

## **User Rights Amendment (Various Measures) Principle 2013 [F2013L01352]**

*Portfolio: Social Services*

*Authorising legislation: Aged Care Act 1997*

*Last day to disallow: 4 March 2014 (Senate)*

### **Purpose**

2.78 This instrument makes changes to the User Rights Principles 1997 in response to the introduction of 'home care' under the *Living Longer Living Better* aged care reforms. Among other things, the instrument removes references to 'community care', which has been replaced by home care, and replaces these with references to 'home care'; and broadens the permitted uses for accommodation bonds for capital funding for investment in building stock.

2.79 The instrument also expands the power of an approved provider of home care to reallocate a care recipient's place. This amendment enables an approved provider to reallocate the care recipient's place to another care recipient if:

- (e) the care recipient does not meet his or her responsibilities, as described in Schedule 2 – Charter of rights and responsibilities for home care, for a reason within the care recipient's control.<sup>1</sup>

### **Background**

2.80 The committee reported on the instrument in its *First Report of the 44th Parliament*.

### **Committee view on compatibility**

#### ***Right to health and right to an adequate standard of living***

##### *Reallocation of home care services*

2.81 The committee sought clarification from the minister as to how the reallocation of home care services was compatible with the right to health and an adequate standard of living. In particular, the committee sought clarification regarding:

- the criteria that will be applied for determining when a care recipient has breached their Charter responsibilities with the consequence that their place in a home care service is reallocated;
- the mechanisms available for a care recipient to appeal or seek review of a decision to reallocate their place in a home care service; and

---

1 New section 23.21(e), User Rights Principles 1997 (inserted by item 8).

- what, if any, assistance will be provided to a care recipient to find suitable alternative accommodation.

### **Assistant Minister's response**

Before a care recipient begins receiving home care, the User Rights Principles require that a home care agreement must be offered to the prospective care recipient and the approved provider must provide the prospective care recipient with guidance (and, if appropriate, interpreter services) to understand the terms and effect of the proposed agreement (see section 23.93 of the User Rights Principles). The home care agreement must include, among other matters, conditions under which either party may terminate the home care services (see paragraph 21.95(d) of the User Rights Principles).

The approved provider must also give the prospective care recipient a copy of the Charter and assist them to understand it (see item 5 of the rights specified in the Charter). These provisions are designed to ensure that a care recipient is made aware of his or her rights and responsibilities and understands the circumstances in which they could place their security of tenure at risk.

If an approved provider were to seek to rely on a care recipient's failure to meet his or her responsibilities under the Charter to reallocate the care recipient's home care place, the care recipient would have the avenues of assistance and appeal outlined below, which include recourse to the Aged Care Complaints Scheme. In interpreting the Charter, Complaints Scheme officers adopt a reasonable person test.

The Commonwealth pays advocacy grants under section 81-1 of the *Aged Care Act 1997* to organisations in each state and territory to provide free, independent and confidential advocacy services to care recipients in relation to their rights.

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

A care recipient, or another person on the care recipient's behalf, can lodge a complaint with the Aged Care Complaints Scheme regarding any issue relating to an approved provider's responsibilities under the *Aged Care Act*, which include responsibilities in relation to security of tenure (see the Complaints Principles 2011 made under section 96-1 of the *Aged Care Act*). If the Complaints Scheme were to find that the loss of a home care recipient's security of tenure was an unreasonable and disproportionate response to the actions of the care recipient, the

Complaints Scheme could give a direction to the approved provider requiring the approved provider to take stated actions, such as restoration of the care recipient's home care place, to comply with the approved provider's responsibilities. Failure by the approved provider to comply with a direction given by the Complaints Scheme could result in compliance action under Part 4.4 of the Aged Care Act, including the imposition of sanctions on the approved provider.

If either the complainant or the approved provider is dissatisfied with a decision made by the Complaints Scheme, they can apply to an independent statutory office holder, the Aged Care Commissioner, for examination of the decision. They may also seek review through the Commonwealth Ombudsman. Parties to a complaint are advised of these avenues of appeal in correspondence from the Scheme.

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

The framework in which the security of place operates (paragraph 23.21(e) of the User Rights Principles) balances the rights of care recipients to health and to an adequate standard of living with the rights of others, such as care workers. The avenues of appeal, outlined above, allow for a proportionate consideration and response to a care recipient's failure to meet his or her responsibilities as set out in the Charter.<sup>2</sup>

## **Committee response**

**2.82 The committee thanks the Assistant Minister for Social Services for his detailed and informative response and has concluded its examination of this instrument.**

---

2 See Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Service, to Senator Dean Smith, 2 June 2014, pp 1-2.