



## **AGED CARE AND OTHER LEGISLATION AMENDMENT (ROYAL COMMISSION RESPONSE NO. 2) BILL 2021**

### **SUMMARY OF MAJOR LEGISLATIVE CHANGES**

As part of the staged implementation of the Government's reform measures announced in the May 2021-22 Budget in response to the Aged Care Royal Commission, the Minister for Health and Aged Care, Greg Hunt, tabled the above [Bill](#) (and accompanying [Explanatory Memorandum](#)) in the House of Representatives on 1 September 2021. This Bill would amend primary legislation, including the *Aged Care Act 1997*, to enable the implementation of the following changes to the aged care system:

1. A new classification and funding model for residential aged care (AN-ACC) to replace the current ACFI
2. Screening for aged care workers and governing persons of aged care providers
3. A Code of Conduct
4. Extension of incident management and reporting to home-based care
5. Changes to governance arrangements for approved providers
6. Information sharing between regulatory authorities
7. Strengthened regulation of Refundable Accommodation Deposits
8. An independent pricing and costing function for aged care services – the Independent Health and Aged Care Pricing Authority

The Bill is subject to consideration by Parliament, and may be referred to a Senate Committee for review.

The Bill also provides for the making of changes to subordinate legislation (Principles and Ministerial Determinations) which will set out operational detail and requirements to complement the primary legislation. Including such detail in subordinate legislation allows greater flexibility to make changes in the light of experience and changing circumstances, and for updates as necessary.

All of the above changes were canvassed by the Aged Care Royal Commission and can be traced back to recommendations in the Commission's Final Report. As well, several of the changes have been the subject of separate consultation processes undertaken by the Department of Health eg the AN-ACC, worker screening and extending the SIRS to home-based care. Exceptions include the governance arrangements for the Independent Health and Aged Care Pricing Authority and some of the new approved provider governance requirements.

It is anticipated that changes to subordinate legislation will be subject to further consultation.

A notable feature of these legislative amendments is that they will significantly increase regulation in the aged care sector. On the other hand, the amendments will see the replacement of the ACFI with the AN-ACC and the introduction of transparent independent costing and pricing arrangements for aged care services, both of which are key to underpinning the future sustainability and quality of future aged care services. Realising the potential offered by these two reforms will require a significant uplift in the sector's capacity to engage with the Independent Pricing Authority professionally on an evidence-based basis.

The implementation of the balance of the Royal Commission's recommendations will involve considerably more legislative change, including legislation to establish a single home-based care program aligned with

residential aged care in a way that would allow greater flexibility to respond to consumer choice of aged care service types and service providers.

All of the current amendments will need be incorporated into the drafting of the new aged care act recommended by the Royal Commission.

Especially given the Royal Commission context which did not shy away from increased regulation, it is not expected that the amendments themselves will draw much opposition in the Parliament.

The following provides more information about the legislative changes.

## 1. Residential aged care – AN-ACC

The Bill provides for amendments to the *Aged Care Act 1997* to enable the introduction of the AN-ACC classification and funding model from 1 October 2022, and related changes to residential respite care. These amendments to primary legislation will be complemented by amendments to subordinate legislation (Principles and Administrative Determinations) which will address important matters of detail.

The key elements of the AN-ACC that would become law under the Bill's amendments, all of which have been previously canvassed in consultations with the sector, are as follows:

- The removal of the current provision which limits the use of the AN-ACC classification system to the shadow assessment pilot so that, from 1 October 2022, AN-ACC classifications can replace the ACFI as the classification system on which care funding is based.
- From 1 October 2022, the calculation of the basic care subsidy under AN-ACC will comprise a **variable amount** linked to a care recipient's AN-ACC classification and a **fixed amount** linked to the characteristics of the residential aged care service where the person receives care.
- Amendments to ensure that the application of the means tested subsidy reduction to care subsidies under the new variable/fixed arrangements does not affect the maximum daily fee amount of resident fees that can be charged so that a resident in a remote area may not be charged a higher maximum daily amount of resident fees than a resident in a metropolitan area (noting that the fixed component has a higher waiting in more remote regions).
- The calculation of a **default variable amount** for the period before a care recipient is assessed and an amount for when a person is on **hospital leave**.
- Payment of the accommodation supplement in respect of residential **respite care** recipients.
- Removal of the current provisions which limit the number of respite days so that providers have flexibility to determine how much residential respite they wish to provide.
- That the basic subsidy amount for a care recipient for a day is either the amount determined by the Minister by legislative instrument, or worked out in accordance with a method determined by the Minister by legislative instrument.
- Continuation of transitional arrangements for residents who entered care prior to 1 July 2014.

## 2. Screening of aged care workers

The Bill includes amendments to the *Aged Care Act* and the *Quality and Safety Commission Act* which will create an obligation on providers to comply with requirements to be included in the *Accountability Principles* relating to the screening of:

- aged care workers of approved providers (being persons employed or otherwise engaged, including on a voluntary basis, by an approved provider or a contractor or sub-contractor), and
- governing persons of approved providers (being persons with responsibility for executive decisions of the entity or any person with significant influence over planning, directing or controlling activities of the entity)

These screening arrangements would replace the existing police check arrangements following a transition period.

Amendments also provide for:

- The Quality Commissioner to establish, operate and maintain an **Aged Care Screening Database** which will contain information about screening applicants, their screening applications and decisions made by Worker Screening Units (WSUs) in each State and Territory
- A civil penalty for corporations if they fail to comply with the screening responsibilities
- Increased information sharing powers that will allow:
  - the Quality Commissioner to share information (including protected information) in the Aged Care Screening Data Base with specified persons and bodies, including registered NDIS providers, the NDIS Quality and Safeguards Commission, WSUs, and state/territory health complaints bodies,
  - mutual recognition of screening checks across the aged care and disability support sectors, including amendments to allow information on the NDIS Worker Screening Data Base to be shared for purposes relating to the screening of an individual who is or is seeking to become an aged care worker or governing person.

The Data Base is intended to assist employers in the aged care and disability sectors to check the clearance status and suitability of an individual who has made a screening application to work in these sectors.

- Personal information on the data base is likely to be limited to full name, date of birth, clearance or exclusion status, clearance expiry date, and whether the clearance permits the individual to work. Details will be set out in subordinate legislation.

There is no mention in the Bill of any charges for individuals applying to be screened.

The *Accountability Principles* will be amended to specify categories of aged care workers and governing persons who will need to be screened, along with transitional arrangements.

## 3. Code of Conduct and banning orders

The Bill includes amendments to introduce a Code of Conduct that will apply to approved providers and their aged care workers and governing persons. The Code is to be finalised following a consultation process, but it is expected that the Code will be based on the existing NDIS Code of Conduct.

The Bill also provides for:

- An expansion of the powers and functions of the Quality Commissioner to allow the Commissioner to deal with failures to comply with the Code, including new powers to impose **banning orders** on aged care workers and governing persons of approved providers
  - The Explanatory Memorandum records that “given the restrictions imposed by a banning order, the intention is for banning orders to be issued only in the most egregious circumstances”, noting that other regulatory action is available for less serious breaches.
  - Banning orders may be of limited application; be permanent; or for a specified period; or subject to specified conditions.
- The Commissioner must give a written notice setting out the reasons for a banning order, the information relied upon for the decision and any conditions that may apply, and include information on how to apply for a reconsideration (within 14 days, or less if specified)
  - In considering the application of banning orders, the Commissioner will have to have regard to specified ‘suitability matters’ that also apply to considering the suitability of key personnel and governing persons under new governance arrangements (see Section 5 below)
  - the Commissioner’s decision will be appealable to the Administrative Appeals Tribunal for review
- The Commissioner to maintain a register containing information about individuals against whom a banning order has been made. Subordinate legislation will include rules concerning correction of information, making the register publicly available in whole or in part and “any other matter relating to the administration or operation of the register”<sup>1</sup>.
- Application to a broad range of workers, including volunteers and employees of contractors of approved providers where they provide care or other services to care recipients; this aligns with the application of the NDIS Code.
- Allows for the establishment of a scheme for dealing with information given to the Commissioner relating to compliance by an approved provider, aged care worker or governing person with the Code. The scheme would set out detail regarding how the Commissioner can deal with information relating to the Code of Conduct, including, for example, any procedures relating to investigations and communication about breaches of the Code, similar to that which applies for complaints.
- Civil penalties of up to 250 penalty points (\$50,000) may be applied to approved providers who are corporations and to aged care workers and governing persons of providers who are corporations who contravene the Code
  - existing conduct requirements and enforcement arrangements apply under state/territory legislation to state/territory approved providers and their workforce.
- A civil penalty of up to 1,000 points (\$200,000) may apply if an approved provider fails to take reasonable steps to ensure that an individual who is subject to a banning order does not engage in conduct that breaches the banning order.

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<sup>1</sup> All quotes in this Summary are taken from the Explanatory Memorandum which accompanied the Bill.

#### 4. Extension of incident management and serious incident reporting to home-based care

The Bill provides for the extension from 1 July 2022 of the Serious Incident Response Scheme beyond residential aged care to include home care and flexible care delivered in a home or community setting. This includes new responsibilities for home and community care providers to implement and maintain an incident management system and to report incidents to the Quality Commission, and protections for individuals reporting incidents.

The specific requirements relating to the management, assessment and response to incidents will be included in the *Quality of Care Principles*. This includes requirements regarding incident management systems and clarity about reportable incidents and events that do not fall within the definition of a reportable incident eg incidents that have resulted from a care recipient choosing to refuse care or services.

#### 5. Governance of approved providers

The Bill includes amendments that will introduce new governance responsibilities for approved providers, including in relation to:

- the re-introduction of key personnel reporting to replace the current disqualified personnel arrangements
- the membership of governing bodies,
- the establishment of new advisory bodies by each approved provider
- publicly available annual statements of operations

##### *Key personnel*

The Bill restores and extends an obligation on approved providers to notify the Quality Commissioner of changes in key personnel, and introduces 'suitability matters' for key personnel, as set out below:

- An approved provider must notify the Commissioner if an individual becomes, or ceases to be, one of the key personnel of the provider, including if the approved provider becomes aware of a change of circumstances that relates to a 'suitability matter' in relation to one of the provider's key personnel
  - the notification by the approved provider regarding a new key personnel must indicate whether the approved provider has considered the 'suitability matters' in relation to the individual, and
  - the notification relating to an individual ceasing to be one of the key personnel of the provider must set out the reasons the person ceased to be one of the key personnel
  - failure to comply will carry a maximum penalty of 30 penalty units (\$6,000)
- 'Suitability matters' in relation to an individual are to be defined in the in the *Aged Care Quality and Safety Commission Act*, and will include:
  - Experience in aged care or related forms of care
  - Whether an NDIS banning order applies
  - Whether convicted of an indictable offence
  - Insolvency
  - Subject to adverse findings by bodies such as ASIC, ACCC, APRA, Australian Crime Commission
  - Subject to findings or judgements in civil or criminal proceedings, but excluding spent convictions

- Any other matters specified in subordinate legislation
- The approved provider will be required to consider, at least once every 12 months, the ‘suitability matters’ in relation to an individual in accordance with any requirements to be specified in the *Accountability Principles*, and to keep a record of the ‘suitability matters’ that comply with the *Accountability Principles*.
- While the expectation is that the approved provider will be responsible for regularly considering suitability matters, the Commissioner will have power at any time to determine that an individual that is a key personnel of an approved provider is not suitable to be involved in the provision of aged care
  - The Commissioner must give notice to the individual and the approved provider that the Commissioner is considering making an ‘unsuitable’ determination, giving reasons and inviting submissions within 14 days
  - The approved provider may seek a review of the Commissioner’s determination, and the determination is reviewable by the Administrative Appeals Tribunal
  - Failure by a corporation to take action specified in a determination will carry a maximum penalty of 300 penalty units (\$60,000)

#### *Membership of governing bodies*

Passage of the Bill will require that approved providers must ensure that the majority of the members of governing bodies are **independent non-executive members**, and that at least one member of the governing body has experience in the provision of **clinical care**

- this provision does not apply if
  - the governing body of the provider has fewer than five members, and
  - the approved provider provides aged care though one or more aged care services to fewer than 40 care recipients

The Bill provides for an approved provider to apply to the Commissioner for an exemption from the requirements that a majority of the governing body must be independent non-executive members and that at least one member must have experience in the provision of clinical care. The intention is “to provide flexibility to allow approved providers to operate with a governing body that is right for their circumstances”.

The amendments also specify a number of factors the Commissioner may take into account in making an exemption determination (which the Commissioner has power to revoke). These factors include:

- The number of aged care services and aged care recipients
- Location of services
- Membership of the governing body and turnover of key personnel
- Alternative arrangements to address the objectives of the governance requirements
- Any other matters specified in the *Accountability Principles*.

#### *Quality care advisory body and consumer advisory body*

The Bill will require approved providers to establish and maintain a **quality care advisory body** with appropriate experience in providing care which must:

- comply with the requirements about membership to be specified in the *Accountability Principles*,

- give the governing body at least once every six months a written report about the quality of the aged care provided, and
- the governing body, in writing, must provide feedback to the quality care advisory body on how the governing body considered each report

Approved providers must offer in writing, at least once every six months, the opportunity to establish a **consumer advisory body**, including provide written advice to the consumer advisory body, where established, on how it considered any feedback received from the body.

#### *Staff – qualifications, skills and experience*

The *Aged Care Act* is to be amended to provide that an approved provider must require their governing body to ensure that staff members of the provider have appropriate qualifications, skills or experience and are given opportunities to develop their capabilities to provide care.

#### *Annual statement*

The Bill also introduces a requirement for approved providers to produce an annual statement which will be published on My Aged Care.

The Bill envisages that the annual statement will provide “clear, timely and meaningful information about the quality of care and performance”, with the details of what is to be provided in the statement to be specified in the *Accountability Principles* eg details of key personnel, attestations by the governing body, information on staffing, financial information and complaints.

- The Royal Commission was of the view that current annual reporting does not cover the scope of matters to be specified in the *Accountability Principles*.

#### *Directors to give priority to the interests of the approved provider*

The amendments set out requirements for directors of wholly-owned subsidiary corporations. That is, directors of a wholly-owned subsidiary that is an approved provider should be permitted by law not to give priority to the interests of the holding company that does not have any responsibilities under aged care law. To give effect to this, it will be the responsibility of the approved provider to ensure that their constitution does not authorise a director of the provider to act in good faith in the best interests of the holding company.

#### *Transition arrangements*

The Bill provides transition arrangements for the implementation of the changes to governance requirements. For example:

- If a change of circumstances occurs prior to 1 March 2022, the approved provider has 28 days, rather than 14 days, to notify the Commissioner
- The governance provisions concerning membership of governing boards applies from 1 March 2023
- The first annual statement must be prepared for the reporting period on or after the 1 July 2022

## **6. Information sharing**

The Bill provides for amendments to relevant Acts to allow greater information sharing between Commonwealth regulatory bodies across the aged care, disability and veterans’ affairs sectors in relation to non-compliance of providers and their workers, both with regard to actual non-compliance and where it is considered on reasonable grounds that a breach has occurred.

- Information sharing will also extend to other relevant bodies such as the Australian Health Practitioner Regulation Agency, the Nursing and Midwifery National Board, Health Care Complaints Commissioners

The Explanatory Memo states that these amendments are the first step towards broader regulatory alignment across the care and support sectors.

The Department of Health has advised that it will be initiating consultation processes later in September to identify opportunities for greater alignment.

## **7. Use of Refundable Accommodation Deposits (RADs) and Accommodation Bonds**

The Bill amends the *Aged Care Act 1997* to allow the Department of Health and the Quality Commission to request information or documents (specified in the Act) from an approved provider or borrower of a loan using a RAD or a bond, and to create an offence for a borrower who does not comply.

- An offence does not apply if the information or documents requested are not in the possession, custody or control of the approved provider

The *Aged Care Act* is also to be amended to clarify that an approved provider may only loan a RAD if it is a condition of the loan agreement that money loaned will only be used for a permitted purpose.

The Explanatory Statement states that the purpose of this amendment is to strengthen oversight of the use of RADs, noting that their use as loans may impact an approved provider's financial viability. Additional legislative changes to further strengthen prudential regulation have been foreshadowed during Departmental consultative processes.

## **8. Independent Health and Aged Care Pricing Authority (Pricing Authority)**

The Bill amends the *National Health Reform Act* and the *Aged Care Act* to:

- expand the functions of the renamed IHPA to include the provision of advice on aged care pricing and costing matters
- enable the performance of certain functions under the *Aged Care Act*
- establish new governance arrangements and appointments processes for the Pricing Authority
- specify in the *National Health Reform Act* that "the Commonwealth has taken full funding, policy, management and delivery responsibility for a consistent and unified aged care system covering basic home care through to residential care", as distinct from public hospital funding which is a joint Commonwealth/state responsibility.

The new aged care pricing and costing advice functions conferred to the Pricing Authority under the *Aged Care Act* are:

- to provide advice to relevant Commonwealth Ministers about methods for calculating amounts of subsidies and supplements to be paid under Chapter 3 (Subsidies) of the *Aged Care Act*,
- such functions relating to aged care pricing (if any) as are specified in regulations,
- to, as necessary, review data, conduct studies and undertake consultation for the purpose of performing an aged care pricing function or related function,
- to perform such functions ("Aged Care Act functions") as are conferred on the Pricing Authority by the *Aged Care Act* or a legislative instrument made under the *Aged Care Act*, or otherwise specified in regulations, and
- to do anything incidental to or conducive to the performance of the above functions.



Amendments to the *Aged Care Act 1997* made by the Bill will also confer those functions currently performed by the Aged Care Pricing Commissioner to the Pricing Authority.

The Bill provides for the following governance arrangements to apply to the Pricing Authority.

- A new position of **Deputy Chair (Aged Care Pricing)** will be created to complement a Deputy Chair (Hospital Pricing).
- Membership of the Pricing Authority will have nine members, including the Chair and the Deputy Chairs for Aged Care Pricing and Hospital Pricing.
- The Chair and Deputy Chair (Aged Care Pricing) are to be appointed by the Commonwealth,
  - whereas the Deputy Chair (Hospital Pricing) is appointed with the agreement of each state/territory health minister, and
  - the other six members of the Pricing Authority are appointed in consultation with the state/territory health ministers
  - The Commonwealth Minister must ensure that the Deputy Chair (Aged Care Pricing) and at least one other member of the Pricing Authority has substantial experience or knowledge and significant standing in aged care strategic leadership or operational management or aged care pricing and costing
- The Pricing Authority will establish an **Aged Care Advisory Committee** chaired by the new Deputy Chair (Aged Care Pricing) which will comprise one other member of the Pricing Authority and five other members with relevant experience and expertise appointed by the Commonwealth Minister
  - the Aged Care Advisory Committee may create sub-committees to assist it to perform its aged care pricing advice functions
  - the Chair of the Aged Care Advisory Committee must prepare and give to the Commonwealth Minister responsible an annual report for presentation to Parliament; such a report should include details of the operation of the Committee during the year being reported on
  - the Minister may require the Pricing Authority to prepare reports on certain matters relating to its aged care functions, which “the Minister may cause to be published”
    - but must exclude any personal information about a care recipient or information about the affairs of an approved provider
  - the Pricing Authority may assist the Aged Care Advisory Committee and its sub-committees, including by providing information and making available resources and facilities such as secretariat services and clerical assistance.
- The Pricing Authority’s requirement to keep the Standing Committee on Health informed of its operations does not extend to the Pricing Authority’s aged care functions.
- The functions of the existing Clinical Advisory Committee do not extend to the aged care pricing functions. “In the case of aged care pricing, the Aged Care Advisory Committee will provide expert advice to the Pricing Authority”.
- The *National Reform Act* will be amended to provide that certain functions are specific to either the aged care or hospital functions, as follows:

- the hospital pricing function includes determining the national efficient price for health services in public hospitals and to determine the efficient cost of health care services in public hospitals
- whereas the aged care functions are “to provide advice about certain aged care pricing and costing matters to each relevant Commonwealth Minister and to perform such functions as are conferred on the Pricing Authority by the *Aged Care Act*”.

Given that the pricing and costing functions for aged care and public hospitals are so different at many levels and contexts, CHA has previously expressed reservations about combining the two functions in one organisation. The governance arrangements provided in this Bill have taken account of these differences to provide a reasonable degree of separation of the two functions, but still leave the bulk of the Authority members appointed in consultation with state/territory Health Ministers.

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