Submission by the Australian Nursing and Midwifery Federation

A New Aged Care Act: the Foundations Consultation paper No 1

September 2023

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 321,000 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 appreciates the opportunity to provide feedback on A New Aged Care Act: the Foundations Consultation paper number 1 (the consultation paper). The Royal Commission into Aged Care outlined at length the need for a new fit for purpose aged care act. The final report for the Royal Commission into Aged Care stated the following:

   > *…we are convinced that a new Act is needed as a foundation of a new aged care system. The new Act must focus on the safety, health and wellbeing of older people and put their needs and preferences first. It should provide an entitlement to the support and care each individual needs to prevent and delay the impairment of their capacity to live independently.*[1]

The ANMF agrees, a new aged care act (new Act) is essential to provide the foundation for the aged care reforms required to fundamentally change the system to improve access, care delivery and outcomes for older people.

Overview

6. Aged care reform offers a once in a generation opportunity to build an aged care sector that is fit for purpose, delivers high quality, safe aged care and is sustainable so that older Australians can have confidence that appropriate services will be available if and when they need them.

Principles of Aged Care Reform

7. The issues in the aged care sector are many and interconnected and cannot be addressed in isolation. The ANMF believes that the new Act must be underpinned by the following principles:
   - Aged care operates is a context of health care. It must be recognised as such and the legislation should align with other health care contexts such as the acute sector and primary care. Any lesser requirements applicable to aged care would be inconsistent with a human-rights based Act.
   - Like health care, aged care is a human right and a social good not solely a market transaction involving a “consumer” and provider of care. A market-based approach to care provision is inconsistent with a human rights framework.
   - It is essential that aged care remains the responsibility of government and is sustainably funded in a transparent manner by government for all Australians to access with providers being held accountable by government regarding the spending of all funding they receive.
   - The new Act will provide a legislative underpinning for the aged care sector that clearly recognises and requires the rights of older people to safely access, receive and evaluate quality care regardless of that person’s socio-economic, cultural or linguistic background.

- The new Act must ensure a continuous improvement approach focused on ensuring best standards of care and preventing failures.
- Along with the rights of older people accessing aged care, workers employed in the sector need to be protected and their rights considered and recognised throughout the new Act.
- Older people who access Australian aged care services in the community or in nursing homes have the right to receive safe, high-quality, person-centred health care in place. This demands a suitably sized health care workforce with the skills mix, capability, and capacity to deliver this care to the highest standard.
- Aged care must have a strong and effective regulator, with the capacity, capability and regulatory powers to ensure that aged care providers are accountable for the services they provide.
- Regulatory measures, including the quality standards, must be clear, effective, measurable, and enforceable, and must include a separate workforce standard, which provides a baseline to exceed rather than being a ceiling of compliance.
- Given that the complexity of health care delivered in both residential and community aged care settings is significantly higher than that which is generally delivered in the disability sector, as identified by the Royal Commission, the regulation of the aged care standards would most appropriately align with Australia’s health service standards as opposed to the NDIS standards.
- The aged care sector should be driven and underpinned by high quality, accessible data, technology, research and evaluation to promote and sustain evidence based care delivery with an ethos of continuous improvement.
- The voice of those providing care, in relation to compliance, continuous quality improvement and safety, must be considered as a rich source of information on system performance.

Workforce

8. The new Act has a direct bearing on the aged care workforce, however the consultation paper does not address the systemic needs of the aged care workforce. The consultation paper fails to provide a voice and safeguards for the thousands of staff in aged care tasked with operationalising the new Act. As the biggest stakeholder in the provision of formal aged care, and a direct point of contact for those receiving care, workers must be seen as key stakeholders and the needs of the workforce must be reflected within the new Act. While the new Act will quite justifiably focus on older Australians, it must not do so at the expense of obscuring the role, rights and responsibilities of other stakeholders such as workers, without whom there can be no aged care system.
9. ANMF members and those in their care have been disadvantaged by the heavy focus on provider responsibilities in the existing Act, which has been accompanies by significant failures by the regulator to ensure providers deliver their services safely and at the highest standard. Whilst recognising an Act needs to be future-proof and overarching, the new Act must also acknowledge workers as key to providing quality care, being strong advocates for older people and key to intelligence gathering regarding care delivery. The ANMF believes the new Act must make provision to ensure that workers are both afforded opportunity and relevant protections to fulfil this role.
10. An important element of these protections for workers and the older person accessing care is the need to clearly identify the minimum staffing and skills mix requirements for care delivery within the new Act. The terminology used in the current Act describing staffing as - 'adequate number of appropriately trained staff' [2] is not sufficient and has perpetuated chronic understaffing in aged care for decades. The Royal Commission for Aged Care also identified this as a major failing and made clear recommendations on staffing requirements going forward.[3] The Government has since set clear expectations and implemented minimum care minutes within residential facilities including the requirement for onsite registered nurses (RN) 24/7 in all facilities. These minimum expectations must be clearly reflected within the new Act with terms such as adequate and appropriate to describe staffing being removed.

11. Mechanisms to provide an evidence base to staffing, skill-mix and care requirements must also be in place to ensure that there is a match between the need for care and the supply of those that provide these services sustainably into the future.

Effective Regulation

12. Effective regulation of the sector is a critical element of the reform process, and if undertaken in the comprehensive direction set out by the Royal Commission into Aged Care Quality and Safety, offers the chance to reverse years of policy and regulatory failure.

13. The ANMF understands that the new Act will pick up and implement the outcomes of the *aged care consultation- a new model for regulating aged care*. Getting regulation right for aged care is key to ensuring public safety and quality outcomes for older people. The ANMF provides the following recommendations to improve aged care regulation that should be reflected within the new Act.

Aged Care Standards

14. As a core element of the new regulatory framework, the aged care quality standards must be fit for purpose and be suitably robust to underpin a continuous quality improvement approach. The ANMF identified that significant changes were required in the first exposure draft of the standards in 2022 to broaden their scope and content to set minimum benchmarks for safety and quality in the sector. The revised aged care quality standards currently being piloted are an improvement on previous versions of the quality standards, but considerable scope for further improvement remains.

15. The ANMF outlines the following improvements that need to be addressed within the new aged care quality standards and provided for within the new Act:

    - The basis for all quality standards must be that aged care is a context of health care and that to set lower standards for aged care contexts is ageist and contrary to a human rights approach.

    As a matter of principle, the same standards of care must apply across sectors irrespective of where the older person is accessing services, e.g., aged care, hospital sector, primary care.

- Aged care standards setting and maintenance must be transferred to the Australian Commission on Safety and Quality in Health Care (ACSQHC) as an independent statutory body.
- Aged care standards must align to state and territory legislation in other contexts in which health care is delivered, such as poisons legislation applicable to healthcare provision in states and territories and reference other established standards, e.g., nursing standards for practice, palliative care standards and guiding principles for medication management.
- Alignment with the NDIS standards is less appropriate than alignment with health service standards. Given the level of often complex health care that occurs in the aged care sector in both the residential and community settings (which would be significantly more in the disability sector) it is more appropriately aligned with the mature and robust health sector standards as identified by the Royal Commission. [4]
- The aged care standards must be clear, effective, measurable, and enforceable. They need to clearly signal to providers that continuous quality improvement and not just minimum compliance is the accepted approach to service delivery to drive the development of this culture within aged care service organisations. They must:
  - Be research and data driven, implementing evidence-based care delivery.
  - Learn the lessons of the flaws on regulatory frameworks in other sectors.
  - Have sufficient sanctions for deviation from standards to act as a significant deterrent and should extend up to and include:
    - A provider being forced to leave the sector.
    - Sale of a facility or facilities.
    - Takeover by a state or the commonwealth, e.g., in cases of market failure or high-level wrongdoing.
    - Consideration should be given to allowing accrediting bodies such as the Australian Council on Healthcare Standards (ACHS) to support the ACQSC in accreditation surveys. Such an approach would open up survey teams to relevant expertise and expand the pool of surveyors to undertake more rigorous surveys. Without a significant expansion of capacity, it is difficult to see how the ACQSC will have the capacity to undertake sector

surveillance around standards compliance. As with the hospital sector, aged care providers should be required to bear the costs of accreditation surveys.

- In accreditation processes, providers must be required to demonstrate that they create the conditions for health professionals, for example nurses, to meet their professional standards, e.g., NMBA Standards for Nursing Practice.

Development of a workforce standard

16. While the revised aged care quality standards quite rightly include an expectation statement for older people, the ANMF believes that the standards should also include expectation statements for those who care for older Australians, reflecting the fact that without an aged care workforce there would be no aged care system and they are integral to ensuring the safety of those they care for, often despite what aged care providers do, rather than because of it.

17. Given the significant and systemic issues identified for the workforce by the Royal Commission, the ANMF believes that a separate workforce standard would provide a defined minimum standard and the new Act should make provision for this separate standard. The standard should provide clear signalling to the sector about workforce minimum expectations. While workforce planning is dealt with in Outcome 2.8 (Workforce Planning) of Standard 2 in the revised standards, the ANMF does not believe this goes far enough, given the significant attention paid to staffing and skill-mix by the Royal Commission and the Government's mandates for RN 24/7 and minimum care minutes.

18. Key elements of a residential aged care standard which could be modified for other settings, such as home care, must ensure:
    - Nurses are provided with a working environment which enables them to practice within professional frameworks.
    - Nurses and care workers are enabled to identify situations which compromise professional standards and the aged care quality standards.

- There is a system in place to ensure matters are reported and resolved within 24 hours.
- Employees are enabled to undertake training and education which:
- Consistency with the assessed needs of the resident cohort.
- Include both mandatory and non-mandatory learning opportunities.
- Enable nurses to comply with the Nursing and Midwifery Board of Australia continuous professional development requirements.
- Enable career progression and meet individual learning needs.
- Nurses are provided access, and enabled to, receive clinical supervision in work time.
- Nurses are supported to network with external healthcare providers and any other entity deemed appropriate to maintain and update their clinical knowledge and skills.
- Direct care workers are provided in sufficient numbers and skills mix to meet the assessed needs of the resident cohort but not less than those numbers required through minimum care minute funding and other legislation.
- Direct care workers are provided opportunity to raise issues of concern relevant to staffing and skills mix with the regulatory authority and a workforce representative.
- Employees are enabled, without disadvantage or adverse consequence relative to their employment, to engage with a workforce representative for industrial and or other matters including professional advice, undertaking a union position or being a union member in the workplace, including Health and Safety Representative roles, and through education, networking and advisory groups and
- Employees are educated with regard to whistleblowing policies and procedures and are enabled to raise concerns in good faith and are protected against reprisal.

A proposed standard can be found in *Appendix A.*

19. The development of a workforce standard would provide clarity and certainty that has not existed to date. The ANMF suggests a separate working group is established with broad stakeholder representation including unions and peak professional bodies, similar to the clinical care standard advisory group, specifically to develop this standard.

Worker voice role

20. A clear finding of the Royal Commission has been the lack of oversight of the aged care system resulting in widespread failures to protect the safety of those receiving care and those providing it. The Royal Commission also identified widespread deficiencies and risks associated with non-compliance relative to standards and regulatory requirements.

21. The voice of those providing care, in relation to compliance, continuous quality improvement and safety, must be considered a rich source of information on system performance. While the perspective of those receiving care is important, as is that of service providers, those providing care are ideally placed to act in a surveillance capacity for safety and quality issues.

22. The extent of reforms being undertaken will test the regulator and will require significantly more resources for the regulator to undertake the comprehensive range of activities. Using workers as on-site safety and quality resources would complement the external assurance role of the regulator.

23. The ANMF proposes that the new Act should make provision for an aged care regulatory environment operationalised through the following:
    - A sufficiently skilled and resourced external regulator to undertake comprehensive and proactive oversight of the aged care sector.
    - A clearly identified, and legislatively enabled and protected worker based, assurance roles supported by a committee of workers within nursing homes. The committee should focus on organisational safety and quality improvement, staffing and skills mix, as well as identification and escalation of issues where standards are breached. It is recommended that this role also be embedded in a workforce standard as outlined above.

24. The ANMF believes that embedding a worker's voice in the regulatory and compliance system for Aged Care will complement the external regulatory function and enhance the safety of older Australians and the quality of care delivered by keeping providers accountable. Our view is that aged care workers, with appropriate training and support can be authentic and powerful voices for older people in the aged care system and provide a quality assurance process that complements and amplifies regulatory oversight of the sector.

25. Specifically, the worker voice is essential in supporting the implementation and ongoing regulation of minimum care minute requirements. The following detail clearly outlines how the ANMF sees the worker voice's role in supporting regulation of the care minute requirements including:

a) **Care minutes should be assessed on a day-by-day basis**:
    - Minimum care minutes for RNs, ENs and AINs/PCWs should be mandatory on a daily basis in all facilities.
    - Skill mix requirement expanded over time to stipulate minimum care minutes for RN's, EN's, Cert iv and Cert iii care workers.*

b) **Transparent, real time reporting and monitoring of compliance**
    - Compliance reporting needs to be simple, and not depend on self-reporting by providers.
    - Give workers access to real time and transparent reporting of the care time in their facility.
    - Daily care minute obligations in each facility should be displayed in a location easily visible to the public and on the roster along with calculations showing how current rostering will meet care minute obligations. Records of whether care minute obligations were met in previous periods should also be kept and displayed.
    - Have a reporting mechanism for workers via their Union or individually to the ACQSC if they believe care time is not being fulfilled

c) **Shift by shift staffing ratios**
    - The best way to ensure safe staffing levels which meet care minute obligations is through simple shift by shift staffing ratios.
    - Aged care employers should be incentivised or required to deliver their care minutes through shift by shift ratios in an enterprise agreement. Providers who do this should be considered to occupy a lower place on the Commission's Regulatory Pyramid.

d) **Reporting not enough**
    - Have significant penalties for misreporting and higher penalties for deliberate or ongoing misreporting.
    - Have significant penalties for non-compliance, and higher penalties for deliberate or ongoing non-compliance.
    - Significant whistle blower protections and penalties for adverse actions.
    - There should be a capacity for inspectors (Regulator, unions and Aged Care Guardians) to issue enforceable Improvement Notices and exercise Right of Entry powers.

e) **Requirement for Provider to facilitate the Guardian role**
    - Rights for Aged Care Guardians:
    - Formal recognition from employer and regulator
    - Access to sufficient resources to perform this function well, including paid time for Guardian duties
    - Access to new starters,
    - training and development
    - Access to meetings with staff (unsupervised),

- Ability to inspect and investigate compliance and reporting issues relating to Care Minutes and staffing mix
- Ability to raise general quality of care issues
- Issue binding Provisional Improvement Notices.
- A formal issue resolution procedure, beginning at the work site and escalating up to and including initiating prosecution *(through their union and/or the regulator)

f) Movement from Education and Engagement > Regulatory Actions

- This would be triggered by a set number of breaches
- An additional requirement to those already envisioned in the Commission Regulatory Pyramid would be an external 6 monthly audit of staffing levels to ensure they are complying.

Appendix B provides proposed draft legislation that the ANMF recommends is included within the new Act to reflect the Guardian model.

Worker Registration for Aged Care

26. The ANMF continues to raise its concerns regarding the proposed worker registration model including the Code of Conduct (the Code) for Aged Care within the broader aged care regulatory framework.

27. The Code duplicates and overlaps existing codes for registered health practitioners with the potential that a registrant could be investigated by two or more regulatory authorities resulting in an excessive and officious situation. This must be corrected within the new Act and duplications be removed. Further, the Code was implemented without primary legislation that requires the Aged Care Quality and Safety Commission (ACQSC) to apply procedural fairness to investigations of the Code. The new Act must rectify this and the ANMF suggests that the National Law[5] should be used as an important reference in laying out these provisions.

28. The ANMF is concerned that the aged care reform process has looked more to the National Disability Insurance Scheme (NDIS) regulatory template for inspiration rather than the better established health care system. Given the many issues exposed through the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability this seems neither appropriate nor wise. As pointed out earlier in this paper, aged care is more aligned to health care, not disability or social care. As such, regulatory frameworks must be aligned with a health, rather than a disability model.

29. The ANMF has raised ongoing concerns about the Aged Care Quality and Safety Commission (ACQSC) managing ongoing worker registration processes including the Code, and these concerns were re-enforced with the findings of the capability report.[6] The role of Australian Health Practitioner Regulation Agency (Ahpra) is underpinned by the Health Practitioner Regulation National Law Act 2009 (National Law) and prior to there being a national system of health practitioner regulation, there were many years of experience of regulation in the state and territory jurisdiction.

30. The ANMF is concerned that handing an expanded system of worker registration over to the ACQSC to administer is inherently flawed and risky. It would be more reasonable to expand the scope of Ahpra, of an existing regulator of workers under the National Law, which has necessary experience and understands what is required to regulate practitioners and workers.

Consultation Questions

Proposed structure and purpose of the new Act

1.	Do you think the aged care legislative framework will be more accessible and transparent if there is a single piece of primary legislation and one set of Rules?
2.	Would you prefer to access separate topic-based subordinate legislation (like the current Quality of Care Principles 2014 and the Subsidy Principles 2014)?
3.	What else would you like to see included in the Objects of the new Act?
4.	Do you think it is a good idea to include a ‘Purpose Statement’ in the new Act, as well as objects provisions? What do you think the purpose of the new Act should be?
5.	Do you have any other feedback on the proposed structure of the new Act?

31. The ANMF supports the proposed legislation being more transparent as a single piece of primary legislation and one set of rules.

32. Separate topic-based subordinate legislation can be useful as they are more likely to provide direction and be clearly measurable. Principles can also be amended to reflect contemporary practice more readily.

Objects of the New Act

33. The objects proposed in the consultation paper are reasonable.

34. The ANMF also recommends that the objects of the new Act clearly outline how it is the responsibility of Government to ensure older people are able to access aged care.

35. The ANMF suggests that there must be an object of the new Act pertaining to workers who deliver aged care including nurses and care workers. This object must address the safety and protection principles of workers employed within the sector and address the importance of safe staffing and skill mixes that enable older people to access care that meets their assessed needs and are provided by an appropriately qualified and trained workforce including registered health practitioners.

36. The objects also need to include the right for older people to have continuity of care and a standard of health care they would rightly expect to receive in other parts of the health system, e.g., primary or acute care.

37. The importance of healthcare as a key component of the new Act must be included. Whilst the ANMF recognises that aged care also requires a focus on social care the increasing vulnerability of people receiving aged care and the rapid change related to frailty makes healthcare critical and to older peoples quality of life. The object of the new Act should outline how health care provided through Commonwealth funded services will be evidence-based, best practice care and will effectively intersect with other health sectors for quality outcomes for older people.

38. An object of the new Act also needs to ensure that those groups considered to be diverse and vulnerable such as Aboriginal and Torres Strait Islander Elders, people from a CALD background or those who live in a rural and remote location etc. need considered and care needs to be adaptable and contemporary given the rapid change of demographics resulting in emerging areas of vulnerable groups. For example, transient homelessness in older women.

Purpose Statement

39. It is important to include a purpose statement in the new Act and the ANMF suggests the definition should be broadened to include freedom from neglect. This would provide better safety for those unable to enact self-determination due to incapacity or cognitive decline. It would also increase accountability for the provision of high quality, safe care. The ANMF recommends the following:

    ‘Facilitate access by older people to quality and safe, funded aged care services, based on their individual assessed needs, with the aim of assisting them to continue to live healthy, active, self-determined and meaningful lives free from neglect as they age.’

Other Feedback

Regulation

40. The consultation paper proposes that regulation for the sector will be proportionate and risk based. However, the Tune report[7] into the capability of the Aged Care Quality and Safety Commission has identified significant shortfalls in the regulators ability to determine risk and it would be unwise to support this type of regulatory strategy through the new Act if it cannot be safely operationalised.

41. The ANMF has suggested many opportunities to enhance the regulation and intelligence gathering to inform proportionate regulation by embedding a worker voice in this submission outlined above.

The Statement of Rights

6. Do you support a Statement of Rights being included in the new Act?
7. Are there any rights that you think we have missed that should be included?
8. Are there any rights that you think should be worded differently?
9. We consider it critical that person-centred complaints pathways are available for older people to seek early resolution of concerns about their rights. This is because the ideal scenario is where the registered provider or if necessary, the Commission can address risks early, instead of using enforcement mechanisms after harm has already occurred. Do you think we have the balance right?

Statement of Rights

42. The ANMF is supportive of the inclusion of a Statement of Rights in the new Act. The Department suggests that one of the key purposes of the Statement of Rights, together with 'new clear and consistent obligations outlined in the legislative framework' is to 'ensure registered providers and other workers within the aged care system have a common understanding of the outcomes expected when such services are delivered'. The ANMF notes that the existence of a Statement of Rights and a new legislative framework is but part of ensuring that providers and workers understand and (ideally) deliver the intended outcomes expected of them.
43. Enabling understanding among a diverse group of stakeholders must go beyond the existence of the Statement of Rights and articulation of obligations within a legislative framework. There will necessarily be further work required to ensure stakeholder understanding and that these understandings are common and consistent. Further, this means that Statements must be clear, effective, measurable, and enforceable. They must also clearly signal to stakeholders that continuous quality improvement and not just minimum compliance is the acceptable approach to the delivery of best practice care.
44. A rights-based approach must establish accessible and effective mechanisms for redress when these rights are breached. To incentivise compliance, the new Act and supporting legislation must address this issue and form part of the regulatory and redress framework needed to make the cost to providers of compliance and doing the right thing less than the cost of non-compliance.
45. The ANMF express a significant concern that the overall focus of the Statement of Rights lacks any clear consideration of the need and rights of older people seeking or accessing aged care to receive safe, evidence-based, timely *healthcare.* Likewise, the right to receive restorative care and care that is aimed at maintaining or improving health, wellbeing, and outcomes appears to have been omitted. While there is a focus on assessment and delivery of 'aged care services' there is no focus on delivery of healthcare nor assessment of healthcare needs which is a significant aspect of aged care irrespective of where this is provided.

46. There is also no right articulated that indicates a person's right to have timely access to healthcare professionals or other staff to deliver that care nor any right that indicates that it is the obligation of the provider to ensure that the right number of the right kinds of staff are available to provide that care. As outlined earlier, it is important to remember that while aged care possesses numerous interfaces with healthcare services beyond the aged care sector, health care is at the core of aged care, and those entering the sector are doing so as they require health care beyond what the wider sector is readily able to provide.

47. Approved aged care providers employ healthcare professionals and other healthcare staff to provide assessment for and provision of healthcare, both in nursing homes and in peoples' homes in the community and is a fundamental and significant part of aged care. While many older people will access the wider healthcare system throughout their lives for various reasons, in many cases it is best practice for many of these healthcare services to be provided in place (in the person's nursing home or home in the community) by familiar staff to support and foster individualised person-centred care and continuity of care, ultimately which is known to result in better experiences and health outcomes.

48. While the ANMF understands that the purpose of the Statements of Rights must be to ensure the older person is at the centre of the system, we are very concerned that the staff that provide direct and indirect care to older people in the aged care sector are largely invisible within the Statement. For example, Right number 6 stipulates that older people have the right to 'freedom from all forms of degrading or inhumane treatment, violence, exploitation, neglect, and abuse'. However, there are numerous instances where nurses, aged care workers, and other staff have experienced these types of occurrences in the line of work.

49. A truly 'rights-based' new Act would clearly acknowledge that while the older person is the central focus, other people such as staff, volunteers, family members, and visitors who are also impacted directly by the delivery of aged care services require provisions and be reflected within a comprehensive Statement of Rights.

50. The ANMF understands that there exists wider legislation that pertains to protection for workers and their workplace health, safety, and wellbeing. However, we highlight that without greater acknowledgement of the people who deliver care and aged care services,

the intended human rights-based approach omits important details and compartmentalises important aspects of the aged care system and risks ineffective and uncoordinated responses to individual and systemic issues. An example of where this might be important is that healthcare practitioners in aged care, such as registered nurses, work closely with the older people they care for and their families and loved ones to help them to understand and make informed decisions about their care preferences and needs.

51. Healthcare professionals provide information and evidence and expert insight into treatments, interventions, care plans, and the potential risks and benefits of these. This helps older people to make decisions that are the best for them based on the available information and evidence that might not be accessible or easily understandable by many community members who do not have the same education, training, and experience that healthcare professionals are qualified and regulated to have and maintain.

52. If a rights-based approach enshrines the right of older people to *'exercise choice and make decisions' and 'exercise choice between available aged care services…and how these services are delivered'*, then there must be acknowledgement of the staff that are supporting and informing this decision making in collaboration with the older person. Put simply, older people should have a right to healthcare and all this entails provided by a suitably sized and skilled workforce of healthcare professionals who have the education, training, and experienced to engage with the older person and their loved ones/family in the assessment and delivery of person-centred, individualised care.

53. The ANMF express some concerns regarding the wording throughout the Statement of Rights regarding ambiguous terminology such as 'when required', 'if/where necessary', and 'as required'. While the ANMF understands that legislation often cannot avoid using such terms, any provisions need to be objective and measurable. This is to ensure common understanding and enable identification of where rights and/or have not been upheld to enable the regulator to hold providers accountable. If this cannot be achieved in the rights, definitions specific to terms use must be provided in supporting documentation.

54. Other ambiguous terms used throughout the Statement of Rights that could be challenged, misinterpreted (intentionally or unintentionally) and/or lead to confusion and poor ability to execute effectively include; in/appropriate (Right 2, Right 7), fairly (Right 10), promptly (Right 10), valued (Right 11), supported (Right 11), acknowledged (Right 14), respected (Right 14), reasonable (Right 16).

55. Further, the ANMF is also concerned that terms such as “choice” and “enabled” can be utilised to shift the risk and responsibility of care outcomes to older people and their families. A person-centred approach must not be used as an excuse to shift risk and scrutiny from government, policy makers, regulators and providers who are responsible and accountable for service delivery and outcomes, to “consumers” under the guise of empowerment, choice, and the “rights-based approach.” As an example, the ANMF expresses concern in the wording of proposed Right 1, in relation to enabling residents to make decisions “including where they include personal risk”. As a representative of nurses and care workers, the ANMF highlights here, and indeed throughout, the lack of consideration for aged care workers in this section of the new Act. While respect for a resident to make decisions that affect their lives is of great importance and paramount for ensuring that care is delivered in a dignified manner, some issues arise when this clashes with the provision of safe and high-quality care. For example, if a resident makes a decision that includes personal risks, against the advice of a healthcare professional such as a registered nurse, staff are placed in a difficult position. If they are to enable this action, and it brings about deterioration or any detriment to the resident they may be placed responsible and face professional reprimanding. For the registered nurse caring for this person, this could potentially lead to the loss of their professional registration. If, on the other hand, they did not enable this decision as it had been identified as a risk, they may be found in breach of the person’s rights and face disciplinary action despite the professional obligations that prevented them from acting in any other manner. Here, and throughout, it is of great importance to define how this right must be respected in practice and include concrete guidelines and appropriate safeguards for workers. Therefore, it is important that the new Act acknowledges and balances competing rights and responsibilities, particularly in circumstances as outlined above.

56. As an example of how ambiguous wording can obfuscate the entire meaning of a Right, the ANMF highlights that Right 3 states that older people should be able to "exercise choice between available aged care services they have been assessed as needing, and, how these services are delivered", but that this language is ambiguous. Does this mean that older people have the right to know where their money is going and how it is spent on care? Or/and does this mean that the older person should have a right to know whether or not the care they receive is evidence-based?

Person-centred complaints pathways

57. The ANMF agrees that harm must be prevented or mitigated through early identification and intervention of any breaches of an older person's rights, however, enforcement of rights and the Code is still required. There must be mechanisms in place to ensure that complaints are registered and addressed in a timely manner, and a third party, such as the complaints commission must monitor all complaints lodged with providers to ensure they are responded to appropriately and efficiently. Sanctions for deviation from standards must be sufficient to act as a significant deterrent.
58. It must be pointed out that complaints are not just an avenue for those using aged care services but must also be a mechanism for workers to use for issues that relate to the safety and quality of care, worker safety, and for unacceptable provider behaviour, or illegality. As outlined above worker protections must be included within the new Act. These protections must include effective Whistleblower protections whether in the new act or in related or supporting/subordinate legislation.
59. There must be a balance between privacy and a complainant's right to know how their complaint has been handled and the outcome. Options for how unions (as representatives of members) could be involved in this process must also be explored to redress the power and authority differentials between management and workers that can be misused to silence dissent or concerns. As with all such mechanisms there must be regular reviews of their effectiveness and a willingness on the part of the authorities to evolve these processes to meet emergent needs and changed circumstances.

Statement of principles

10. Do you support a Statement of Principles being included in the new Act as well as a Statement of Rights?
11. Are there any principles that you think we have missed that should be included?
12. Are there any principles that you think should be worded differently?

Statement of Principles

60. The ANMF is supportive of the Statement of Principles being included in the new Act, however, this needs to be considered alongside pre-existing and/or co-existing guidelines to ensure consistency of focus. Additionally, while the ANMF understands that the Statement of Principles and the Statement of Rights are meant to be complementary, there needs to be clarity regarding when and how either Statement is to be applied.

61. Additionally, as with the Statement of Rights, the Statements here must be understandable, clear, and measurable. If this cannot be achieved in the wording of the principles they must be accompanied by supporting documentation that outlines how principles must be implemented. In this, wording throughout the statements, such as “effective”, “inappropriately”, “best available care”, “appropriately skilled”, and “empowered” needs to be accompanied by clear and measurable definitions specific to each context that they are mentioned in. Further, these definitions should not be based on minimum compliance, but rather promote continuous quality improvement.

62. As with the statement of rights, the ANMF highlights the critical importance of clearly including health/clinical care as a focus for aged care provision. If the Statement of Principles are to be “guiding principles of the new Aged Care Act” they must encapsulate the purpose of aged care and acknowledge that a large and important proportion of aged care relates to the assessment and provision of *clinical* care. For example, Principle 2 makes no mention of the provision of health/clinical care despite the fact that the funding model underpinning the sector is primarily focussed on identifying and meeting the costs of the provision of clinical care.

63. Additionally, the Statement of Principles lacks consideration for aged care workers. While the ANMF agrees that the Statement of Principles must enshrine older people at the centre of the aged care sector and care delivery, the safety, health, and wellbeing of those who care for them must also be a prominent consideration and focus.

64. The only mentions of aged care workers in this section of the act discuss how the workers can be utilised to support and 'prop up' the aged care sector (e.g., Principle 11 " …[A]*ged care workers empowered to contribute to … support ongoing business improvement across the aged care sector*") rather than how the sector can support staff to deliver high-quality care. It is important to remember that the workers are the ones assessing older peoples care needs and preferences delivering that care and evaluating it. Therefore, the principles should prioritise the well-being of workers as well as older adults to ensure they are adequately supported to deliver care.

65. Under principle 3, subpoint 1, it is important to define what measures determine when an older person no longer is able to reside in their home. While the ANMF is supportive of enabling older people to stay in their homes for as long as possible, some consideration needs to be made regarding the burden of care this may place on aged care workers. For example, if an older person is deteriorating rapidly, and begins to require a greater amount of care than is allocated for aged care workers making home visits, they might need to be moved to residential aged care to ensure effectiveness and safety. It is important here, that the care delivered be considerate of preferences, but the quality of that care must not be diminished by this preference.

66. In relation to Principle 8, while the ANMF recognises that residential aged care for younger people is largely inappropriate, it needs to be made clear in the principles that when alternative services are not available or not appropriate for the individual, some considerations may be required. Priority should be placed on the development of more appropriate services, however, in their absence, it is vital that nursing homes should be able to provide the best possible care to these people. This is achieved by adequately staffed facilities with proper skill mixes.

67. Another point is that repeatedly, the Principles (and Rights) focus on ‘older people’ despite acknowledgement within the Principle 8, that younger people are still receiving care in nursing homes. Here, the Principles and Rights generally overlook this important and vulnerable population through wording that often only focusses on older people.

68. It should be made clear to aged care providers that care comes first and that aged care needs to be run in the clinical context with care recipient outcomes and wellbeing at the forefront rather than one where an effective business model could take precedence. Throughout the principles, but specifically, Principles 14 and 15, the ANMF expresses concern in the focus on financial viability for aged care providers. This should not be a principle of the new Act as this draws focus from the purpose of delivering high quality, safe, and dignified care to profit margins. While the ANMF recognises that delivery of aged care necessitates financial viability of providers, an Act with a ‘rights-based’ approach must not prioritise economic considerations of providers.

Definition of high quality care

13. Are there any changes you would make to the proposed definition of high quality care?
14. Outside of the new regulatory model, are there any other initiatives that you would like to see addressed in the new Act to encourage registered providers to aim higher and deliver high quality care?

Definition of high quality care

69. The definition of the proposed high quality care does encompass the elements expected of such a definition, however, some of the language used is problematic. The use of terms such as compassion, respect, and trauma aware are subjective and difficult to measure. This definition must include clear, effective, measurable, and enforceable quality and safety standards, including a separate workforce standard, which provides a baseline to exceed rather than being a ceiling of compliance. Additionally, the definition of high-quality care requires a larger focus on its *clinical* aspects. While this is somewhat mentioned in “*facilitating regular clinical reviews*”, the clinical aspect of aged care is largely overlooked. The need for comprehensive aged care quality standards can’t be overemphasised. The

ANMF believes there is much work to be done to make the existing standards suitable to drive high quality care.

70. When defining quality, it is also essential to consider the worker who is providing care. Those working in direct care roles such as nurses and care workers are ideally placed to assess the quality of care and help to define it in terms of what they do and how they keep those they care for safe. By including the nature of the work performed in the definition of quality, workers are supported in making contributions to assessments of quality, for example through formalised worker voice avenues, as referred to above.

71. Delivery of care cannot always result in the improvement of a persons' physical and mental health and cognitive capacity, the ANMF recommends that the definition at sub-point four be updated to read*: "supporting the person to improve or maintain their physical and cognitive capacities and mental health…".*

72. Care delivery should be based on the best available evidence, the ANMF recommends that high quality care must include clear acknowledgement of best practice, evidence-based health care as a cornerstone of health and aged care quality and safety.

73. Non-medical social determinants of health play a powerful role in the health, wellbeing, and outcomes of all people, the ANMF recommends that high quality care should also include clear acknowledgement of these. High quality care must also attend to the social determinants of health to ensure that all people have equity when accessing and receiving care.

Delivery of high quality care

74. As outlined throughout this document healthcare is a fundamental and central component of aged care, the ANMF urges the Department of Health and Aged Care to use the health sector as the exemplar for such processes rather than those of the NDIS and disability sector.

75. As recognised by the Department in the consultation paper, defining high quality care will not lift the standard of aged care services on its own. If there is no place for substandard or low-quality care, then a high standard must be imposed as a minimum benchmark and failure to achieve this must be clearly and effectively disincentivised. There will need to be pathways

for providers to improve care quality and appropriate repercussions when high quality care is not provided.

76. Likewise, situations that perpetuate the provision of low-quality care, such as low staffing levels and skills mixes must be addressed. Here, an important initiative is to ensure staffing levels and skills mixed improve over time by addressing the size and capability of the aged care workforce as well as issues with attraction, retention, and the workplace safety, health, and wellbeing of staff working in the sector.

77. For more extreme violations of the regulatory model, as outlined above the ANMF suggests that aged care providers must not be permitted to provide services if they do not meet clear regulatory expectations. Individual accountability must also be placed at both the Board and managerial levels, signalling strong deterrence to those providers tempted to game the system. The ANMF also supports the need for critical failure provisions for the ACQSC in relation to situations such as sudden provider collapse, e.g., the Earlhaven collapse in 2019, or for provider insolvency.

A new duty of care and compensation pathways

15. Do you support inclusion of the new statutory duty of care in the new Act?
16. Do you think the new duty could result in any unintended consequences?
17. Do you support related duties being placed on responsible and governing persons of aged care providers?
18. Do you think a related duty should be placed on aged care workers?
19. Do you think a separate duty should be placed on organisations that provide enabling services and/or facilitate access to aged care workers? What should be the extent of such a duty?
20. Do you have any further feedback on the proposed approach to compensation?

Duty for providers and responsible persons

78. The ANMF supports the inclusion of a new statutory duty of care in the new Act for providers and responsible persons. However, we would like to clarify further what intersection this new duty would have with the Work Health and Safety Act. Providers already have a duty to residents under 19(2) of the WHS Act - (2) A person conducting a business or undertaking

must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. Similarly, the duties of officers and workers in the WHS Act also apply to "others" (in this case residents).

79. It is the ANMF position that the new Act should also have clear provisions ensuring providers and responsible persons are accountable for ensuring government funds are spent in the way they were intended. For example for care or funding for wage increases for the workforce. Any funds received must be transparently and accountably used for the purposes it was provided, and if not, for the surplus to be returned to the Government.

Platform providers

80. The ANMF supports a separate duty on organisations that provide enabling services and/or facilitate such as platforms access to aged care workers. The ANMF supports the recommendation 14 of the Royal Commission into aged care which outlines:

    Any entity that facilitates the provision of aged care services funded in whole or in part under the new Act should have a duty to ensure that any worker whom it makes available to perform personal care work has the experience, qualifications, skills and training to perform the particular personal care or nursing care work the person is being asked to perform.[8]

Duty on workers

81. The ANMF does not support a new duty of care being applied on workers. Workers are not responsible for the way a service is delivered and at this point of the reform have little power to influence the organisational environment in which they work.

82. The ANMF understands there is a layer of accountability at an individual level for aged care workers and multiple legislative obligations already exist. 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)[9], administered by the Nursing and Midwifery Board of Australia (NMBA)/ 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.

83. 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.

84. Care workers along with nurses are also subject to the Code of Conduct for aged care workers and work is already underway with Government commitments for a worker registration scheme for these workers.

85. Applying a further duty of care on workers is unnecessary and would duplicate regulation that is already in place. Further a applying a duty of care on workers would also potentially have unintended consequences and act as a deterrent for workers to remain or join the sector.

86. The new Act should instead focus on providing the foundation for a positive registration scheme for care workers as outlined extensively above.

Memorandums of understanding

87. Provision for memorandums of understanding between regulators to ensure registrants to professional bodies should be embedded with provisions in the new Act. This will protect workers against being adversely impacted by substandard working conditions and employment practices. There must be provision for the regulator or individual workers to

alert their registration bodies to substandard conditions impacting their ability to protect the public and practice safely. Currently, their only option is to leave employment, face repercussions from their employer or lose their right to practice or have complaints made against them. A similar system for work health and safety should also be applied.

88. Aged care workers have the highest rates of serious injuries of any workers, additionally there is a large cohort of "vulnerable" workers – migrant workers, CALD/CARM workers, labour hire etc. Sick and injured workers cannot safely provide quality care.

Disclosure protections for whistleblowers

21. What challenges could there be with the proposed whistleblower framework, and do you have any proposed solutions?
22. What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

Protections for Whistleblowers

89. The ANMF supports the intention outlined in the consultation paper to broaden the whistleblower protections in the new Act. An effective whistleblower framework is critical. The fear of retribution is the reality for many workers working in aged care and frequently workers are penalised for speaking out and advocating for older people. If workers are protected and empowered to voice concerns, it will better protect people particularly vulnerable older people who cannot voice concerns for themselves.

90. The Whistleblower framework needs to be clear and transparent and workers need to understand the provisions. Workers need to feel empowered to speak up when necessary and know who they can trust to go to safely make disclosures and be assured of protection from adverse consequences.

91. It is important that Work health and safety (WHS) regulators and Work health and safety entry permit holders (officers of unions who hold a WHS permit) also be included within the framework.

92. The ANMF notes that the proposed expanded provisions for the framework outlines that workers will be required to disclose their name before raising an issue in good faith. The ANMF does not agree that workers should be required to establish their bona fides by being required to identify themselves. Unfortunately even with the best legislative protections it is unlikely for workers to feel sufficiently safe to raise issues directly and disclose their identity. In addition to ensuring the identity of a whistleblower is protected, workers should also be able to nominate unions as organisations who may receive disclosures and raise issues on behalf of workers. This provides a legal pathway that is both non-threatening for the worker but facilitates the giving and receiving of information to the regulator to achieve resolution.

Supported decision-making arrangements

23. What are your views on the proposed nominee framework?
24. What challenges could there be with the proposed framework, and do you have any proposed solutions?
25. Are there any other duties or obligations you think should be put on appointed nominees?
26. When do you consider a supporter nominee would be most useful to a recipient of aged care services? For example, to convey decisions, understanding processes, receiving and explaining correspondence in a way which is understood by the older person.
27. What kind of information do you think support nominees should receive?
28. Are there any categories of information that support nominees should not receive?
29. How can the Department best support the transition from current My Aged Care arrangements to the new nominee arrangements? Are there any implementation issues you are concerned about?

93. The ANMF notes that the challenge with the proposed new system will be ensuring it can be operationalised and monitored effectively. The ANMF is concerned that having two separate systems, one for guardianship and power of attorney administered at state and territory level and the proposed nominee arrangement administered federally will create confusion with people potentially falling between the gaps, or a system that is not used as intended.

94. One of the criticisms of existing arrangements is the confusion which occurs when state and territory legislative requirements overlap federal responsibilities embedded in the existing

Act. Given the potential for overlap, and confusion of nominated roles the oversight of the proposed system will create regulatory challenges leading to outcomes that would be inconsistent with a human rights-based Act.

95. Consumers, families, aged care workers, providers and regulators are not experts in legislation and our experience is that workers already find guardianship and power of attorney issues problematic. Often nurses and care workers are caught in the middle of decision makers attempting to provide person centred care but are unable to due to the complex structures that can hamper and slow care delivery.

96. For this reason, introducing further models for advocacy such as supporter and representative roles, not embedded in legislation have the potential to be underutilised and poorly understood. The new Act needs to attempt to simplify the provisions and provide a framework that all stakeholders can easily understand and work within.

Eligibility for funded Aged Care Services

30. Do you support the proposed eligibility requirements under the new Act?
31. Do you have any concerns about people under 65, unless homeless or First Nations and over 50, being excluded from entering funded aged care services?
32. Are there other things you would like to see changed about entry arrangements for the aged care system?

97. The ANMF supports a single assessment pathway for access into aged care. However, the single assessment process must remain independent to the provider and continue to be delivered by a multidisciplinary team. The ANMF supports the pathway continuing to be delivered by government services and not being privatised.

98. The proposed access rules into aged care are reasonable. However, the ANMF does note the exclusions for younger people to be accommodated in aged care services should also consider the needs of those with younger onset dementia.

Conclusion

99. A new aged care Act is essential to provide the foundation for the aged care reforms required to fundamentally change the system to improve access, care delivery and outcomes for older people. The ANMF looks forward to working with the Government and the Department of Health and Aged Care moving forward to discuss the new Act and the development of the exposure draft later in the year.

Appendix A

Standard 8: The Workforce

Intent of Standard 8

Standard 8 describes the responsibilities and obligations of providers for ensuring that the direct and indirect care workforce has the demonstrated capability and capacity to deliver safe and quality care that meets the individual care needs of older people.

Standard 8 expectation statement for older people:

The workforce that provides my care has the appropriate number and skill-mix of staff to meet my planned care needs effectively, safely and to a high standard.

Standard 8 expectation statement for employees:

I am treated as a valued member of the organisation and this is demonstrated by:

- feeling physically, psychological and culturally safe
- having clear lines of communication and feedback for work related issues and concerns
- being supported and encouraged to identify and report issues and concerns relating to the work
- a work environment that supports me to provide personal, clinical and health care that complies with relevant laws, regulations and professional standards.
- organisational systems that support me to identify and meet my learning and development needs.

Standard 8 expectation statement for the provider:

The organisation is provided with clear and timely feedback regarding the workforce planning and management and the capacity and capability of the workforce to provide safe, quality care, a professional practice work environment, and works with relevant regulatory bodies to ensure that workforce standards are met.

Outcome 8.1: Workforce planning

Outcome statement:

The provider understands and manages its workforce needs and plans for the future.

Actions:

8.1.1 The provider demonstrates that they have developed, implemented and regularly reviewed a workforce strategy and plan that:

a) provides evidence that the strategy and plan is based on gap analysis of current and anticipated future workforce needs and risks.

b) identifies the number and skill-mix of direct and indirect care workers to manage and deliver safe, quality care and services.

c) specifically identifies the number and skill-mix of health practitioners (nursing and allied-health) required to meet the clinical and health care needs of older people cared for by the nursing home or service and to meet regulatory requirements.

d) Identifies the skills, qualifications and competencies required for each role.

e) Identifies strategies and processes for engaging suitably qualified and competent workers.

f) Is based on a permanent workforce model and identifies strategies to minimise the use of indirect employment workers wherever possible.

g) Identifies strategies to mitigate the risk of workforce shortages, absences or vacancies.

h) Identifies and demonstrates strategies to for supporting the physical, psychological and cultural safety of the workforce including work-life balance.

Outcome 8.2: Workforce utilisation

Outcome statement:

The provider ensures that the workforce is fit for purpose to meet the individual care and clinical needs of older people receiving care provided by the service.

8.2.1 The provider demonstrates that sufficient numbers and mix of suitably qualified and skilled staff are employed to meet the care needs of older people cared for by the nursing home or service to meet regulatory requirements:

a) Best practice rostering optimises the skills, knowledge and abilities of staff to meet care needs of residents and clients

b) Staff work-life balance requirements are considered in all deployment decisions

c) Business planning is demonstrated to match workforce capability and capacity to service demand.

8.2.2 Direct care workers are provided in sufficient numbers and skills-mix to meet the needs of the resident or client cohort but not less than those number required through direct care minutes funding and any other relevant legislation or regulation:

a) Rosters clearly identify average minutes of care per resident and registered nurse minutes of care in the residential setting so that these metrics can be easily accessed by staff.

Outcome 8.3: Workforce development

Outcome statement:

The provider demonstrates that a planned, communicated and continuously evaluated strategy, plan and process is in place to support the role, and professional and personal developmental needs of the workforce.

8.3.1 Staff receive the appropriate support, training, professional development, supervision and personal performance and development relevant to their job description.

8.3.2 Staff are supported, enabled and encouraged to obtain further qualifications relevant to the role they perform within the organisation.

8.3.3 Employees are enabled to undertake training and education needs which:

a) Is consistent with the assessed needs of the resident or client cohort

b) Includes both mandatory and non-mandatory learning opportunities

c) Enable health practitioners to comply with their continuous professional development requirements

d) Enables career progression and meets individual learning needs.

8.3.4 Priority training areas are encouraged and supported within the organisations workforce plan:

a) The health service organisation provides access to supervision and support for the workforce providing:

- end-of-life care, including palliative care
- dementia care
- skin integrity care
- behaviour management
- nutritional support.

Outcome 8.4: Workforce regulatory requirements

Outcome statement:

The provider demonstrates that the organisation enables and supports Health Practitioners registered with the Australian Health Practitioner Regulation Agency (Ahpra), or Self Regulating Allied Health Professions, to meet the standards of practice and code of conduct requirements of the relevant professional regulator.

8.4.1 Care staff including health practitioners and unregulated care workers are enabled to identify situations that compromise their professional standards of practice or codes of practice.

There is a system in place to support staff to report concerns or situations that compromise their capacity to meet their professional standards or codes of practice.

b) Reported concerns or situations are responded to by the provider in a timely manner (where possible within 24 hours).

c) Staff are supported to meet continuing professional development or credentialing requirements for registration or membership of a professional body.

Outcome 8.5: A positive workplace environment

Outcome statement:

The provider demonstrates that the organisation enables and supports the physical, psychological and cultural safety of staff.

8.5.1 The provider has effective systems in place for the identification, reporting and escalation of safety and quality issues and operational and professional decisions.

a) Contemporary policy and procedures in relation to physical, psychological and cultural safety are in place.

b) Processes are in place to regularly seek feedback from the workforce on their understanding and use of the safety and quality systems.

c) Systems are in place for workers to raise concerns regarding staffing and skill-mix, incidents, complaints and workplace health and safety issues.

d) Whistle-blowing policies and procedures are in place and known to employees and they are enabled and supported to raise concerns in good faith and protected against reprisal.

e) Direct care workers are provided the opportunity to raise issues of concern relative to staffing and skills mix, resident and client safety and quality and workplace safety with the relevant regulatory authority and a workforce representative.

8.5.2 Health professionals are provided access to, and enabled, receive clinical supervision and mentoring.

a) Orientation and transition to practice programs are individualised to the learning needs of individual practitioners.

b) Health practitioners are supported to connect with external healthcare providers and any other entity deemed appropriate to maintain and update their clinical knowledge and skills.

8.5.3 Worker rights in relation to association and membership of industrial bodies are acknowledged and supported in the workplace.

a) Employees are enabled, without disadvantage or adverse consequence relative to their employment, to engage a workplace representative for industrial and or other matters including professional advice, undertaking a union position, or being a union member in the workplace, including Health and Safety Representative role, and through education, networking and advisory groups.

8.5.4 Professional reporting lines are clearly identified within the organisation to support the practice of health practitioners in relation to:

a) role responsibilities and accountabilities

b) scope of practice issues

c) supervision and delegation

d) professional advice, direction and performance.

---

[1] The Royal Commission into Aged Care Quality and Safety (2020) Aged Care Royal Commission Final Report: Summary, retrieved from https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf
[2] Aged care act 1997 (Cth) https://www.legislation.gov.au/Details/C2023C00073
[3] The Royal Commission into Aged Care Quality and Safety (2020) Aged Care Royal Commission Final Report: Summary, retrieved from https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf
[4] The Royal Commission into Aged Care Quality and Safety (2020) Aged Care Royal Commission Final Report: Summary, retrieved from https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf
[5] Health Practitioner Regulation National Law as enacted in each state and territory
[6] Tune, D (2023) Report of the Independent Capability Review of the Aged Care Quality and Safety Commission. https://www.health.gov.au/sites/default/files/2023-07/final-report-independent-capability-review-of-the-aged-care-quality-and-safety-commission.pdf
[7] Tune, D (2023) Report of the Independent Capability Review of the Aged Care Quality and Safety Commission. https://www.health.gov.au/sites/default/files/2023-07/final-report-independent-capability-review-of-the-aged-care-quality-and-safety-commission.pdf
[8] The Royal Commission into Aged Care Quality and Safety (2020) Aged Care Royal Commission Final Report: Summary, retrieved from https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf
[9] Health Practitioner Regulation National Law as enacted in each state and territory

AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

NSW BRANCH

AGED CARE GUARDIANS

PROPOSED LEGISLATION

August 2023

Table of Contents

EXECUTIVE SUMMARY 3
CARE MINUTES SHOULD BE ASSESSED ON A DAY-BY-DAY BASIS 4
Possible Legislation 4
Average care minutes per resident per day 4
Clinical Handover 5
TRANSPARENCY, REAL TIME REPORTING AND MONITORING OF COMPLIANCE 6
Possible Legislation 6
Transparency for Staff, Residents and Families 6
SHIFT BY SHIFT STAFFING RATIOS 8
Possible Ratios Clauses 8
MODEL 1: Ratios by Agreement with Association 9
MODEL 2: Ratios Created by Employer 9
AGED CARE GUARDIANS 11
Possible Legislation 11
Who is eligible to be appointed as an Aged Care Guardian? 11
How is an Aged Care Guardian appointed? 11
Can an employer organise a meeting to appoint an Aged Care Guardian? 12
Notification of employer and employees 12
How long are Aged Care Guardians appointed for? 12
The role of an Aged Care Guardian 13
Staffing issues must be the subject of consultation with Aged Care Guardians 13
Staffing issues which cannot be resolved by consultation 14
Protection of Aged Care Guardians 14
COMPLIANCE - REPORTING IS NOT ENOUGH 15
Possible Legislation 15
Improvement Notices for Regulator, Unions and Aged Care Guardians 15
Right of Entry 16

EXECUTIVE SUMMARY

This document should be considered alongside the *Aged Care Guardians: A Proposal for Reform.*

In short, we propose that the current aged care Regulatory Pyramid be modified to provide workers with a legislatively supported role ("Aged Care Guardians") in the continuous improvement process sitting in the Education/Engagement space. This would include recognition of their role and time to do it, provision of training, a requirement for information to be provided in an understandable format and powers similar to those provided to health and safety representatives to report issues to the regulator and issue improvement notices.

We believe there needs to be a very defined process for how providers get moved up the Regulatory Pyramid and therefore attract a high level of compliance. Our suggestion is that a defined number of breaches would trigger providers being moved up the pyramid from education and engagement into regulatory actions, including enforceable regulatory actions.

The ANMF NSW Branch proposes a range of changes to aged care legislation designed to compliment the reform model outlined in *Aged Care Guardians: A Proposal for Reform*. By way of summary, the changes proposed are as follows;

- Minimum **daily aged care minutes** for RNs, ENs and AINs/PCWs in all facilities through legislation.
- **Transparency** requirements around care minute obligations to enable **real time monitoring** in all facilities.
- **Reduced regulatory/auditing** requirements for employers who agree to minimum **staffing ratios in Enterprise Agreements** in line with minimum care minutes and **Aged Care Guardians**.
- Legislation relating to compliance including **right of entry** and **improvement notice powers for unions and Aged Care Guardians**.

CARE MINUTES SHOULD BE ASSESSED ON A DAY-BY-DAY BASIS

Minimum care minutes for RNs, ENs and AINs/PCWs should be mandatory on a **daily basis in all facilities**. An optimal **skillmix** should form part of care minute obligations and include minimum minutes for RNs, ENs and Certificate III and IV care workers.

Possible Legislation

Average care minutes per resident per day

(1) A person who operates an Aged Care Facility must ensure that

(a) the combined total number of Nursing and Personal Care minutes provided by registered nurses, enrolled nurses, nursing assistants or personal care workers to all residents in an Aged Care Facility on any day, equates to an average at least equal to the care minute target applicable in that facility pursuant to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT] per resident

(b) the total number of Nursing and Personal Care minutes provided by registered nurses to all residents in an Aged Care Facility on any day, equates to an average at least equal to the Registered Nurse care minute target applicable in that facility pursuant to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT] per resident.

(c) the total number of Nursing and Personal Care minutes provided by enrolled nurses to all residents in an Aged Care Facility on any day, equates to an average at least equal to the Enrolled Nurse care minute target applicable in that facility pursuant to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT] per resident.

Maximum penalty—X penalty units

(2) For the purposes of this section;

(a) Nursing and Personal Care includes both Direct Nursing and Personal Care and Indirect Nursing and Personal Care.

(b) Direct Nursing and Personal Care means;

(i) the provision of nursing care to a resident which involves all aspects of the health care of a resident, including assessments, re-assessments, activities of daily living, treatments, counselling, self-care, education, complex care, management and administration of medication, and documentation, and

(ii) the provision of the activities of daily living and management, including personal hygiene, grooming, dressing and assistance with mobility, meals and fluids.

(c) Indirect Nursing and Personal Care means the care that registered nurses, enrolled nurses, nursing assistants or personal care workers undertake that is not directly related to an individual resident, but has a relationship to the care provided to that resident, such as medical consultations, case conferencing and restocking of equipment.[1]

(3) Time spent performing duties which do not involve the provision of Nursing and Personal Care, such as managerial duties or the work of educators or consultants

[1] The definition of Nursing and Personal Care is based upon that set out in the ANMF's study, "*Meeting Residents' Care Needs*".

who are not given a specific resident allocation, cannot be included for the purposes of ensuring compliance with subsection (1).

Clinical Handover

(4) A person who operates an Aged Care Facility must ensure that each shift commences at least 15 minutes before the conclusion of the previous shift for the purposes of enabling workers to conduct or participate in a clinical handover.

Maximum penalty—X penalty units

TRANSPARENCY, REAL TIME REPORTING AND MONITORING OF COMPLIANCE

Compliance **reporting needs to be simple** and **not depend on self-reporting** by providers.

Workers should be given access to **real time and transparent reporting** of the care time in their facility.

Daily care minute obligations in each facility should be displayed in a location **easily visible to the public** and on the **roster** along with calculations showing how current rostering will meet care minute obligations. **Records** of whether care minute obligations were met in previous periods should also be kept and displayed.

There should be a reporting mechanism for workers via their union or individually to the Regulator if they believe care time is not being fulfilled.

Simpler requirements can apply to facilities with **shift by shift staffing ratios**. For example, such employers could be relieved of the requirement to publicly display their care minute obligations and how they will be met. Instead, they could simply be required to display the applicable staffing ratios pursuant to the Enterprise Agreement.

Possible Legislation

Transparency for Staff, Residents and Families

(5) A person who operates an Aged Care Facility in the External Audit Stream must ensure that;

- (a) the following is displayed prominently on all rosters:
    - (i) the combined total number of Nursing and Personal Care minutes rostered to be provided by registered nurses, enrolled nurses, nursing assistants and personal care workers on each day
    - (ii) the combined total number of Nursing and Personal Care minutes rostered to be provided by registered nurses on each day
    - (iii) the combined total number of Nursing and Personal Care minutes rostered to be provided by enrolled nurses on each day
    - (iv) the total number of residents expected to be in the Aged Care Facility on each day
    - (v) the total average number of rostered Nursing and Personal Care minutes per resident per day calculated by dividing (i) by (iii)
    - (vi) the total average number of rostered Nursing and Personal Care minutes provided by registered nurses per resident per day calculated by dividing (ii) by (iv)
    - (vii) the total average number of rostered Nursing and Personal Care minutes provided by enrolled nurses per resident per day calculated by dividing (iii) by (iv)

Maximum penalty—X penalty units

(b) the following is displayed prominently in a publicly accessible place within an Aged Care Facility as soon as practicably after the conclusion of each roster period;

(i) the combined total number of Nursing and Personal Care minutes provided by registered nurses, enrolled nurses, nursing assistants and personal care workers on each day during the previous roster period

(ii) the combined total number of Nursing and Personal Care minutes provided by registered nurses on each day during the previous roster period

(iii) the combined total number of Nursing and Personal Care minutes provided by enrolled nurses on each day during the previous roster period

(iv) the total number of residents in the Aged Care Facility on each day during the previous roster period

(v) the total average number of Nursing and Personal Care minutes provided per resident for each day during the previous roster period calculated by dividing (i) by (iv)

(vi) the total average number of Nursing and Personal Care minutes provided by registered nurses per resident for each day during the previous roster period calculated by dividing (ii) by (iv)

(vii) the total average number of Nursing and Personal Care minutes provided by enrolled nurses per resident for each day during the previous roster period calculated by dividing (iii) by (iv)

Maximum penalty—X penalty units

(c) A person who operates an Aged Care Facility must ensure that the calculations referred to in subsection (b) do not contain the names or personal details of employees working within the facility.

(d) A person who operates an Aged Care Facility must retain records of the calculations referred to in subsections (a) and (b) for a period of at least 6 years.

(e) A person who operates an Aged Care Facility must, as soon as practicably after the conclusion of each roster period, publish the calculations referred to at subsections (a) and (b) on a publicly accessible website for a period of at least [INSERT PERIOD EG 12 MONTHS].

SHIFT BY SHIFT STAFFING RATIOS

The best way to ensure safe staffing levels which meet care minute obligations is through simple shift by shift staffing ratios.

Aged care employers should be **incentivised or required** to **deliver their care minutes through shift by shift ratios** in an enterprise agreement. Providers who do this should be considered to occupy a lower place on the Commission's Regulatory Pyramid and could be **relieved of much of the regulatory burden** associated with the ongoing auditing of care minutes.

In short, the creation of staffing ratios enforceable under an Enterprise Agreement should be the **primary vehicle** through which compliance by these employers with their care minute obligations would be facilitated and monitored. An employer who agrees to staffing ratios **should not need to engage in ongoing burdensome reporting and auditing**.

Similarly, employers with shift by shift staffing ratios could be relieved of the requirement to publicly display their care minute obligations and how they will be met. Instead, they could simply be required to display the applicable staffing ratios pursuant to the Enterprise Agreement.

Possible Ratios Clauses

Staffing ratios in an Enterprise Agreement could be in a prescribed form. For example;

STAFFING RATIOS

Morning shift[2]	1 registered nurse for every 20 residents 1 enrolled nurse, nursing assistant or personal care worker for every 5 residents
Afternoon shift	1 registered nurse for every 37.74 residents 1 enrolled nurse, nursing assistant or personal care worker for every 8 residents
Night Shift	1 registered nurse for every 50 residents 1 enrolled nurse, nursing assistant or personal care worker for every 20 residents[3]

For the purposes of calculating these ratios, a registered nurse, enrolled nurse, nursing assistant or personal care worker rostered on duty and providing 7.6 hours of Nursing and Personal Care shall count as 1 staff member. Employees working less or more than 7.6 hours shall be counted proportionately.

Example

---

[2] Note these are likely defined elsewhere in the agreement For example, Morning shift means a shift commencing at or after 6am and before 10am, Afternoon shift means a shift commencing at or after 10am and before 4pm, Night shift means a shift commencing at or after 4pm and before 6am.

[3] These ratios should equate to 215 min of care per resident and 44 min of RN care per resident although rounding will have an effect on this. As we are attempting to fit our ratio into the 215min model, the ratio outcomes are not round numbers.

By way of example, for an 80 resident facility the staffing required (before rounding) would be;

Morning	4 RNs 16 ENs/AIN/PCWs	1824 min 7296 min
Afternoon	2.12 RNs 10 ENs/AIN/PCWs	966.72 min 4560 min
Night	1.6 RNs 4 ENs/AIN/PCWs	729.6 min 1824 min

TOTAL RN minutes = 3520.32 = approx. 44min/resident
TOTAL AIN/CSE/EN minutes = 13680 min = approx. 171min/resident

There are a number of different options for staffing ratios clauses in Enterprise Agreements.

MODEL 1: Ratios by Agreement with Association

Ratios

(1) The Employer must ensure that sufficient numbers of registered nurses, enrolled nurses, nursing assistants or personal care workers are rostered on duty and providing Nursing and Personal Care to residents in a facility so that the ratio of staff to residents on any given shift is at least equal to;
   (a) the applicable ratios set out at Annexure A, or
   (b) the ratios as agreed between the Employer and the Association
   pursuant to subclause (2).

(2) An Employer and the Association may agree in writing on a set of staffing ratios which will apply to a facility or group of facilities, provided that these agreed ratios only apply if they ensure that;
   (a) the combined total number of Nursing and Personal Care minutes provided by registered nurses, enrolled nurses, nursing assistants or personal care workers to all residents in a facility on any day, equates to an average at least equal to the care minute target applicable in that facility pursuant to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT] per resident, and
   (b) the total number of Nursing and Personal Care minutes provided by registered nurses to all residents in a facility on any day, equates to an average at least equal to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT] per resident.

MODEL 2: Ratios Created by Employer

Ratios

(1) Every quarter the Employer must display in a prominent place visible by all employees in the facility;
   (a) the applicable average care minute target per resident per day pursuant to [INSERT REFERENCE TO LEGISLATIVE INSTRUMENT]
   (b) the applicable average registered nurse care minute target per resident per day pursuant to [INSERT REFERENCE TO LEGISLATIVE INSTRUMENT]
   (c) a document headed Minimum Staffing Ratios detailing;
      (i) the minimum ratio of registered nurses to residents on each shift,

(ii) the minimum ratio of enrolled nurses, nursing assistants or personal care workers to residents on each shift, and

(iii) calculations demonstrating whether the applicable ratios referred to in subclauses (1)(c)(i) and (ii) equate to at least the average care minute targets referred to in subclauses (1)(a) and (b).

(2) The Employer must ensure that the ratios set out in the document referred to in subclause (1)(c) would ensure that the combined total number of Nursing and Personal Care minutes provided by staff is at least equal to the applicable care minute targets referred to at subclauses (1)(a) and (b).

(3) The Employer must ensure that sufficient numbers of registered nurses, enrolled nurses, nursing assistants or personal care workers are rostered on duty and providing Nursing and Personal Care to residents in a facility so that the ratio of staff to residents on any given shift is at least equal to that set out in the document referred to in subclause (1)(c).

AGED CARE GUARDIANS

Providers should be required to **facilitate** the role of **Aged Care Guardians** and **consult** with them regarding staffing issues.

Aged Care Guardians should:

- be **formally recognised** by employers and the Regulator
- have access to **sufficient resources** to perform their function well, including **paid time**
- have access to **new starters**
- receive **training and development**
- have access to **meetings with staff** (unsupervised),
- have the ability to **inspect and investigate** compliance and reporting issues relating to Care Minutes and staffing mix
- be able to raise **general quality of care** issues
- be able to issue binding provisional **Improvement Notices**.
- have access to a formal **issue resolution procedure**, beginning at the work site and escalating up to and including initiating prosecution (through either a union and/or the Regulator)

Aged Care Guardians should be **appointed by the care workers** within a facility in much the same way that health and safety representatives are appointed.

Possible Legislation

(1) An Aged Care Facility is an Aged Care Guardian Facility if;
  (a) one or more Aged Care Guardians have been appointed in the facility in accordance with this Act and have been undertaking the role of Aged Care Guardian in the facility in the previous [INSERT TIME PERIOD EG 30 DAYS],
  (b) the person who operates the Aged Care Facility complies with this Part.

Who is eligible to be appointed as an Aged Care Guardian?

(2) Any employee employed as a registered nurse, enrolled nurse, nursing assistant or personal care worker at an Aged Care Facility is eligible to be appointed as an Aged Care Guardian at that facility.

How is an Aged Care Guardian appointed?

(3) A person who is eligible to be an Aged Care Guardian at a facility shall be considered to be appointed as an Aged Care Guardian of that facility if;
  (a) all registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility are invited to attend a meeting either in person or by teleconference, and
  (b) the person operating the Aged Care Facility is not present at this meeting, and
  (c) no other classification or employee of the person who operates the Aged Care Facility is present at the meeting, and

(d) at least [INSERT PERCENTAGE] of the cumulative total number of registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility attend that meeting, and
(e) more than 50% of those who attend that meeting vote to appoint the person as an Aged Care Guardian at that facility, and
(f) only one vote per person is counted.

(4) The meeting referred to at subsection (3) may be split into two or more smaller meetings in order to ensure sufficient staffing continues at the facility at all relevant times, provided that together those smaller meetings are considered to be a single meeting for the purposes of subsection (3).

(5) A representative or representatives of an industrial organisation able to represent the interested the interests of either registered nurses, enrolled nurses, nursing assistants and personal care workers may attend the meetings referred to at subsections (3) and (4).

Can an employer organise a meeting to appoint an Aged Care Guardian?

(6) A person who operates an Aged Care Facility **may** organise a meeting of all registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility for the purposes of appointing an Aged Care Guardian in accordance with subsection (3).

(7) A person who operates an Aged Care Facility **must** organise a meeting of all registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility for the purposes of appointing an Aged Care Guardian in accordance with subsection (3) if at least one registered nurse, enrolled nurse, nursing assistant or personal care worker requests such a meeting.

Notification of employer and employees

(8) A person appointed as an Aged Care Guardian in a facility must inform their employer of their appointment within 3 working days.

(9) A person who operates an Aged Care Facility must display in a prominent place within the facility visible by all employees a notice detailing the name and contact details of all Aged Care Guardians within the facility (or the name and contact details of the industrial organisation if that organisation has agreed to undertake the role of Aged Care Guardian) .

How long are Aged Care Guardians appointed for?

(10) A person who is appointed as an Aged Care Guardian shall be considered to be appointed to the role for either;
(a) a period of 12 months, or
(b) such shorter time as voted upon by a majority of the total number of registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility,
whichever is sooner.

(11) If a person appointed as an Aged Care Guardian at a facility ceases to be employed at that facility as either a registered nurse, enrolled nurse, nursing assistant and personal care worker, the person ceases to be an Aged Care Guardian at that facility.

(12) A person who is appointed as an Aged Care Guardian at a facility may terminate their appointment to this role at any time by notifying the person who operates the Aged Care Facility.

(13) A copy of the notification referred to at subsection (12) must be provided by the person who operates the Aged Care Facility to all registered nurses, enrolled nurses, nursing assistants and personal care workers employed at the facility as soon as practicably.

The role of an Aged Care Guardian

(14) The role of an Aged Care Guardian within an Aged Care Facility is to;
- (a) be a point of contact for;
  - (i) the person who operates the Aged Care Facility,
  - (ii) all workers working within the Aged Care Facility, and
  - (iii) the Regulator,

  regarding staffing issues in that facility,
- (b) be an advocate for the improvement of staffing levels within the facility,
- (c) consult with the person who operates the Aged Care Facility regarding staffing issues,
- (d) exercise powers conferred by this Act regarding staffing issues, and
- (e) report to the Regulator any staffing issues in the Aged Care Facility which are unable to be resolved through consultation with the person who operates the facility.

(15) For the purposes of this section, **staffing issues** means issues relating to whether the number of registered nurses, enrolled nurses, nursing assistants and personal care workers previously on duty, on duty or expected to be on duty, were, are or will be sufficient to meet the care needs of residents.

Staffing issues must be the subject of consultation with Aged Care Guardians

(16) A person who operates an Aged Care Facility must consult with all Aged Care Guardians within that facility regarding all staffing issues within the facility including;
- (a) day to day staffing levels for each classification,
- (b) whether or not the combined total number of Nursing and Personal Care minutes which has been, is being or will be provided by staff at the facility was, is or will be at least equal to the care minute target applicable in that facility pursuant to [REFERENCE RELEVANT LEGISLATIVE INSTRUMENT],
- (c) any changes which are being considered which could have a significant impact upon staffing issues at the facility,
- (d) any failure to comply with any obligation under this Act or its subordinate legislation and the measures which will be taken to rectify such non-compliance,
- (e) [LIST ANY OTHER MATTERS WHICH GUARDIANS SHOULD BE CONSULTED ON]

(17) Aged Care Guardians must inform the person who operates the Aged Care Facility in which they work of any staffing issue which has, is or could adversely impact upon the quality of care provided to residents at the facility.

(18) Where an Aged Care Guardian informs the person who operates an Aged Care Facility of a staffing issue as referred to in subsection (19), the person who operates the Aged Care Facility must consult with all Aged Care Guardians at the facility regarding the issue.

(19) During consultation regarding staffing issues, Aged Care Guardians and the person who operates the Aged Care Facility must;
- (a) participate in good faith with a view toward properly resolving staffing issues which have, are or could adversely impact on the quality of care provided to residents,
- (b) duly consider the views of all participants regarding staffing issues,
- (c) openly share information regarding staffing issues, and

(d) provide prompt responses to any ideas or proposals designed to maintain or improve the quality of care provided to residents.

Staffing issues which cannot be resolved by consultation

(20) If a staffing issue which has, is or could adversely impact upon the quality of care provided to residents;

(a) has been the subject of consultation between an Aged Care Guardian and a person who operates and Aged Care Facility, and

(b) the Aged Care Guardian believes on reasonable grounds that the issue remains unresolved,

the Aged Care Guardian may do any or all of the following;

(c) exercise Right of Entry powers pursuant to section [INSERT REFERENCE TO SECTION], and/or

(d) issue an Improvement Notice regarding the issue in accordance with section [INSERT REFERENCE TO SECTION], and/or

(e) report the issue to the Regulator.

(21) An Aged Care Guardian may do any or all of the things set out in subsections 20(c), (d) or (e) even if consultation has not been initiated or completed in accordance with subsection 20(a), if there are reasonable grounds for not initiating or completing consultation between the Aged Care Guardian and the person who operates the Aged Care Facility.

Protection of Aged Care Guardians

(22) Aged Care Guardians may undertake activities or exercise powers pursuant to their role as Aged Care Guardians during paid work time.

(23) A person must not do any of the following;

(a) treat a person adversely, or

(b) injure a person in their employment, or

(c) discriminate against a person, or

(d) terminate the employment of a person, or

(e) refuse to engage or re-engage a person, or

(f) commence or continue a disciplinary process in relation to a person

for reasons which include one or more of the following;

(g) because the person is, was or could become an Aged Care Guardian, or

(h) because the person has engaged, is engaging or could engage in any of the activities of an Aged Care Guardian, or

(i) because the person has exercised, is exercising or could exercise any of the powers of an Aged Care Guardian, or

(j) because the person contacted or raised an issue, concern or complaint with an Aged Care Guardian.

Maximum penalty: X penalty units [PENALTIES SHOULD BE SIGNIFICANT]

(24) In proceedings before any court or tribunal, the onus of proving that conduct of the kind referred to in subsections 23(a)-(f) was not for reasons which include one or more of those set out in subsections 23(g)-(j) rests with the person alleged to have engaged in such conduct.

COMPLIANCE - REPORTING IS NOT ENOUGH

There should be **significant penalties for misreporting** and higher penalties for deliberate or ongoing misreporting.

There should also be **significant penalties for non-compliance**, and higher penalties for deliberate or ongoing non-compliance.

Significant **whistleblower protections and penalties for adverse action** should be implemented to protect those who raise concerns, especially aged care workers.

There should be a capacity for the Regulator, unions and Aged Care Guardians to issue enforceable **Improvement Notices and exercise Right of Entry powers**.

Possible Legislation

Improvement Notices for Regulator, Unions and Aged Care Guardians

(1) An Aged Care Compliance Officer may issue an Aged Care Improvement Notice to a person who operates an Aged Care Facility relating to any actual or suspected contravention of this Act.

(2) An Aged Care Improvement Notice must detail;
  - (a) the nature and circumstances of any actual or suspected contravention of this Act,
  - (b) the steps which must be taken by the person who operates the Aged Care Facility to remedy the contravention, and
  - (c) the timeframe within which the steps referred to in subsection (b) must be taken.

(3) Within 14 days of receiving an Aged Care Improvement Notice, a person who operates an Aged Care Facility must provide a written response to the Aged Care Compliance Officer detailing;
  - (a) the steps it has or will take to comply with the notice, and
  - (b) the reasons why it has not or will not comply with the notice.

Maximum penalty—X penalty units

(4) A person who operates an Aged Care Facility must comply with an Aged Care Improvement Notice issued by an Aged Care Compliance Officer.

Maximum penalty—X penalty units

(5) An Aged Care Guardian or an officer of an industrial organisation of employees;
  - (a) which is able to represent the industrial interests of registered nurses, enrolled nurses, nursing assistants or personal care workers performing work within an Aged Care Facility, and
  - (b) who holds a federal right of entry permit pursuant to the *Fair Work Act 2009* (Cth),

may issue an Aged Care Improvement Notice to a person who operates an Aged Care Facility in the form set out at subsection (2) relating to any or actual or suspected contravention of [INSERT REFERENCE TO SECTIONS PERTAINING TO RNS 24/7, CARE MINUTES ETC].

(6) Subsection (3) applies to Aged Care Improvement Notices issued under subsection (5).

(7) If a person who operates an Aged Care Facility fails to comply with an Aged Care Improvement Notice issued under subsection (5), the issuing officer may refer the notice to the [REGULATOR] for review.

(8) The [REGULATOR] must review an Aged Care Improvement Notice referred to it under subsection (7) within 14 days and notify the issuing officer and the person who operates the Aged Care Facility in writing as to whether the notice, or any part of the notice, must be complied with.

(9) A notification under section (8) has the same effect for the purposes of this section as an Aged Care Improvement Notice issued by an Aged Care Compliance Officer.

(10) A Court must consider any failure to comply with an Aged Care Improvement Notice when deciding whether to impose civil penalties under this Act.

Right of Entry

(1) An Aged Care Compliance Officer is able to;
   (a) enter an Aged Care Facility for the purpose of investigating a suspected contravention of this Act,
   (b) inspect any work, process or object relevant to a suspected contravention of this Act,
   (c) interview any person about a suspected contravention of this Act, provided that this person agrees to be interviewed,
   (d) require the occupier or a person who operates an Aged Care Facility to provide copies of any documentation, whether in electronic form or otherwise, for the purpose of investigating a suspected contravention of this Act, provided that this documentation,
      (i) is kept on the premises; or
      (ii) is accessible from a computer that is kept on the premises, and
   (e) require the occupier or a person who operates an Aged Care Facility to produce or provide access to a record or document relevant to a suspected contravention of this Act on a later day or days specified.

(2) An Aged Care Guardian is able to exercise the powers of an Aged Care Compliance Officer set out in subsection (1) in relation to the facility in which they work.

(3) An officer of an industrial organisation of employees;
   (a) which is able to represent the industrial interests of registered nurses, enrolled nurses, nursing assistants or personal care workers performing work within an Aged Care Facility, and
   (b) who holds a federal right of entry permit pursuant to the *Fair Work Act 2009* (Cth),

   is able to exercise the powers of an Aged Care Compliance Officer set out in subsection (1).

(4) Nothing in this Act prevents an officer of an industrial organisation of employees from entering an Aged Care Facility pursuant to other legislation.

(5) A person must not refuse or unduly delay entry to an Aged Care Facility by an Aged Care Compliance Officer (or an Aged Care Guardian exercising powers pursuant to subsection (2) or an officer of an industrial organisation of employees exercising powers pursuant to subsection (3)) entitled to enter the facility.

   Maximum penalty—X penalty units

(6) A person must not intentionally hinder or obstruct an Aged Care Compliance Officer (or an Aged Care Guardian exercising powers pursuant to subsection (2) an officer of an industrial organisation of employees exercising powers pursuant to subsection (3)) exercising rights in accordance with this Act.

Maximum penalty—X penalty units