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Department of Health,
Disability and Ageing

Inquiry into the Aged Care (Accommodation Payment Security) Levy Amendment Bill 2025 and Aged Care and Other Legislation Amendment Bill 2025

Submission from the Department of Health, Disability and Ageing
to the Senate Community Affairs Legislation Committee Inquiry into the
Aged Care (Accommodation Payment Security) Levy Amendment Bill 2025
and Aged Care and Other Legislation Amendment Bill 2025

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Introduction

The Aged Care (Accommodation Payment Security) Levy Amendment Bill 2025 (AC(APS) Levy Amendment Bill) and the Aged Care and Other Legislation Amendment Bill 2025 (ACOLA Bill) make amendments to existing legislation to support the commencement of the *Aged Care Act 2024* (the new Act) commencing on 1 November 2025.

The new Act replaces the *Aged Care Act 1997* (the 1997 Act), the *Aged Care Quality and Safety Commission Act 2018* (the Commission Act) and the *Aged Care (Transitional Provisions) Act 1997* (the old Transitional Provisions Act) as the Commonwealth's primary aged care legislation.

Bill overview

Aged Care (Accommodation Payment Security) Levy Amendment Bill 2025

The AC(APS) Levy Amendment Bill amends the *Aged Care (Accommodation Payment Security) Levy Act 2006* (AC(APS) Levy Act) to ensure that references to 'approved providers' (relevant under the 1997 Act) now refer to 'registered providers' (relevant under the new Act).

Aged Care and Other Legislation Amendment Bill 2025

The ACOLA Bill makes technical and consequential amendments to support the commencement of the new Act.

The amendments made by the ACOLA Bill support the seamless transition for individuals accessing aged care services from the system established under the 1997 Act to the new regulatory model designed to encourage delivery of high quality funded aged care services by registered providers and increase provider accountability established under the new Act. The amendments also make amendments to correct errors in drafting, and policy matters picked up through drafting the Aged Care Rules, to improve the new Act. The ACOLA Bill further facilitates the Government's aged care reform agenda which responds to recommendations from the Royal Commission into Aged Care Quality and Safety.

The ACOLA Bill comprises three schedules:

- ☐ **Schedule 1** - provides for amendments to the new Act
- ☐ **Schedule 2** - provides for amendments to the *Aged Care (Consequential and Transitional Provisions) Act 2024* (the C&T Act)
- ☐ **Schedule 3** – provides for consequential amendments to a range of Commonwealth legislation to reflect the repeal of the 1997 Act, Commission Act and the old Transitional Provisions Act

A more detailed overview of both the AC(APS) Levy Amendment Bill and the ACOLA Bill is set out in the document 'Aged Care Amendment Bills: Summary' at Attachment A.



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Aged care reform

On 1 March 2021, the Royal Commission into Aged Care Quality and Safety (the Royal Commission) *Final Report: Care, Dignity and Respect* (Final Report) was publicly released. The Royal Commission heard evidence regarding substandard care throughout its inquiry. The Final Report identified significant inadequacies with the current aged care system and made 148 wide-ranging recommendations for fundamental reform. In response, significant reform to the aged care system has been made.

The new Act passed both houses on 25 November 2024 and received Royal Assent on 2 December 2024. It will commence on 1 November 2025. The new Act will put older Australians first, strengthening quality, improving safety, and informed choice.

Consultation

The Amendment Bills accommodate feedback received through the Department's separate consultations on the draft Aged Care Rules, conducted between September 2024 and May 2025. For example, in response to feedback received on the Rules, the ACOLA Bill amends the new Act to:

- ☐ remove the ability for the rules to prescribe caps for cleaning and gardening services,
- ☐ remove the requirement for Higher Everyday Living Agreements to be in writing, giving the rules flexibility to prescribe specific circumstances where a written agreement is required (for example, planned on-going services, as opposed to ad-hoc services).

Aged Care (Accommodation Payment Security) Levy Amendment Bill 2025

The *Aged Care (Accommodation Payment Security) Levy Act 2006* (AC(APS) Levy Act) gives Ministerial discretion to impose levies on approved providers to recover any costs incurred by the Australian Government as a result of repaying refundable accommodation deposit balances (in all their forms) to residents. This would only occur in circumstances where an approved provider becomes insolvent and triggers the Accommodation Payment Guarantee Scheme.

The original legislation forms part of a suite of legislation which strengthened protection of residents' refundable accommodation deposits by guaranteeing the repayment of bond balances to residents if an approved provider becomes insolvent and is unable to repay bonds. It enables the Minister to make a determination to impose a cost-recovery levy on other approved providers to offset the cost of provider failure. While the power has not been used to date, as the collective holding of accommodation deposits across the sector rises, the contingent liability to the Commonwealth increases. The AC (APS) Levy Act allows the Commonwealth discretion to impose a levy and recoup costs of refunding residents' accommodation payments where no other avenue of recovery is available. The approach implemented was "post-payment" rather than seeking a guarantee fund, to ensure there are no impediments to capital being used as effectively as possible.



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Amendment is required to ensure that the AC(APS) Levy Act applies to ‘registered providers’ under the new Act rather than ‘approved providers’ under the 1997 Act. If the changes aren’t made, any levy applied would not be able to apply to the correct industry parties.

Aged Care and Other Legislation Amendment Bill 2025

Schedule 1 - Amendment of the Aged Care Act 2024

Overview

Schedule 1 provides for amendments to the new Act which make technical amendments and editorial corrections which ensure that the new Act supports intended policy outcomes. The matters provided through these amendments:

- ☐ allow different subsidy calculators to be set out in the rules for cohorts of people who are already receiving funding under the aged care system, implementing the ‘no worse off’ principle
- ☐ enable unspent funds accrued on behalf of older persons to remain available to them under the new system
- ☐ provide for interim funding for services for older persons during high demand periods
- ☐ mandate a review of the Aged Care Quality Standards every five years
- ☐ ensure that compliance data, both current and historical, can be used to inform Star Ratings
- ☐ provide authorisations for automation of decisions by Services Australia and the Department of Veterans’ Affairs related to means testing and subsidy calculations

Automation of Administrative Action

Schedule 1 contains amendments to the new Act to provide legislative authority for the automation of administrative action. While the new Act already provides for the automation of administrative action, the new amendments more transparently and explicitly provide legislative support for each of the instances of automated administrative action.

The amendments authorise the System Governor to arrange for the use of computer programs to take ‘administrative action’ under one of the specified provisions in the Act, including Parts 2 to 5 of Ch 4 (which deal with funding of aged care services). The System Governor may delegate this power to the Chief Executive Medicare and Chief Executive Centrelink. The amendments are in line with the revised automated-decision making framework led by the Attorney-General’s Department.

The amendment allows continuation of current automated components of provider payment and client means testing arrangements that have been in place under the 1997 Act for many years. The amendments will authorise and permit the use of automated systems and computer programs by Services Australia and Veterans’ Affairs to carry out their responsibilities under the new Act.



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Examples:

With respect to residential care subsidy and supplements, it is intended that the amendments will:

- ☐ explicitly permit the continuation of existing automated checking of objective tests for eligibility for subsidy such as:
 - an individual having an access approval in effect that covers the funded aged care service they are receiving (see paragraph 227(2)(b)); or
 - the individual has an entry into care date entered in the system; and
- ☐ explicitly permit the continuation of automated calculation of the objective methods for determining correct amounts of subsidy once eligibility has been confirmed, such as the individual was in care for 30 days during the claim period, is eligible for a daily subsidy of \$100, therefore the provider is owed \$3,000 for that individual for that claim period.
 - Where eligibility tests involve a subjective element, such as the Oxygen Supplement, Enteral Feeding Supplement or Fee Reduction Supplement, these will not be fully automated as they require an officer to manually check relevant applications for subsidy.

The intended effect of the amendments is to ensure all automated processes are described in entirely objective terms, putting it beyond doubt that they are administrative actions appropriate to automate.

Final approval of each payment of residential care subsidy and supplements will continue to involve a person engaging in a review step before manually releasing the payment.

With respect to means testing relating to both residential care and Support at Home, it is intended that the amendments will permit the continuation of existing automated checking of objective tests such as using already validated income and asset information collected as part of the pension process in the calculation of the individual's means tested consumer contribution. As this data had already been validated, it lends itself to automation where appropriate.

- ☐ Importantly, not all data comes from this source, so is not automated. People that have international pensions or are self-funded retirees, for example will not have validated pension data. Therefore, the data used for means testing for these individuals cannot be fully automated, but parts of the process can be, such as generating letters seeking further information.

Schedule 1 provides a series of consequential amendments required to ensure the relevant decisions under the new Act are amenable to automation. These amendments include



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removing discretion and subjective evaluation and ensuring that the provisions proposed to be automated are supported by objective criteria, formulae, or use validated data.

Schedule 2 - Amendment of the Aged Care (Consequential and Transitional Provisions) Act 2024 (C&T Act)

Overview

Schedule 2 provides for amendments to the C&T Act which make technical amendments and editorial corrections to support transition from the existing system established under the 1997 Act to that established under the new Act. In addition, these amendments provide for several new matters including:

- ☐ authorising the collection, use and disclosure of relevant protected and personal information acquired under the 1997 Act, old Commission Act, Social Security Act 1991, Social Security (Administration) Act 1999 or in relation to grant-funded aged care programs to prepare for implementation of the new Act
- ☐ bringing the information noted above into the information management regime of the new Act to ensure it can be used for the purposes of that Act as well as maintaining appropriate protections for its use and disclosure
- ☐ introducing a new time-limited rule making power which empowers the Minister, during the first two years of operation of the new Act, to make rules modifying the operation of primary legislation to ensure that continuity of care is maintained for older persons in the event of unforeseen or unintended circumstances arising during transition and implementation of the new rights-based aged care system established by the new Act.

Henry VIII Rule Making Power

Part 4 of Schedule 2 - Modification of operation of Commonwealth aged care system during first 24 months

Schedule 2 provides for rules to be made which alter the operation of any aspect of the Commonwealth's aged care system. It does so by modifying the operation of the provisions of the Aged Care (Consequential and Transitional Provisions) Act 2024, or any other Act, or by saving specified provisions of the old law. The old law includes the Aged Care Act 1997, the Aged Care Quality and Safety Commission Act 2018, and the Aged Care (Transitional Provisions) Act 1997. Rule making powers of this nature are often referred to as "Henry VIII" rule making powers.

This schedule provides for a Henry VIII rule making power because it allows the Minister to make rules, subject to ordinary scrutiny mechanisms, which modify the operation of legislation as passed by Parliament. This power is adapted and proportionate and may only be used where the Minister is satisfied that it is necessary or appropriate to do so, and only in relation to the Commonwealth aged care system. The rule should also be viewed against the context of supporting the continuity of provision of funded aged care services.



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That said, it is not uncommon that rules act to determine or alter the law under a power delegated by the Parliament - see the legislative instrument framework provided for by the Legislation Act 2003. The use of rules, even those of legislative character, is an implicit understanding that there are matters where the Parliament is better served by providing the Executive branch an ability to manage the systems they operate. The rationale for this rule making power relates to the significance of the legislative changes made under the new Act, being a completely new legislative framework, and the significance for potentially vulnerable older Australians that the legislation supports.

This power is carefully adapted and limited and is intended to apply only in circumstances where an inadvertent consequence of legislative change creates a gap in how the system operates.

Subitem (1) sets out examples of when the rules may modify the operation of the aged care system, and, although not an exhaustive list, they are illustrative of the matters contemplated at the time of drafting. For instance, provisions across the Act have been amended to ensure they are amenable to automation, where necessary. Subitem (1) contemplates that there may be further amendments required, should it be necessary for the operation of the aged care system to automate additional administrative actions. Additionally, these provisions provide for rules to save provisions of the old law (1997 Act or related subordinate legislation) that provide for subsidy under certain circumstances under the old law. Rules could be made to ensure that where a registered provider receives payment of a certain form of subsidy in respect of older persons, that payment could continue, if provision was not made for this ahead of commencement of the new Act. This power to make rules is bound by expiry and time limitation provisions which ensure that the rules may only be used for a limited period following commencement of the amendment. Rules can only be made for 24 months following commencement, which occurs on Royal Assent, and any rules made under the power are repealed 24 months after they are made, unless an earlier date is specified. Enduring changes will still require a legislative amendment.

Subitem (6) of item 2 of Part 4, Schedule 2 of the ACOLA Bill provides for a contrary intention to subsection 12(2) of the Legislation Act 2003. The effect of this provision is that rules made retrospectively, noting that they must overwhelmingly be necessary or appropriate, may not disadvantage a person or impose liability on a person that did not apply at that time. Subitem (7) provides that this retrospective effect cannot result in a conviction for an offence, or payment of a pecuniary penalty.

The intention of the rule making power is to serve as a failsafe, ensuring the Minister can act swiftly to address an unforeseen or unintended circumstances that could potentially arise following the implementation of the new Act. Primarily it would be to address any interruption to critical services that may result in significant detriment to the older persons who rely on them. Further, this rule making power is intended to ensure that technical matters, such as those set out above, which may be unrealised at the time of



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commencement, may be dealt with by the Minister in accordance with the expected outcome.

Ultimately, any legislative instrument made by the Minister is disallowable by Parliament, which ensures that there is appropriate Parliamentary scrutiny and oversight of any exercise of legislative power under this provision by the Minister.

Schedule 3 - Amendments of other Acts

Overview

Schedule 3 includes provisions which make consequential amendments to a range of Commonwealth legislation to reflect the repeal of the 1997 Act, Commission Act and the old Transitional Provisions Act. These amendments ensure that legislation affected by the repeal of the old law reflect the concepts and terminology used within the new Act, and that references to the old laws are read as references to the new Act and associated legislative instruments.

This Schedule also includes provisions to amend the Healthcare Identifiers Act 2010 to enable (but do not mandate) healthcare identifiers and other identifying information to be used in relation to the delivery of health and aged care and other support services, including the delivery of disability services, and for health-related and health administration purposes.