Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | qls.com.au

Office of the President

Your ref: Aged Care Bills 2013
Our ref: 328-12 Elder Law Committee

22 April 2013

Committee Secretary
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary

AGED CARE BILLS 2013

We write in relation to the following aged care bills 2013:

- *Aged Care (Living Longer Living Better) Bill 2013;*
- *Australian Aged Care Quality Agency Bill 2013;*
- *Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013;*
- *Aged Care (Bond Security) Amendment Bill 2013;*
- *Aged Care (Bond Security) Levy Amendment Bill 2013.*

The ***attached*** submission is written with the assistance of the Queensland Law Society Elder Law Committee. The committee is comprised of legal practitioners who have considerable knowledge and experience in aged care.

Thank you for the opportunity to make comments on the proposed bills.

Yours faithfully

Annette Bradfield
President

Queensland
Law Society

Submission

Aged Care Bills 2013

Senate Standing Committee on Community Affairs

A Submission of the
Queensland Law Society

22 April 2013

Table of Contents

1 Overall comments on the Bills

We note that the Bills contain significant amendments and that there is a severely truncated opportunity for review of the amending legislation. As such, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified.

We observe that the impetus of these bills is to:

> *... amend the Aged Care Act 1997 to:*
> - *remove the distinction between low level and high level residential care;*
> - *provide for a means test combining income and assets tests and annual and lifetime caps on means tested care fees;*
> - *provide for a dementia supplement, veterans' mental health supplement and workforce supplement to be payable to providers who care for eligible care recipients; enable care recipients to choose the method by which they pay for accommodation, including by a fully refundable lump sum, a rental style periodic payment, or a combination of both;*
> - *replace community care and some forms of care delivered in a person's home with home care; extend the community visitors scheme to people in home care;*
> - *appoint and provide for the functions of an Aged Care Pricing Commissioner;*
> - *require the commissioner to prepare an annual report; and*
> - *provide that an independent review of this package is undertaken and provided to the minister by 1 July 2017; and eight Acts to make consequential and technical amendments.*[1]

In general, we consider the removal of the distinction between low level and high level residential care as a positive step, subject to industry support. We also strongly support the proposal that there be an independent review of this package and note that to be effective the review needs to incorporate all the proposed Bills.

2 Accommodation payments

2.1 General comments

The Productivity Commission Report proposed a more flexible, market driven model of aged care funding. Under the Productivity Commission's model, providers would charge an accommodation payment (a lump sum, periodic equivalent or combination) to all permanent residents who have an ability to pay. The Productivity Commission proposed that providers set accommodation payments for their facilities as a reflection of the cost of supply of the residential place offered.

A number of the substantive concepts relative to accommodation payments contained in the Living Longer Living Better reform package are contrary to the market driven model proposed by the Productivity Commission and will, without significant amendment, likely deter future investment in the sector.

We have set out below a list of critical issues arising in the reform package relevant to accommodation payments.

2.2 Accommodation payments - levels and approvals

We consider that the provisions, including Part 3A.2—Accommodation payments and accommodation contributions, *Aged Care (Living Longer Living Better) Bill 2013,* that introduce controls for setting accommodation payments should be removed and replaced

[1] http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4980

with a market driven model where providers set price as proposed by the Productivity Commission.

If the proposed controls for setting accommodation payments are not removed, the following compromises set out below should be considered.

(a) **Daily payments and lump sums (Division 52H—Rules about daily payments, Part 3A.2—Accommodation payments and accommodation contributions, *Aged Care (Living Longer Living Better) Bill 2013)* - conversion**

Under the system proposed, there will be specified limits on daily accommodation payments. Daily payments will be converted to a lump sum using the Maximum Permissible Interest Rate and the maximum lump sum will therefore be affected by interest rate fluctuations. For example, as interest rates increase, the likely effect will be a significant reduction on the maximum lump sum that can be charged without government approval. We consider that this issue should be addressed.

(b) **Retentions**

We note that accommodation bonds paid before 1 July 2014 will continue to be subject to the same rules as applied on 30 June 2014. Post 1 July 2014, providers will no longer have the right to charge retentions.

We have been informed that income from retentions represents a substantial portion of the operating surplus for many facilities, and the loss of this key income stream will be particularly detrimental to rural and remote providers, low care providers and other providers on the margin of sustainability.

If retentions are removed, it will be very difficult for providers to compensate for this loss of income. At an interest rate of 4.6% per annum an additional bond amount of $84,261 would be needed to offset the annual loss of retention income. Clearly, for providers receiving average bond amounts of $264,000 (AIHW 2009-10,) such a large increase in bond levels will simply not be achievable.

The loss of retentions will be felt more keenly by the capping of accommodations payments.

We therefore recommend that reconsideration be given as to removing retentions. In the alternative, should retentions be removed, we strongly recommend that, from a practical perspective, information and guides be distributed by the Government as to how providers might recover income lost via retentions. If providers may recover income by accepting, for example, a part lump sum and a part periodic further clarity as to what is permitted is required in the proposed Bills.

(c) **Choice of payment method**

We note that the "*Choice of Payment Method Period*" proposed will allow residents 28 days after entry of care to specify whether they wish to pay their accommodation by refundable accommodation deposit (RAD) or daily accommodation payment (DAP) or a combination of the two.

The "*Choice of Payment Method Period,*" whilst providing a measure of flexibility for residents, will likely create significant viability issues and uncertainty for providers. There does not appear to be any other contractual agreements or circumstances where it is considered commercial or equitable to allow a person to take possession of property without agreeing the terms of payment. Whilst this provision may assist residents in the short run, its operation will have a significant long term impact on the viability and operations of service providers. It will also certainly discourage service providers from commencing operations, which again will have a significant negative impact in the aged care industry. In this

circumstance we consider that there needs to be a weighing up of the financial interests between the residents and the service providers so that the industry remains viable.

To that end, we recommend that the "*Choice of Payment Method Period,*" in the *Aged Care (Living Longer Living Better) Bill 2013* be removed. In the alternative, if the "*Choice of Payment Method*" is not removed, we consider that the Nill be at least amended to state that the Security of Tenure provisions do not apply during that period.

(d) **Significant refurbishment**

We note that only providers who have undertaken a "significant refurbishment" post 20 April 2012 will be entitled to the uplift in the accommodation supplement. We consider this inequitable to other facilities who undertook a significant refurbishment that was completed prior to 20 April 2012. This means that these facilities will not be entitled to the uplift and there is no element of discretion. We consider that this needs to be addressed.

We have been informed that providers will consider ways to maximise returns within the parameters of the accommodation payments levels and the 'significant refurbishment" definition. In the course of doing so it may well give rise to unintended consequences that negatively impact the availability of accommodation for residents of limited means. For example, those providers who still have multi bed wards that are mostly filled by concessional residents may decide to undertake a refurbishment to replace the multi bed rooms with single rooms and to attract higher accommodation payments. This could conceivably fit within the significant refurbishment definition but have the effect of reducing the number of beds offered to concessional residents.

We consider that providers should be encouraged to invest in the development of facilities for the financially disadvantaged by enabling equitable access to increased accommodation supplements. This is not achieved by the current proposal and we consider that this should be addressed.

(e) **Supported resident ratios**

Department of Health and Ageing (DOHA) states that the total of all persons currently in the system that satisfy the "supported" criteria is approximately 37%. It is not therefore possible for all providers to achieve the 40% target needed to avoid the 25 % discount applied to those facilities who do not meet the supported resident ratio. With the current occupancy issues, providers do not discriminate, and all admissions are based on need. We consider that there should be no penalty for being below a percentage rate that does not reflect the potential residents in the catchment area.

As a minimum, any penalty applied needs to be at the margins, not across all supported residents in a facility. For example, the penalty to be applied in a 100-bed facility where there are 39 supported residents should only be applied to two places rather than across all 39 places.

Providers who do not satisfy the' significant refurbishment' criteria (anticipated as being a significant proportion of providers) and who cannot meet the 40% supported resident ratio will have the double impact of not receiving the uplift and still having the 25% discount applied across all residents. We therefore consider that this issue be should examined.

(f) **Payroll tax supplement**

The amendments propose to remove the accommodation supplement and the conditional adjustment payment (CAP) supplement from the list of primary supplements. They are proposed to be classified as an 'additional supplement.'

Taking the accommodation supplement out of the primary supplement and the CAP supplement out of the basic supplement will likely mean a decrease in funding via a reduced payroll tax supplement, because the payroll tax supplement is calculated by reference to the subsidies and primary supplements for the facility for the previous year.

This is likely to result in a significant decrease in revenue for some providers. We therefore consider there be thought to retaining the accommodation supplement as a primary supplement.

(g) **Pension impacts**

We note that income and assets (including the family home and rent from the home if the resident uses that rent to subsidise a periodic accommodation payment) will impact on a resident's contribution to their care costs.

Under current means testing for pension entitlements:

(i) accommodation bonds are exempt from the assets test;

(ii) for residents who choose to rent out their home to pay all or some of their accommodation payments by periodic payment the value of the former home and rental income is exempt; and

(iii) if a resident sells their home and otherwise invests the funds, this will impact the resident's pension eligibility.

Under the *Social Security Act 1991* (Cwth) and *Veterans' Entitlements Act 1986* (Cwth) the value of the home and the rental income from the family home during the period that periodic payments are made will continue to be regarded as exempt assets for pension purposes.

The bills propose to amend the *Social Security Act 1991* (Cwth) and *Veterans' Entitlements Act 1986* (Cwth) so that accommodation bond, accommodation bond balance, refundable deposit and refundable deposit balance are all to be excluded from the class of a 'financial investment' for the purpose of being counted in the income test for pension purposes.

Accordingly, while care recipients will still have some incentive to invest the proceeds of the sale of their home in payment of a lump sum (in our members' experience, few residents seem to exercise the option to keep the home, rent it and use that income to fund a periodic payment), there is no proposal to amend the *Social Security Act 1991* (Cwth) and *Veterans' Entitlements Act 1986* (Cwth) to provide a general exemption for the sale of the proceeds of the family home as an exempt asset for the purposes of assessment of pension eligibility.

The cap on accommodation payments may mean that those care recipients selling a home to fund an accommodation payment where the value of their home is more than the amount of the accommodation payment, may be penalised by way of a reduction in pension, because the remaining equity that is otherwise invested will be taken into account in the assessment of their pension entitlement.

This may have a significant impact on those incoming residents whose only asset is their home and who have limited income.

We consider that this issue could be overcome by providing that any equity released from the sale of the family home to fund an 'accommodation payment' is exempt for the purpose of determining the pension entitlement. We recommend that consideration be given to this issue.

(h) **Prudential requirements**

Approved providers who hold lump sum accommodation payments will continue to be required to meet certain prudential requirements, similar to those that currently apply to approved providers who hold accommodation bonds.

The proposed changes (Division 52N—Permitted uses, Part 3A.2—Accommodation payments and accommodation contributions, *Aged Care (Living Longer Living Better) Bill 2013)* post 1 July 2014 include a revised definition of "permitted use". An issue has previously been raised and acknowledged by DOHA via a discussion paper that the "Permitted Use" rules do not, in their current form, allow for an approved provider to loan bonds received to an associated entity which holds the aged care assets in order for that associated entity to pay down the debt on those assets.

We understand that DOHA had indicated that this issue would be amended in the Act, however this has not been addressed. We have been informed that DOHA has now indicated this issue will be addressed in a revision of the Principles. We note that the Principles may be changed without the same level of parliamentary scrutiny that would apply to an amendment to the Act. Therefore we strongly recommend that the proposed Division 52N—Permitted uses, Part 3A.2—Accommodation payments and accommodation contributions, *Aged Care (Living Longer Living Better) Bill 2013* be amended to rectify this issue as it will have significant costs issues for many providers.

3 New governing bodies

The proposed changes to the Act (namely the *Australian Aged Care Quality Agency Bill 2013* and the *Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013*) and the delegated legislation together allow for the creation of a number of new administrative bodies. Some of these entities are yet to be established whilst some bodies are already operational (for example the Aged Care Implementation Council).

We note this may give rise to an additional administrative burden for approved providers.

We note the amendments in the *Aged Care (Living Longer Living Better) Bill 2013* contemplate that an independent review of reforms be undertaken after five years. Specifically clause 4(1), *Aged Care (Living Longer Living Better) Bill 2013* states:

> *The Minister must cause an independent review to be undertaken of the operation of the amendments made by:*
>
> *(a) this Act; and*
>
> *(b) the Aged Care (Bond Security) Amendment Act 2013; and*
>
> *(c) the Aged Care (Bond Security) Levy Amendment Act 2013.*

In our view, this review must also take into account the regulatory impact for providers of these new bodies. We therefore recommend that the independent review include the following Bills:

- *Australian Aged Care Quality Agency Bill 2013;*

- *Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013;*

Some specific comments in relation to some of the new bodies are set out below.

3.1 **Pricing Commissioner**

We note that the Minister currently has very broad powers to set the price of subsidies, supplements and other fees under the Act. However it is proposed that from 1 July 2014 a Pricing Commissioner will be appointed to make decisions on pricing issues and to carry out "*such other functions as specified by the Minister by Legislative instrument.*" At this stage, the Pricing Commissioner's role is proposed to be limited to approving accommodation payments over specified limits and approving extra service fees. The proposed amendments provide that the Pricing Commissioner may delegate any of its functions to an employee of the DOHA.

We consider that this limited role is inconsistent with the concept of an independent pricing authority, as contemplated by the Productivity Commission. We recommend that if there is to be a Pricing Commissioner, it should be a body independent of DOHA with powers unfettered by the Minister to set price.

3.2 **Australian Aged Care Quality Agency**

We note the Productivity Commission, in its Report, identified three principal issues with the Accreditation Agency in its current form:

(a) it operates as a monopoly being the sole accreditation body of aged care providers;

(b) its dual functions of compliance and continuous improvement conflict; and

(c) there is a lack of consistency (and in some cases quality) of the assessors appointed by the Agency.

We consider that the proposed Quality Agency does not address the issues raised by the Productivity Commission. The Quality Agency will continue to have a monopoly over accreditation and its role in quality and compliance will now extend from residential care to home care post 1 July 2014. The staff of the Accreditation Agency will become the staff of the Quality Agency.

We therefore recommend that further consideration be given to addressing the dual functions of compliance and lack of consistency of the assessor appointed by the Agency.

3.3 **Aged Care Commissioner**

We note the amendments propose to grant expanded powers to the Aged Care Commissioner and introduce new Commissioner Principles.

We refer to the Productivity Commission Report, which questioned the value of retaining the role of the Aged Care Commissioner unless his/her powers were expanded to include some right to overturn decisions of DOHA. We note the amendments do not give the Aged Care Commissioner any expanded powers of this nature.

We therefore recommend that the *Australian Aged Care Quality Agency Bill 2013* be amended to expand the powers of the Aged Care Commissioner to overturn decisions of DOHA.

4 Care recipient contributions to home care and residential care

4.1 General

(a) This section will consider:

(i) the income tested fee for home care;

(ii) the means tested care fee for residential care; and

(iii) annual and lifetime caps on those contributions.

4.2 Contributions to home care – proposed changes

(a) From 1 July 2014, the Act will be amended (section 48-7) to require some care recipients to contribute more to the cost of their care through an income tested care fee.

(b) No full rate pensioner will be asked to pay an income tested care fee (though they will still contribute a part of their pension) and no care recipient will be asked to contribute more than the cost of their care.

(c) In relation to the income tested fee the following will apply:

(i) The care recipient's home and other assets are excluded from the assessment undertaken to determine their capacity to pay.

(ii) Once a care recipient reaches the applicable annual or lifetime cap (see further information below at section 4.5) of their 'combined care subsidy reductions', they will pay no additional income tested care fee for home care or income/asset tested care fees for residential care. They will however continue to pay a basic daily fee being a percentage contribution of their pension to the home care and residential care.

4.3 Reductions to government subsidy for residential care

(a) Proposed changes:

(i) From 1 July 2014 three reductions may be made to the amount of Government subsidy paid for residential aged care recipients:

(A) the care subsidy reduction – this will be a means tested care subsidy reduction and will replace the existing income tested reduction (described in further detail below);

(B) the adjusted subsidy reduction – this is applicable only to State and Territory operated facilities and is not applicable to UCA (in any event it will continue to operate as it currently does); and

(C) the compensation reduction – this will continue to operate as it currently does, i.e. a reduction to represent the care component of any compensation award.

(b) Care subsidy reduction:

(i) The care subsidy reduction will be calculated in accordance with a calculator described in the Act. The changes are reflected in new sections 44-21, 44-22 and 44-23 of the Act proposed to commence on 1 July 2014. (see below)

(ii) The maximum care subsidy reduction is the cost of care, i.e. the total sum of any subsidies payable and all primary supplements.

(iii) The care subsidy reduction will involve:

(A) applying a means testing calculator to identify the care recipient's relevant means tested amount; and

(B) comparing the relevant means tested amount to the maximum daily rate of accommodation supplement.

4.4 **Means tested reduction /care subsidy reduction - Steps 1 to 4**

(a) Section 44-21 sets up the new 'care subsidy reduction calculator'. The provisions are complex.

(b) **Step 1 –** Calculate the 'means tested amount' as provided for under section 44-22.

(i) The means tested amount is the sum of the 'income tested amount' and the 'per day asset tested amount'.

(ii) A new section 44-26A sets out the value of the person's assets for the purposes of determining the 'per day asset tested amount'. It now includes the value of any refundable accommodation deposit (bond) paid but still excludes the value of the person's home if it is occupied by a partner, a dependent or a carer. If the care recipient is a member of a couple only 50% of their joint assets are considered.

(iii) The section also states that if a person's home is to be considered, the value of a person's home can only be considered up to the maximum value of the home as determined by the Minister by Legislative Instrument – at this stage proposed to be approximately $140,000.

(c) **Step 2 -** Compare the 'means tested amount' with the maximum daily amount of the accommodation supplement. If the relevant 'means tested amount' is less than the maximum daily amount of the accommodation supplement (i.e. without significant refurbishment - $32 per day or with significant refurbishment - $50 per day), then the means tested reduction is zero. Accordingly, the Government pays the full subsidy and the care recipient pays no means tested care fee. This would occur where, for example, a single person's income is below $22,701 (indexed) and their assets are below $40,500 (March 2012 rates).

(d) **Step 3 -** If the relevant 'means tested amount' is more than zero, but less than the sum of the basic subsidy amount and all primary supplements (i.e. the relevant means tested amount is less than the care costs), then the care subsidy reduction is the relevant means tested amount less the maximum daily amount of the accommodation supplement.

The care recipient contributes what they can to the cost of their care, but the Government pays the difference between this and the person's actual cost of care.

(e) **Step 4** - If the relevant 'means tested amount' is more than the sum of the basic subsidy amount and all primary supplements (i.e. the relevant means tested amount is greater than the cost of care), then the care subsidy reduction is the sum of the basic subsidy amount and all primary supplements. The resident pays the costs of care.

4.5 **Life time and annual caps on care contributions**

(a) As from 1 July 2014, it is proposed that a life time and annual cap shall apply to care subsidy reductions.

(b) If the annual care subsidy reduction exceeds the annual cap ($25,000 indexed annually), the care subsidy reduction is zero and no means tested care fee is payable until the anniversary of the care recipient's date of entry to care.

(c) If the lifetime care subsidy reduction exceeds the lifetime cap ($60,000 indexed), the care subsidy reduction is zero and no means tested care fee is payable by the care recipient for as long as they receive Government subsidised care.

(d) It is proposed that the caps will operate as follows:

(i) The standard resident contribution will not count towards the annual and lifetime caps i.e. the annual and lifetime caps apply to the means tested care fee only.

(ii) The dollar value of the caps will be indexed annually.

(iii) A 'care subsidy reduction' is defined under section 44-21 or 48-7 i.e. residential care subsidy reduction plus home care subsidy reduction. The 'combined care subsidy reduction' therefore excludes any amount paid by the resident as a contribution to their accommodation.

(iv) Each care recipient's care subsidy reductions will be tracked by Government (the Department of Human Services, i.e. Centrelink).

(v) The caps will be calculated by reference to the care subsidy reduction, i.e. the maximum amount of means tested care fee that could have been charged by the approved provider even if a lesser amount was actually charged.

(vi) The calculation of the care recipient's lifetime cap will commence on the person's entry into care, regardless of whether the person first commenced receiving home care or residential care. The calculation of a care recipient's annual cap will commence on the person's date of entry to care and the annual cap re-sets annually from that date.

(vii) The annual cap will not re-set when a care recipient moves between services, even if there is a 28 day gap in the provision of residential care.

(viii) If a care recipient moves from home care to residential care, the income tested care fees that the care recipient paid in home care will count towards both the residential care annual cap and the lifetime cap.

(ix) If a care recipient is in residential care on 30 June 2014, there will be no change to the way that the care recipient's fees are calculated.

4.6 **Possible consequences**

(a) Management of the annual and lifetime caps will be crucial as approved providers will face a temporary loss of income unless the Department of Human Services manages the annual and whole of life caps in a timely fashion.

(b) Given there is no maximum cap on daily contributions, it remains to be seen what impact the annual caps have on residents.

(c) Certainly, some residents will pay more by way of contribution to their care than they would have previously. There appears to have been some erroneous suggestion that the caps offer a benefit to consumers, however it is likely that some residents may end up paying for the majority of the costs of their care until the caps are reached, when they would not previously have done so.

(d) For example, a care package recipient who has care costs at $200 per day who is assessed as fully self-funding will pay $200 per day until their annual cap is reached. The resident will also have to pay their basic daily fee i.e. $42 per day. This is a significant contribution and it would appear to be far more equitable to ask that care recipient to contribute those costs over the course of a year rather than pay all costs upfront.

(e) Further consideration of the same issue is set out below:

(i) Say the resident is a high care resident and her subsidies and primary supplements are $200 per day;

(ii) Because she has sufficient income and assets her maximum contribution may be $200 per day (no maximum daily contribution);

(iii) She also has to pay her basic daily fee i.e. $42 per day;

(iv) The resident will be paying $242 per day until she gets to the $25,000. This will take approximately 125 days ($200 x 125);

(v) Total cost to resident over 125 days is $30,250.

(f) Compare under current system:

(i) Her subsidies and supplements are $200 per day;

(ii) Her income tested fee is $67 per day;

(iii) Her basic daily fee is $42 per day;

(iv) Government pays $200 less her income tested care fee $67, being $133 per day;

(v) Resident pays $109 per day;

(vi) Cost to government over 125 days $16,625;

(vii) Costs to resident over 125 days $13,625 – total cost $30,250.

If the resident passes away before the expiration of 125 days, this will result in a significant cost saving to the Government and a significant financial impost for the resident. Admittedly,

this will only apply to a limited number of residents with significant means but it may still be an issue and is clearly inequitable. We recommend that consideration be given to this issue.

5 Removal of the high care / low care distinction

(a) It is also proposed that the Act will be amended to remove the high care/low care distinction post 1 July 2014. This will require relatively minor changes to the Act but significant changes will be made to the *Quality of Care Principles 1997* (Cwth) (Quality of Care Principles) including to the existing Schedule 1 Specified Care and Services.

(b) It is proposed that the Act will be amended to provide that from 1 July 2014:

(i) all approvals for residential care that were given before 1 July 2014 (and were limited to low level residential care) are no longer limited to low care;

(ii) approvals (regardless of when they were given) for residential care will be for residential care, without limitation as to the level of residential care; and

(iii) residential care approvals (that were in force on 30 June 2014) will not lapse but may expire if they were explicitly time limited.

(c) Removal of the distinction between high care and low care is generally considered to be positive reform, subject to industry support of the proposed amendments to the Schedule of Specified Care and Services and eventually a cost of care study being performed.

(i) It will be critical to ensure that any changes are cost neutral to providers and/or that any additional costs resulting from removing the high/low distinction are fully compensated via the subsidies paid through the Aged Care Funding Instrument (ACFI).

(ii) A review of the 'Security of Tenure' legislation is required. For example, where a service is unable to provide a certain level of care, homes that traditionally only have low care residents would have had grounds to ask the resident to leave. We consider that this will need to be recast.

6 Extra services

(a) Approved providers of residential care will continue to be able to offer care on a dedicated 'extra service basis' (ES). If a provider held ES places before 1 July 2014 those arrangements will continue with no change for the residents who entered under those arrangements.

(b) The arrangements relating to new applications for ES status and the granting of ES status will remain largely the same. Applications for ES status will continue to be competitively assessed via Aged Care Approval Round (ACAR).

(c) The key differences are that post 1 July 2014:

(i) Providers will be able to apply for ES status for one or more rooms in the service. This would be achieved by repealing paragraph 30-3 (b) of the Act and including an additional example within the definition of a 'distinct part' of a service at section 30-3 of the Act. The section will state, by way of an example, that a distinct part of a service might include an individual room.

(ii) The Pricing Commissioner will approve ES fees. This power will no longer sit with DOHA. The criteria to be utilised by the Pricing Commissioner has not yet been released.

(d) The additional charge of 25% of the ES fee will be repealed i.e. the ES clawback.

(i) The requirement of DOHA to respond to a new application for ES within a prescribed period will be removed. The reason given for this change is that as the application for ES sits in the ACAR process and the timing for completion of ACAR does not always allow a response in the prescribed period

We also note the following issues have not been addressed:

(a) Section 44 – 28(2)(a)(iii) of the proposed amendments provides that a care recipient is eligible for an accommodation supplement if "*the residential care provided to the care recipient is not provided on an ES basis.*" It is not clear from the amendments or the explanatory materials whether the intention is that the increased accommodation supplement will not be payable for supported residents in ES facilities or ES places within a facility.

(b) Will ES providers' places or facilities be exempt from the 40% supported resident ratio rule?

(c) Will ES applications for individual rooms be made in or out of the approvals round? If they are to be approved outside of the round, who will determine the application? Can an application be made at any time?

(d) Will the ES clawback continue to apply for residents who enter an ES place pre 1 July 2014?

We therefore consider that these issues should be addressed.