

Australian Nursing and Midwifery Federation Response

**Exposure Draft and Explanatory
Statement - Aged Care Legislation
Amendment (Registered Nurse)
Principles 2023**

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**Australian
Nursing &
Midwifery
Federation**



Annie Butler
Federal Secretary

Lori-Anne Sharp
Federal Assistant Secretary

Australian Nursing and Midwifery Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
E: anmffederal@anmf.org.au
W: www.anmf.org.au



INTRODUCTION

The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 320,000 nurses, midwives and carers across the country.

Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a professional and industrial organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

With regard to care of older people, ANMF members work across all settings in which aged care is delivered, including over 45,000 members who are currently employed directly in the aged care sector. Many more of our members are involved in the provision of health care for older persons who move across sectors (acute, residential, community and in-home care), depending on their health needs. Being at the forefront of aged care, and caring for older people over the twenty-four hour period in acute care, residential facilities and the community, our members are in a prime position to make clear recommendations to improve the care provided and enhance processes for access to that care.

The ANMF has been instrumental in progressing and supporting the legislative requirement for registered nurses to be on-duty in nursing homes 24 hours per day for many decades. We welcome the opportunity to provide feedback on the exposure draft for the Aged Care Legislation Amendment (Registered Nurse) Principles 2023. Our submission makes comment on a number of key issues regarding the Bill and its associated amendments commencing 1 April 2023.



OVERVIEW

The ANMF understands that the proposed legislation will enable providers to apply for an exemption to require a registered nurse (RN) 24 hours per day (RN 24/7) if the facility is located in a Modified Monash Category 5, 6 or 7 and has no more than 30 operational places. The ANMF supports the need to have established processes in place to enable exemptions only while the sector transitions to meet the requirement of having registered nurses on-site and on-duty in rural and remote areas where it may be difficult to recruit and retain registered nurses. However, the ANMF recommends that an exemption must only be granted if the safety of residents and workers providing care is assured and the clinical care requirements of care recipients are met. An exemption must only be granted for a short period (no longer than 6 months) and regular exemption reporting that is made publicly available by the provider, the Aged Care Quality and Safety Commission and the approving Secretary must be in place.

The ANMF does not support aged care providers receiving any funding supplement for RN 24/7 if there is an approved exemption in place. The ANMF also only supports a funding supplement for RN 24/7 being paid to providers when they have been able to ensure all shifts are covered with registered nurses on-site and on-duty in a 24 hour period.

In addition to funding exclusions, it is essential that the Aged Care Quality and Safety Commission establish clear expectations that are consistent with the legislative requirements for registered nurses on-site and on-duty 24 hours per day in facilities. This should be done through the Aged Care Quality standards and ongoing monitoring. If a provider is found to be non-compliant that is, not having a registered nurse on-site and on-duty, this situation must automatically trigger a review audit.

Information Principles 2014

1 After paragraph 8(a)

The ANMF understands that the draft legislation is proposing that an exemption when approved will be applied for all shifts for a facility. It is very unlikely and would be of grave concern that a facility would require a blanket exemption. It is more likely that a limited number of shifts in a week are unable to be covered by registered nurses. For example, a facility may be unable to have registered nurse coverage for two night shifts in a week or a Sunday afternoon shift. The ANMF is concerned that applying a blanket exemption for all shifts with minimal safe guards could result in the unintended consequence of more shifts not being covered by registered nurse than necessary. It is important that the legislation clearly reflects that exemptions are only approved for shifts that cannot be filled and that providers are not given a blanket exemption.



The exposure draft outlines that the approving Secretary will be responsible for determining if a provider meets the criteria for an exemption and the Secretary needs to be *satisfied that the provider has taken to ensure that the clinical care needs of the care recipients in the facility will be met during the period for which the exemption is in force*. As the decision for an exemption is based on the identification of clinical care not being compromised, it is reasonable to expect that it would be health practitioners, including registered nurses, with appropriate expertise and experience, who will provide advice to the Secretary regarding the granting of exemptions. The ANMF recommends that this decision is founded on established evidence based processes. Advice provided to the Secretary through the Aged Care Quality and Safety Commission should be compiled by the relevant health practitioners employed within the Commission. The Secretary should also gather other relevant stakeholder information relating to the decision, including the voice of the workers within the facility and their representatives.

Division 2 Process for granting exemptions

Section 15Q Application for exemption

The ANMF understands that processes will be established to identify the content required to be populated in the application form for an exemption and that it is unreasonable for all of this detail to be added to legislation. The ANMF does however provide the following list of essential criteria that should be included in the application form for assessment. These include:

- Shifts per week requiring an exemption;
- Identification of the AN-ACC classification for each resident;
- The staffing and skill mix on each shift- outlining how many registered nurses, enrolled nurses and care workers are present;
- Clinical governance processes in place;
- Policies in place for administering medicines, including the administration of medicines that are not scheduled such as break through pain relief;
- Established processes for assessing and managing resident deterioration;
- Policies and procedures in place for managing emergencies; and
- Established protocols for the use of on-call registered nurses that are consistent with the expectations of the Nursing and Midwifery Board of Australia.

Section 15S Decision whether to grant exemption

The exposure draft provides that an exemption can be granted on the following grounds:

Criteria for grant of exemption



(1) If the Secretary receives an application under section 15Q from an approved provider for an exemption from section 54-1A of the Act in relation to a residential facility, the Secretary may grant the exemption only if:

(a) the facility is located in an MM 5 area, MM 6 area or MM7 area; and

(b) there are no more than 30 operational places in the facility on the day of the Secretary's decision; and

(c) the Secretary is satisfied that the provider has taken reasonable steps to ensure that the clinical care needs of the care recipients in the facility will be met during the period for which the exemption is in force;

The ANMF submits the following amendments should be made to section 15S.

The ANMF notes that subsection 15S(1)(b) outlines the requirement to ensure there are no more than 30 operational places in the facility on the day of the Secretary's decision. However, this requirement should not be limited to only the day of the decision, this clear threshold of no more than 30 operational places needs to be established for the period of the extension. The ANMF recommends that the following provisions be added to this subsection:

(i) the Secretary is satisfied that there will not be more than 30 operational places in the facility within the period during which any exemption will apply; and

In addition to the threshold for granting an exemption based on the size of the facility, such a decision must also be based on reasonable grounds. The following provision should be added to the legislation:

(ii) there are reasonable grounds for doing so; and

The ANMF also suggests that a statement is included in subsection 15S(1) to ensure that an exemption is not granted to a facility under any circumstances if residents in that facility require a high level of care. If residents do require this level of care, a registered nurse needs to be on site and on duty to ensure the assessed care needs are met. The following statement should be included:

(iii) the Secretary is satisfied that the care recipients in the facility during the period of the exemption will not require a high level of residential care; and

In relation to subparagraph (c) in this subsection the ANMF recommends that it is important that the secretary is satisfied the clinical care needs are met during the whole exemption period not simply satisfied that the provider has taken reasonable steps to ensure clinical care needs of care recipients are met at the time of the decision to grant the exemption. The ANMF suggests the following words in bold should be added to this subparagraph.



*(c) the Secretary is satisfied that the provider has taken **and will take** reasonable steps to ensure that the clinical care needs of the care recipients in the facility will be met during the period for which the exemption is in force; **and***

It is recommended that a number of additional statements are added into this subsection relating to co-located facilities such as Multi-Purpose Services. The ANMF is concerned that an unintended consequence of this legislation and the granting of exemptions could result in staffing within the co-located facility being understaffed. It is essential that the decision for an exemption considers the staffing arrangements not just for the aged care facility but also the co-located facility. The following statements should be included in section 15S:

(d) in relation to residential facilities that are co-located with a health service facility, such as a Multi-Purpose Service within a state public health service, the Secretary is satisfied that;

- (i) the residential facility is within the same building as the health service facility and is easily accessible by a registered nurse at all times,**
- (ii) there is at least one registered nurse on duty at all times within the health service facility who is able to easily access the residential facility at all times,**
- (iii) there are sufficient numbers of registered nurses on duty at all times at the health service facility to ensure that there is at least one registered nurse on duty who is able to attend the residential facility, even in the event that there is an emergency in the health service facility,**
- (iv) there is at least one registered nurse on duty at all times within the health service facility who is rostered over and above the usual staffing profile which would be rostered in the health service facility if it did not contain a residential facility, and**
- (v) the person who operates the health service facility has implemented emergency response procedures designed to minimise the adverse impact of emergencies on the staffing of the residential facility.**

The ANMF is also concerned that the draft legislation does not provide detail outlining the required expectations for ongoing recruitment and retention mechanisms to be in place for facilities. Without a provision of this kind there would be no obligation on a provider to attempt to recruit registered nurses either prior to seeking an exemption or thereafter. The ANMF recommends that the following subparagraph is included:

(e) the facility has taken, and will continue to take in the period during which any exemption will apply, all reasonable steps to engage a sufficient number of registered nurses to work at the facility to ensure there is a registered nurse on duty at all times including by way of;



- (i) **job advertisements,**
- (ii) **use of agency staff,**
- (iii) **use of casual employees,**
- (iv) **use of reasonable overtime or additional hours for existing staff,**
- (v) **offering higher remuneration or bonus arrangements,**
- (vi) **offering to provide workers with suitable accommodation, and**
- (vii) **offering to compensate workers for travel and accommodation costs; and**

Further, the ANMF considers the legislation should include a provision designed to mitigate against providers arranging their services in order to evade the legislation relating to 54-1A. Without it, the Secretary would not be required to consider such matters. The following subparagraph is recommended to be included:

(f) the Secretary is satisfied that the operator of the facility has not arranged its operations in a manner designed to evade the effect of section 54-1A, including by taking action designed to, in whole or in part, result in there only being 30 or less operational places in the facility for the purposes of subsection (1).

To ensure the assessment for an exemption includes a comprehensive review of the facility as a whole, including how it is designed and the services provided the following additions are recommended with the addition of (d) outlined below:

(2) In deciding whether to grant the exemption, the Secretary must have regard to:

(a) any sanction imposed on the approved provider under section 63N of the Quality and Safety Commission Act; and

(b) any notice given to the approved provider under section 63S, 63T, 63U or 74EE of that Act; and

(c) any information given to the Secretary by the Quality and Safety Commissioner in accordance with section 56 of that Act that is relevant to assessing whether the provider has taken the reasonable steps mentioned in paragraph (1)(c) of this section; and

(d) the facility as a whole including;

- (i) the physical layout of the facility,**
- (ii) the services provided at the facility,**
- (iii) all residential facilities and residential care services operated at the location, adjacent to the location or in the immediate vicinity of the location.**

As discussed above it is also essential that the Secretary is not solely relying on the information provided by one source- the Commission, when granting an exemption. A broad range of important stakeholder views must be heard including that of the worker, their representatives and consumers.



To address this issue the ANMF recommends the following statement is added to section 15S:

(e) any other matter the Secretary considers relevant including, but not limited to, the views of workers employed at the facility or their representatives and the views of residents of the facility or their representatives.

The ANMF also notes that section 15 lacks detail about timeframes for exemption decisions to be assessed and outcomes made. It is important that these comprehensive decisions are made in a timely and transparent manner. Providers need to clearly understand how long the decision will take and their responsibilities for safe care delivery while the assessment is being made. Further, the legislation needs to provide transparent timeframes for appeal processes and identify what safety measures will need to be temporarily put in place while the facility goes through the appeal process.

Period of exemption

(3) The Secretary may grant an exemption to an approved provider in relation to a residential facility for which the approved provider has previously been granted an exemption.

(5) The period:

(a) must not be longer than 12 months; and

(b) must not begin before the day on which the Secretary grants the exemption.

As outlined above the ANMF does not support the maximum period of the exemption being 12 months, this is unreasonably long. It is essential that registered nurses are present 24 hours per day in a nursing home to provide their expertise and clinical leadership in care delivery for older people. The intention of the exemption is to give providers time to implement recruitment and retention strategies to employ registered nurses. Giving an exemption for 12 months is unnecessary. Processes need to be put in place in a timely manner to ensure registered nurses are recruited and retained in a facility. The ANMF recommends that the maximum exemption period should be six months.

Section 15W Revocation on other grounds

Grounds for revocation

The ANMF suggests that if an exemption is in place and the Quality and Safety Commission imposes sanction/s on a facility then the exemption should automatically lapse. Contravention of these provisions should cause the exemption to cease to apply. Otherwise, there would be a delay between the contravention and any decision to revoke the exemption. This would be to the detriment of care recipients. Subparagraph (c) and (d) should be deleted from subsections 15W(1) and replace with section 15WA below:



(1) The Secretary may revoke an approved provider's exemption from section 54-1A of the Act in relation to a residential facility if:

(a) the Secretary is satisfied the approved provider has breached a condition of the exemption; or

(b) the Secretary is not satisfied that the clinical care needs of the care recipients in the facility:

(i) are being met; or

(ii) will be met during the period the exemption would otherwise be in force; or

~~*(c) the Quality and Safety Commissioner imposes sanctions on the approved provider under section 63N of the Quality and Safety Commission Act; or*~~

~~*(d) the Secretary becomes aware there are more than 30 operational places in the residential facility.*~~

Insert Section 15WA as follows

(1) An approved provider's exemption from section 54-1A of the Act in relation to a residential facility ceases to have effect if;

(a) the approved provider breaches a condition on the exemption; or

(b) the Quality and Safety Commissioner imposes sanctions on the approved provider under section 63N of the Quality and Safety Commission Act;

(c) there are more than 30 operational places in the residential facility at any one time; or

(d) a care recipient in the facility requires a high level of residential care.

(2) if an exemption ceases to have effect under subsection (1), it can never have effect again.

Schedule 2- Amendments commencing 1 July 2023

Part 4B Information about registered nurses

44B Report about registered nurse responsibility at residential facility

Provision of report

(1) An approved provider who provides residential care through a residential care service to care recipients in a residential facility during a calendar month must give the Secretary a report about the responsibility relating to registered nurses in section 54-1A of the Act (whether or not the approved provider has been granted an exemption from section 54-1A of the Act in relation to the residential facility).

2) The report must be given to the Secretary within 7 days after the end of the calendar month, or within a longer period specified by the Secretary by notice in writing given to the approved provider.



The ANMF supports the intention of section 44B(1) outlined above, however is concerned that providers are required to only provide a monthly report. A monthly reporting cycle suggests that any facility issues relating to RN 24/7 coverage may not be identified and dealt with by the regulator for at least a month. The ANMF suggests that a real-time digital information system should be implemented that will capture this information in a timely manner and flag issues quickly.

It is also essential that reporting data including compliance rates are made publicly available on a quarterly basis for transparency. Further, decisions made about exemptions and reporting relating to an approved exemption should be publicly available. All stakeholders including workers, their representatives and consumers must be able to easily access information about a facility, their compliance and any approved exemptions.

CONCLUSION

The ANMF maintains that exemptions are necessary only while the sector transitions to meet the requirement of having registered nurses on-site and on-duty 24 hours per day in Modified Monash Category 5, 6 and 7 where it may be difficult to recruit and retain registered nurses. Exemptions must only be granted if the safety of residents and workers providing care is assured and the clinical care requirements of care recipients are met. They should only be granted for a short period and all regular reporting for the registered nurse 24 hour requirement and exemptions must be publicly and transparently available to all tax-payers.