



Law Council
OF AUSTRALIA

Aged Care Amendment (Implementing Care Reform) Bill 2022

Community Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia (**Law Council**) thanks the Law Society of New South Wales (**Law Society of NSW**), the Law Institute of Victoria (**LIV**) and the Law Society of South Australia (**Law Society of SA**) for their input into this submission. The Law Council also thanks its National Elder Law and Succession Law Commission and the Industrial Law Committee of its Federal Litigation and Dispute Resolution Section for their contributions to this submission.

Executive Summary

1. The Law Council thanks the Senate Community Affairs Legislation Committee for the opportunity to make a submission to its inquiry on the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth) (**Bill**).
2. The Bill, which will amend the *Aged Care Act 1997* (Cth), has three features:
 - it imposes responsibilities on approved aged care providers (**approved providers**) to ensure at least one registered nurse is on site, and on duty, at all times at a residential aged care facility, subject to being granted an exemption;
 - it prohibits the imposition of a charge for ceasing the provision of home care and authorises the Minister to impose other requirements in relation to home care charges; and
 - it empowers the Minister to require the Secretary to publish information about aged care services or providers.
3. The Law Council broadly supports the measures in the Bill, which are beneficial in their nature and good faith attempts to give effect to recommendations of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) directed at improving the quality of aged care services.
4. The Law Council recommends consideration be given to amendments to the Bill to provide for a process of natural justice in relation to exemption decisions, remove ambiguities and strengthen its drafting, consistent with rule of law principles. These include:
 - amending the very broad powers the Bill gives to the Minister to prescribe regulation in a legislative instrument, to ensure that those powers are employed consistently with their intended purpose. This includes the powers to grant exemptions from the one registered nurse requirement and to impose requirements in relation to capping home care charges;
 - provide a mechanism or clarify the right of an approved provider to challenge a determination to reject an application for exemption from any of the provisions; and
 - drafting amendments to clarify the meaning of terms such as ‘on duty’ and to ensure the Bill uses language consistent with language already used in the aged care scheme.
5. Further, the Law Council notes that while the measures in the Bill are directed towards reducing the cost of aged care services for aged care recipients and their families and improving the quality of care:
 - imposing additional requirements on approved providers through measures related to the engagement of registered nurses without a countervailing right to challenge any decision not to grant an exemption to those requirements; and
 - limiting their ability to contract directly with care recipients as to any other fees for additional or other services,may result in impose greater burden and costs to approved providers which may discourage the delivery of the care objectives.

6. The Minister should take care, in making legislative instruments under the powers inserted into the Aged Care Act by the Bill, to ensure that they do not, through the costs implications they impose or denial of any right of review, adversely affect the quality of care services they provide. Thought may also be given to mitigating the possibility of this adverse effect in the text of the heads of power themselves. In addition, it is important the measures are offset by sufficient funding and other measures to improve the pay and conditions of aged care workers, such as registered nurses.

Schedule 1—Registered nurses

Amendments made by Schedule 1

7. Schedule 1 to the Bill would amend the Aged Care Act to impose a ‘responsibility’ on an approved provider that:
 - provides either residential aged care or a specified type of flexible care in a residential aged care facility; and
 - has not been granted an exemption,to, on and after 1 July 2023, ensure at least one registered nurse is on site, and on duty, at all times at the residential facility (**one registered nurse requirement**).²
8. Schedule 1 will also authorise the Quality of Care Principles to make provision for and in relation to, the granting of an exemption to the one registered nurse requirement to an approved provider in relation to a residential facility.³
9. The power to make an exemption extends to:
 - the making of an application for an exemption;
 - the circumstances in which an exemption may be granted; and
 - the conditions that may apply to an exemption.⁴
10. The *Quality of Care Principles 2014* (Cth) is a legislative instrument made by the Minister under section 96-1 of the Aged Care Act.

Context – Royal Commission findings

11. According to the Explanatory Memorandum (**EM**) for the Bill, this Schedule responds to Recommendation 86 of the final report of the Royal Commission.⁵
12. The Royal Commission Final Report noted that:
 - there is ‘effectively no regulation of aged care staffing levels or skill mixes’;⁶

² Proposed subclauses 54-1A(1) and (2) of the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth) (**Bill**).

³ Ibid, subclause 54-1A(3).

⁴ Ibid, subclause 54-1A(4).

⁵ Explanatory Memorandum, Bill 7.

⁶ Royal Commission into Aged Care Quality and Safety (Royal Commission), ‘Final Report: Care, Dignity and Respect – Volume 1 Summary and recommendations’ (2021) 129.

- the Productivity Commission has ‘identified that the largely unregulated aged care sector provided an incentive to aged care providers to replace higher paid and skilled nurses with lower paid and semi-skilled personal care workers’;⁷ and
 - the ‘evidence is compelling that overall staffing levels in aged care are linked to quality of care, and that registered nurse numbers are particularly important’.⁸
13. The Royal Commission recommended the Australian Government should require residential aged care providers to meet a minimum staff time quality and safety standard.⁹
14. The Royal Commission recommended a minimum time standard made up of two complementary measures:
- a minimum number of registered nurses on site at the aged care facility at a particular time – that is, the **one registered nurse requirement**; and
 - a minimum number of minutes of care from health professionals per resident (**staff per resident requirement**)
15. The staff per resident requirement would in turn be linked to the casemix-adjusted activity based funding model, meaning that approved providers with a higher-than-average proportion of high needs residents would be required to engage additional staff, and vice versa.
16. The following table summarises the key aspects of Recommendation 86 of the Royal Commission’s report.

Date	Staff per resident requirement	One registered nurse requirement
<i>The minimum staff time standard should require...</i>		
from 1 July 2022	registered nurses, enrolled nurses, and personal care workers for at least 200 minutes per resident per day for the average resident, with at least 40 minutes of that staff time provided by a registered nurse	at least one registered nurse on site per residential aged care facility for the morning and afternoon shifts (16 hours per day)
from 1 July 2024	registered nurses, enrolled nurses, and personal care workers for the average resident for at least 215 minutes per resident per day for the average resident, with at least 44 minutes of that staff time provided by a registered nurse	at least one registered nurse on site per residential aged care facility at all times

17. The Royal Commission also recommended that approved providers should be able to apply for a time-limited ‘exemption from the quality and safety standard relating to staff skills mix, but not the standard relating to numbers of staff’.¹⁰
18. It indicated that the grounds for granting an exemption should include:¹¹

⁷ Ibid.

⁸ Ibid.

⁹ Royal Commission into Aged Care Quality and Safety (Royal Commission), ‘Final Report: Care, Dignity and Respect – Volume 3A The new system’ (2021) Recommendation 86(1).

¹⁰ Ibid Recommendation 86(7).

¹¹ Ibid.

- a. *specific purpose residential aged care facilities, such as specialist homeless facilities, where the profile of the residents is such that it may be appropriate to substitute a registered nurse with another qualified health professional;*
- b. *residential aged care facilities that are co-located with a health service, such as Multi-Purpose Services, where registered and enrolled nurses are present at the co-located health service;*
- c. *regional, rural and remote residential aged care facilities, where the approved provider can demonstrate it has been unable to recruit sufficient numbers of staff with the requisite skills; and*
- d. *residential aged care facilities where an alternative skills mix is being trialled and it would be appropriate to substitute a registered nurse with another qualified health professional. There should be a requirement for any such trial to be comprehensively evaluated and publicly reported.*

19. It is not entirely clear whether the reference by the Royal Commission to an exemption being appropriate in the standard relating to the ‘staff skills mix’, but not the standard relating to ‘numbers of staff’ applies to the one registered nurse requirement. However, the detail around the exemptions seems to anticipate that it may be permissible for a registered nurse not to be on site at all times when an exemption applies.

Law Council view

In-principle support for both minimum time standard measures

- 20. The Law Council supports the introduction of measures to give effect to both the one registered nurse requirement *and* the staff per resident requirement.
- 21. The purpose of these measures – being to, respectively, ‘provide, or direct the provision of, clinical care’¹² and ensure a high quality of care¹³ – goes to a key object of both the Aged Care Act¹⁴ and the Royal Commission’s vision of the purpose of the aged care system.¹⁵
- 22. The Bill would only address the one registered nurse requirement.
- 23. The Law Council considers it is important to also address the staff per resident requirement. While the one registered nurse requirement provides a baseline availability of clinical care, the staff per resident requirement provides for a proportionate availability of staff to provide care to residents. This will effectively require the larger aged care facilities to provide more staff than smaller ones. It reflects the position that if there are not enough qualified staff on duty, the purpose of the one registered nurse requirement to ensure a safe foundational quality of care is undermined. That is, in larger facilities with many residents, more than one registered nurse may be required to provide an adequate level of care.

¹² Ibid 421.

¹³ Ibid 420.

¹⁴ Paragraph 2-1(1)(b) of the Aged Care Act.

¹⁵ ‘The purpose of the aged care system must be to ensure that older people have an entitlement to high quality aged care and support and that they must receive it. Such care and support must be safe and timely and must assist older people to live an active, self-determined and meaningful life in a safe and caring environment that allows for dignified living in old age’: Royal Commission into Aged Care Quality and Safety (Royal Commission), ‘Final Report: Care, Dignity and Respect – Volume 3A The new system’ (2021) 14.

24. A report to the Royal Commission found that ‘staffing levels within large parts of Australian residential aged care, as a whole, fall well short of good or even acceptable practice standards’.¹⁶
25. While the Bill would not impose a staff per resident requirement on aged care providers, the Minister’s Second Reading Speech indicates that this will be given effect through delegated legislation:¹⁷

Further, I can say that, relying on powers in the Aged Care Act, the Albanese Labor government will progress subordinate legislation in parallel with this bill to mandate more time for care.

Under that legislative instrument everyone living in a residential aged-care facility will receive an average of 200 minutes per day of care by 1 October 2023, and an average of 215 minutes of care per day by 1 October 2024.

I am working closely with providers, unions, advocates, the allied health sector and, most importantly, the people receiving and giving care, on the detail of this regulation.

26. Technical observations regarding giving effect to the staff per resident requirement in the Quality of Care Principles are discussed below.

The Minister’s power to prescribe an exemption provision

27. The Law Council is also supportive of there being a power given to an appropriate official to exempt an aged care provider from the one registered nurse requirement.
28. However, the Law Council suggests the drafting of subclauses 54-1A(3) and (4), which would empower the Minister to prescribe an exemption provision in the Quality of Care Principles, could be improved so that they are more consistent with rule of law principles.
29. The Law Council recognises that it is consistent with the aged care legislative framework for the Aged Care Act to authorise the Minister to prescribe specific regulatory details in Principles.
30. It is a principle of the rule of law that executive powers to prescribe regulatory frameworks in legislative instruments should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used.¹⁸ Where, as here, legislation allows for the Executive to issue subordinate legislation, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision.¹⁹
31. For several reasons, the exemption power in subclause 54-1A(3) of the Bill lacks consistency with that principle.

Identification of the decision-maker

32. Subclause 54-1A(3) does not identify a person to whom the Minister may, through the Quality of Care Principles, authorise to grant an exemption.

¹⁶ Ibid 422.

¹⁷ Commonwealth, *Hansard*, House of Representatives, 27 July 2022 (Hon Anika Wells, Minister for Aged Care and Minister for Sport) 24.

¹⁸ Law Council of Australia, ‘Policy Statement – Rule of Law Principles’ (March 2011), <https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf> > principle 6.

¹⁹ Ibid 6(a).

33. It is assumed that there will be a decision-maker, given the reference in subclause 54-1A(3) to 'granting' an exemption, which suggests the making of a decision, as opposed to a provision permitting an exemption by operation of the law.
34. The most likely decision-maker holding the power to make an exemption is the Secretary. Subsection 96-2 of the Aged Care Act anticipates that the Secretary may hold (and delegate) powers under Principles made under the Aged Care Act.
35. It is also conceivable that the decision maker may be delegated to a person within the Aged Care and Quality Commission as it is that body that has the power to impose a sanction for a breach of an approved provider's responsibilities under the *Aged Care Quality and Safety Commission Act 2018* (Cth) (**ACQSC Act**).²⁰
36. Nevertheless, the Bill would not require the Minister to authorise the Secretary to grant exemptions. Despite section 96-2, it is not clear that the Minister may only validly authorise the Secretary to grant exemptions – a court may interpret the absence of an express decision-maker to be intentional.
37. The Law Council suggests that Parliament should be judicious in the delegation of its powers to the Executive, particularly when it is authorising the sub-delegation of those powers, and should identify the persons to whom its powers may be sub-delegated.

Recommendation

- **Subclause 54-1A(3) of the Bill be amended to provide that the Quality of Care Principles may make provision for the Secretary to grant an exemption from the one registered nurse requirement.**
- **Consideration be given as to whether there should be any limits imposed on the persons to whom the Secretary may delegate their power to grant an exemption (to circumscribe the ordinary operation of section 96-2).**

Grounds on which an exemption may be granted

Views on the exemption grounds recommended by the Royal Commission

38. The Law Council is supportive of the Quality of Care Principles authorising an exemption from the one registered nurse requirement on the grounds recommended in Recommendation 86(7) of the Royal Commission report.
39. The exemptions suggested by the Royal Commission reflect circumstances where the purpose of the one registered nurse requirement would be served through a different means (e.g. a differently qualified health professional), a registered nurse may be available in any event, or brief relief from the requirements is reasonable in the circumstances. It is understood that the reason the Royal Commission recommended a time limited exemption was to permit reflection on whether the purpose was still served by the alternative arrangements.
40. The Law Council received mixed input from its constituent bodies regarding whether the grounds for an exemption should be limited to only those recommended by the Royal Commission.

²⁰ Section 63N of the *Aged Care Quality and Safety Commission Act 2018* (Cth).

41. Some considered that a short-term exemption may also be appropriate in certain circumstances in which a provider is temporarily incapable of complying with the requirement, such as staffing difficulties due to COVID-19-related illness or restrictions, on the basis that quality and safety of care are not substantially undermined.
42. Conversely, there may be circumstances where an exemption is never justified, such as a provider that is frequently or permanently unable to comply and should not be exempt.

Views on scope of the exemption power in the Bill

43. The Bill does not ensure that the Minister will permit an exemption to be granted in the circumstances recommended by the Royal Commission.
44. In fact, the Bill does not specify the grounds on which an exemption may be permitted nor even provide guidance to the Minister, in making a quality of care standard under the power, regarding the kinds of matters which may be relevant to an exemption decision. It would not require exemptions to be time-limited. The Minister has complete discretion to determine in the Quality of Care Principles the circumstances in which an exemption may be granted.
45. The approach providing the greatest certainty would be to prescribe the grounds in the Act itself.
46. However, noting the general structure of the aged care legislation is to authorise the Minister to prescribe regulatory details in delegated legislation, an acceptable approach would be for the Aged Care Act to continue to provide discretion to determine the bases on which an exemption may be permissible in the Principles, but subject that power to limits.
47. Specifically, the Law Council recommends consideration be given to amending the Bill so that the Quality of Care Principles must only permit exemptions to be:
 - (a) granted when to do so would be consistent with the purpose of the one registered nurse requirement – to ensure the ongoing availability of clinical care and a high quality of care generally; and
 - (b) time-limited and/or subject to regular review.
48. Not to limit the power in that way would suggest that Parliament was comfortable with the Minister having the discretion to permit exemptions potentially to be granted in circumstances beyond the scope anticipated by the Royal Commission, without limit.
49. The kind of factual matters which could be prescribed as necessary to consider in order to determine whether an exemption would be consistent with that purpose include:
 - (a) the number of residents;
 - (b) the location of the facility;
 - (c) the medical history of the residents;
 - (d) the skills, experience and qualifications of other health professionals on site;
 - (e) the reason for the request; and

(f) the period of time the exemption would persist.

50. In relation to matter (d), it is suggested that consideration to be given to ensuring the presence of persons with appropriate skills and experience as a whole, and these factors should be taken into account as well as qualifications. It may be that an enrolled nurse with extensive experience dealing with aged residents may be as appropriate to handle certain situations as a registered nurse. This consideration is also relevant in determining the staff per resident requirements.

Recommendation

- **Clause 54-1A of the Bill be amended to either:**
 - **prescribe the circumstances in which an exemption may be granted in the Quality of Care Principles; or**
 - **require the exemption power be limited such that an exemption could only be granted:**
 - **where the decision maker considered the purpose of the one nurse requirement – to ensure the ongoing availability of clinical care and ensure a high quality of care – was to be served through other means; and**
 - **for a limited period and/or subject to ongoing review.**

Power to review an exemption decision

51. As a 'responsibility' on the aged care provider, failure to comply with the one registered nurse requirement may result in the imposition of a sanction on the aged care provider under Division 2 of Part 7B of the ACQSC Act.
52. The imposition of a sanction arising from the failure to comply is a reviewable decision under section 74J of the ACQSC Act. Even though the decision is reviewable, the imposition of a sanction may have immediate impacts on an approved provider's operations and financial circumstances even when there may be an ostensibly good reason for the breach.
53. The legislation as presented does not address how a decision to reject an application for exemption could be reviewed (even internally) beyond following a path of a 'reviewable decision' arising from the imposition of a sanction by reason of the breach.
54. It is not clear whether the power in paragraph 54-1A(4)(a) to make provision in relation to the granting of an exemption would include a power to provide for a merits review mechanism.

Recommendation

- **Consideration be given to providing a mechanism which enables an approved provider to seek merits review of a decision not to grant an exemption.**

Meaning of 'on duty' and 'on site'

55. There is potential for ambiguity in the interpretation of the italicised phrase within the following extract of subclause 54-1A(2) of the Bill: 'the provider must ... ensure at

least one registered nurse ... is on site, and *on duty, at all times at the residential facility*'.

56. In particular, it may not be abundantly clear to an approved provider whether a registered nurse who is on a break which she or he may be required to take under the terms of their employment would or would not be 'on duty' within the meaning of that subclause.
57. The term 'on duty' has an accepted meaning in awards and enterprise agreements and does not include non-work time such as required meal and crib breaks. The Law Council expects the term 'on duty' in subclause 54-1A(2) of the Bill would be interpreted by a court to have that meaning.
58. For example, clause 14.1 of the *Nurses Award 2020* provides (emphasis added):²¹

14.1 Unpaid meal breaks

(a) An employee who works in excess of 5 hours will be entitled to an unpaid meal break of 30 to 60 minutes. Such meal break will be taken between the 4th and the 6th hour after beginning work, where reasonably practicable. Provided that, by agreement of an individual employee, an employee who works shifts of 6 hours or less may forfeit the meal break.

*(b) Where an employee is required to be **on duty** during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.*

*(c) Where an employee is required by the employer to remain available during a meal break, but is **free from duty**, the employee will be paid at ordinary rates for a 30 minute meal break. This period will not count as time worked when calculating ordinary hours for the purposes of overtime or penalties. If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break is taken.*

59. Having a registered nurse 'on duty' at all times could be achieved in one of two ways:
 - (a) more than one registered nurse would need to be working in order to cover another registered nurse when not 'on duty' and on a break; or
 - (b) the registered nurse must remain on call during meal breaks, which has a financial consequence (including the payment of penalties/loadings)
60. For smaller facilities, option (b) is more likely as there will probably only be one registered nurse rostered, which will have cost implications.
61. Even for larger facilities, option (a) would lead to additional staff to be engaged to merely cover the break periods.
62. The Law Council suggests that consideration be given to amending subclause 54-1A(2) to define the term 'on duty'. This will provide clarity to aged care providers as to the nature of their obligation with respect to the provision of registered nurses in aged care facilities, including their payment obligations under an Award or enterprise agreement.

²¹ Fair Work Ombudsman, *Nurses Award 2020*,
<https://asset.fwc.gov.au/documents/documents/modern_awards/award/ma000034/default.htm> cl 14.1.

63. Similarly, consideration should be given to addressing the impact of the words '*on site, ... at all times at the residential facility*'. These words if interpreted literally, would mean a nurse:
- could not be located in place immediately adjacent to a residential care service which given the growing flexibility of the aged care sector and the development of co-located seniors living environments and emphasis for the provision of home care, means a nurse located in the adjacent seniors living part of the complex would be in breach of the obligation;
 - could not deliver care remotely such as by telehealth if the circumstances were such that a nurse were on duty for two separate and distinct care facilities operated by an approved provider in a remote or rural area; and
 - could not leave the care facility during the period they are on duty, even if there is a need to leave the care facility in the performance of their duty.
64. Depending on whether these scenarios are intended to be covered by the operation of the provision, these may be matters which could be addressed in the exemption provision.

Recommendation

- **The Bill be amended to define the terms 'on duty' and 'at the care facility' in subclause 54-1A(2) to provide clarity to approved providers as to their obligations under that provision, including in relation the payment of staff, and the ability to be located in an immediately proximate area.**

The staff per resident requirement

65. As noted above, it is anticipated that the Minister will provide for the staff per resident requirement (that is, the minimum number of minutes of care from health professionals per resident) in the Quality of Care Principles under an existing head of power.
66. The head of power for this instrument would appear to be paragraphs 54-1(1)(a) and (b) of the Aged Care Act, which impose a responsibility of aged care providers to, respectively:
- (a) *to provide such care and services as are specified in the Quality of Care Principles in respect of aged care of the type in question;*
 - (b) *to maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met;*
67. The use of these paragraphs to impose the staff per resident requirement is intimated by the EM.²²
68. The step-up to 215 minutes of care per day by 1 October 2024 is broadly consistent with the Royal Commission recommendation. However, it does not include a minimum number of minutes of care by a registered nurse per aged care resident, and the Committee may wish to raise this point with the Department of Health (**Department**).

²² Explanatory Memorandum, Bill 9.

69. Although not a matter addressed by this bill, the Law Council takes the opportunity to suggest that the details of the staff per resident requirement should also consider factors in addition to the number of residents.
70. For example, consideration could also be given to the physical layout and residential density of the facility as a relevant factor in determining the number of required registered nurses. It may be impractical for a single registered nurse to be responsible for ensuring care across a facility which is spread out across several buildings. Similarly, it may be that the circumstances are such that the care and services required for the provision of care may require the support of non-nursing staff.
71. Further, the Law Council suggests the Department and Minister give consideration to providing for a power to grant an exemption or dispensation from the staff per resident requirement in the Quality of Care Principles.
72. There may be occasions where it is more fitting to grant a dispensation from the staff per resident requirement rather than the one-registered nurse requirement, particularly in facilities with a large number of residents.
73. It is not clear whether paragraphs 54-1(1)(a) and (b) of the Aged Care Act would authorise such an exemption/dispensation power. The Law Council suggests the Committee may wish to enquire of the Department as to whether there is a head of power enabling the Minister to provide for exemptions or dispensations from the staff per resident requirement.

Recommendation

- **The Committee query the Department as to whether the amendments to the Quality of Care Principles to give effect to the staff per resident requirement will:**
 - **expressly address registered nurses;**
 - **allow for non nurse staff to be engaged but in a manner that does not undermine the delivery of quality care and services; and**
 - **permit exemptions or dispensations from those requirements.**

Need for complementary measures

74. For the one registered nurse requirement (and other measures provide by this Bill) to succeed, the Law Council considers that complementary measures are required to address the widely reported shortage of registered nurses working in aged care. Options include reducing the barriers to entry or re-entry into the nursing profession, and taking steps to encourage the improvement of nurses' remuneration and working conditions.
75. A further option may be to recognise levels of education required to deliver certain levels of care and services.
76. The Law Council acknowledges the challenges that providers face in maintaining qualified staff, particularly in regional, rural and remote areas.

Schedule 2 – Capping home care charges

Amendments made by Schedule 2

77. Schedule 2 to the Bill would amend the Aged Care Act to make it a responsibility of an approved provider of aged care which provides home care:
- not to charge for ceasing to provide the care to the care recipient (**measure 1**);²³ and
 - to comply with such requirements as are specified in the User Rights Principles in relation to the prices charged by the approved provider for, or in connection with, the provision of care or services to the care recipient (**measure 2**).²⁴

Law Council comments

Re measure 1 – prohibiting charging for cessation of care

78. The Law Council received mixed views on this measure which would abolish charging of exit fees by home care providers. The LIV and Law Society of NSW support it – the latter submits this measure would remove a cost disincentive to recipients changing providers, and thereby support the delivery of high quality and appropriate care. The Law Society of SA expressed some reservations, as set out below.
79. Section 21H of the *User Rights Principles 2014* (Cth) (**User Rights Principles**) presently requires that:
- an exit amount must not be imposed unless the amount is specified in a home care agreement between the approved provider and the care recipient and the provider has given the maximum exit amount to the Secretary of the Department of Health and Aged Care; and
 - the exit amount can only be deducted from any funds remaining in the care recipient's home care package. Therefore, in circumstances where the care recipient has insufficient funds in their package, the exit amount cannot be charged.
80. The Law Society of SA has indicated that in the professional experience of a practitioner in that state, the exit amount charged, at least by not-for-profit providers in South Australia, is increasingly \$0 or, if an amount is charged, it is around \$300 to \$500.
81. In order to address the Law Society of SA's reservations, it is worth setting out the objective of this measure as described in the EM:²⁵
82. Some home care providers charge exit amounts to cover the administrative costs of ceasing care to a care recipient. This amendment would eliminate the ability for home care providers to charge for this separately, and instead encourage approved providers to charge appropriate care and package management amounts to cover these administration and management costs.

²³ Proposed paragraph 56-2(aa) of the Bill.

²⁴ Proposed paragraph 56-2(ab) of the Bill.

²⁵ Explanatory Memorandum, Bill 10.

83. The Law Society of SA suggested that there may be greater transparency if the exit amount is kept as a separate charge rather than within the package management or care management charge.
84. The Law Society of SA further notes that the drafting in paragraph 56-2(a)(aa) – “*not to charge for ceasing to provide the care to the care recipient*” – is inconsistent with the expectation in the EM that the administration and management costs generally addressed by an exit amount would instead be diffused within the package management or care management charge. That is, effectively the charge will still be imposed, just included in charges made payable earlier.
85. Further, the Law Society of SA suggests that section 21K of the User Rights Principles provides an example of current drafting which prohibits a separate charge being imposed, which may better reflect the Government’s intent than paragraph 56-2(a)(aa):

21K Business costs not to be charged for separately

An approved provider of home care must not charge a care recipient to whom the approved provider provides home care for costs (however described) that are business costs as a separate charge.

86. In relation to the suggestion in the EM that the costs currently charged as an exit charge would instead be charged as a package management or care management charge, it is noted that these terms are presently defined in section 4 of the User Rights Principles and item 3 of clause 2 of Schedule 3 to the Quality of Care Principles.
87. The Law Council of SA notes that the former definition appears more appropriate.
88. It is conceivable that the Minister’s and Department’s intention is that rules around the charging of administration and management costs may be addressed in the power to impose charging requirements in the User Rights Principles which would be inserted in the form of proposed paragraph 56-2(ab). If this is the intention, the Law Council suggests consideration be given to making this clear in the text of paragraph 56-2(ab).

Recommendation

- **In aid of consistency in drafting, consideration be given to redrafting paragraph 56-2(a)(a) to be consistent with the language used in section 21K of the User Rights Principles.**

Re measure 2 – complying with charging requirements in the User Rights Principles

The need for consistency in language

89. The experience of practitioners is that home care providers adopt various methodologies and terminologies when charging for services. For example, case management fees may (or may not) cover charges for various administrative services such as phone calls, which may be charged individually.
90. The EM demonstrates an awareness of this:²⁶

Under the Home Care Packages Program some administration and management costs are charged separately (for example, care and package management) while

²⁶ Ibid 10.

some are built into the unit price of direct care charges (for example, cost of office accommodation). Approaches to charging differ across home care providers. While these providers are required to publish their service charges online and provide these to care recipients, there are no set caps for charges and no effective cap on prices.

91. As a general point, the Law Council considers that the effectiveness of the regulation of charging for home care services will depend on the appropriateness, specificity and comprehensiveness of those Principles. Again, the Law Council has received different views on the need for regulation in this area.
92. The Law Society of NSW indicated that while it supports the availability of choice in home care services and in providers, there should be a high degree of consistency in how providers charge for their services, to help potential aged care recipients and their families compare and choose between providers. Accordingly, it suggests the structure and content of charging should be regulated. This may require the use of statutory definitions of the various components of service, differentiating between different types of care and administrative charges.
93. The Law Society of SA noted that aged care is a highly regulated sector, including for compliance requirements and reporting requirements. To comply with the requirements, providers incur costs (e.g. staff for collating, recording and reporting information). This needs to be understood when regulating or capping administration charges.
94. In both cases, the issue is to define the common basis of what may be charged without limiting the ability of approved providers to reach agreement on other aspects of the fees and charges for other services not funded by subsidies.

Capping charges?

95. The title of Schedule 2 is 'Capping home care charges', and the EM suggests this intent.²⁷ However, aside from prohibiting the imposition of charges for the cessation of care, the Bill would not expressly authorise or require the Minister to 'cap' home care and service charges. Under present drafting, it would be open to the Minister to not cap charges as part of the requirements imposed in the User Rights Principles under this new power.
96. The LIV and Law Society of NSW support mechanisms that cap the cost of home care services, with the objective of reducing the amount of funding directed to administration and management.
97. The Law Society of SA on the other hand considers that capping the charges is a simplistic solution where that approach is taken without considering the actual costs incurred by providers to meet the required regulatory and reporting obligations. It notes that it is important to ensure that capping the pricing does not jeopardise the sustainability of the sector and therefore the availability of care and services to care recipients.
98. It is understood that there is already a lack of staff and providers to fill the number of home care packages required, based on the numbers of older Australians who have been assessed as eligible for a home care package. In such an environment it is not in the interests of care recipients that the home care sector becomes unviable because providers are unable to recover the reasonable costs of providing the care and services, complying with the regulatory and compliance obligations and

²⁷ Ibid.

remunerating staff with a competitive wage to attract the number and quality of staff required to meet the growing need of the community.

99. The consequence of this interpretation would be that the quality of care delivered may be impacted by the amount of the charge.
100. The power which would be given to the Minister by paragraph 56-2(ab) to specify requirements in the User Rights Principles in relation to the prices charged for, and in connection with care and services is broadly drawn and does not address these nuances.
101. In the absence of detail around how, and on what basis, the charging of services may be 'capped', it is difficult to provide submissions on the reasonableness or risks which arise from any particular approach.
102. If the intention of the legislation is to limit the amount an approved provider may charge for a defined service, then the Law Council suggests that it also be made clear within the structure of the legislation whether fees and charges for other services not so defined and agreed between the approved provider and the care recipient may be agreed as a matter of contract consistent with paragraph 56-2(d).
103. The consequence of this approach would be that the quality of care delivered may be impacted by the amount of the charge.
104. If this is the intended approach, consideration could be given to permitting an approved provider to agree with a care recipient for the payment of an amount above the stated or defined charge. This would reflect the preservation of choice (some providers may charge more for a better service) and the ability for parties to contract as to the provision of services. It is noted that the Aged Care Act preserves other applicable Commonwealth laws in relation to home care agreements entered into between a care recipient and approved provider, which includes the Australian consumer law: see subsection 61-1(3) of the Aged Care Act.
105. Similarly, it is suggested that there should also remain the ability to charge for 'additional' services as a matter of contract.
106. If capping these charges is the intent – as the title to Schedule 2 and EM suggests that it is – to ensure this objective is given effect in the scheme going forward, the Law Council suggests consideration be given requiring the Minister to provide for capping charges in the User Rights Principles and provide a mechanism for parties to contract in relation to those charges. It also suggests consideration be given to expressly addressing the matters raised by the Law Society of SA in that head of power, including the need to balance matters such as the reasonable costs of care fees and the viability of home care providers and their capacity to provide a high standard of care with choice for the range of consumers seeking such services.

Recommendation

- **Consideration be given to amending paragraph 56-2(ab) to make clear the considerations relevant to any requirements which cap charges, including that such requirements balance affordability to a care recipient and their family against financial viability of an aged care provider and their ability to provide high quality care.**

Schedule 3 – Transparency of information

Amendments made by Schedule 3

107. Schedule 3 to the Bill would insert clause 86-10 into the Aged Care Act to provide that the:

- Secretary *must*, in accordance with the Information Principles, make publicly available information in relation to aged care services;²⁸
- the Information Principles *may* provide for information about:
 - information about
 - aged care provided through an aged care service or class of services;
 - the approved provider of an aged care service or class of providers;
 - the way in which information must be made publicly available; and
 - the period within which information must be made available.²⁹

Context – Royal Commission findings

108. The Explanatory Memorandum indicates that the measure responds to Recommendation 88 of the Royal Commission.³⁰

109. Recommendation 88 contains a number of recommendations directed to improve aged care provider governance.

110. The only recommendation which seems to be engaged by this measure is that an approved provider must provide an annual report to the Secretary of the Australian Department of Health containing certain information to be made publicly available through My Aged Care.³¹

111. The Royal Commission report states that:³²

Accountability and transparency are critical features of good governance. They are particularly important in the case of approved providers of aged care which receive most of their funding from taxpayers and provide care to vulnerable people. Approved providers should be required to provide ready access to information about their operations to enable proper scrutiny.

112. Both Commissioners considered that the annual report should include at least the following information:³³

- the names and positions of all key personnel;

²⁸ Subclause 86-10(1) of the Bill.

²⁹ Ibid, subclause 86-10(2).

³⁰ Explanatory Memorandum 11.

³¹ Royal Commission into Aged Care Quality and Safety (Royal Commission), 'Final Report: Care, Dignity and Respect – Volume 3B The new system' (2021), Recommend 88(1)(e).

³² Ibid 465.

³³ Ibid 466.

- any attestation by the governing body of the kind we describe below;
- information on staffing levels, qualifications, hours worked, employment status, and staff turnover.

113. Commissioner Briggs considered that the annual report should additionally include:³⁴

- financial reports, including profit and loss and balance sheet information;
- details of the provider's related party transactions such as, for example, transactions between an approved provider and a member of its key personnel or the provider and another entity which is part of the same corporate group;
- information on service provision and use, which could include, for example: in the case of approved providers of residential aged care, the number of residents who entered and left the service, the reason for leaving and the average number of residents;
- in the case of an approved provider of home care services, the number of people who started with and left the provider, the reason for leaving and the total number of hours of different kinds of services delivered;
- information on the number, type, and outcome of complaints.

Law Council comments

114. The Law Council generally supports this measure, subject to the comments below.

Obligation not imposed on aged care providers

115. While Recommendation 88 relates to information to be made available by *aged care providers*, Schedule 3 would impose an obligation on the Secretary to publish certain information, including information about aged care providers.

116. The reason for this departure in the recommended approach is not explained in the EM. The EM states that the information to be published is expected to include: financial information, including expenditure on care, nursing, food, maintenance, cleaning, administration, and profits; levels of care time provided; details of key personnel; and/or information about staffing of an aged care service.³⁵

117. It is not clear how the Secretary will come to possess this information about aged care providers and services. In the time available, the Law Council has not been able to identify a head of power that could be used to require an aged care provider to give this information to the Secretary. Division 9 of the Aged Care Act imposes obligations on approved providers to give some kinds of information to the Secretary and Part 6.3 of the Aged Care Act imposes some record-keeping obligations on aged care providers. However, neither seems to include a power that the Minister could exercise to require aged care providers to provide the requisite information to the Secretary.

Recommendation

- **The Committee seek clarity as to whether there is a mechanism in the scheme which will require approved providers to give information to**

³⁴ *Ibi.*

³⁵ Explanatory Memorandum 11.

the Secretary that the Secretary must publish under requirements prescribed in the Information Principles under new clause 86-10.

Scope of the power

118. The Law Council considers that, in order to ensure greater public certainty and confidence that the Minister will exercise the power in an ongoing basis on the way it is being conveyed as intended, it would be preferable to impose some limit on the scope of the power.
119. This could be done through, for example, requiring the Minister to require the publication of certain kinds of information under the Information Principles, and providing a discretionary power to add more, if needed, consistent with the purpose of ensuring good governance and proper scrutiny.

Recommendation

- **Subclause 86-10 of the Bill be amended to either (in order of preference):**
 - **prescribe the kinds of information the Minister must require be made publicly available under the Information Principles; and/or**
 - **provide the Minister's discretionary power is to be exercised to impose requirements in relation to the publication of information which is considered consistent with the purpose of ensuring good governance and proper scrutiny.**
- **Consideration be given to requiring the Minister to consider matters such as the capacity of aged care providers to meeting any associated reporting requirements be considered.**

Costs considerations

120. Other factors may be relevant, including the burden on aged care providers who would (presumably) need to provide the information to the Secretary in the first place.
121. It is also noted that additional reporting obligations for aged care providers (who would presumably need to provide the information to the Secretary in the first place) may contribute to higher administrative costs, and thus could conceivably reduce the funds available for care and services.
122. While the Law Council considers the publication of information of this kind is appropriate to ensure quality of care, transparency and accountability, it should be balanced by public funding that ensures that the high amount of regulation does not reduce the funds a care recipient has to spend on care and services and that providers are able to afford the costs associated with compliance.
123. Further, the Law Council suggests care be taken to ensure that smaller providers are not burdened with reporting requirements that erode their capacity to provide quality care. The experience of practitioners is that consumers value the availability of smaller providers, as some consumers prefer the more highly personalised service that may be offered. The Law Council supports measures that help to sustain a diverse range of providers in the market, including smaller providers.

124. Consideration could be given to applying different reporting requirements to different categories of provider, or alternatively, to specifically fund support for the reporting function for smaller providers.

Recommendation

- **Consideration be given to amending 86-10 of the Bill to require the Minister to consider matters such as the capacity of aged care providers to meeting any associated reporting requirements be considered.**