

Submission by the Australian Nursing and Midwifery Federation

**Aged Care Quality and Safety
Commission Amendment (Code of
Conduct and Banning Orders)
Rules 2022**

Exposure Draft

October 2022



**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

1. 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 310,000 nurses, midwives and care-workers across the country.
2. 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.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides 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.
4. 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.
5. The ANMF welcomes the opportunity to provide comment on the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 Exposure Draft (ED). The ANMF does not support the introduction of the Code and accompanying Exposure Draft in its current form as we consider it is not the appropriate instrument to ensure safe and quality outcomes in aged care and that it is structurally flawed.
6. The ANMF has advocated for reform in aged care over many years and was a strong contributor to the Royal Commission into Aged Care Quality and Safety. Since the Final Report was handed down, a number of recommendations were acted upon by the Morrison Government and many welcome reforms are now in the process of being implemented by the Albanese Government. The ANMF is concerned however, that the implementation of reform, including the introduction of the Code of Conduct and Banning Orders, has not been done in a system wide manner as part of a coordinated and cohesive reform program. The ANMF takes the opportunity to make the observation that the Code and accompanying ED appear to have been developed without sufficient or adequate consultation and without a clear overview of how the ED will operate in the broader context of aged care reform and the current regulatory scheme.
7. The Code as currently proposed is to apply to all aged care workers, governing persons and approved providers. It is the ANMF's strong view that adoption of one Code to regulate the conduct of all service and care providers in the aged care sector will result in inequity, unfairness and fail to ensure that the appropriate level of accountability is met by those who



are responsible for the delivery of safe and quality care. On the one hand, the scheme as proposed sets a compliance burden on aged care workers that is excessively high and on the other, standards that are too low to be effective for providers. A regulatory scheme that proposes to set compliance standards and consequences for breaches of standards at the same level for a kitchen hand, personal care worker, nurse as a CEO or board member, is fundamentally flawed. The consequences of non-compliance with respect to the ED and supporting legislation must be revisited.

8. The ANMF represents registered nurses (RNs) and enrolled nurses (ENs) who are registered health practitioners. As set out below, the effect of being a registered health practitioner is to ensure that appropriate skills, training and understanding of care delivery standards are met upon entry to the relevant profession and that these standards are maintained on an ongoing basis. The ANMF states that it is neither necessary, practical nor appropriate for registered health practitioners to be subject to the Code. For unregistered care workers, such as assistants in nursing or personal care workers, the ANMF considers, as set out below, that the preferred means of ensuring standards of safe and quality care are met is to establish a registration scheme.
9. The ANMF appreciates that the primary aim of the Code, is to protect the safety and wellbeing of people receiving aged care services and to ensure services are delivered respectfully and in a manner that acknowledges the individual's human rights, privacy and personal, cultural and spiritual needs and aspirations. The ANMF agrees with the aim of the Code, however, considers its current execution is flawed and fails to recognise existing schemes that address the same aims. In addition, any regulation of the sector must be viewed as a factor that may influence the attraction and retention of a suitably skilled and qualified workforce into the aged care sector.
10. The ANMF recommends that the ED and the Code be withdrawn and that further consultation about the design and application of the Code be undertaken. In the alternative, the ANMF raises the following concerns in relation to the application of the Code and specific concerns about the ED.
11. The ED has been released following consultation held in late 2021, in relation to introducing a Code of Conduct applicable to providers and workers across aged care, veterans' care and disability support sectors. The ANMF made a submission¹ in that consultation which raised concerns about the scope and operation of a Code of Conduct as it would apply to aged care workers.
12. In the interim, the Act has been amended by the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*, (Royal Commission Response Act) making provision for Rules to be made in relation to a Code of Conduct. In this submission, the ANMF outlines its concerns in relation to the Code of Conduct (the Code) and then addresses specific issues in relation to the ED.

¹ [ANMF Submission to the Australian Government Consultation on the Care and Support Sector Code of Conduct 15 December 2021](#)



The proposed Code would duplicate and overlap existing Codes for registered health professionals

13. The proposed Code applies to approved providers, governing persons and aged care workers. The ANMF is particularly concerned that for aged care workers, who are also registered health professionals, the introduction of a Code, with accompanying compliance and enforcement regulations, overlaps with the existing regulatory scheme for health professionals.
14. Both registered and enrolled nurses and nurse practitioners (who are also registered nurses) are already subject to a registration scheme under the Health Practitioner Regulation National Law (the National Law), administered by the Nursing and Midwifery Board of Australia (NMBA)/ Australian Health Practitioner Regulation Agency (AHPRA). In order to practice as a registered or enrolled nurse, a person must be registered in accordance with the NMBA. In order to be eligible for registration, a person must have successfully completed an Australian Nursing and Midwifery Accreditation Council accredited program of study, approved by the NMBA. For a registered nurse, the approved program of study is a three-year Bachelor of Nursing degree and for an enrolled nurse, an eighteen-month Diploma of Nursing. Nurse practitioners must have also completed an additional approved Masters degree on top of their registered nurse education and gained significant experience in practice.
15. Both registered nurses and enrolled nurses must meet the NMBA's registration standards when first registering and renewing their registration. This includes scrutiny of any criminal history (including an international criminal history check), professional indemnity insurance, recency of practice, and continuing professional development. Both registered nurses and enrolled nurses are also required to comply with the NMBA professional standards, including the Codes of Conduct, and can be sanctioned for failure to meet the requisite standards. The existing registration scheme includes mechanisms for reporting misconduct, serious misconduct, and conditions that may impact a nurse's capacity to practice safely. Nurses found to have breached the code of conduct or to be otherwise unfit to practice are subject to sanctions, including imposing conditions on registration, suspension, or cancellation of registration.
16. The ANMF argues that it is not necessary to include health practitioners, who are currently subject to the National Law registration scheme, in the proposed Code of Conduct as these measures are already met, and exceeded, pursuant to the National Law. Inclusion of registered and enrolled nurses in applying a code of conduct in addition to the existing registration scheme, which includes the requirement to meet standards set in codes of conduct, would result in unnecessary duplication and regulatory burden. Similarly, the definition of governing person captures registered health practitioners, including registered and enrolled nurses.



17. The ANMF foresees the potential for significant regulatory complications for nurses in aged care if they are included in this proposed Code of Conduct. The proposed system would make nurses and other health professionals employed in aged care settings more highly regulated than most other health practitioners while taking on an enormous and disproportionate degree of personal financial risk in circumstances where there is no clear, due process for decision-making.

Multiple and overlapping Codes for unregistered aged care workers

18. The proposed Code does not acknowledge the varying state-based Codes of Conduct for unregistered health workers, including assistants in nursing, and personal care workers (however titled), and any state-based legislation that applies to complaints made about workers in those jurisdictions. Currently, most jurisdictions in Australia have adopted the National Code of Conduct for Health Care Workers, which is both more extensive and overlaps the obligations created by the Code.

19. Given that the current state-based processes incorporate unregistered health workers in sectors other than aged care (and so would not be replaced in any way by this Code of Conduct), the ANMF submits that the proposed Code would effectively create duplicate processes and powers. As an example of the issues this Code will create in jurisdictions, in the New South Wales context, the Health Care Complaints Commission has the power to assess, investigate and make a finding and orders (e.g., prohibition order, public statement) in relation to complaints about (unregistered) health care workers. A prohibition order is effectively the same as a banning order.

20. The Health Care Complaints Commission also has the power to assess, investigate, and prosecute complaints against registered health practitioners in consultation with the applicable health professional council (e.g., the Nursing and Midwifery Council of NSW). The draft Code lacks regard for these processes that occur within NRAS and associated co-regulatory models. The ANMF therefore considers that the Code creates an additional (and additionally punitive) process that the worker would be subjected to in response to a complaint.

21. Introduction of the Code will create the possibility where two, or more, regulators could be tasked with considering the same complaint with these processes yielding either conflicting outcomes or, alternatively, where one regulator's decision could potentially prejudice another's decision. In addition, this exposes our members to being required to respond to potentially dual and overlapping compliance and enforcement proceedings, which could result in prejudice to the member and potentially conflicting and inconsistent outcomes.



Regulation of aged care workers should occur prior to implementation of the Code

22. The ANMF notes the Government has committed to introducing a registration scheme for all currently unregistered aged care workers in 2023. The ANMF maintains that establishing a registration scheme under the auspices of AHPRA, and thereby adopting similar standards, code of conduct and processes as currently apply to other registered health professionals will be more effective than introducing a Code now.
23. Regulation through registration of care workers will provide greater opportunity for care workers to articulate into nursing and other health professional qualifications as well as into higher level certificate qualifications and relevant training packages. The ANMF considers that the benefits of aligning registration of care workers with the nursing profession will ensure they are subject to investigation and sanction if reported for failing to meet conduct standards and provide an enhanced layer of protection for the public, than simply implementing a Code of Conduct would provide.

The Aged Care Quality and Safety Commission is not a suitable organisation to administer the Code

24. Based on the past performance of the Aged Care Quality and Safety Commission (ACQSC) and its predecessors which have failed to administer the Aged Care Quality Standards and provide adequate protection to the public as evidenced during the Royal Commission, the ANMF argues that the ACQSC is neither sufficiently qualified nor resourced to perform the function of an Australian Health Practitioner Regulation Agency (AHPRA)-like licensing and registration body responsible for monitoring, investigating, and in some cases banning workers and providers. If the Commission is to take on this significant additional regulatory role, it must be adequately funded to perform the role and ensure there are appropriately trained and skilled staff to carry out the investigation, compliance and enforcement functions associated with the Code.

The Code applies without distinction between approved providers, governing persons and aged care workers.

25. The ANMF considers it is inappropriate to apply the same Code to approved providers, governing persons and aged care workers. The Code as it is currently written in the first person, fails to distinguish how the standards set by the Code should adapt to the level of responsibility of each group as covered by the Code.

Specific concerns in relation to the Exposure Draft

26. Noting the ANMF does not support the adoption of the Code for registered health practitioners and would prefer to see currently unregistered aged care workers become subject to a regulatory scheme before the introduction of a Code, the ANMF makes the following observations about the ED.



- a) The ED does not include a preamble. A preamble, may be beneficial in explaining the purpose and objectives of the Code.
- b) The ED does not provide definitions of key terms, including ‘approved provider’ ‘governing persons’ and ‘aged care workers’. These terms are defined in other legislation, and should be specifically referenced in the ED.

Rule 23AC Code of Conduct

- c) Rule 23AC sets out to whom the Code applies. By way of a note, a range of provisions in the Commission Act and Aged Care Act are referred to with regard to compliance with the Code. Division 3 of the ED also sets out actions the Commission can take with respect to compliance. In order to understand the powers of the Commission and obligations on the parties subject to the Code requires reference to multiple sources and to track how each provision intersects with the others. A new regulatory scheme should be as clear and accessible as possible, including setting out all powers and obligations in one instrument.

Rule 23BD Actions the Commissioner may take

- d) Rule 23BD raises a number of concerns. Rule 23BD (1) provides that the Commissioner may discuss compliance with an approved provider, an aged care worker, governing person or ‘any other person’. The ED provides no definition of who any other person may be. While it is understood that in order to ensure compliance it is necessary to be able to discuss compliance matters with relevant people, the current wording appears to be too broad in scope. Discussion with ‘any other person’ should be confined to persons who are relevant to the compliance matter.

Similarly, the Commissioner can request information or documents from any person. There is no limitation on either the nature of the information or documents that can be requested or on the person to whom a request can be made. The ANMF is concerned that this power is too broad and could be subject to overreach.

In addition, given the broad nature of the power, there appears to be no option for any of the persons subject to this Rule to refuse to discuss matters, provide information or documentation on reasonable grounds. For example, the ANMF represents aged care workers in disciplinary matters, including those that may arise in relation to non-compliance with the Code. The ANMF, or any other representative, must be able to represent aged care workers without fear of being compromised in that representation due to a conflicting obligation to respond to the Commission.



The powers listed in 23BD appear to be additional to those provided for under s74FA of the Royal Commission Response Act 2022. The limited protections against self-incrimination and limiting inquiries to people considered relevant to the matter are not provided for in the ED.

Investigations

- e) Rule 23BD provides that the Commissioner may carry out investigations. The ED does not set any threshold for when an investigation should be undertaken, the timeframe for any investigation, or provision of information and outcomes to persons the subject of any investigation. The ANMF is concerned, that the Code can be breached for a wide range of matters, which may be low level to extremely serious. Not all matters can be or should be referred to investigation; education and support in most instances should be the first response.

Rule 23BD(2) provides that the Commissioner may carry out an investigation independently or jointly with another person or body. This Rule highlights the concerns raised above about the risks of multiple investigations taking place in relation to the same or similar conduct and the possibility of conflicting outcomes. For ENs, RNs and NPs the ANMF maintains that the NMBA is the appropriate body to be carrying out investigations, noting that the potential outcome of an investigation can have serious professional and employment consequences for the registered health practitioner.

In practical terms, the method of conducting a joint investigation is unclear, and exposes both the Commission and any other regulatory body to governance risks, including protecting the privacy of any material provided. The delineation of power between the Commission and any other body to conduct an investigation is also unclear.

The impact of being investigated by multiple agencies on an individual can be excessively onerous, costly and damaging to mental health and wellbeing. For a representative body, such as the ANMF, the need to respond to multiple investigations is also an unnecessary drain on resources and limits the ability to provide efficient and effective representation to individuals. This is particularly acute for individuals who do not have resources to fund private legal representation, but instead rely on union membership for industrial and professional representation.

The ANMF notes also that while a power to conduct investigations is included in the ED, there are no rights conferred on the individual or governing person to ensure procedural fairness.



Requiring action by approved providers

- f) **23BD(3)** provides that the Commissioner can require a provider to carry out an investigation in relation to a compliance matter. The Commissioner can require the investigation to be conducted either by the provider, or require engagement of an external investigator.

The ANMF considers the following may be problematic with regard to providers conducting their own investigations:

- There is a perceived or actual lack of independence in relation to the investigation, particularly where a provider is required to investigate its own conduct.
- Providers may focus investigations on individual aged care workers, at the expense of considering broader systemic issues that may have contributed to the alleged compliance issue.
- Investigations, whether conducted internally or externally, require time, expertise and can be costly. Providers with limited resources may be reluctant to report matters that could subsequently require them to conduct investigations.
- To date there is no indication that providers will be funded and or trained to conduct investigations.
- Regulatory schemes, such as those under the auspices of AHPRA have dedicated resources to conduct investigations that are independent from the bodies or persons being investigated. Will this be a function of the Commission?

The Commissioner may also require providers and individuals to undertake any specified action. The nature of the specified action is not defined and may in some circumstances be onerous, costly or difficult to implement.

Referring information

- g) The ANMF queries how these sections will operate in practice. If an aged care worker is employed across multiple employers will information be provided to each employer? How do individuals make a complaint? And where is this information shared? How is the individual's privacy protected?



Part 2C- Register of Banning Orders

- h) 23CB requires that details of an individual's State, Territory, suburb and postcode against whom a banning order has been made, must be included in the register of banning orders. Further identifying information can be included where there is the risk of confusion about the identity of the individual. The ANMF considers that the Commission must have discretion about whether this information is included on the banning register and whether it is published pursuant to Rule 23CG (2). There is a real risk that an individual could be located and targeted as a result of publishing this information. The most obvious concern is for women who are escaping situations of family and domestic violence and or stalking behaviour.

The ED provides the Commissioner with a discretion as to what is published if it would be contrary to the public interest or the interests of a care recipient. This discretion should be extended to include the interests of the person against whom the banning order is made and be subject to review. Individuals must have the opportunity to request information be kept private, removed or have limited access available at any time during which the banning order operates.

23CG provides that the Commissioner may publish the register of banning orders. Subject to the comments above, the ANMF considers that for banning orders to be effective they must be published. The purpose of the banning order is to protect the public from risk of harm, therefore it is important for prospective employers to be able to check whether a banning order is in place with respect to an individual.

Schedule 1- Code of Conduct

- i) The ED Code resembles the NDIS Code, with some minor variation. There are a range of concerns in relation to the ED Code:
- It applies to individuals, governing persons and approved providers in the same terms. The ANMF considers providers should be held to a more extensive Code that reflects the full scope of matters within the governance control of the provider.
 - It is unclear as to where the locus of responsibility rests for a provider when the Code is expressed in the first person.
 - The language of the ED Code is very broad and may therefore be difficult for compliance concerns to be expressed with sufficient specificity and clarity. This has the effect of making it more difficult to both make complaints and to respond appropriately to them, for both the Commissioner and the person or body the subject of the complaint.



Additional concern regarding penalties

Section 74AC of the Act provides that an aged care worker can be fined 250 penalty units for failing to comply with the Code and under S74GD, 1000 penalty units for contravening a banning order. A penalty unit is currently set at \$184.92, meaning an individual can be fined \$46,230 for a compliance breach and \$184,920 for a contravention of a banning order. These are the same penalties to be applied to approved providers. The Act does not provide for a discretionary range of penalty to be imposed.

The ANMF considers the penalties that can be imposed on individuals to be manifestly excessive, particularly when considered that aged care workers are often low paid and in insecure work. The penalty imposed has the potential to act as a deterrent to working in the aged care sector. In addition, it may act as a deterrent to reporting matters because of concern of exposing individuals to unreasonable consequences. The Commission itself may be hesitant to progress matters when the consequences of a negative finding are excessive and unreasonable.

The ANMF urges review of the relevant sections of the Royal Commission Response Act 2022 with respect to the imposition of civil penalties.

Conclusion

The ANMF maintains that the Code and ED in its current form are not fit for purpose. We urge the Department of Health and Aged Care to reconsider both the purpose and design of the ED. We ask that any future scheme be developed in light of the following :

- It is subject to further consultation with all stakeholders to ensure future design is fit for purpose
- Consideration be given to developing a Code that applies only to approved providers and governing persons and sets compliance standards that are appropriate for the level of responsibility held by these parties. The aim must be to ensure approved providers and governing persons are accountable and responsible for ensuring quality and safety of care at all levels of an organisation.
- Registered health practitioners, including RNs and ENs are excluded from application of any Code, as there is no justification for duplication of regulatory schemes. The current NRAS is established and proven to be effective in ensuring the protection of the public and people accessing aged care services.
- Priority be given to establishing a registration scheme for currently unregistered direct care aged care workers, such as assistants in nursing and personal care workers, as this is the more effective way of ensuring direct care staff are appropriately qualified, trained and skilled on an ongoing basis



- Recognises that regulation of workers in aged care must be seen in the context of ensuring the sector attracts and retains suitable staff.
- Is designed in a cohesive manner that aids understanding and minimises administrative burden
- Is an effective tool to promote and educate parties as to the standard of conduct expected to ensure the safety, wellbeing and care of recipients of aged care services.