



LEADING AGE SERVICES

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LEADING AGE SERVICES AUSTRALIA

SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO THE LIVING LONGER, LIVING BETTER LEGISLATION

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**SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE LIVING LONGER,
LIVING BETTER LEGISLATION
TABLE OF RECOMMENDATIONS**

Recommendation 1

Unless the Department of Health and Ageing (the Department) publishes:

- (a) specific dates as to when the draft (or a consolidated) principles documents will be presented for consultation;
- (b) a reasonable consultation period to facilitate appropriate and effective consultation; and
- (c) a summary of the subject matters to be dealt with in the draft

prior to the publication of the Committee's report, the Committee should not recommend that the Bill proceed during the life of this Parliament.

Recommendation 2

The Aged Care (*Living Longer, Living Better*) Bill should be amended to establish:

- (a) a statutory consultation process that will, in particular, assess draft principles on the basis of certainty, adequacy, fairness and sustainability; and
- (b) a parliamentary approval mechanism which requires both Houses of Parliament to approve the proposed instrument and permits a House of Parliament to amend the instrument.

Recommendation 3

At a minimum, the Committee should recommend the Senate Standing Committee on Regulations and Ordinances conduct an inquiry into:

- (a) the manner by which principles documents made under the *Aged Care Act 1997* are developed;
- (b) a consideration of the classes of rules that can be dealt with under subordinate legislation (such as principles documents) and those matters that should be contained in primary legislation; as well as
- (c) the role of the Parliament in the approval of principles instruments.

Recommendation 4

The Aged Care Pricing Commissioner should:

- (a) be a full time position;
- (b) have the position's qualifications set out in a manner similar to legislation creating Commissioners for the Productivity Commission and the Australian Competition and Consumer Commission; and
- (c) should not be able to delegate responsibility to the Department or, if that must be necessary, at the very least directions made should be published in the same way that the Prime Minister's directions are given to the Australian Prudential Regulation Authority as to how it should perform its relevant powers and functions.

Recommendation 5

The Aged Care Financing Authority should be established under the *Aged Care Act*, as a Committee, with responsibility to ensure, amongst other things, the continued sustainability of the aged care sector.

Recommendation 6

The Minister responsible for aged care (the Minister) should be required to provide a statement of material facts and reasons for decision where the Minister varies from the advice provided by the Aged Care Financing Authority.

Recommendation 7

The proposed section 52-N be amended so as to permit accommodation bonds to be used to repay loans listed in proposed subparagraphs 52N-1(2)(c)(i) – (iv).

Recommendation 8

The accommodation supplement should be added to the list of primary supplements made by the repeal and substitution of section 44-5 of the *Aged Care Act 1997* made by item 103 of Schedule 3 to the Aged Care (*Living Longer, Living Better*) Bill.

Recommendation 9

That the provisions imposing sanctions contained in the Aged Care (*Living Longer, Living Better*) Bill be deleted and the issue be reviewed further by the Prudential Advisory Group.

Recommendation 10

To preserve the right of approved providers to make an application for extra service status outside of the Aged Care Approval Round, items 65 and 74 of Part 1 of Schedule 3 to the Aged Care (*Living Longer, Living Better*) Bill should be removed.

Recommendation 11

The choice of payment (or 'cooling off') provisions contained in proposed Division 52F of the *Aged Care Act 1997* should be removed.

Recommendation 12

References to the workforce supplement in the Aged Care (*Living Longer, Living Better*) Bill should be removed.

Recommendation 13

The independent review proposed by the legislation should commence in January and report by 31st December 2015.

Recommendation 14

The Independent Review should also consider:

- (a) steps that are necessary to ensure the sustainability of the aged care sector;
- (b) areas where administrative steps involved in the regulation of aged care provision can be minimised or removed; and
- (c) the structure of the legislation, including a review of the matters better dealt with in the principal act and those matters properly dealt with by subordinate legislation, such as principles documents.

SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE LIVING LONGER, LIVING BETTER LEGISLATION

Introduction

1.1 LASA welcomes the opportunity to respond to the Committee on the *Living Longer, Living Better* legislation package¹.

1.2 Leading Age Services Australia (LASA) is the peak body for age service providers representing around 70% of providers covering all service types (home care, retirement living and residential care) in all settings (private, not-for-profit and mission based). LASA is committed to improved standards, equality and efficiency throughout the industry. We advocate for the health, community and accommodation needs of older Australians, working with government and other stakeholders to advance the interests of all age services providers, and through them, the interests of older Australians.

1.3 As Deloitte Access Economics has remarked:

The aged care system is experiencing rapid growth in demand due to demographic ageing, increases in income and expectations, and increasing prevalence of chronic disease. The industry is struggling to respond to these demand pressures, due to a lack of funding and tight regulations. In particular, there is evidence that the aged care industry is unsustainable, already exhibiting signs of a shortfall in investment in high care.²

1.4 In 2011, the Productivity Commission published *Caring for Older Australians*³, which made a number of recommendations proposing removal of supply restrictions of community care packages and licensed beds.

1.5 LASA agreed with the general direction of the report, if not every recommendation made.

1.6 The Government's response to the 2011 Productivity Commission Report is contained in the *Living Longer, Living Better* package which adopted some of the Commission recommendations but not others.⁴

¹ Constituting the Aged Care (*Living Longer, Living Better*) Bill 2013, the Australian Aged Care Quality Agency Bill 2013, Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013, Aged Care (Bond Security) Amendment Bill 2013 and the Aged Care (Bond Security) Levy Amendment Bill 2013

² Deloitte Access Economics *The Viability of Residential Aged Care Providers and the Potential Impact From Productivity Commission Recommendations on Changes to Aged Care Systems* (2011):i (citations removed)

³ Productivity Commission Inquiry Report Volume 1, No.53, 28 June 2011

⁴ <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-aged-care-review-measures-living.htm>

1.7 In particular, the Government believed ‘premature’ removal of all supply restrictions would create significant risk, although there is no statement of reasons as to why moving to such a position would be ‘premature’ in either the explanatory material accompanying the aged care package or the regulatory impact statement prepared for it.⁵

The Issue – A Shortage of Capital in Aged Care

1.8 In its *Caring for Older Australians* report, the Productivity Commission found:

The aged care industry is characterised by centralised planning processes which result in a heavy regulatory burden on aged care providers in order to maintain the quality of care. Without tackling the underlying policy framework that constrains supply it is unlikely that the regulatory burden can be substantially reduced.⁶

1.9 Moreover:

- (a) The Treasury’s Intergenerational Report indicates that 1 in 4 of the Australian population will be 65 years or older - doubling from 3 million people currently to over 6.2 million people - by 2042; whilst
- (b) the regulatory impact statement prepared for the aged care reform package has found that 82,500 beds must be built in the next 10 years at a cost of \$17 billion (in 2009-2010 prices)⁷; at a time when
- (c) 15% of residential care facilities or more ran at a loss up to December 2012; highlighting that there is a gross inadequacy of capital that will cancel industry’s ability to reach the target set in (b).⁸

1.10 Industry is concerned the *Living Longer, Living Better Package* does not recognise the difficulties faced by the sector in attracting the capital necessary to invest in services to the aged care market.

1.11 If sufficient capital is not attracted, where will the resources come from to provide the services that an aging Australian community require?

1.12 Industry is concerned that government funding of age services does not meet the cost of care and continues to deteriorate. Every Australian is entitled to quality care and that care must be funded adequately by

⁵ Australian Government *Australian Government Response Productivity Commission’s Caring for Older Australians Report* (2012):4

⁶ Productivity Commission *Caring for Older Australians* (2011):137

⁷ Aged Care Reform Package *Regulatory Impact Statement*: 15

⁸ Stewart Brown AGED CARE FINANCIAL PERFORMANCE SURVEY December 2012

government to ensure that their individual care needs are met. Outcomes of inadequate matching of funds to assessed need are:

- (a) client choice will be impacted;
- (b) lack of access to services;
- (c) prioritisation of resources – leads to inequity for clients;
- (d) reduced flexibility of services to adequately accommodate older people's needs and preferences;
- (e) lack of staff leads to fewer services offered;
- (f) pressure on carers to fill the gap;
- (g) social dislocation if clients have to move to access services;
- (h) providers may be forced to 'select' patients to reduce cost implications (bariatric, dementia, special needs); and
- (i) increased pressure on the health system including extended lengths of stay in hospitals and wait times for primary health care.

1.13 The remainder of this submission discusses the structure of the Government's proposed legislation as presented.

Primary concern – most reforms are contained in yet to be seen principles and other forms of subordinate instrument

What is actually going to be in the principles documents?

- 2.1 The most consistent observation made in the commentary on the aged care legislative package is that the majority of the elements important to the continued economic viability of the aged care sector are contained in subordinate instruments that will be prepared sometime prior to 1 July 2014.
- 2.2 It is a feature of the Health and Aged Care portfolio that many of the details are left to subordinate instruments called 'principles'.
- 2.3 This is the case with the *Living Longer, Living Better* legislative package. A non-exhaustive list of the matters expected to be dealt with in principles documents is contained in **Attachment 1**.
- 2.4 They will set the rules with regards to many of the areas of the *Living Longer, Living Better* package with which members of LASA have concerns. A brief summary of the more important concerns as expressed by LASA members is set out in **Attachment 2**.
- 2.5 LASA is quite concerned about the current timeline within which the new principles are being developed, given that these documents contain the detail that can determine whether or not millions of dollars are invested in aged care investment.
- 2.6 The timetable is tight:
 - (a) the Bills are scheduled to be passed by 1 July 2013 – little development of principle documents can be undertaken until the passage of the legislation;
 - (b) a general election is anticipated to be called on 14 September 2013, with the caretaker period commencing on 12 August 2013. It is likely that the capacity to consult and develop principle instruments will be limited (and could indeed stop) as this could be construed as a step in the making of policy decisions likely to commit an incoming government, and therefore contrary to the *Guidance on Caretaker Conventions*⁹;
 - (c) following the election, a government (irrespective of whether or not the current government is returned, or there is a change) will take time to form; and

⁹ See <http://www.dpvc.gov.au/guidelines/index.cfm> under relevant hyperlink

(d) the reality is that the Christmas period means that personnel will not be available to develop or process comments made against deadlines set around this period.

2.7 In this context, and given the volume of documentation that needs to be developed by 1 July 2014, there is great concern industry will be given limited time to consider instruments that will form the basis of commercial decisions made by providers worth millions of dollars and will greatly influence the nature of aged care services offered to Australians.

2.8 Unless appropriate advice can be taken to test the propositions contained in proposed rules, or that time is provided to allow a reasonable opportunity to decide whether rules can be practically applied in a commercial environment, regulatory failure will result.

2.9 It will be terribly disappointing if there are delays in developing principles documentation, and then industry is told that consultation will be curtailed because the Department is running up against a 1 July 2014 statutory deadline.

2.10 This is an issue the Committee has adversely commented on previously. In its report on the National Disability Insurance Scheme Bill 2012 it said:

Availability of the rules

1.9 A regular issue raised in the evidence for this inquiry was the lack of access to the draft Rules that would provide much of the detail on how the NDIS will function. People with disabilities, their families, carers and organisations were understandably frustrated that they were unable to answer many basic questions about the NDIS because the information was not yet available. The committee understands these frustrations, and regrets that hundreds of people who took the time to examine the legislation and provide detailed comment to the committee were unable to do so with the benefit of having the full legislative picture before them.

1.10 While the committee accepts that the officers of the Department of Families, Housing, Communities and Indigenous Affairs (department) were not 'sitting around twiddling our thumbs and wondering how late we can provide [the Rules] to the committee', the committee's inquiry was made more difficult due to a lack of knowledge regarding what the Rules contained.

1.11 The committee considers that, as a matter of good public policy, when a bill seeking to institute significant national reforms is going to rely on extensive subordinate legislation, a draft of that ancillary material should

be released as close as possible to the introduction of the bill itself, to enable both Parliament and the public to fully consider the issue before it.¹⁰

2.11 LASA acknowledges the publication of the Aged Care Principles Navigation Overview included at **Attachment 3**.

2.12 However, this document does not provide with sufficient precision as to when particular documents will be developed or what specific issues will be covered.

Recommendation 1

Unless the Department of Health and Ageing (the Department) publishes:

- (a) specific dates as to when the draft (or a consolidated) principles documents will be presented for consultation;**
- (b) a reasonable consultation period to facilitate appropriate and effective consultation; and**
- (c) a summary of the subject matters to be dealt with in the draft.**

prior to the publication of the Committee's report, the Committee should not recommend that the Bill proceed during the life of this Parliament.

2.13 The *Aged Care Act* is properly characterised as being 'framework' legislation.

2.14 This means that only the highest level of regulation establishing classes of entitlement are contained in the legislation, and the details establishing rights and obligations are contained in subordinate instruments.

2.15 In the case of aged care legislation, this largely constitutes the principal suite of documentation and ministerial determination.

2.16 As the Government's *Overview* document says:

As with the development of any legislation, decisions need to be made about the level of detail that is included in the Act, and the level of detail that should be included in delegated legislation such as the Principles and Aged Care Determinations (the Determinations). The Principles and Determinations are made by the relevant Minister but are still subject to regulatory impact assessment and to disallowance by the Parliament.

¹⁰ Senate Standing Committee on Community Affairs report *National Insurance Disability Bill 2012*, paragraphs 1.9-1.11 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/completed_inquiries/2010-13/ndis/report/c01.htm

Consistent with the principles of good regulation, the Government's approach has been to:

- describe the broad legal and policy framework in the Act
- ensure that important safeguards are expressly included in the Act
- enable the Principles and Determinations to deal with matters of detail that are likely to change over time and where flexibility is needed.¹¹

2.17 The Government has made a decision to increase the matters dealt with by subordinate instruments

2.18 For example, provisions governing eligibility for the viability supplement and the method for calculating the supplement amount are to be included in the new Subsidy Principles.

2.19 The relevant part of the explanatory memorandum says:

Item 126

Section 44-29 currently sets out the provisions governing eligibility for the viability supplement and the method for calculating the supplement amount.

This item removes section 44-29 from the *Aged Care Act 1997*. The eligibility criteria will be included in the new Subsidy Principles.

This is consistent with other changes made by this Bill to include eligibility details for all supplements (other than the accommodation and hardship supplements) in Principles.

The details about the viability supplement (to be included in the Principles) **are expected to remain the same as the details currently contained in the *Aged Care Act 1997***.¹² (emphasis added).

2.20 It is this uncertainty as to what *precisely* is going to be in subordinate legislation that concerns LASA members – after all, it is one thing to be generally aware, or be briefed by the Department on what will broadly be contained in instruments; however, the ‘eligibility details’ are the very things that aged care providers need to consider when deciding whether aged care services is a viable investment.

2.21 There are no prescriptive guidelines establishing what should be dealt with in either primary or subordinate legislation.

¹¹ *Implementing the Living Longer, Living Better Aged Care Package – Overview of Proposed Changes to the Aged Care Act 1997 and Related Legislation: 6*

¹² *Aged Care (Living Longer, Living Better) Bill 2013 Explanatory Memorandum page 65*

- 2.22 It is a choice of the department sponsoring legislation as to what is ‘important’ and what is a detail appropriate for subordinate legislation.
- 2.23 However, LASA notes that:
- (a) under Principle D of the Senate Standing Committee on Regulations and Ordinances *Guidelines on the Committee’s Application of its Principles* legislation that fundamentally changes the law should be regarded as being something more appropriately dealt with in primary, and not secondary legislation¹³; and
 - (b) paragraph 1.12(b) of the *Legislation Handbook* suggests that significant questions of policy including significant new policy or fundamental changes to existing policy should be contained in primary legislation.¹⁴
- 2.24 LASA believes the somewhat arbitrary nature of what is contained in principles and what is contained in the primary legislation is unsatisfactory.
- 2.25 The Government has announced a Council of Superannuation Custodians that will not only take the politics out of legislative reform but also ensure that the continued sustainability of superannuation is taken into account as regulatory decisions are made.
- 2.26 Because of the millions of dollars involved when investment decisions into aged care are made the same considerations apply in this context. A similar governance structure should apply with respect to aged care.
- 2.27 Finally, Parliament should have a clear role in approving principles before they commence, rather than an after-the-event opportunity to disallow; this includes the opportunity to amend principles as presented.

¹³ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/guidelines.htm

¹⁴ DPMC *Legislation Handbook* (1999):4. Document under relevant hyperlink at <http://www.dpmc.gov.au/guidelines/index.cfm>

Recommendation 2

The Aged Care (*Living Longer, Living Better*) Bill should be amended to establish:

- (a) a statutory consultation process that will, in particular, assess draft principles on the basis of certainty, adequacy, fairness and sustainability; and
- (b) a parliamentary approval mechanism which requires both Houses of Parliament to approve the proposed instrument and permits a House of Parliament to amend the instrument.

Recommendation 3

At a minimum, the Committee should recommend the Senate Standing Committee on Regulations and Ordinances conduct an inquiry into:

- (a) the manner by which principles documents made under the *Aged Care Act 1997* are developed;
- (b) a consideration of the classes of rules that can be dealt with under subordinate legislation (such as principles documents) and those matters that should be contained in primary legislation; as well as
- (c) the role of the Parliament in the approval of principles instruments.

Transparency – the Aged Care Pricing Commissioner and the Aged Care Financing Authority

Aged Care Pricing Commissioner

3.1 The Aged Care Pricing Commissioner¹⁵ has the important role of (amongst other things) approving extra service fees and accommodation payments that are higher than the maximum determined by the Minister.

3.2 The office bearer should therefore possess skills and attributes that are necessary to execute the role of the office, such as, for instance extensive skills and experience in working in, or providing services to, aged care services, as other commissioners appointed under other Commonwealth laws exercising specialist skills are required to hold.

3.2 However, we note that the legislation allows:

- (a) the position to be part time¹⁶;
- (b) no qualifications are prescribed; and
- (c) everything can be delegated to any APS employee (that is, not restricted to SES officers), although the Commissioner will be able to issue 'directions' to the delegate.¹⁷

3.3 Although the Minister said in his second reading speech:

I am pleased to advise that the bills introduce a new Aged Care Pricing Commissioner. The commissioner will make decisions where required on pricing issues, for example, regarding accommodation payments and extra service fees. This will increase the level of transparency and will ensure that aged-care recipients are charged fairly for their accommodation.

It is not clear how the office, as established in this legislation, is particularly independent of the government. Given the responsibilities reposed in the position of Commissioner, or for that matter the requirement for increased 'transparency' of process, LASA therefore does not believe the role of Aged Care Pricing Commissioner can be delegated to the Department of Health and Ageing.

¹⁵ Created by the proposed addition of Part 6.7 of the *Aged Care Act 1997* by Item 14 of Part 1 of Schedule 2 to the Aged Care (*Living Longer, Living Better*) Bill

¹⁶ Proposed section 95B-1

¹⁷ Proposed section 95B-11

Recommendation 4

The Aged Care Pricing Commissioner should:

- (a) be a full time position;**
- (b) have the position's qualifications set out in a manner similar to legislation creating Commissioners for the Productivity Commission and the Australian Competition and Consumer Commission; and**
- (c) should not be able to delegate responsibility to the Department or, if that must be necessary, at the very least directions made should be published in the same way that the Prime Minister's directions are given to the Australian Prudential Regulation Authority as to how it should perform its relevant powers and functions.**

Aged Care Financing Authority

3.4 The Aged Care Financing Authority (the Authority) is an administrative construct, not supported by statute.

3.5 Whilst it is perfectly legal for such 'authorities' to be created without statute, it would be unusual for a committee making recommendations as important as those made by the Authority to be a non-statutory body.

Recommendation 5

The Aged Care Financing Authority should be established under the *Aged Care Act*, as a Committee, with responsibility to ensure, amongst other things, the continued sustainability of the aged care sector.

3.6 An additional provision should be added requiring the Minister to provide a statement of material facts and reasons for decisions where the Minister varies from the advice provided by the Authority in much the same way that the Food Standards Australia New Zealand Council must notify when it rejects a standard prepared by the technocratic Food Standards Australia New Zealand, in the circumstance where the Minister rejects advice from the Authority/Advisory Committee.

3.7 This is because the regulatory impact statement for the aged care package indicated:

An Aged Care Financing Authority (ACFA) would be established to provide advice to the Department on fees and charges, including accommodation supplements paid to providers who offer superior accommodation services (for example new and significantly refurbished facilities).

.....

The proposal (contained in the legislation) would allow providers to charge accommodation charges or bonds that reflect the cost of accommodation is expected to result in an overall increase in the level of charges compared to the status quo. **This would improve the viability of providers because ACFA will ensure that accommodation bonds and charges will be set at an appropriate level to lift rates of return to a level necessary to attract investment. ...**¹⁸

3.8 This seems to imply that the Authority would make final decisions.

3.9 Yet the Authority's recommendations for level 2 accommodation payments was rejected by the Minister, who said in part his decision will 'offer greater consumer protection whilst still allowing industry sufficient flexibility in pricing'. There was no publication of the facts that led him to come to his asserted conclusion.¹⁹

3.10 More generally, the Committee should note that industry members were also disappointed that this mechanism failed to recognise that for aged care investment to be worthwhile, a fair rate of return on investment required is represented by the Weighted Average Cost of Capital (WACC). That accommodation payments are not structured to reflect this will, in time, lead to less willingness to invest (or remain in) the aged care sector. This issue remains a significant concern to aged care providers.

Recommendation 6

The Minister responsible for aged care (the Minister) should be required to provide a statement of material facts and reasons for decision where the Minister varies from the advice provided by the Aged Care Financing Authority.

¹⁸ Aged Care Reform Package *Regulatory Impact Statement*: 47

¹⁹ See: Minister Butler announced the Government's response to recommendations to Significant Refurbishment and Accommodation Payments <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-aged-care-acfa-final-recommendation-gov-response>

Specific provisions contained in legislation

- 4.1 As previously discussed, the vast majority of the *Living Longer, Living Better* initiatives will be enacted through the principles documents.
- 4.2 However, there are a few provisions contained in the Aged Care (*Living Longer, Living Better*) Bill that require comment and amendment.

Permitted use of accommodation bonds

- 4.3 It is common for approved providers operating nursing homes and similar accommodation to lend the proceeds of accommodation bonds to associated companies responsible for the construction of the accommodation to repay construction debt.
- 4.4 The current Section 37-17A of the Aged Care Act 1997, largely replicated in the proposed new section 52N-1²⁰ does not clearly permit this.
- 4.5 Should the current position be retained, to stay compliant with the new legislation and still meet the bank debt reduction requirements, an approved provider will need to restructure these existing structures and consolidate the operating and leasehold structures into one entity, incurring significant stamp duty and capital gains tax costs without providing any further security to the resident.
- 4.6 Whilst undoubtedly it can be argued that it is something that can be dealt with 'in the principles' this is such a standard accounting structure in the industry it is appropriate for this to be a matter established in the legislation itself, and so cannot be changed without the prior consent of Parliament rather than being dealt with by way of subordinate legislation.
- 4.7 This certainty in legislative structure is important to maintain the sustainability of accommodation supply to an aging community as it will provide lenders the certainty that any change will only take place after parliamentary debate.

Recommendation 7

The proposed section 52N-1 be amended so as to permit accommodation bonds to be used to repay loans listed in the proposed subparagraphs 52N-1(2) (c) (i)-(iv).

²⁰ Inserted by item 149 of Part 1 of Schedule 3 to the Aged Care (*Living Longer, Living Better*) Bill

Payroll tax supplement

- 4.8 LASA cannot support the removal of the accommodation supplement from the list of primary supplements as this will mean a decrease in funding via a reduced payroll tax supplement.
- 4.9 Given that other government payments have been clawed back, this is a further reduction in payments to providers that cannot be supported, particularly given that the reduction, aimed at supplementing the capacity for approved providers to pay payroll tax, could lead to a decision to reduce employment numbers because of the level of payroll tax payable.
- 4.10 This would also appear counter to the Government's intentions to improve workforce retention levels inherent in the creation of the Workforce Supplement.
- 4.11 The methodology and intent of the Aged Care (Payroll Tax Supplement) Determination 2001 should be maintained.

Recommendation 8

The accommodation supplement should be added to the list of primary supplements made by the repeal and substitution of section 44-5 of the *Aged Care Act* made by item 103 of Schedule 3 to the *Aged Care (Living Longer, Living Better) Bill*.

Sanctions

- 4.12 The proposed legislation proposes to impose sanctions on approved providers if they make a single mistake in appraising or reappraising a person's level of care; this is seen as excessive. The current law, which requires a substantial number of errors before a sanction can be imposed should remain especially where under the current legislation there has been few approved providers sanctioned or prosecuted for this offence.
- 4.13 Moreover, the proposed new sanctions for breaching duties imposed by Parts 4.1, 4.2 and 4.3 of the *Aged Care Act* on approved providers have been neither discussed as part of the Prudential Advisory Group established by the Minister nor mentioned in the draft *Compliance Strategy Paper* issued by the Department.

4.14 LASA recommends that these proposed changes be referred to the Prudential Advisory Group for consideration.

Recommendation 9

That the provisions imposing sanctions contained in the Aged Care (*Living Longer, Living Better*) Bill be deleted and the issue be reviewed further by the Prudential Advisory Group.

Application for Extra Services

4.15 As the explanatory memorandum makes clear, the structure of the Aged Care (*Living Longer, Living Better*) Bill anticipates that applications for extra service status should be submitted and considered through the Aged Care Approval Round (ACAR).

4.16 However, an explanation that because of reasons of ‘administrative efficiency’ these applications should be managed in parallel with the ACAR²¹ is insufficient to remove the statutory right to apply for extra service status within 90 days of receiving the application²², the provision proposed to be removed by the current Bill. A general right to seek extra service status should remain.

Recommendation 10

To preserve the right of approved providers to make an application for extra service status outside of the Aged Care Approval Round, items 65 and 74 of Part 1 of Schedule 3 to the Aged Care (*Living Longer, Living Better*) Bill should be removed.

Choice of payment options (‘cooling off’)

4.17 LASA members have expressed a strong view that consumers should formally agree and commit to their particular accommodation payment option before entry (that is lump sum, or periodic payment or some combination) into residential aged care.

4.18 It is uncommercial:

- (a) to allow someone to take possession of a property without agreeing the terms of payment;
- (b) for an approved provider not to know whether there will be a bond (Refundable Accommodation Deposit) to replace a bond (when a bond paying resident leaves); or

²¹ As explained in page 12 of the Overview document

²² Currently contained in section 32-9 of the *Aged Care Act 1997*

- (c) from the resident's perspective, not having made financial arrangements to enter a place of accommodation before the resident moves in.

4.19 LASA is concerned that the choice of payment (or 'cooling off') period could inadvertently cause cost increases as providers must cater for circumstances where either the resident changes his or her mind as to how to pay for accommodation. Commercial certainty requires that both parties have properly determined their commercial relationship, including mode of payment before it has commenced.

Recommendation 11

The choice of payment (or 'cooling off') provisions contained in proposed Division 52F of the *Aged Care Act 1997* should be removed.

Workforce Compact

- 4.20 The current workforce of 350,000 age service workers will need to grow to almost 1 million (1 in 20 Australians) by 2050 to meet the increasing age services demand.
- 4.21 The Government has proposed a workforce supplement to be enacted through subordinate legislation²³ to give effect to a 'workforce compact' designed to encourage workforce participation and retention²⁴.
- 4.22 However, unfortunately the use of the term 'compact' is a misnomer as there is no general agreement between all the relevant stakeholders.
- 4.23 Moreover, eligibility terms and conditions need to be adhered to, including a requirement for providers to fund a minimum pay increase for care workers of 3%, for enrolled nurses 8.5% and for registered nurses 12.6%, whilst all participating employers are required to deliver minimum pay increases of 2.75% through enterprise bargaining agreements.
- 4.24 At the same time, \$1.6b has been clawed back through reductions in the Commonwealth's own outlays on aged care funding and through funding decisions made under what is known as the Aged Care Funding Instrument²⁵, with the net result being that this reform is being fully funded by providers with limited capacity to either absorb or pass on the additional costs.

²³ Called 'subsidy principles' – see section 48-3 proposed to be inserted into the *Aged Care Act 1997* by Item 142 of Part 1 of Schedule 3 to the Living Longer Living Better Bill 2013

²⁴ See <http://www.livinglongerlivingbetter.gov.au/internet/living/publishing.nsf/Content/Workforce-Compact>

²⁵ Used to calculate the Residential Aged Care Subsidy

Recommendation 12

References to the workforce supplement should be removed.

The Statutory Committee

5.1 Finally, section 4 of the Aged Care (*Living Longer, Living Better*) Bill proposes that an ‘independent review’ be undertaken of the operation of the amendments made by the legislation that implements the Government’s *Living Longer, Living Better* package, that will look at the following things:

- (a) whether unmet demand for residential and home care places has been reduced;
- (b) whether the number and mix of places for residential care and home care should continue to be controlled;
- (c) whether further steps could be taken to change key aged care services from a supply driven model to a consumer demand driven model;
- (d) the effectiveness of means testing arrangements for aged care services, including an assessment of the alignment of charges across residential care and home care services;
- (e) the effectiveness of arrangements for regulating prices for aged care accommodation;
- (f) the effectiveness of arrangements for protecting equity of access to aged care services for different population groups;
- (g) the effectiveness of workforce strategies in aged care services, including strategies for the education, recruitment, retention and funding of aged care workers;
- (h) the effectiveness of arrangements for protecting refundable deposits and accommodation bonds;
- (i) the effectiveness of arrangements for facilitating access to aged care services; and
- (j) any other related matter that the Minister specifies.²⁶

5.2 The Committee will report in 2017, giving effect to the Government promise to ‘conduct a substantial review five years into the current ten year plan in an endeavour to ‘allow the Government and the sector to consider further relaxation of supply arrangements taking into account the development of a mature market’.²⁷

5.3 LASA believes this committee report, and the enactment of market based mechanisms to guide investment in the aged care sector, cannot wait.

²⁶ Section 4 of the Aged Care (*Living Longer, Living Better*) Bill 2013

²⁷ Australian Government (2012): 4

- 5.4 Put another way, it is not satisfactory for the concerns of LASA to be dealt with by being told 'we know, they are in the terms of reference for a Committee will look at it and report back in five years time'.
- 5.5 Many of the Productivity Commission recommendations were not accepted or otherwise significantly changed by the Government, so as to retain a system that remains subject to significant government discretion.
- 5.6 Industry fears that without clear market signals there is some possibility of a misallocation of places in various communities, leading to a shortage in aged care accommodation availability. The creation and enforcement of rules requiring the maintenance of financially unsustainable business models also hinders the efficient provision of aged care services. Those requiring aged care will be the losers.
- 5.7 The public interest requires the aged care funding structure to be reviewed earlier than 2017. The review must be expedited to ensure that the aged care legislation captures market efficiencies, to the advantage of all Australians.

Recommendation 13

The independent review proposed by the legislation should commence in January and report by 31st December 2015.

Recommendation 14

The Independent Review should also consider:

- (a) steps that are necessary to ensure the sustainability of the aged care sector;**
- (b) areas where administrative steps involved in the regulation of aged care provision can be minimised or removed; and**
- (c) the structure of the legislation, including a review of the matters better dealt with in the principal act and those matters properly dealt with by subordinate legislation, such as principles documents.**

ATTACHMENT 1

The following is a non-exhaustive list of matters that are important to the industry that LASA members expect will be dealt with by way of subordinate instrument. Because no precise detail of what will be contained in the instruments is available, no further comment can be made at this time.

- Amendment of the accommodation bond retention mechanism contained in the User Rights Principles.
- Amendments to the contents of the Specified Care and Service Schedule contained in the Quality of Care Principles to describe what is to be provided to all residential aged care residents.
- What constitutes the 'significant refurbishment' of premises?
- The purposes to which refundable deposits and accommodation bonds may be put.
- The prudential standards that must be met by approved providers.
- With the removal of the flexible care provisions, the period of time in which a care recipient must be provided with care is in accordance with the approval of care recipient principles that have yet to be seen.
- The period of time in which a care recipient must be provided with care, in accordance with (unseen) approval of care recipient principles.
- The criteria for granting extra service status, to be contained in Extra Service Principles.
- The precise nature by which accommodation payments and accommodation contributions have yet to be determined. These will be contained in yet to be seen fees and payment principles.
- The unknown criteria to receive the two new supplements for dementia and veterans.

ATTACHMENT 2

This is a brief discussion of some of the more important issues arising from *the Living Longer, Living Better Package* not discussed earlier.

Changes to the Specified Care and Services Schedule

One of the features of the *Living Longer, Living Better Package* is that the distinction between high care and low care residents will be removed.

This means the Specified Care and Services Schedule for Residential Care Services which is part of subordinate legislation known as the Quality of Care Principles, will require amendment.

It is proposed that with the removal of the high care / low care distinction, the new Schedule will outline what are the 'standard' care and services that are required to be provided to **ALL** residents with some requiring the resident to have an assessed need to receive the care or service. The concern is that with this fundamental change to the Schedule there will inevitably be increased costs to providers, and for the system overall. There is no guarantee that these additional costs will be met by increased government subsidy or recognition that consumers may face increased fees and charges. Moreover, items in the draft schedule assume that there will be the workforce available to provide the additional items outlined in the draft schedule. This is an assumption based on aspiration rather than fact.

This again creates uncertainty, and increased cost, for industry.

Changes to Accommodation Prices

The Government has proposed to change the way accommodation payments are structured.

One of the most important elements is the establishment of a three-tiered accommodation \$payment methodology set by reference to a Daily Accommodation Payment and a maximum permissible interest rate (MPIR) determined by the Minister (thus tying returns to providers to the performance of monetary policy rather than to the weighted average cost of capital, WACC).

It is also proposed to abolish the retention amounts on lump sum payments (Refundable Accommodation Deposits, or RADs).

LASA opposes the abolition of the retention amounts on refundable accommodation deposits.

This is because bonds are typically used to either pay back finance or fund capital works when undergoing construction of new facilities. In this way, commercial debt is sourced from financial market institutions (e.g. banks) for the construction period, and then paid back as residents enter the new residential aged care facility and provide bonds.

Using bonds to reduce commercial debt provides advantages to providers as there is a shorter period of debt repayment compared to funding construction finance through other means, such as periodic payments, and there is a lower required rate of return paid on bond debt relative to commercial debt.

Based on current policies, the Department of Health estimates that the residential care industry will need to build in the order of 82,500 additional places over the next decade. At the same time, the industry will need to rebuild some of its current stock.

It is industry experience that existing accommodation payment and funding arrangements have not provided sufficient incentive for investors and providers to build and improve aged care facilities.

Additionally, changes in consumer demands are leading to the expansion of community care packages. This is acting to ensure that older people delay their entry to residential care until they require high-level care.

Coupled with lower investment due to the modest financial returns gained by providers under the current funding arrangements, providers will have less access to capital to build and invest in aged care facilities, which could in turn impact on availability of aged care to Australians.

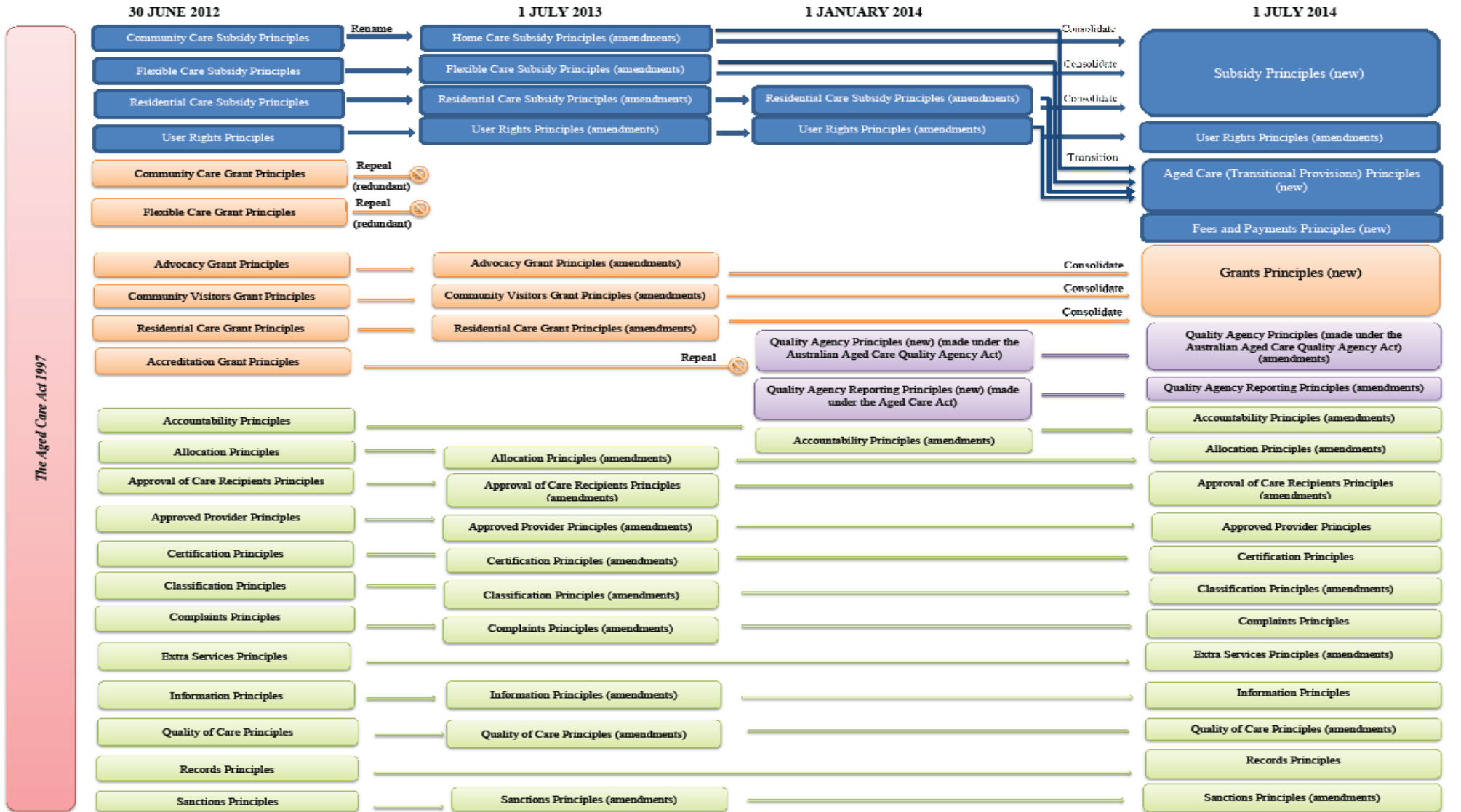
40% Ratio

The Government must consider changes to requirements to accommodate a minimum of 40% financially disadvantaged residents to qualify for full accommodation supplement. This is a discriminatory restriction upon providers and unachievable in many areas of Australia. It is a restriction that does not achieve its intended use of ensuring disadvantaged residents receive equivalent access to care and services.

Attachment 3: Aged Care Principles Navigation Overview

Aged Care Principles Navigation Overview- as at 18 March 2013

Produced by the Department of Health and Ageing



ATTACHMENT 4 – Draft Legislative provisions

1. Establishing a committee to review the development of principles documentations and to create a more formalised role for the Parliament in the approval (Recommendation 2)

1. Schedule 1, after Item 184 insert:

184A After table, section 96-1

- (2) The Minister must not make a Principle unless the Minister has:
- (a) caused to have published a discussion version of the draft (**the discussion draft**) on a website maintained by the Department; and
 - (b) provided the discussion draft to members of the Principles Review Committee; and
 - (c) allowed at least eight weeks for public comment, from the day the discussion draft was published on the website; and
 - (d) has received a report on the draft Principle from the Principles Review Committee.
- (3) Despite anything contained in the *Legislative Instruments Act 2008*:
- (a) a Principle does not come into effect until it has been approved by resolution of each House of Parliament; and
 - (b) a House of Parliament may amend a Principle.
- (4) A Principle that has been amended by a House of Parliament (**the amended Principle**) has no effect unless the other House of Parliament agrees by resolution to the amended Principle within 15 sitting days of being informed of the making of the amended Principle.

96.1A Establishment of the Principles Review Committee

The Principles Review Committee is established.

96.1B Functions of the Principles Review Committee

The function of the Principles Review Committee is to review the discussion draft of Principles and to prepare a report on the quality of the document against the principles of:

- (a) certainty; and
- (b) adequacy; and
- (c) fairness; and
- (d) sustainability.

96.1C Membership of the Principles Review Committee

The Principles Review Committee consists of the following members:

- (a) a Chair; and
- (b) at least 4, and not more than 5, other members.

96.1D Appointment of Principles Review Committee members

- (1) Each Principles Review Committee member is to be appointed by the Minister by written instrument for a period not exceeding three years.
- (2) A person is not eligible for appointment as a Principles Review Committee member unless the Minister is satisfied the person has:
 - (a) substantial experience or knowledge; and
 - (b) significant standing;in the field of the provision of aged care services.

96.1E Publication of report on draft Principles

- (1) The Chair of the Principles Review Committee must:
 - (a) present to the Minister; and
 - (b) cause to have published on a website maintained by the Departmentany report on the discussion draft of Principles prepared pursuant to section 96.1 as soon as practicable after the Committee has finalised its report .
- (2) The report may include statements from members who do not agree with the conclusions contained in the report.

2. Amendments to the legislation establishing the Aged Care Pricing Commissioner **(Recommendation 4)**

- 1. Schedule 2, item 10, omit paragraph 95A-10(2)(g)
- 2. Schedule 2, item 14, insert after subsection 95B-2(1)
 - (1A) The *Aged Care Pricing Commissioner must have extensive skills and experience acquired in working in, or providing services to, aged care services.
- 3. Schedule 2, item 14, subsection 95B-2(2), omit “or on a part-time basis”.
- 4. Schedule 2, item 14 omit subsection 95-B(5), substitute:

Leave of absence

The *Aged Care Pricing Commissioner:

- (a) has the recreation leave entitlements that are determined by the Remuneration Tribunal; and
- (b) the Minister may grant the Aged Care Pricing Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

5. Schedule 2, item 14, omit section 95B-7, substitute:

95B-7 Restrictions on outside employment

The *Aged Care Pricing Commissioner must not engage in paid employment outside the duties of the Aged Care Pricing Commissioner's office without the Minister's approval.

6. Schedule 2, item 14, omit paragraph 95B-10(2)(g)

7.

Either

Schedule 2, item 14, omit subsection 95B-11

Or

Schedule 2, item 14, after subsection 95B-11(3), insert

- (4) The *Aged Care Pricing Commissioner must cause to have any direction made under subsection (3) published on a website maintained by the Department within 7 days of making the direction.

3. Establishing the Aged Care Financing Authority in statute (Recommendations 5 and 6)

Schedule 1, after item 13, insert:

13A at the end of Part 6.5

Add:

Part 6A – The Aged Care Financing Advisory Committee

95AA Establishment of the Aged Care Financing Advisory Committee

The Aged Care Financing Advisory Committee is established.

95AB Membership of the Aged Care Financing Advisory Committee

The Aged Care Financing Advisory Committee shall consist of:

- (a) an independent Chair; and
- (b) an independent Deputy Chair and
- (c) five Members with substantial experience and significant standing in at least one of the following:
 - (i) the provision of aged care services, with particular expertise in relation to the not-for-profit sector; and
 - (ii) the provision of aged care services, with particular expertise in relation to the for-profit sector; and
 - (iii) the provision of debt finance to the aged care sector or similar sectors;
 - (iv) the provision of equity investment to the aged care sector or similar sectors;

95AC Appointment of Aged Care Financing Advisory Committee members

Each Aged Care Financing Advisory Committee member is to be appointed by the Minister by written instrument for a period not exceeding three years.

95AD Functions of the Aged Care Financing Advisory Committee

- (1) The function of the Aged Care Financing Advisory Committee is to:
 - (a) produce annually a report on the ongoing sustainability of the aged care sector (called in this part the **annual sustainability report**);
 - (b) provide advice to the Minister on:
 - (i) the level of accommodation payments;
 - (ii) the level of fees payable to approved providers for additional amenities or services not covered by the relevant Schedule of Specified Care and Services; and
 - (iii) any other matter related to pricing and financing issues in the aged care sector referred by the Minister.
- (2) For the purposes of subsection (1), when considering the ongoing sustainability of the aged care sector, the Aged Care Financing Advisory Committee must consider the need to:
 - (a) support access, quality care, flexibility and choice for care recipients including those with special needs and living in rural and remote areas;
 - (b) recognise that accommodation is essentially a personal responsibility, so that care recipients with sufficient means should pay a reasonable price corresponding to the value of the accommodation services that they receive, with appropriate safeguards for people who are marginalised, disadvantaged or have modest means;

- (c) enable efficient aged care providers to:
 - (i) provide quality care for their care recipients, while being appropriately rewarded for the operational risks inherent in operating an aged care business; and
 - (ii) make a return on investment that is sufficient to ensure that investment will continue to be made in the aged care industry at the rate needed to meet the demand for services;
- (d) ensure that the cost of aged care remains sustainable for the Australian taxpayer;
- (e) support a stable and skilled workforce that can meet the growing demand for aged care services;
- (f) minimise the regulatory burden placed upon aged care providers;
- (g) maximise competition while ensuring appropriate consumer protection;
- (h) ensure that the availability, affordability and quality of aged care services meet the broader community's expectations;
- (i) assess the impact of the aged care financing arrangements on access to quality care, sustainability, industry viability, and the aged care workforce, including an analysis of revenue, cost and productivity movements in the aged care sector;
- (j) assess the level, and impact on access to care, sustainability, industry viability, and the aged care workforce, of any accommodation payments levied by approved providers for entry to residential aged care; and
- (k) assess the level, and impact on access to care, sustainability, industry viability, and the aged care workforce, of any additional amenity fees for additional services that are levied by approved providers for aged care services.

95AE Annual report to Parliament

- (1) The Chair of the Aged Care Financing Advisory Committee must provide the annual sustainability report to the Minister by 31 May in each year.
- (2) The Minister must cause the annual sustainability report to be tabled in both Houses of Parliament as soon as practicable after receipt.

95AF Consideration of reports by Minister

If the Minister decides to either reject or vary advice received from the Aged Care Financing Advisory Committee provided pursuant to paragraph 95AD(1)(b), the Minister must:

- (a) prepare a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision; and
- (b) cause to have the statement published on a website maintained by the Department.

4. Allowing accommodation bonds to be used to repay certain loans (Recommendation 7)

Schedule 3, item 149, omit subsection 52N-1(2), substitute:

- (2) An approved provider is *permitted* to use a * refundable deposit or * accommodation bond for the following:
- (a) for capital expenditure of a kind specified in the Fees and Payments Principles and in accordance with any requirements specified in those Principles;
 - (b) to invest in a financial product covered by subsection (3);
 - (c) to refund, or to repay debt accrued for the purposes of refunding, * refundable deposit balances, * accommodation bond balances or * entry contribution balances;
 - (d) to repay debt accrued for the purposes of capital expenditure of a kind specified in the Fees and Payments Principles;
 - (e) to repay debt that is accrued before 1 October 2011, if the debt is accrued for the purposes of providing * aged care to care recipients;
 - (f) for a use permitted by the Fees and Payments Principles.
 - (g) to make a loan in relation to which the following conditions are satisfied:
 - (i) the loan is not made to an individual;
 - (ii) the loan is made on a commercial basis;
 - (iii) there is a written agreement in relation to the loan;
 - (iv) it is a condition of the agreement that the money loaned will only be used as mentioned in paragraph (a),(b),(c),(d),(e) or (f);
 - (v) the agreement includes any other conditions specified in the Fees and Payments Principles;

5. Addition of the accommodation supplement to be added to the list of primary supplements (Recommendation 8)

Schedule 3, item 103, omit the clause, substitute:

44-5 Primary supplements

- (1) The primary supplements for the care recipient are such of the following primary supplements as apply to the care recipient in respect of the * payment period:
- (a) the following primary supplements as set out in the Subsidy Principles:
 - (i) the respite supplement;
 - (ii) the oxygen supplement;
 - (iii) the enteral feeding supplement;
 - (iv) the dementia supplement;
 - (v) the veterans' supplement;

- (vi) the workforce supplement;
 - (vii) the accommodation supplement
- (b) any other primary supplement set out in the Subsidy Principles for the purposes of this paragraph.
- (2) The Subsidy Principles may specify, in respect of each primary supplement, the circumstances in which the supplement will apply to a care recipient in respect of a * payment period.
- (3) The Minister may determine by legislative instrument, in respect of each such supplement, the amount of the supplement, or the way in which the amount of the supplement is to be worked out.

6. Removal of sanctions (Recommendation 9)

Schedule 1, items 36, 37, 38, 39, 40, 41, 52 and 43, omit the items.

Schedule 4, items 169,170 and 171, omit the items.

7. Preservation of the right of approved providers to make an application for extra service status outside of the Aged Care Approval Round (Recommendation 10)

Schedule 3, items 65 and 74, omit the items.

8. Amending choice of payment provisions

1. Schedule 3, item 149 omit subsections 52F-2 (1) and (2), substitute

An approved provider must enter into an accommodation agreement with a person before the person enters the provider's service.

2. Schedule 3, item 149, omit paragraphs 52F-3 (e), (f) and (g).

9. Removal of references to the workforce supplement

1. Schedule 3, item 103, omit subparagraph 44-5 (1)(a)(vi).

2. Schedule 3, item 142, omit subparagraph 48-3(1)(a)(v).

10. Amendment to proposal for a committee to review the operation of the Living Longer Living Better Package (Recommendations 13 and 14)

Clause 4, omit the clause, substitute:

4 Review of operation of aged care funding legislation

- (1) The Minister must cause an independent review to be undertaken of the operation of :
- (a) the *Aged Care Act 1997*; and
 - (b) the *Aged Care (Bond Security) Act 2006*; and
 - (c) the *Aged Care (Bond Security) Levy Act 2006*; and

(d) the *Aged Care (Consequential Provisions Act 2007)*

- (2) The review must consider at least the following matters:
- (a) whether unmet demand for residential and home care places has been reduced;
 - (b) whether the number and mix of places for residential care and home care should continue to be controlled;
 - (c) whether further steps could be taken to change key aged care services from a supply driven model to a consumer demand driven model;
 - (d) the effectiveness of means testing arrangements for aged care services, including an assessment of the alignment of charges across residential care and home care services;
 - (e) the effectiveness of arrangements for regulating prices for aged care accommodation;
 - (f) the effectiveness of arrangements for protecting equity of access to aged care services for different population groups;
 - (g) the effectiveness of workforce strategies in aged care services, including strategies for the education, recruitment, retention and funding of aged care workers;
 - (h) the effectiveness of arrangements for protecting refundable deposits and accommodation bonds;
 - (i) the effectiveness of arrangements for facilitating access to aged care services;
 - (j) which further steps are necessary to ensure the sustainability of the aged care sector
 - (k) the areas where administrative steps involved in the regulation of aged care provision can be minimised or removed;
 - (l) the structure of aged care legislation, including a review of matters better contained in primary legislation rather than by legislative instrument;
 - (m) any other related matter that the Minister specifies.
- (3) The review must make provision for public consultation and, in particular, must provide for consultation with:
- (a) approved providers; and
 - (b) aged care workers; and
 - (c) consumers; and
 - (d) people with special needs; and
 - (e) carers; and
 - (f) representatives of consumers.
- (4) The inquiry phase of the review must conclude as soon as practicable after 31 December 2015.
- (5) The person who undertakes the review must give the Minister a written report of the review by 30 June 2016.
- (6) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of receiving it.