Bills Digest No. 94, 2015–16

Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016

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Social Policy Section

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House: House of Representatives
Portfolio: Health

Commencement: Sections 1 to 3 upon Royal Assent. All other provisions on 27 February 2017 except Division 1 of Part 2 (contingent amendments) which will not commence due to the commencement of the Aged Care Amendment (Red Tape Reduction in Places Management) Act 2016 on 11 February 2016.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
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Purpose of the Bill

The purpose of the Aged Care Legislation Amendment (Increasing Consumer Choice) Bill 2016 (the Bill) is to amend the Aged Care Act 1997 (the Act) and the Aged Care (Transitional Provisions) Act 1997 (the Transitional Provisions Act) to:

- allocate home care packages (HCPs) directly to consumers, rather than to approved providers
- create a national system for prioritising consumer access to HCPs and
- reduce regulation of the approval process for all aged care providers.

Background

The Australian Government subsidises aged care services for older people who cannot live without support in their own homes. The Act and associated Principles provide the regulatory, funding and quality framework for residential aged care, home care and flexible care services. The Transitional Provisions Act and associated Principles provide for continuing care recipients (who were receiving an aged care service under the Act prior to 1 July 2014 and are still receiving that service) to continue under the pre-1 July 2014 subsidy and fee arrangements.

As at 30 June 2015, under the Act there were:

- 72,702 operational home care packages providing aged care services to individuals in their homes
- 192,370 operational residential care places providing permanent and respite care in aged care homes
- 7,629 operational flexible care places

The majority of Australian Government expenditure under the Act in 2014–15 was for residential care ($10.6 billion), with $1.28 billion spent on home care packages and $407.5 million on flexible care programmes.

The Australian Government also provides funding for aged care services outside of the Act. The largest single component of this funding in 2014–15 was $1.9 billion for Home and Community Care (HACC) services. HACC providers offer basic maintenance, support and care services such as domestic help, counselling, personal and nursing care, meals, transport and home modifications. From 1 July 2015, HACC (other than in Victoria and Western Australia) was integrated with three smaller programs to form the Commonwealth Home Support Programme (CHSP). The CHSP provides entry-level home support to older people and their carers.

Home care packages

An HCP is a coordinated package of care provided to an older person by an approved home care provider. It offers a greater level of support than the CHSP. HCPs assist older people to stay at home (rather than entering residential aged care) and provide ongoing personal and support services and clinical care. All HCPs are now

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8. Ibid., p. 49.
9. Ibid., p. 70. Flexible care includes transitional care (to assist people to return home after a hospital stay), aged care provided by a Multi-Purpose Service (a service in a rural or remote area that also provides health and community services), and innovative care (a small number of grandfathered places remaining from a home care pilot program).
10. Ibid., xiii.
11. Ibid.
12. Ibid., p. 28.
delivered on a Consumer Directed Care (CDC) basis. CDC allows the HCP recipient to have more choice and flexibility when selecting care and services, including a say in how the funding for their HCP is spent.\footnote{14}

HCP recipients can choose to include a variety of services in their package, including:

- personal care such as assistance with bathing, dressing, mobility and communication
- nutrition, meal preparation and feeding
- skin care
- continence (bladder and bowel) management
- mobility aids and
- nursing, allied health, hearing and vision services.\footnote{15}

There are four levels of home care packages, ranging from Home Care Level 1 (supporting people with basic care needs) to Home Care Level 4 (supporting people with high care needs).\footnote{16} The higher the level of the package, the more funding it attracts. Daily HCP subsidies currently range from $21.71 (Home Care Level 1) to $132.01 (Home Care Level 4). Supplements may also be paid depending on the consumer’s circumstances (for example, if they have dementia, need oxygen or tube feeding, or live in a rural or remote area). Subsidies and supplements are currently paid directly to the approved provider of the HCP.\footnote{17}

Consumers are required to contribute to the cost of their HCP. Everyone receiving an HCP can be asked by their provider to pay the basic daily fee of up to 17.5 per cent of the single basic Age Pension (which currently equates to $137.76 per fortnight).\footnote{18} Part pensioners and self-funded retirees taking up an HCP from 1 July 2014 can also be asked to pay an income tested fee (subject to annual and lifetime caps). The Commonwealth subsidy received by the provider of the HCP is reduced by the amount of the income tested fee.\footnote{19} Continuing care recipients are able to continue on the pre-1 July 2014 fee arrangements, under which basic daily fees and income tested fees were not applied consistently by providers (because the subsidy received by the provider was not reduced by the income tested fee).\footnote{20}

**Planning and allocation of aged care places**

The Australian Government controls the supply of subsidised aged care places. The current planning framework aims to increase the number of aged care places in line with the ageing population, and to balance provision of places across metropolitan and non-metropolitan areas, including for people with special needs.\footnote{21} The Government is aiming for an aged care provision ratio of 125 aged care places per 1,000 people aged 70 years or over by 2021–22.\footnote{22} As at 30 June 2015, there were 111.5 operational aged care places (81.1 residential and 30.4 home care) per 1,000 Australians aged 70 years or over.\footnote{23}

Aged care places are currently allocated directly to providers who are approved to provide aged care under the Act (approved providers), rather than directly to consumers. Existing places allocated to providers generally continue from year to year. For new places, the Minister determines the number of additional residential, home care and flexible care places to be made available in each state and territory each year, in accordance with the planning framework. The Secretary (or delegate) then distributes these places amongst the Aged Care Planning Regions in each state and territory. Prospective and existing approved providers compete for the majority of these places (with the exception of some flexible care places) through the open Aged Care Approvals Round...
In anticipation of the passage of this Bill, the 2015 ACAR is expected to be the last one in which providers can apply for an allocation of new home care places.

**Consumer access to HCPs**

In order to access an HCP, a person must be assessed and found eligible for home care by an Aged Care Assessment Team (ACAT). They then need to find an approved home care provider that has an HCP available (either at their assessed level or a lower level).

Consumers who have been assessed as eligible can join the waiting lists of individual providers, if a suitable package is not immediately available in their area. Because individual providers maintain their own waiting lists, there is currently no national data available on the number of people waiting for HCPs (unmet demand). However, national data on occupancy rates (met demand) are available. In 2013–14, the occupancy rate across all HCPs was 88.4 per cent, with the lowest occupancy rates for Level 1 and Level 3 HCPs (as these were newly introduced levels of care at that time). Occupancy rates varied across jurisdictions, with Victoria having the highest occupancy rate (93.2 per cent) and Western Australia the lowest (77.8 per cent).

Consumers can change providers under the current system, but only if they can find another provider that has a suitable package available.

**Recommendations for greater consumer choice**

In recent years, the National Health and Hospitals Reform Commission (NHHRC) and the Productivity Commission (PC) have called for greater consumer choice in aged care, including in home care. Both Labor and Coalition Governments have responded to these calls.

**National Health and Hospitals Reform Commission**

The NHHRC’s 2009 report called for ‘greater choice and responsiveness in how older people use aged care services’, including through removing restrictions on the number of places an aged care provider can offer:

> We recommend that the current restrictions on the number of aged care places an approved provider can offer be lifted. This means good aged care providers will be able to take as many people as wish to use their services, and older people will no longer have to accept the only place they can find. Aged care services will compete with each other to attract older people. Older people who are unhappy with their care will find it easier to shift to a different service;\(^{31}\)

and giving home care consumers more choice in how funding for their care is directed:

> ... we recognise the value of moving towards ‘consumer-directed care’, where older people can have more say in tailoring the package of services that they use to best meet their assessed needs. While such an approach will need to be developed and introduced over time, our recommendations support giving people receiving care in the community greater choice in how the resources are allocated, and to whom, for their care and support;\(^{32}\)

The mechanisms proposed by the NHHRC for achieving these changes included removing planning ratios and linking subsidies to consumers’ needs (with the number of subsidies capped at the point of assessment), and allowing providers to convert some residential places to community care places.\(^{33}\)

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26. Ibid., p. 36.
27. Ibid., p. 36.
28. ACFA, Third report on the funding and financing of the aged care sector, op. cit., p. 57.
29. Ibid., pp. xx–xxi.
30. DSS, Five steps to accessing a Home Care Package, DSS, Canberra, 2015, accessed 16 February 2016.
32. Ibid., p. 110.
33. Ibid., pp. 110–111.
Productivity Commission

In 2011 the PC released a report recommending significant changes to the operation and delivery of aged care in Australia.34 The PC considered the benefits and risks of introducing greater consumer choice in aged care (such as through CDC), and noted that ‘even a relatively small number of active consumers switching between alternative services can induce providers to improve services and encourage broader innovation and quality improvement.’35

Similarly to the NHHRC, the PC recommended that consumers should access aged care based on their needs (as determined by a proposed ‘Gateway’ assessment). The PC also recommended that consumers should be able to choose their aged care provider:

the Australian Government should approve a schedule of aged care services to be provided to individuals on an entitlement basis, according to the Gateway’s assessment of their need. Individuals should be given an option to choose an approved provider or providers.36

Living Longer. Living Better. reforms

The Labor Government responded to the PC report in 2012 with a ten year package of reforms known as Living Longer. Living Better. (LLLB).37 While not implementing all the structural changes recommended by the PC, the first wave of LLLB reforms, enacted in 2013, did separate the costs of accommodation and care, require those who can afford to contribute to the cost of their care to do so, introduce accommodation payments for all people in residential aged care, place a greater focus on consumer directed care and introduce a ‘Gateway’ (now known as the My Aged Care website and call centre) to help older Australians navigate the aged care system.38

The LLLB reforms also included a longer term goal to create a more flexible aged care system driven by consumer choice, with reduced government regulation:

The longer term vision for reform is to create a more flexible and seamless ‘end-to-end’ aged care system that provides more choice and access to the full range of aged care services, from low intensity support in the home, to Home Care packages and residential aged care provided at variable levels of intensity. Increasingly, the level and mix of services would be more driven by consumers and less by government regulation, with the role of government more focused on protecting equity in access and quality. In line with the preferences of older people and their families, a key element would be expanding access to care in the home and enabling people to live independently in the community as long as possible, including developing a new national system of home support.39

This longer term reform was to include ‘further government decision making about transition to a less highly regulated system that allows consumers more choice in how the care subsidy provided by government is used to support their care needs.’40

Aged Care Sector Committee

Following its election win in 2013, the Coalition Government established the Aged Care Sector Committee (ACSC) to provide advice to Government on aged care policy and reform. The Committee includes representatives from across the aged care sector, including, peak bodies, large for-profit and not-for-profit providers, consumers, workforce, the National Aged Care Alliance and the Department.41 The ACSC and the Government developed the Aged Care Sector Statement of Principles to guide future changes in the aged care

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36. Ibid., p. 173.
40. Ibid.
system. One element of the Principles is that ‘Funding will attach to the consumer allowing greater consumer choice of who provides services and how they are provided.’

2015–16 Budget

The Coalition Government announced in the 2015–16 Budget that from 1 February 2017, HCPs will be allocated directly to consumers by the ‘My Aged Care Gateway’ rather than to service providers through the ACAR. This will enable consumers to receive services from a provider of their choice, and to change providers if they wish. $73.7 million over four years has been provided for the implementation of this measure.

The measure aims to ‘give older Australians greater choice in deciding who provides their care, and will establish a consistent national approach to prioritising access to care.’ It is also intended to increase competition among providers, leading to improved service delivery, and to reduce regulation and red tape for providers. The Government calls the changes a ‘key step in moving to a less regulated, more consumer-driven and market-based aged care system.’ The Bill implements this Budget measure.

At the same time, the Government announced that it would consult with the aged care sector on options for combining HCPs with the entry-level CHSP to create a single integrated care at home programme from 2018. This ‘second stage of home care reform’ is not implemented by the Bill and is not discussed further in this Bills Digest.

Committee consideration

Senate Standing Committee for Selection of Bills

The Senate Standing Committee for Selection of Bills recommended that the Bill not be referred to a committee for inquiry.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills has one concern with the Bill.

The Committee feels that ‘a significant element of discretionary judgment’ may still be involved. The Committee is concerned that the provisions ‘may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions’. The Committee has sought the Minister’s advice as to why merits review is impractical in this instance, and whether any alternatives to merits review have been considered.

Policy position of non-government parties/independents

Shayne Neumann, the Labor Shadow Minister for Ageing, stated in 2015 that he wanted consumers to have ‘more choice, control and flexibility’, but that he would have liked to see ‘the current changes bedded down prior to any major changes [such as the 2017 HCP reforms] being announced.’

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43. Ibid., p. 7.
50. Ibid.
No statements by other non-government parties or independents specifically relating to the Bill have been identified.

Position of major interest groups
Aged care providers and consumer groups are broadly supportive of the changes contained in the Bill, although with some concerns in particular areas. The following summary draws on public comments by relevant stakeholders, as well as the Department of Health’s (DoH) summary report of feedback to the *Increasing Choice in Home Care – Stage 1* discussion paper (which does not identify comments by individual stakeholders).  

**Greater consumer choice**
As noted above, the ACSC, which includes representatives from across the aged care sector, has endorsed the idea that funding should be attached to the consumer in order to allow greater choice of services.  

Ian Yates, CEO of COTA Australia (a peak national body representing older Australians), has described the Bill as ‘a great first step in allowing older people to pick and choose their services, and who provides them’. He believes the changes will allow consumers to move away from poor providers, and has urged the Parliament to pass the Bill quickly to allow time for implementation planning.

Nick Mersiades of health and aged care provider Catholic Health Australia (CHA) has welcomed the move to let consumers direct their HCP funding to their preferred provider. He notes that CHA has regularly advocated for such a measure, although it would like the Government to go further and eventually remove the rationing of places for all aged care services. He also notes that for the first time, the aged care sector will have a good measure of unmet demand in the form of an accurate waiting list.

Brian Sullivan, a community, aged and health policy consultant with Verso Consulting, has sounded a note of caution regarding quality control. He notes that the Government can currently influence quality (above and beyond quality standards) through the ACAR allocation of places, and that this influence may be weakened under the proposed changes:

> The policy levers available under the current system may be weakened under a heavily market-based approach, which implies a more hands-off regime. Just look at the vocational training sector scandals.

**Information for consumers**
Alzheimer’s Australia (AA), which advocates for people living with dementia and their carers, has welcomed the Bill, but noted that consumers will not be able to make informed decisions about their care unless they have clear, easy to access information about their entitlements and the services that are available to them. AA would like the My Aged Care website to include quality information about services from a consumer point of view.

The requirement for quality information to support consumer choice is also reflected in the stakeholder feedback received by DoH:

- Overall, the premise that allowing home care packages to follow the consumer and opening up the home care market will afford greater choice, flexibility and continuity of care for consumers was generally supported.

- However, some stakeholders raised concerns that there is a risk of confusing consumers with further changes following the introduction of consumer directed care and with the anticipated increase in, and variability of, provider marketing.
• Supports will be required to enable consumers to navigate a market-based system and make informed decisions. Some stakeholders have suggested adopting a standardised approach to provider marketing/pricing (e.g. use of consistent terminology) to enable consumers to easily compare providers.

• Safeguards will be required for consumers (particularly those from special needs groups) who may not have the capacity, skill, or support to make decisions regarding their choice of provider.

• The My Aged Care referral process must be transparent and ensure that consumers are made aware of all suitable providers in their locality.58

Special needs (including rural/remote) consumers
The Secretary is currently able to determine that a certain number of aged care places be allocated to people with special needs, such as Indigenous Australians, people from culturally and linguistically diverse backgrounds and people living in rural and remote areas.59

Some stakeholders are concerned that people with special needs may not be adequately catered for in a market-based system, when special needs home care places are no longer allocated through the ACAR.

AA National CEO, Carol Bennett believes that ‘[c]hoice will only exist if there is also support available to special needs groups’ including consumers with dementia.60 AA is also concerned that real choice will not exist in regional and remote areas where there are limited services.

Brian Sullivan agrees that the main choice for consumers in rural and remote areas can be ‘simply to get care at home at all’.61 He notes that removing the ACAR for home care and increasing competition may cause providers to focus on larger population centres in non-metropolitan areas:

Current regional allocation of places puts some level of obligation on providers to service all parts of a region. Sometimes this is best met through regional provider collaborations. There is a real danger that increased competition between providers will lead to reduced incentives for collaboration (as seen in the UK) and an increased focus on the more lucrative population centres in non-metropolitan regions.62

The Victorian Healthcare Association is also concerned that specialised providers of care for vulnerable groups may not be viable under a free-market model.63

Impact on aged care providers
Feedback to DoH suggests that the loss of a guaranteed allocation of places may threaten the financial sustainability of some providers, as well as encouraging casual labour:

The removal of allocated home care places will reduce certainty of service volume and income stream. Some stakeholders raised concerns that this may impact financial sustainability. A number of stakeholders have also commented that it may also affect providers’ ability to manage and plan their workforce, which may encourage casualisation of the workforce. A casual or contract-based workforce may be more difficult for providers to monitor consistency of care quality, and to attract and retain staff.64

Jason Horne, CEO of large private aged care provider KinCare, has called the changes ‘the mother of all disruptions’.65 He believes they will have a greater impact on home aged care providers than Uber has had on the taxi industry. He believes that providers will have to shift from a focus on compliance to a focus on meeting

59. This process is discussed further in the ‘Key issues and provisions’ section of this Bills Digest.
60. Alzheimer’s Australia, More choice and control in aged care = more information needed, op. cit.
62. Ibid.
63. Ibid.
64. Ibid.
65. Ibid.
66. Victorian Healthcare Association (VHA), ‘Priority groups must be protected under new home care system’, VHA website, 10 November 2015, accessed 23 February 2016. The VHA is a peak body representing public hospitals, rural and community health services, aged and primary care providers across Victoria.
consumer expectations. He sees the changes as both an opportunity and a threat, and believes that market consolidation will cause a number of providers to disappear from the sector. Horne has also cautioned that the reforms may lead to a ‘honey pot effect’ similar to that seen in the vocational education and training sector. 66

Financial implications
In keeping with the Budget announcement, the Government has committed $73.7 million over four years to implement the HCP reforms. 67

According to the Regulation Impact Statement in the Explanatory Memorandum, the net regulatory saving to providers of aged care is estimated to be $4.51 million per year. The bulk of the savings are expected to come from ceasing the ACAR process for home care places and streamlining approved provider arrangements, although these savings are partially offset by increased costs associated with the management of unspent funds when consumers leave providers. 68

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible because it will give older consumers greater choice in how they receive home care services, implement a national prioritisation approach to ensure that HCPs are distributed based on need, and give older people with disabilities greater choice of care provider. 69

Parliamentary Joint Committee on Human Rights
The Parliamentary Joint Committee on Human Rights had no concerns regarding the Bill. 70

Key issues and provisions
Allocation of HCPs directly to consumers
As described in the Background section of this Bills Digest, aged care places are currently distributed between regions according to a planning framework, with approved providers competing to have newly released places allocated to them through the ACAR. Eligible consumers must then find a provider that has a suitable vacant place to provide their care.

The key measure of this Bill is to allocate HCPs directly to consumers, rather than to approved providers. This involves amending the planning and allocation provisions in the Act, introducing new provisions to prioritise consumer access to HCPs and changing provider eligibility for Government subsidies to make funding follow the consumer. These changes are outlined below.

Removing home care from the planning and allocation process
Currently, the planning and allocation processes set out in the Act apply to all types of care provided under the Act (that is, residential care, flexible care and home care). The Minister determines the number of new places to be allocated in each State or Territory for each type of care, and the Secretary distributes these among the planning regions. 71 The Secretary may determine that certain places must be provided to people of kinds specified in the Allocation Principles, which currently includes people with special needs and residents with limited financial resources. 72 The Secretary may then allocate places to an approved provider to deliver a particular type of aged care within a region. 73 This is typically done through the competitive ACAR process (discussed earlier).

66. Ibid.
69. The Statement of Compatibility with Human Rights can be found at page 28 of the Explanatory Memorandum to the Bill.
73. Aged Care Act 1997, section 14-1.
**Items 24–30** amend the above provisions such that they only apply to residential and flexible care. This has the effect of removing home care from the planning and allocation process. HCPs will no longer be allocated to particular regions within states and territories, nor will certain HCPs be reserved for people with special needs. Approved providers of HCPs will no longer compete for places through the ACAR. However, the Government will continue to cap the total number of HCPs available, in line with the aged care planning ratio.

**Prioritising consumer access to HCPs**

Currently, in order to access subsidised residential, flexible or home care, a consumer must be assessed (by an ACAT) and approved as eligible by the Secretary.

**Item 39** inserts **proposed section 22-2A** which provides that when approving someone as eligible for home care, the Secretary must determine (and may vary) a person’s priority for home care services, in a manner that is consistent with the care needs of that person.

**Item 41** inserts **proposed subsection 22-4(2A)** which specifies that if a person is being assessed for home care, the person’s priority for home care services must be evaluated as part of the assessment.

According to the Explanatory Memorandum, ‘a person’s priority for home care services will be largely based on information obtained through the comprehensive assessment undertaken by an ACAT in accordance with a clinical framework.’ This information on a person’s priority will then feed into the proposed national prioritisation process.

**Item 44** inserts **proposed Part 2.3A** which deals with the prioritisation of home care recipients.

**Proposed section 23B-1** allows the Secretary to determine that a person who has been approved as a recipient of home care is a **prioritised home care recipient**, and to determine the level of HCP that they have been prioritised for. This in effect means that the person has reached the top of the waiting list and can now seek an approved provider to deliver their HCP. In determining that a person is a **prioritised home care recipient**, the Secretary must consider the period of time that the person has been waiting for home care services, and any other matters specified in the proposed Prioritised Home Care Recipients Principles. The Secretary may also consider any exceptional circumstances.

This means that the waiting lists for HCPs currently maintained by individual providers will be replaced with a national prioritised waiting list based on a person’s needs and how long they have been waiting. This is meant to facilitate ‘a more equitable and flexible distribution of home care packages to care recipients based on individual needs and circumstances, regardless of where they live.’ It should also allow unmet need (the number of people waiting for packages) to be easily measured for the first time.

**Proposed section 23B-2** allows the Secretary to increase a person’s level of care as a **prioritised home care recipient**, up to and including the highest level of HCP that the person has been approved for. This provision allows a person to receive an HCP at a lower level, as an interim arrangement, while still remaining on the national waiting list for a higher level package.

**Proposed section 23B-3** sets out the circumstances in which a person ceases to be a **prioritised home care recipient**. This will occur if the person dies, ceases to be approved for home care, does not receive home care within a specified period or ceases to receive home care in specified circumstances. This means that a person could lose their entitlement to an HCP if they do not find a provider within a reasonable timeframe, or if they permanently enter residential care.

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74. Under section 11-3 of the Aged Care Act 1997, people with special needs include, amongst others, Indigenous Australians, people from culturally and linguistically diverse backgrounds, people living in rural and remote areas, disadvantaged people, veterans, homeless people and lesbian, gay, bisexual, transgender and intersex people.

75. Explanatory Memorandum, op. cit., p. 16.


77. Explanatory Memorandum, op. cit., p. 38.

78. Ibid., p. 39.

79. Ibid., p. 41.

80. The specified period and specified circumstances will be set out in the Prioritised Home Care Recipients Principles.

81. Explanatory Memorandum, op. cit., p. 42.
Proposed section 23B-4 allows the Secretary to use a computer program to make decisions to make or vary determinations under proposed Division 23B (Prioritised home care recipients). The Secretary may substitute a new decision if satisfied that the initial decision made by the computer program is incorrect. The Government intends to use the My Aged Care system to make decisions regarding the national prioritisation process for HCPs.  

Provider eligibility for home care funding

The Act currently provides that an approved provider is eligible to receive a home care subsidy from the Government if they hold an allocation of home care places and they are providing care to an approved recipient under a home care agreement.

Item 47 repeals and replaces section 46-1 of the Act. Proposed section 46-1 provides that an approved provider of home care is eligible for a home care subsidy if they have notified the Secretary that they are providing home care, they are providing care to a prioritised home care recipient under a home care agreement, and they have undertaken to deal with any unspent home care amount in accordance with the User Rights Principles. Funding will follow the consumer, and providers will no longer have a fixed allocation of places.

This will allow eligible consumers to ‘direct government funding to the provider of their choice’, and to ‘change their provider if they want to’, or to take their HCP with them ‘if they move to another area or state’. The move to a ‘market-based system’ with more consumer choice is intended to drive ‘quality, value and performance of services’.

In keeping with this market-based philosophy, the Government has chosen not to further regulate home care agreements (beyond what is already specified in the Act).

To support transparency and choice for the consumer, before a consumer commences in a home care package, the provider must disclose all relevant charges that may be deducted from the total of any future unspent funds. All applicable charges must be clearly set out in the Home Care Agreement offered to the consumer and be published on My Aged Care. The provider will also be required to disclose to the consumer other matters which could restrict portability, such as minimum contractual periods and required notice to leave a package.

Consistent with the Government’s approach to reducing regulation and encouraging businesses to compete in a market-based system, it is not proposed to initially regulate (prohibit or restrict) minimum contract periods, minimum notice requirements, or administrative charges on entry, exit or transfer.

Therefore, although consumers will be free to choose and change providers under the proposed changes, they may be restricted in practice by such matters as minimum contract periods and exit fees. The Government may enact further regulation in the future if there is evidence that ‘restrictive conditions are being included in Home Care Agreements’.

Reduced regulation for approved providers

Providers of aged care are currently required to meet suitability criteria, and also to hold an allocation of places, in order to be approved providers under the Act. As home care places will no longer be allocated to providers, the Government has taken the opportunity to ‘streamline’ these requirements for all approved providers, not just providers of home care.

82. Ibid., p. 42.
84. User Rights Principles 2014, accessed 22 February 2016. Item 59 provides that unspent home care amount will be defined in the User Rights Principles.
86. Ibid., p. 5.
87. Requirements for home care agreements between a care recipient and an approved provider are set out in section 61-1 of the Aged Care Act 1997.
89. Ibid.
90. Aged Care Act 1997, sections 8-1 and 8-3.
Lapsing of approval

The Act currently provides that the Secretary must approve a person as a provider of aged care if they meet certain requirements. The approval begins to be in force on the day that the person first has places allocated to them (whether through an ACAR process or by transfer from another provider). However, the approval does not come into force if the person fails to secure an allocation of places within 2 years (or a longer period as specified in the Approved Provider Principles).\(^92\)

**Item 8** repeals and replaces subsections 8-1(3) and (4) of the Act. **Proposed subsection 8-1(3)** provides that an approval as a provider of aged care begins to be in force on the day the applicant is approved by the Secretary. Thus, applicants will no longer need to secure an allocation of places within two years to become approved providers.

Further, section 10-2 of the Act currently provides that an approval of a person as a provider of aged care that is in force lapses if that person does not hold an allocation of places. **Item 23** repeals this section, with the effect that approved provider status will no longer lapse if providers are not providing care.

**Item 20** inserts proposed section 9-1A, which will require approved providers to notify the Secretary of certain information (such as the name and address of each service) prior to first providing home care. This is to ensure that the Secretary will continue to receive the type of information that is currently provided by home care providers as part of the ACAR process.\(^93\)

**Streamlined eligibility requirements for providers**

The Act sets out the criteria that the Secretary must consider when deciding whether to approve a person as a provider of aged care.\(^94\) These currently include:

- suitability and experience of key personnel\(^95\)
- track record of key personnel in delivering aged care for another approved provider
- ability and record in providing aged care, meeting relevant standards for the provision of aged care, and committing to the rights of aged care recipients
- record of financial management (both generally and in relation to the provision of aged care)
- history as a provider of aged care, including conduct and compliance with responsibilities and obligations and
- any other matters specified in the Approved Provider Principles.

**Item 9** repeals the above criteria and replaces them with a shorter list of simplified criteria for assessing the suitability of an aged care provider. The proposed criteria are:

- experience in providing aged care or other relevant care
- demonstrated understanding of responsibilities, and systems in place to meet its responsibilities as a provider of the type of care for which approval is sought
- record of financial management and methods to ensure sound financial management
- history as a provider of aged care, including conduct and compliance with responsibilities and obligations and
- any other matters specified in the Approved Provider Principles.

This means that the Secretary will no longer be required to consider matters relating to the applicant’s key personnel, although the Secretary will still retain the option to consider the above criteria in relation to key personnel.\(^96\) There also appears to be a reduced focus on the provider’s past record in providing aged care (particularly in relation to financial management, meeting standards and the rights of aged care recipients) in the streamlined criteria.

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95. ‘Key personnel’ is defined in section 8-3A of the *Aged Care Act 1997* and include directors, executives, managers and nursing managers.
96. *Aged Care Act 1997*, subsection 8-3(2).
The proposed criteria are intended to ‘have a greater focus on the capacity of the organisation as a whole to deliver the type of care for which approval is sought and less focus on key personnel, who may change over time.’ In keeping with the streamlined criteria, the Government also intends to streamline the administrative process to become an approved provider (for example by streamlining the application form and making it easier for existing residential and flexible care providers to be approved as home care providers). The Bill does not alter the responsibilities of approved providers as set out in the Act.

Other provisions

**Extension of delegation powers**

The Secretary may currently delegate all or any of his or her powers and functions under the Act to an officer of the Department. Item 56 amends this provision such that the Secretary may delegate all or any of his or her powers and functions under the Act to a person engaged (as an employee or otherwise) by an Agency or an authority of the Commonwealth. This is intended to allow for delegations to be made to contractors (due to the increased volume of decisions required as a consequence of allocating HCPs directly to consumers).

**Amendments to the Transitional Provisions Act**

The Transitional Provisions Act grandfathers aged care subsidy and fee arrangements for continuing care recipients. Item 63 amends the Transitional Provisions Act to allow approved providers to continue to receive subsidies for continuing home care recipients when home care places are no longer allocated to providers. The other amendments to the Transitional Provisions Act mirror the key amendments to the Act, and are adequately described in the Explanatory Memorandum.

**Application and transitional provisions**

Schedule 1, Part 3 contains application and transitional provisions to ensure continuity of service for existing providers and recipients of HCPs. Item 78 provides that anyone who is receiving a HCP the day before the item commences (that is, on 26 February 2017) will be taken to be a prioritised home care recipient. This means that the recipient will be able to continue receiving their HCP under the new arrangements, and will not have to re-apply or go on the national waiting list.

The other application and transitional provisions are adequately described in the Explanatory Memorandum.

**Concluding comments**

Government Commissions, consumer groups and aged care providers have long been calling for older Australians to have more choice in the care they receive. This Bill represents the first stage in a move towards a consumer-driven market for Government subsidised aged care in the home. Funding will follow the consumer, and providers will compete directly for customers, rather than for a guaranteed allocation of places.

These changes will, for the first time, create a national waiting list for HCPs, and allow consumer access to be based on assessed need, as well as waiting time. The Government has also taken the opportunity to streamline the process for aged care providers to gain approval across all types of care, not just home care.

While stakeholders are generally supportive of the Bill, there are concerns that not all home care consumers will be able to exercise their choice in practice, particularly if they have special needs or live in a rural or remote area. Restrictive conditions in agreements between consumers and providers could also limit the portability of HCPs, but the Government has chosen not to impose further regulation on such agreements at this time.

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98. Ibid., pp. 33-34.
100. Ibid., subsection 96-2(1).
102. Continuing care recipients entered care before 1 July 2014 and have not ceased care nor opted into the new fee and subsidy arrangements. Aged Care Act 1997, Schedule 1, Clause 1.
104. Ibid., pp. 49–52.
To the extent that the market can meet the needs of all older Australians requiring care at home, and the Government releases enough HCPs to satisfy demand, the measures in this Bill are likely to give consumers greater choice in the care that they receive.

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