future) in exceptional circumstances. In deciding whether to approve a transfer, the Department will consider a number of factors, including (but not limited to) whether:

- the transferor has made significant progress towards being in a position to provide care, in respect of the places;
- it would be contrary to the interests of the aged community in the region to not permit the transfer; and

- the transferee is able to demonstrate an ability to provide care within a short timeframe after the transfer

This change allows a transfer in circumstances where the provider has progressed development to a point where significant delays in the provision of care would occur if the development of the aged care service was not completed in a short timeframe. If the provider could not continue the development, and exceptional circumstances are able to be demonstrated, the places could be transferred to another provider that could ensure completion (provided **this occurs at the same location** and is in the interests of the aged community).

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## What will this mean for existing approved providers?

Where an approved provider seeks to transfer provisionally allocated places, they will need to apply to the Department and include all the required information, as detailed in the Principles.

Approval for the transfer of provisionally allocated places will only be granted in **exceptional circumstances**, where it is in best interests of the aged community and it is clear that transferee will be able to bring beds on line in a timely manner.

### References

#### **New Subdivision 16-B of the Act and the Allocation Principles 1997 (as amended)**

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

## Increased Protections of Residents' Funds

The rationale for the bond refund requirements of the *Aged Care Act 1997*, the *Aged Care (Bond Security) Act 2006* and the Accommodation Bond Guarantee Scheme is to provide strong protections for consumers and ensure high levels of confidence in the aged care industry. The existing protections for accommodation bonds paid by residents include:

- the three Prudential Standards;
- the refund timeframes and interest requirements of the Act and the User Rights Principles 1997; and
- the Accommodation Bond Guarantee Scheme (Guarantee Scheme), created through operation of the *Aged Care (Bond Security) Act 2006* (the Bond Security Act), which guarantees the refund of accommodation bonds in the event that an approved provider becomes insolvent.

Since the introduction of the Guarantee Scheme in 2006 experience has highlighted some areas in which the protections for residents could be strengthened. In particular there was a need to:

- ensure continued protection of accommodation bonds taken by an approved provider that subsequently loses its approval; and
- address protection of unregulated lump sum payments (very similar to accommodation bonds) so that residents in similar circumstances are accorded similar protections.

### Protection of accommodation bonds owed by former approved providers

Prior to these changes, the Bond Security Act only operated in regards to current approved providers and did not protect bonds when the provider's approval lapsed or was revoked before the refund declarations had been made.

Additionally, once a service provider lost its approved provider status, the provisions of the Act intended to protect accommodation bonds, such as timeframes for bond refunds and interest on late refunds of bonds, ceased to have effect.

This was particularly problematic in cases where the reason for departure was the death of a care recipient and probate took time to be awarded, or where the liquidation process did not commence until several months after the facility has closed and approved provider status lapsed due to not providing aged care for six months.

This represented an unintended gap in the protections of the Guarantee Scheme, which has been addressed through amendments to the Bond Security Act and Act to ensure that:

- the Guarantee Scheme covers accommodation bonds owed by former approved providers; and
- approved providers responsibilities in relation to bonds survive the lapsing or revocation of approved provider status (refer section 57-21AA of the Act).

## Protection of lump sums taken prior to approval

The Department has identified that some existing approved providers have charged some of their residents lump sums very similar to accommodation bonds prior to receiving approved provider status (unregulated lump sums). To ensure that residents in this situation receive similar protection to those that paid accommodation bonds, the amendments ensure that:

- the Guarantee Scheme covers unregulated lump sums held by existing approved providers; and
- new approved providers are required to refund these payments (pre-allocation lump sums) as a condition of the allocation of aged care places, and may then choose to charge accommodation bonds subject to conditions of allocation requiring that the accommodation bond not disadvantage the existing resident compared to the arrangements for the pre-allocation lump sum, including that the accommodation bond not exceed the remaining amount of the pre-allocation lump sum. Other types of conditions that may be imposed by the Secretary include:
  - the timeframe for the refund of the pre-allocation lump sum;
  - the maximum size of any subsequent accommodation bond payable, being no more than the amount of the pre-allocation lump sum;
  - asset testing provisions, while ensuring the resident is not in a less advantageous position; and
  - retention amounts.

These changes will ensure that funds paid by

residents to their care providers, where the care provider subsequently becomes an approved provider, are protected under the Act and Bond Security Act. It is expected that only a small number of entities would be affected by these conditions.

There has been no change to arrangements for accommodation bonds associated with the transfer of allocated places between existing approved providers. Where an approved provider transfers all allocated places of a service to another approved provider, the accommodation bond liabilities continue to transfer in accordance with section 16-11 of the Act. Therefore there is no need for the transferor to refund the accommodation bonds. The transferor service becomes a former approved provider after all places and accommodation bond liabilities have transferred to the second approved provider:

Places transferred to new approved providers who hold pre-allocation lump sums may also be subject to conditions determined by the Secretary, which would be similar to those on new approved providers receiving an allocation of places through the ACAR.

## What will this mean for applicants who wish to become approved providers?

As detailed, above for the small number of prospective approved providers with residents, conditions will be applied to new allocations of places (or places transferred to them) to provide that, once a service provider accepts allocations of places and becomes an approved provider in respect of that service, they must (within a specified period), refund any lump sums payments paid by residents of the service. In place of the unregulated lump sums, the approved provider may accept bonds or

accommodation charges under the Act (refer Section 14-5 of the Act).

This must happen with the informed consent of the resident. If the resident does not consent, then the approved provider can continue to hold the lump sum but such funds will not be protected by the Guarantee Scheme and the resident should be made aware of this. The Department will expect the information provided to the resident and written confirmation of the resident's decision to be available in order to confirm such decisions.

### What will this mean for existing approved providers with allocations of places?

The amendments do not change arrangements for, or introduce any obligations on approved providers (as at 1 January 2009) in relation to, the transfer of existing unregulated lump sums.

Where existing approved providers (with allocations) hold unregulated lump sums (taken at a time before they became approved providers) these unregulated lump sums will be protected by the Guarantee Scheme.

### What will this mean for existing approved providers without an allocation of places?

Entities that do not hold allocations of places will cease being approved providers from 1 July 2009 (assuming they do not apply for, and receive, places before 1 July 2009).

If residents choose to stay in the home, the Guarantee Scheme will continue to apply to bonds

and lump sums for a further year. This strikes a balance between protecting the resident and recognising that they and their care provider have moved outside of the Commonwealth aged care regulatory framework.

The changes give residents in this circumstance reasonable time within which to move homes (if they wish to have ongoing protection of their bond) or to negotiate private arrangements with the service provider noting that as at 1 July 2009 they will no longer be an approved provider because they do not hold allocations of places.

### Other technical Amendments Related to the Protection of Residents' Funds

- Refund of outstanding amounts only - Previously, the Bond Security Act required the Department to determine the amount owing to a resident under the Guarantee Scheme at the time that their bond first becomes outstanding. If, after that point, a payment was made to the resident, then the amount paid by the Commonwealth under the Guarantee Scheme could not be adjusted so that the former resident only received the amount due. The unintended consequence was that the Commonwealth could technically be required to pay a former resident more than the amount that the resident was actually due. Technical amendments made to the Bond Security Act allow the Department to now take into account amounts that may be received by a care recipient subsequent to their bond becoming an outstanding bond such that the Commonwealth (and industry in cases where a levy is applied) only repays the actual amount outstanding to the resident.
- The impact of "claw-back" by a liquidator -

Previously, former care recipients who were refunded their bond balance up to six months before their approved provider entered liquidation could have potentially faced a situation where that bond refund was recovered (clawed back) by a liquidator during a company insolvency. In these cases, the resident would no longer have had their bond balance and would not have been eligible for refunds under the Guarantee Scheme. This would have disadvantaged such residents through no fault of their own. The Bond Security Act has now been amended to ensure that the Guarantee Scheme covers bonds that have been clawed back by a liquidator through no fault of the care recipient.

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Sanctions

### Amendments in relation to protection of current and future residents and deterring non-compliance

Amendments to the Act have made it clear that, in deciding whether to impose sanctions, the Department must consider whether the non-compliance threatens the health, welfare or interests of existing and future care recipients and the desirability of deterring future non-compliance.

These changes do not introduce fundamentally new concepts – rather they simply alleviate confusion and reflect past and current practice rather than expanding the range of matters taken into account. The amendments are designed to clarify and put beyond doubt the matters that the Secretary must take into account when deciding whether it is appropriate to impose sanctions.

The amendment specifying that the health, welfare or interests of care recipients is to be the Secretary's paramount consideration reinforces the emphasis placed in the objects of the Act on the interests of care recipients. The Secretary's delegates have always looked to the objects of the Act for guidance in deciding how much weight to give to the various matters they are required to take into account in making a decision.

### New sanction relating to no funding for new care recipients

The introduction of a new sanction is not a shift in policy, rather this is a technical amendment that more

directly achieves the original policy intention and will be more transparent in its application.

Prior to the amendments being made, there was a sanction that was used to restrict subsidy for new care recipients (in circumstances of non-compliance) – the sanction was known as “no funding for new care recipients” however, in practice the sanction restricted the provider’s “approved provider” status. Under this sanction the provider maintained all of its responsibilities under the *Aged Care Act 1997* in relation to care recipients at the time of the sanction, however, the responsibilities did not extend to care recipients who entered during the sanction period. Care recipients who entered the service during the period of sanction and who paid lump sums to the provider were not covered by the Guarantee Scheme - as the lump sums failed to meet the definition of an accommodation bond because when it was paid the provider’s approved provider status was suspended as a result of the sanction).

As this was never the intention, the new sanction has been included to better address the original intent (i.e. to deny subsidy for new care recipients) without needing to suspend or revoke the approved provider status in order to do so. The new sanction allows the Department to suspend an approved provider’s eligibility for subsidies for any person entering the service of the approved provider or for any service of the approved provider:

The Department recognises that sanctions of this nature have significant impact on aged care services and, as outlined below, rarely needs to impose such sanctions.

## What do the changes to the sanctions mean for approved providers?

The measures clarify the current intent, purpose and power of the legislation - there is nothing new in the measure for providers. The changes simply alleviate confusion and reflect past and current practice rather than expanding the range of matters taken into account.

When focussing on sanctions it is important to bear in mind that the Department rarely needs to impose sanctions. To give some perspective, in the year ended 30 June 2008 sanctions were only imposed on 14 services out of a total of nearly 3,000 aged care homes.

In the vast majority of cases involving non-compliance with the legislation - educative, pre-compliance activity is sufficient to encourage and assist providers to address areas of non-compliance.

To provide an example of the normal procedural steps, if the Aged Care Standards and Accreditation Agency finds non-compliance at a home, but the non-compliance does not pose a serious risk to residents, the Agency puts the home on a timetable for improvement. If the home makes the required improvements, the matter stops there and no compliance action is taken by the Department. It is only when there is an immediate and severe risk to residents, or when other approaches relying on the good-will and cooperation of the provider have been tried and have failed, that sanctions are imposed.

In deciding whether it is appropriate to impose sanctions, the Secretary’s delegates have always taken into account whether the non-compliance would

threaten the health, welfare or interests of future care recipients. For example, in imposing the sanction which restricts funding for new care recipients who enter the home while the sanctions is in effect, it is clear from the nature of the sanction that the Secretary is taking into account the interests of future care recipients by discouraging the home from admitting any new residents until the quality of care at the home meets the required standard.

By clarifying the matters that the Secretary must take into account in deciding whether to impose sanction, the amendments will also assist providers on whom sanctions are imposed to make submissions in support of an application for reconsideration that address the substantive issues.

## References

### Sections 65-2 of the Act

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If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Role of the Aged Care Commissioner

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The Aged Care Complaints Investigation Scheme (CIS) was established in May 2007 and provides a free and accessible complaints handling process which aims by the use of investigation to validate, or otherwise, issues that have been raised to determine whether there may be a breach of approved provider responsibilities.

The Aged Care Commissioner is a statutory appointment which was established to independently examine complaints made about the Department and the Aged Care Standards and Accreditation Agency (the Agency).

The Commissioner is able to examine certain decisions made by the CIS and to examine complaints about the CIS processes for handling matters under the *Investigation Principles 2007* (the Principles). The Commissioner may also examine complaints about the conduct of the Agency and the conduct of persons carrying out audits, or making support contacts, under the *Accreditation Grant Principles 1999* (the Principles). The legislation also gives the Commissioner the power to examine particular matters on the Commissioner's own initiative.

Experience with the administration of the CIS has highlighted some areas where the system can be improved. Amendments to the Principles have made necessary changes to ensure that the Commissioner can continue to properly perform his/her important role and that the complaints process is as effective as possible in addressing the concerns of individuals making complaints to the Commissioner.

Changes made include the following:

- Previously there was no avenue available for appeal to the Commissioner if the Department decides not to investigate a matter relating to an approved provider's responsibilities – the amendments address this and ensure that the Commissioner can examine such decisions and provide recommendations on these matters to the Department for reconsideration.
- The Commissioner can now accept an oral application from aggrieved person, dissatisfied about a decision and also have the discretion to require that it be in writing where necessary. Previously, an aggrieved person who was dissatisfied about a decision had to apply in writing, which was difficult for some older Australians.
- The Commissioner can now consider process concerns without the requirement that they first be referred to the Department or the Agency. However, the Commissioner would still have discretion to refer complainants to the Department or the Agency before accepting a process related concern. Before these changes, a complaint about the processes of the Department or the Agency had to be brought to the attention of the Department or the Agency, before the Commissioner could consider such concerns, which may have deterred valid complaints.
- Previous wording of the Principles potentially allowed for a cycle of appeal and counter appeal by aggrieved parties, as it was not clear that a decision made by the Secretary following advice from the Commissioner was a final decision. This has now been clarified. Those decisions upon reconsideration which relate to issuing a notice of required action will be treated as a new decision and therefore will be examinable

by the Commissioner: Any other decision of the Secretary on reconsideration is not examinable by the Commissioner:

- A change to the timeframes within which the Secretary must respond to a recommendation by the Commissioner (from 14 days to 21 days). This provides the Secretary with adequate time to obtain expert advice and to take this into consideration, along with the Commissioner's recommendations, when reconsidering the original decision.

## What will this mean for Approved Providers?

The changes are not expected to have a significant impact on Approved Providers.

Most of the changes simply streamline and improve the Commissioner's process and makes the CIS more accessible for people seeking examination of matters relating to the conduct of the Agency or the Department.

## References

### **Amended Investigation Principles 2007**

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If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Notifying the Department when residents are reported missing to police

Amendments have been made to the *Accountability Principles 1998* to introduce a new requirement for approved providers to notify the Secretary of the Department of Health and Ageing in the case of unexplained absences of residential care recipients where such absence has been notified to the police.

It is important to note that the notification will only be required when the approved provider has decided that a person is unaccountably missing and is sufficiently concerned to notify police.

This notification will enable the Department to determine whether appropriate action has been taken by the approved provider in respect of the missing resident and whether there are adequate systems and processes in place to ensure other residents' safety.

The Department's response to the notification will check with the approved provider whether there is an ongoing risk to residents. For example, further action would not be taken where a 'missing' resident turns up, having spent a day with family or friends without having previously advised the provider using available mechanisms. Whereas, if a resident is reported as 'missing' without reasonable explanation and it is considered that the approved provider did not have adequate systems and processes in place to prevent the absence, then an investigation would ensue and compliance action may be considered.

Amendments to the *Aged Care Act 1997* have also been made to allow approved providers to release personal information relating to compulsory reporting responsibilities under the *Accountability Principles 1998*.

### What will this mean for approved providers?

As a result of this new measure providers should not need to change their current practices in relation to the monitoring of residents or the reporting of absences to police.

The key difference is that with this measure approved providers will be required, from 1 January 2009 to notify the Department if there is an unexplained absence of a care recipient from a residential aged care service and the provider is sufficiently concerned that police have been notified. After the provider has notified the missing resident's family and the police it should then notify the Department.

The number to call is **1800 550 552**. The notification should be made as soon as practicable, and in any case within 24 hours of reporting to police.

This measure in no way impinges on the basic human rights of older Australians. An approved provider would only be required to notify the Department when it has decided that a person is **unaccountably missing** and the provider is sufficiently concerned that it has notified the police.

### References

**Section 62-1 of the Act and new section 1.14A of the *Accountability Principles 1998***

If you require further information about this new arrangement please phone the Aged Care Complaints Investigation Scheme on 1800 550 552.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

## Aged Care Assessment Team (ACAT) Assessments

The Aged Care Assessment Program (ACAP) is an initiative of the Australian Government that funds the state and territory governments to operate Aged Care Assessment Teams (ACATs). In 2008-09 the Australian Government funded \$72.18 million to the ACAP.

The role of ACATs is to assess the care needs of older people and to determine their eligibility for Australian Government-funded services – such as community aged care, nursing homes and aged care hostels.

Changes to the legislation, outlined below, remove unnecessary and administrative reassessments and provide the ACAT with the ability to focus their attention on the clients most in need of their services. However, an older person can still be reassessed at any time, if their care needs change.

- An approval for **residential respite care will not lapse**, but will expire if time limited. However, reassessment should occur at any stage if there has been a change in the care recipient's care needs.
- An approval for **high level residential care, EACH and EACH (Dementia) will not lapse**, but will expire if time limited.
- Approvals for care, either in the community or in a residential setting that has been limited to a low level will continue to lapse after 12 months. Assessment should be current at the commencement of the provision of care services and reassessment should occur at any stage if

there has been a change in the care recipient's care needs.

- Approvals in a community setting will align with approvals in a residential care setting. That is, for a person approved as a recipient of a high level of residential care, the limitation of approval does not prevent the person receiving residential care at any classification level, including low level. In other words, as a result of the legislative changes a person is **eligible to receive a CACP if they are eligible to receive an EACH or EACH (Dementia)** package and is **eligible to receive an EACH if they are eligible to receive an EACH (Dementia)** package.

Please note that only approvals granted from 1 July 2009 will be affected by these legislative changes.

### References

**Sections 23-3 of the Act and sections 5.7, 5.7AA, 5.9, 5.13A and 5.14 of the *Approval of Care Recipients Principles 1997 (as amended)***

If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of **1 July 2009**, can be found at [www.health.gov.au](http://www.health.gov.au)

## Police Check Requirements

In April 2006 the Government announced that operators of aged care services, directly subsidised by the Australian Government, would be subject to new police check requirements for certain staff and volunteers.

All approved providers were required to complete a Police Check Declaration form indicating their compliance with the requirements and submit the form to the Department by 30 September 2007,

The aim of the police check arrangements was to prevent unsuitable people from working in Australian Government subsidised aged care services. However, the current arrangements permit people with convictions for serious offences to have access to aged care recipients, where they are under supervision, and it is difficult to monitor approved providers' compliance with requirements for supervised access.

Amendments have therefore been made to the *Accountability Principles 1998* to amend existing provisions relating to police checks and to strengthen the current police check requirements making it necessary for all aged care staff with unsupervised or supervised access to care recipients to have a police check.

The current requirements in relation to volunteers will not change.

## What will this mean for approved providers?

Approved providers are currently required to ensure staff members and volunteers who have unsupervised access to care recipients undertake a police check every three years to determine their suitability to provide aged care.

As a result of these changes, police checks will be mandatory for *all staff*, regardless of whether they have supervised or unsupervised access to residents. Approved providers will also be required to take reasonable measures to require each of its staff members and volunteers to notify them if the staff member or volunteer is convicted of a precluding offence.

The matter of who bears the cost of a police check is for negotiation between the approved provider and their staff and volunteers. Volunteers may be eligible for reduced fees for police checks, if there is a state/territory scheme to support this, whether requested by an individual or by an approved provider on behalf of a volunteer.

The amendment clarifies that trades people who perform work otherwise than under the control of the approved provider (for example, independent contractors such as plumbers, electricians and delivery people) will not fall within the definition of a staff member.

As part of the amendments, approved providers are required to make a one-off written declaration to the Secretary by 30 April 2009, that they have met the new requirements.

## References

### **Part 4 of the Accountability Principles 1998 (as amended)**

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If you have any question about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at **[www.health.gov.au](http://www.health.gov.au)**

## Hardship Provision

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Amendments to the Act in relation to hardship are for very limited and particular circumstances relating to accommodation payments, and align with the changes to aged care funding that were implemented on 20 March 2008.

Under current arrangements, for example, a resident may be unable to access some assets, such as an investment that is unable to be withdrawn because the investment company has become insolvent, but may still have \$65,000 of other assets. This person has the capacity to pay a small accommodation bond or accommodation charge. However, the Act does not currently allow this resident to pay a reduced amount of accommodation bond or accommodation charge, or allow the provider to receive an accommodation supplement.

The amendments allow a resident with access to few assets to pay a small bond or charge and the Government to provide an accommodation supplement – this ensures that the approved provider is not out of pocket and that where the care recipient is able to pay some bond or charge, that this can occur.

### What will this mean for approved providers?

As a result of these changes, a resident will be able to contribute according to his or her ability. Changes to the Act, Principles and relevant Determination also ensure the provider receives an appropriate amount of accommodation supplement from the Government based on the amount of bond or

charge paid (or not paid).

### References

**Section 57-14 and 57A-9 of the Act, User Rights Principles 1997 (as amended) and Aged Care (Residential care subsidy – amount of accommodation supplement) Determination 2008 (No.2)**

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If you require further information about this new arrangement please phone the Aged Care Information Line on 1800 500 853.

Further information and answers to questions about changes to the regulatory framework for aged care, which take effect as of 1 January 2009, can be found at [www.health.gov.au](http://www.health.gov.au)

