

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Aged Care

Aged Care Act 1997

Aged Care Legislation Amendment (Registered Nurses) Principles 2023

Purpose

The *Aged Care Legislation Amendment (Registered Nurses) Principles 2023* (Amending Principles) amends aged care subordinate legislation following the introduction of Schedule 1 to the *Aged Care Amendment (Implementing Care Reform) Act 2022* (Implementing Care Reform Act). The relevant provisions of the Implementing Care Reform Act commence on 1 April 2023. The Amending Principles give effect to matters relating to the responsibility for approved providers who provide residential care to care recipients in a residential facility to ensure at least one registered nurse (RN) is on site, and on duty, at all times (that is, 24 hours a day, 7 days a week) at the residential facility (24/7 RN responsibility).

The Amending Principles amend the following subordinate legislation:

- *Accountability Principles 2014* (Accountability Principles)
- *Information Principles 2014* (Information Principles)
- *Quality of Care Principles 2014* (Quality of Care Principles).

Exemptions

The Amending Principles specify arrangements in the Quality of Care Principles for the granting of exemptions from the 24/7 RN responsibility to approved providers in relation to residential facilities, from 1 April 2023. The Amending Principles provide for matters relating to the granting of exemptions, including the application process and the circumstances in which an exemption may be granted. The Amending Principles also provide for conditions that may apply to exemptions and the revocation of exemptions.

Reporting

The Amending Principles also specifies a new responsibility under the Accountability Principles for approved providers who provide residential care through a residential care service to care recipients in residential facilities to give the Secretary reports about the 24/7 RN responsibility, from 1 July 2023. This includes requirements for approved providers to give further information or documents to the Secretary on request in relation to the report.

Publication of information

The Amending Principles also allow the Secretary to publish information relating to approved providers exemptions from the 24/7 RN responsibility, from 1 April 2023. An additional provision is included to allow for the Secretary to publish information included in the reports given to the Secretary by approved providers in relation to the 24/7 RN responsibility, from 1 July 2023.

The Amending Principles are a legislative instrument for the purposes of the *Legislation Act 2003*.

Background

Schedule 1 to the Implementing Care Reform Act establishes a new responsibility under section 54-1 of the *Aged Care Act 1997* (Aged Care Act) for approved providers of residential care and certain kinds of flexible care to ensure that a RN (within the meaning of the *Health Insurance Act 1973*) is on site and on duty at all times at each residential facility operated by them. Enacting this new responsibility fulfilled an election commitment of the Australian Government and responds in part to Recommendation 86 of the Final Report of the Royal Commission into Aged Care Quality and Safety (Royal Commission).

The inclusion of an exemption framework from the 24/7 RN responsibility is consistent with Recommendation 86 of the Royal Commission, which recommended that approved providers should be able to apply for an exemption in certain circumstances. The Royal Commission highlighted the need to allow for exemptions to be granted to residential care facilities in regional, rural and remote areas where the approved provider is unable to recruit sufficient numbers of staff with the requisite skills to meet the 24/7 RN responsibility.

Authority

Under section 96-1 of the Aged Care Act, the Minister may, by legislative instrument, make Principles (as specified in the table in the Aged Care Act by reference to the provisions specified in column 3 of the table). Section 96-1 further specifies that the Principles may provide for matters required or permitted by the Aged Care Act, or necessary or convenient, in order to give effect to that relevant Part or section of the Aged Care Act. Relevant to the Amending Principles, this includes the Accountability Principles, the Information Principles and the Quality of Care Principles.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Commencement

Schedule 1 of the Amending Instrument commences on 1 April 2023. Schedule 2 of the Amending Instrument commences on 1 July 2023.

Consultation

The arrangements relating to exemptions from and reporting about the 24/7 RN responsibility were developed in consultation with the aged care sector, including through the Residential Aged Care Funding Reform Working Group.

An exposure draft of the Amending Instrument was available for public comment on the [health.gov.au](https://www.health.gov.au) website from 27 February 2023. Responses were received from 22 bodies and individuals representing providers, workforce and advocates for care recipients.

All provider responses proposed reducing or removing the criteria for an exemption based on geographical location and number of operational beds. These proposals have not been adopted, as they are inconsistent with the Government's policy intent that 24/7 registered nurse coverage become the standard at residential facilities.

Most providers requested additional detail about what would be considered reasonable steps, such as acceptable alternative arrangements for the provision of clinical care, to ensure the clinical care needs of care recipients will be met in the residential facility where an exemption is in force.

The Department of Health and Aged Care (Department), drawing on clinical expertise of the Aged Care Quality and Safety Commission (Commission), has produced the approved exemption application form. This will be available on the health.gov.au website and include extensive guidance about what types of alternative clinical care arrangements that may be considered relevant in the Secretary's consideration of whether reasonable steps have been taken to ensure the clinical care needs of care recipients in the facility will be met.

Some providers expressed concern about the potential burden of monthly reporting about the 24/7 RN responsibility. The Department has designed a draft reporting tool with involvement of a user experience group of providers and is confident that it is not onerous. The Department will expose a draft of the approved form for the report to the sector more generally prior to the commencement of the reporting responsibility in the April-June 2023 period.

Workforce representatives broadly supported the exposure draft's exemption criteria, while making specific recommendations about the information that should be provided in an exemption application. Suggestions have been considered by the Department in designing the approved exemption application form.

Workforce representatives supported exemptions being granted for less than the maximum possible 12 month period, to encourage workforce recruitment efforts. The Secretary will consider the appropriate period of an exemption in determining individual applications for exemption.

Workforce representatives supported information held by the Commission being shared with the Secretary for consideration in determining whether to grant and to revoke exemptions. The Department and the Commission have arrangements under existing provisions in the Act and the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) to facilitate information sharing where relevant to the Secretary or the Commissioner's powers, functions or duties under the relevant legislation.

Advocates for care recipients supported the exposure draft's exemption criteria. Advocates also proposed that providers should have to directly inform care recipients at a residential facility if it has an exemption, including the period for which the exemption is in force, and what reasonable steps the provider has taken to ensure the clinical care needs of care recipients in the facility will be met. New paragraph 15S(6)(b) of the Quality of Care Principles will permit the Secretary to place "additional conditions" on exemptions, including potentially the imposition of a

condition requiring disclosure of particular information to care recipients regarding the exemption if the Secretary decides to do so.

Feedback was also received from providers, workforce representatives and advocates for care recipients in relation to the potential consequences of non-compliance with the 24/7 RN responsibility. This feedback is not addressed through these amendments as compliance with the 24/7 RN responsibility is out of scope.

The Amending Instrument maintains the text of the preceding exposure draft version. During 2023-24, the Department will undertake a review of the exemption arrangements set out in the Amending Instrument as data becomes available about achievement of 24/7 RN coverage in residential facilities, which alternative clinical care approaches are most appropriate to ensure clinical care needs are met, and the period for which an exemption should be in force. Responses to the exposure draft process will be considered further during that review.

Regulation Impact Statement (RIS)

Consistent with the former Office of Best Practice Regulation (now known as the Office of Impact analysis) requirements at the time, the Department of Health and Aged Care certified that an independent review undertook a process analysis for the 24/7 RN responsibility, which was equivalent to a RIS at that time (Reference OBPR 22-02547). The Department of Health and Aged Care also completed a supplementary regulatory impact analysis that complemented the certification.

This process was undertaken through introduction of the Implementing Care Reform Act. The certification, details of the review, and the supplementary regulatory impact analysis are available in the Explanatory Memorandum to the Implementing Care Reform Act.

Details of the Aged Care Legislation Amendment (Registered Nurses) Principles 2023

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Registered Nurses) Principles 2023* (Amending Principles).

Section 2 states that sections 1 to 4 and Schedule 1 commence on 1 April 2023. Schedule 2 commences on 1 July 2023.

Schedule 1 contains provisions regarding the circumstances in which an exemption from the responsibility set out in subsection 54-1A(1) of the *Aged Care Act 1997* (Aged Care Act) for an approved provider to have a registered nurse (RN) on site and on duty at all times (that is, 24 hours a day, 7 days a week) at a residential facility (24/7 RN responsibility) may be granted. Schedule 1 commences on 1 April 2023 to allow approved providers of residential care to seek an exemption prior to the commencement of the 24/7 RN responsibility on 1 July 2023. The effect of this will be that on and from 1 July 2023, the 24/7 RN responsibility will not apply to approved providers where an exemption has been granted before 1 July 2023.

Schedule 2 contains provisions setting out a new responsibility for approved providers who provide residential care through a residential care service to care recipients in a residential facility during a calendar month to give a monthly report and additional information or documents requested by the Secretary about registered nurses at residential facilities. Consequently, Schedule 2 commences on 1 July 2023 to align with the commencement of the 24/7 RN responsibility, as specified in subsection 54-1A(2) of the Aged Care Act.

Section 3 provides the authority for making the instrument is the Aged Care Act.

Section 4 provides that each instrument that is specified in a Schedule to the Amending Principles is amended or repealed as set out in the applicable items in the relevant Schedule and other items in the Schedules have effect according to its terms.

SCHEDULE 1 – Amendments commencing 1 April 2023

Schedule 1, which commences on 1 April 2023, amends the following legislative instruments:

- *Information Principles 2014* (Information Principles)
- *Quality of Care Principles 2014* (Quality of Care Principles).

Information Principles 2014

Item 1 – After Paragraph 8(a)

This item inserts new paragraph (b) into section 8 of the Information Principles. This item will enable the Secretary to publish, if an approved provider of a residential care service has an exemption from the 24/7 RN responsibility in relation to a residential facility, the steps that the Secretary is satisfied the provider has taken to ensure that the clinical needs of the care recipients in a facility will be met during the period which the exemption is in force.

It is intended that the Secretary may publish the steps, or a summary or synopsis of the steps taken. This will enable the information to be published in a way that is easy for care recipients and their families to understand.

This item aims to increase transparency of the 24/7 RN responsibility exemption process by enabling publication of information relied upon by the Secretary in granting an exemption from that responsibility (see item 3 of the Amending Principles, discussed below). Making this information publicly available will assist current and prospective care recipients to be better informed about the steps taken and any arrangements that will be or have been put in place by an approved provider of a residential care service that has an exemption from the 24/7 RN responsibility.

Quality of Care Principles 2014

Item 2 – Section 4

This item inserts the following new definitions into section 4 of the Quality of Care Principles:

MM 5 area means an area in the MM category known as MM 5.

MM 6 area means an area in the MM category known as MM 6.

MM 7 area means an area in the MM category known as MM 7.

MM category has the meaning given by section 64H of the *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy, Fees and Payments Determination).

Section 64H of the Subsidy, Fees and Payments Determination defines “MM category” as a category for an area provided for by the “Modified Monash Model”, and relevantly includes MM 5, MM 6 and MM 7. “Modified Monash Model” is also defined in section 64H of the Subsidy, Fees and Payments Determination as meaning the 2019 model developed by the Department of Health and Aged Care to categorise areas according to geographical remoteness and population size, as that model exists on 1 October 2022.

offline place: a place is an ***offline place*** for a residential care service on a day if:

- (a) the place is covered by a notice under subsection 27B(2) of the *Accountability Principles 2014*; and
- (b) the day is within the period specified in the notice.

A notice under subsection 27B(2) of the Accountability Principles is required where an approved provider operating a residential care service in a remote or very remote region (that is, with a street address in MM category 6 or 7) becomes aware that they are unable or will be unable to provide residential care through all of the allocated places at the service – which are known as “offline places” (see paragraph 27B(3)(b) of the Accountability Principles).

operational place: a place is an ***operational place*** in a residential facility on a day if, on the day:

- (a) the place is allocated in respect of:

- (i) the facility's location; and
- (ii) a residential care service through which residential care is provided at the facility; and
- (b) the allocation of the place is held by the approved provider that provides residential care through the service; and
- (c) the place is not provisionally allocated; and
- (d) the place is not an offline place for the service; and
- (e) the provider would be eligible for residential care subsidy under Part 3.1 of the Act, or Part 3.1 of the *Aged Care (Transitional Provisions) Act 1997*, if a care recipient were provided with residential care through the service.

Item 3 – After Part 4B

This item inserts new Part 4C into the Quality of Care Principles, which provides for matters relating to the granting of exemptions to the 24/7 RN responsibility, which will apply from 1 April 2023.

Part 4C—Responsibility relating to registered nurses

This item inserts new Part 4C – Responsibility relating to registered nurses.

Division 1 – Preliminary

This item inserts new Division 1 into new Part 4C, which deals with preliminary matters relating to the 24/7 RN responsibility.

Section 15P – Purpose of this Part

New section 15P provides that new Part 4C is made for the purposes of subsection 54-1A(3) of the Aged Care Act and provides for:

- the circumstances in which an exemption from section 54-1A of the Aged Care Act, which establishes the new 24/7 RN responsibility, may be granted to an approved provider in relation to a residential facility;
- the period for which an exemption may be in force;
- the conditions that apply to an exemption; and
- the circumstances in which the exemption will be revoked.

The note to new section 15P restates the 24/7 RN responsibility as set out in section 54-1A of the Aged Care Act.

Division 2 – Process for granting exemptions

New Division 2 of new Part 4C outlines the process for granting exemptions to the 24/7 RN responsibility.

Section 15Q – Application for exemption

New section 15Q provides that an approved provider may apply to the Secretary for an exemption from the 24/7 RN responsibility in section 54-1A of the Aged Care Act in relation to a residential facility at which the provider provides residential care.

Subsection 15Q(2) provides that the application for exemption must be in a form that has been approved, in writing, by the Secretary and be accompanied by any documents required by the approved form. The application must also include the following information:

- the name of the approved provider;

- the name of the residential care service or services through which the provider provides residential care at the facility;
- the name and street address of the facility; and
- any other information required by the approved form.

This provision is aimed at ensuring that applications for the exemption include the necessary information in writing that will enable the Secretary to determine whether the criteria under new section 15S (discussed below) is met.

Section 15R – Secretary may request further information or documents

New section 15R(1) provides the Secretary may request further information or documents from an approved provider for the purposes of considering an application for an exemption from the 24/7 RN responsibility made under new section 15Q.

A request for further information or documents made by the Secretary must be made by written notice to the approved provider and identify the information or documents that are required to be provided for the purposes of considering the application.

New subsection 15R(2) outlines the effect of an approved provider failing to comply with the request within 14 days after being notified by the Secretary, or within a longer period if specified in the notice. If the approved provider does not comply with the notice within the timeframe required in the notice, the application for exemption is taken to be withdrawn. Where a notice requesting information or documents is issued under section 15R, the notice must set out the consequences of not complying with such a request.

If an approved provider's application is withdrawn by operation of new subsection 15R(2), the approved provider is not prevented from making another application for exemption at any time after the withdrawal.

Section 15S – Decision whether to grant exemption

New section 15S provides the relevant considerations for the Secretary's decision to grant an exemption from the 24/7 RN responsibility. New section 15S sets out the criteria for the granting of an exemption, matters the Secretary must have regard to in making a decision on the exemption application, the period an exemption may apply for and the conditions that apply to an exemption.

Criteria for exemption

New subsection 15S(1) provides that if the Secretary receives an application for exemption in relation to a residential facility under new section 15Q, the Secretary may only grant the exemption if:

- (a) the facility is located in an MM 5 area, MM 6 or MM7 area; and
- (b) there are no more than 30 operational places in the facility on the day of the Secretary's decision; and
- (c) the Secretary is satisfied that the provider has taken reasonable steps to ensure that the clinical care needs of the care recipients in the facility will be met during the period for which the exemption is in force.

An exemption that is granted under new section 15S will apply in respect of a residential facility. A residential facility may consist of one or more residential care services (that is, undertakings through which residential care is provided – see definition in Schedule 1—Dictionary to the Aged Care Act), and a residential care service may comprise one or more residential facilities.

A residential facility may consist of more than one residential care service where, for example, multiple residential care services operated by the same approved provider are co-located at the same address or on the same site. A residential care service may comprise more than one residential facility where, for example, residential care is delivered under the umbrella of one service across multiple sites that contain building(s) for the purpose of delivering residential care and the sites are sufficiently distant from each other such that each site must be considered a separate facility.

The 24/7 RN responsibility and any exemption from it applies at a residential facility rather than at a residential care service. This is consistent with the responsibility, as provided in subsection 54-1A(2) of the Aged Care Act, that at least one registered nurse is on site (that is, at a specific physical location) and on duty at all times at the residential facility.

The criteria in new paragraphs 15S(1)(a) and (b) relate to the location and size of the facility. Facilities must be located in an MM 5, MM 6 or MM 7 area (see definition in item 3 above), that is locations that are small rural towns, remote communities or very remote communities. Facilities must also have no more than 30 operational places (see definition in item 3 above) at the facility on the day of the decision. In respect of a residential facility that comprises more than one residential care service, this means the total number of operational places for all residential care services at the facility must, on the day of the Secretary's decision, equal the sum of 30 or less. In respect of a residential care service that comprises more than one residential facility this means the number of operational places is counted separately for each residential facility.

These exemption criteria recognise the unique challenges faced by approved providers operating small facilities in small rural towns, remote communities and very remote communities to attract and retain registered nurses.

The criterion in new paragraph 15S(1)(c) corresponds with the requirement under subparagraph 54-1A(4)(a)(ii) of the Aged Care Act, where the Secretary must be satisfied that the approved provider has taken reasonable steps to ensure that the clinical care needs of the care recipients in the facility will be met during the period for which the exemption is in force. This criterion is central to the intent of the 24/7 RN responsibility, which is that care recipients living in residential facilities have access to clinical care when they need it.

Under this criterion, the Secretary will need to assess whether the application for exemption demonstrates that the steps undertaken by the approved provider are reasonable in the circumstances to ensuring the clinical care needs of the care recipients in the residential facility will be met during the period of the exemption.

For example, reasonable steps may, for a particular approved provider and their residential facility, involve the approved provider establishing an arrangement with a

local hospital that is close by to have an RN on call to attend to the clinical care needs of care recipients at the facility, while having a sufficient number of enrolled nurses and/or nursing assistants and/or personal care workers on site to provide clinical care other than that which is specifically within a registered nurse's scope of practice.

New subsection 15S(2) provides that, in deciding whether to grant the exemption to an approved provider in relation to a residential facility, the Secretary must have regard to:

- (a) any sanction imposed on the approved provider under section 63N of the Commission Act;
- (b) any notice given to the approved provider under sections 63S, 63T, 63U or 74EE of the Commission Act; and
- (c) any information given to the Secretary by the Quality and Safety Commissioner in accordance with section 56 of that Act that is relevant to assessing whether the provider has taken the reasonable steps mentioned in paragraph (1)(c) of section 15S.

Section 56 of the Commission Act provides that the Commissioner must give information to the Secretary in certain circumstances for the purposes of the Secretary's functions or powers.

Section 63N of the Commission Act relates to sanctions that may be imposed by the Aged Care Quality and Safety Commissioner (Commissioner) on an approved provider for non-compliance with aged care responsibilities. Sections 63S, 63T and 63U deal with notices that the Commissioner must or may give to an approved provider when considering imposing a sanction on the provider. Section 74EE relates to compliance notices that may be issued by the Commissioner to an approved provider for non-compliance with certain aged care responsibilities. The mere fact that an approved provider has been or is the subject of a notice or sanction will not mean that the Secretary will not grant an exemption from the 24/7 RN responsibility in respect of a residential facility. The Secretary will have regard to the currency and nature of any sanction or notice in making a decision to grant an exemption.

The effect of new paragraphs 15S(2)(a) and (b) is to require the Secretary to have regard to whether an approved provider has been or is currently subject to any of the compliance-related actions under the relevant provisions by the Commissioner.

The effect of new paragraph 15S(2)(c) is that the Secretary must have regard to other information given in accordance with section 56 of the Commission Act in relation to the reasonable steps the approved provider has taken to ensure the clinical care needs of care recipients will be met in the absence of having a RN on site and on duty at all times. In this context, the term 'information' is intended to take its ordinary meaning. In line with the Macquarie Dictionary definition, it is intended to mean "knowledge communicated or received concerning some fact or circumstance". This will encompass a broad range of types of material.

This provision is intended to ensure the Secretary has sufficient information before them to properly consider whether an approved provider has taken reasonable steps to ensure that the clinical care needs of care recipients at the residential facility will be met.

Common law procedural fairness will apply. For example, If the Secretary proposes to refuse to grant an exemption on the basis of information provided by the Commissioner, the information will be put to the provider and the provider will be given an opportunity to comment before an adverse decision is made.

New subsection 15S(3) provides that the Secretary may grant an exemption to an approved provider in relation to a residential facility for which the approved provider has previously been granted an exemption. This is to align with the paragraph 54-1(4)(c) of the Aged Care Act and will allow for a residential facility to be granted more than one exemption over time. This means that a residential facility that has an exemption in force, which is due to expire, will not be prevented from re-applying for another exemption. It will also allow for a residential facility that currently has an exemption in force to request that the exemption be revoked under new section 15V (discussed below) in circumstances where they are able to recruit sufficient registered nursing staff to meet the 24/7 RN responsibility. Equally, it allows an approved provider to reapply in the future if their circumstances change and they are no longer able to meet the 24/7 RN responsibility in respect of that facility.

Period of exemption

New subsection 15S(4) provides that where the Secretary decides to grant an exemption, they must determine the period that the exemption will be in force. The note to new subsection (4) reminds the reader that the 24/7 RN responsibility does not commence until 1 July 2023.

Under new subsection 15S(5), the period for exemption must not:

- be longer than 12 months; and
- begin before the day on which the exemption is granted.

The requirement that the period be no longer than 12 months aligns with paragraph 54-1A(4)(b) of the Aged Care Act.

Conditions that apply to exemption

In accordance with paragraph 54-1A(4)(d) of the Aged Care Act, new subsection 15S(6) provides for conditions to apply where an exemption from the 24/7 RN responsibility has been granted.

That is, an approved provider who has been granted an exemption must notify the Secretary in writing of any material change to the information given to the Secretary in either the application for the exemption, or any additional information or documents that were provided to the Secretary in response to a request made under subsection 15R(1).

This condition aims to ensure the Secretary is notified of any material change to the information that was provided to them by the approved provider for the purposes of determining whether an exemption should be granted. For example, a material change may be the cessation of an arrangement with a local hospital that is close by to have an RN on call to attend to the clinical care needs of care recipients at the facility that

formed part of the reasonable steps taken to ensure the clinical care needs of care recipients during the period of the exemption.

This condition will allow the Secretary to assess whether, despite the material change, the clinical care needs of the care recipients at the residential facility will continue to be met. If the Secretary is not satisfied that, following the material change, the clinical care needs of the care recipients at the facility are being or will be met, the Secretary may revoke the exemption (see new section 15W discussed below). Further, the Secretary may also revoke the exemption if the approved provider has breached a condition of the exemption (see new section 15V below).

New paragraph 15S(6)(b) also allows the Secretary to impose additional conditions on the exemption. It is important to enable the Secretary to impose other conditions where appropriate to satisfy themselves as far as possible that the reasonable steps taken to ensure that the clinical care needs of care recipients during the period of the exemption will be effective for the entire period of the exemption. For example, it may be necessary to impose a condition of an exemption that particular arrangements that form part of the reasonable steps are formalised through written agreement for the duration of the exemption, where only informal arrangements are in place at the time of the application.

Section 15T – Notice of decision

New section 15T requires that, where the Secretary has approved an exemption from section 54-1A of the Aged Care Act in respect of a residential facility of an approved provider, they must provide written notice of their decision to the approved provider.

New subsection 15T(1) provides that the notice of decision must specify:

- (a) the period that the exemption will be in force; and
- (b) the conditions that apply to the exemption.

New subsection 15T(2) provides that, where the Secretary has refused to grant an exemption from section 54-1A of the Aged Care Act in respect of a residential facility of an approved provider, they must give the approved provider written notice of their decision. The notice of decision must include:

- (a) the date of the decision; and
- (b) a statement of the provider's review rights in relation to the decision.

The note to new subsection 15(2) makes clear that a decision by the Secretary to refuse to grant an exemption is a reviewable decision under new section 15U (discussed below). The note also includes a reference to section 85-3 of the Aged Care Act, which requires a notice of a reviewable decision to include reasons for the decision.

Section 15U – Reviewable decision – refusal to grant an exemption

New section 15U provides that a decision by the Secretary to refuse to grant an exemption from the 24/7 RN responsibility to an approved provider in relation to a residential facility is a reviewable decision under section 85-1 of the Aged Care Act. Section 85-1 of the Aged Care Act sets out a table of decisions that are “reviewable decisions”. Item 59 of the table provides a reviewable decision includes a decision

under the Principles (which includes the Quality of Care Principles) that is specified in the Principles to be a reviewable decision.

New subsection 15U(2) provides that Part 6.1 of the Aged Care Act applies to the reviewable decision to refuse to grant an exemption to the 24/7 RN responsibility, as if a reference in Part 6.1 included a reference to the Amending Principles. This provision ensures the provisions in Part 6.1 regarding reviewable decisions also apply to a decision of the Secretary to refuse to grant an exemption to the 24/7 RN responsibility. This includes the ability for an application to be made to the Administrative Appeals Tribunal for review of a reviewable decision that has been confirmed, varied or set aside under section 85-4 or 85-5, in accordance with section 85-8 of the Aged Care Act.

Division 3 – Revocation of exemptions

New Division 3 in new Part 4C deals with the circumstances in which an exemption from the 24/7 RN responsibility in section 54-1A of the Aged Care Act can be revoked.

Section 15V – Revocation on request

New subsection 15V(1) provides that the Secretary must revoke an approved provider's exemption from the 24/7 RN responsibility in relation to a residential facility if the approved provider requests the revocation in writing.

New subsection 15V(2) provides that the Secretary must give the approved provider written notice of the date that the exemption ceases to have effect. The date of revocation may be the date of the notice given by the Secretary or a later date, as specified by the Secretary in the notice.

This provision allows for situations where an approved provider may want an exemption to be revoked as they have been able to employ sufficient staff to meet the 24/7 RN responsibility.

Section 15W – Revocation on other grounds

New section 15W provides for matters relating to the revocation of an exemption by the Secretary, including the grounds upon which the Secretary may revoke an exemption from the 24/7 RN responsibility.

Grounds for revocation

New subsection 15W(1) provides that the Secretary may revoke an approved provider's exemption from the 24/7 RN responsibility in relation to a residential facility if:

- the Secretary is satisfied that the approved provider has breached a condition of the exemption. This includes the condition that automatically applies to every exemption that the approved provider must update the Secretary of any material changes to the information provided in respect of the application for the exemption, and any additional conditions that are imposed on the exemption (see new subsection 15S(6), discussed above);
- the Secretary is not satisfied that the clinical care needs of the care recipients in the residential facility are being, or will be, met during the period the

exemption would otherwise be in force. This allows for the Secretary to consider both whether the clinical care needs of the care recipients are being met at the point at which revocation is being considered, but also to consider whether those clinical care needs will continue to be met for the future period that the exemption is meant to be in force. Allowing the Secretary to revoke on this ground relates back to the key consideration of whether a facility should be granted an exemption in the first place, being whether the approved provider has taken reasonable steps to ensure that the clinical care needs of care recipients living in residential care facilities will be met for the period of the exemption. It enables the Secretary to revoke the exemption if they become aware of information which suggests there is a risk the clinical care needs of the care recipients are not being met or will not be met;

- the Commissioner imposes sanctions on the approved provider under section 63N of the Commission Act. This is an appropriate ground for which the Secretary may revoke an exemption, as a sanction for non-compliance may suggest a provider is not providing an appropriate standard of clinical care to care recipients in the residential facility in question. It is also noted that the Secretary must have regard to the issue of sanctions when deciding whether to grant an application for exemption under new section 15S, making it an equally appropriate consideration in the context of deciding whether to revoke an exemption; or
- the Secretary becomes aware that the residential facility has more than 30 operational places, which aligns with the criteria for the granting of an exemption under new paragraph 15S(1)(b), discussed above.

Submissions by an approved provider

New subsections 15W(2), (3) and (4) provide for certain steps the Secretary must take before deciding to revoke an approved provider's exemption from the 24/7 RN responsibility in relation to a residential facility.

The Secretary must first notify the provider in writing that the Secretary is considering revoking the exemption. The notice must then set out the reasons why the Secretary is considering revoking the exemption, and invite the approved provider to make written submissions in response within either:

- 14 days after receiving the notice; or
- a shorter period as specified in the notice.

The Secretary is required to consider any submissions provided by the approved provider in response to the notice in making their decision on whether to revoke the exemption.

The above steps afford procedural fairness to approved providers as it will ensure they are formally made aware of the possibility that their exemption will be revoked, gives them a reasonable opportunity to respond, and requires the Secretary to consider any response they may make in response to the notice.

Notice of decision to revoke

New subsection 15W(5) provides that where the Secretary decides to revoke an exemption from the 24/7 RN responsibility, they must give the approved provider written notice of their decision.

The notice of decision to revoke the exemption must:

- (a) identify the date on which the exemption ceases to have effect; and
- (b) a statement of the provider's review rights in relation to the decision.

The note makes clear that a decision by the Secretary to revoke an exemption is a reviewable decision. The note also includes a reference to section 85-3 of the Aged Care Act, which requires the notice of a reviewable decision to include the reasons for the decision.

Reviewable decision—revocation of exemption

New subsection 15W(6) provides that a decision by the Secretary to revoke an approved provider's exemption from the 24/7 RN responsibility in relation to a residential facility is a reviewable decision under section 85-1 of the Aged Care Act.

Section 85-1 of the Aged Care Act sets out a table of decisions that are "reviewable decisions". Item 59 of the table provides a reviewable decision includes a decision under the Principles (which includes the Quality of Care Principles) that is specified in the Principles to be a reviewable decision.

New subsection 15W(7) provides that Part 6.1 of the Aged Care Act applies to the reviewable decision to revoke an exemption, as if a reference in Part 6.1 included a reference to the Amending Principles. This provision ensures the provisions in Part 6.1 of the Aged Care Act regarding reviewable decisions also apply to a decision of the Secretary to revoke an exemption from the 24/7 RN responsibility under subsection 15W(5). This includes the ability for an application to be made to the Administrative Appeals Tribunal for review of a reviewable decision that has been confirmed, varied or set aside under section 85-4 or 85-5, in accordance with section 85-8 of the Aged Care Act.

SCHEDULE 2 – Amendments commencing 1 July 2023

Schedule 2, which will commence on 1 July 2023, amends the following legislative instruments:

- Accountability Principles (Accountability Principles)
- Information Principles (Information Principles)
- Quality of Care Principles (Quality of Care Principles).

Accountability Principles 2014

Item 1 – After Part 4A

Item 1 inserts new Part 4B into the Accountability Principles.

Part 4B—Information about registered nurses

New Part 4B of the Accountability Principles specifies the information to be provided by certain approved providers to the Secretary at the end of each calendar month about registered nurses at residential facilities.

Section 44A – Purpose of this Part

New section 44A provides that new Part 4B is made under paragraph 63-(1)(m) of the Aged Care Act, which enables additional responsibilities of an approved provider in relation to accountability for the aged care provided by the approved provider through an aged care service to be specified in the Accountability Principles. It makes clear that this new Part deals with the responsibility of certain approved providers to give a report to the Secretary about registered nurses at residential facilities.

Section 44B – Report about registered nurse responsibility at residential facility

Provision of report

New subsection 44B(1) requires that approved providers of a residential care service who provide residential care to care recipients in a residential facility must give to the Secretary a report about the 24/7 RN responsibility (as set out in section 54-1A of the Aged Care Act) (24/7 RN report). These approved providers must provide a 24/7 RN report even where they have been granted an exemption from the 24/7 RN responsibility in relation to a residential facility.

New subsection 44B(2) provides that the 24/7 RN report must be given to the Secretary within 7 days after the end of each calendar month, or within a longer period specified by the Secretary by notice in writing that is given to the approved provider. This is intended to provide a mechanism for the Secretary to allow additional time for an approved provider to submit their 24/7 RN report if required, such as if there is a natural disaster or disease outbreak.

Form and content of report

New subsection 44B(3) provides that the 24/7 RN report must be in a form approved in writing by the Secretary and include the following information specified in relation to the residential facility:

- each period of 30 minutes or more that an RN was not on site and on duty at the residential facility on a day during the calendar month on which residential care was being provided by an approved provider of a residential care service to care recipients in a residential facility (new subparagraph 44B(3)(b)(i));
- for each such period, the reason the RN was not on site or on duty or both (new subparagraph 44B(3)(b)(ii));
- for each such period, the alternative arrangements that were made for the period to ensure the clinical needs of care recipients in the facility were met or a statement that no other alternatives were available (new subparagraph 44B(3)(b)(iii)); and
- any other information required by the approved form (new subparagraph 44B(3)(b)(iv)).

The information is relevant to ensuring the health and safety of care recipients.

Section 44C – Provision of information and documents to the Secretary

New section 44C allows the Secretary to, at any time, issue a written notice requiring an approved provider to give the Secretary:

- updated information about matters that are included in or are required to be included in the 24/7 RN report; or
- information or documents that the Secretary considers are or may be relevant to assessing the accuracy of information included in the 24/7 RN report or updated information provided to the Secretary in accordance with new subsection 44C(3) (discussed below).

Approved provider must comply with notices under this section

New subsection 44C(1) provides that an approved provider must comply with a notice provided by the Secretary under new subsections 44C(3) or (4) within the period specified in the notice, or within 28 days after the day in which the notice is given if no period is specified in the notice.

New subsection 44C(2) provides that an approved must give the information or documents required by the notice in the form approved by the Secretary (if any), in order to comply with the notice.

Notice to provide updated information

New subsection 44C(3) provides that the Secretary may at any time, by notice in writing, require an approved provider to give the Secretary updated information about a matter specified in the notice if the information about the matter is included, or required to be included, in a 24/7 RN report given to the Secretary in accordance with new section 44B.

Notice to provide supporting information or documents

New subsection 44C(4) provides that the Secretary may at any time, by notice in writing, require an approved provider to give the Secretary specified information or documents that the Secretary considers are, or may be, relevant to assessing the accuracy of:

- information included in a 24/7 RN report for the provider; or
- updated information given to the Secretary by the approved provider in accordance with a notice under new subsection 44C(3).

New subsection 44C(5) clarifies that a notice under new subsection 44C(4) may require an approved provider to give the Secretary information or documents, whether or not the information or documents are required to be included in a 24/7 RN report.

These provisions which will allow the Secretary to request updated information, or additional supporting information or documents are intended to enable the Secretary to validate and assess the currency and accuracy of the information provided through

the 24/7 RN report. This will assist in making sure the Secretary has the correct and most recent information relevant to the 24/7 RN responsibility.

Information Principles 2014

Item 2 – Paragraph 8(b)

This item repeals paragraph 8(b) (as inserted by Item 1 to Schedule 1 of the Amending Principles) and inserts a new paragraph 8(b) into section 8 of the Information Principles, which specifies that the Secretary may make publicly available information relating to a residential care service through which residential care is provided to care recipients in a residential facility.

Previous paragraph 8(b) (discussed above) only enables the Secretary to publish the steps that the Secretary is satisfied an approved provider has taken to ensure that the clinical needs of the care recipients in a facility will be met during the period which the exemption is in force where an approved provider has an exemption from the 24/7 RN responsibility in relation to a residential facility.

The effect of this item is that, from 1 July 2023, paragraph 8(b) will also allow the Secretary to publish information included in a 24/7 RN report provided by an approved provider in accordance with new section 44B in relation to the facility. Under this item, what was previous paragraph 8(b) will become subparagraph 8(b)(ii), enabling the reasonable steps taken by an approved provider who has an exemption from the 24/7 RN responsibility to still be published.

Quality of Care Principles 2014

Item 3 – At the end of subsection 15S

This item inserts a new paragraph (d) into new subsection 15S (as inserted by item 3 to Schedule 1 of the Amending Principles) of the Quality of Care Principles. From 1 July 2023, this new paragraph will add an additional criterion for an approved provider to be granted an exemption from the 24/7 RN responsibility.

The effect of this item is that the Secretary may grant an exemption to an approved provider providing residential care in relation to residential facility only if, in addition to satisfying the other criteria under new subsection 15S(1), the approved provider has given the Secretary all 24/7 RN reports in relation to the residential facility for each calendar month from 1 July 2023. This is intended to ensure that approved providers have their reporting up to date in order to be eligible for an exemption from the 24/7 RN responsibility.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aged Care Legislation Amendment (Registered Nurses) Principles 2023

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny Act) Act 2011*.

Overview of the instrument

The *Aged Care Legislation Amendment (Registered Nurses) Principles 2023* (Amending Principles) amends a number of aged care subordinate legislation following the introduction of Schedule 1 to the *Aged Care Amendment (Implementing Care Reform) Act 2022* (Implementing Care Reform Act). The relevant parts of the Implementing Care Reform Act commence on 1 April 2023. This is to give effect to matters relating to the responsibility for approved providers who provide residential care to care recipients in a residential facility to ensure at least one registered nurse (RN) is on site, and on duty, at all times (that is, 24 hours a day, 7 days a week) at the residential facility (24/7 RN responsibility).

The Amending Principles amend the following subordinate legislation:

- *Accountability Principles 2014*
- *Information Principles 2014*
- *Quality of Care Principles 2014*.

Human rights implications

The Amending Principles engage the following human rights:

- the right to access information in article 21 of the *Convention on the Rights of Persons with Disabilities* (CRPD);
- the right to the enjoyment of the highest attainable standard of physical and mental health in article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and article 25 of the CRPD.

Right to access information

The right to access information is contained in article 21 of the CRPD. It provides that parties to the CRPD shall take appropriate measures to ensure people with disabilities can exercise their right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. Such measures include providing information in accessible formats and technologies, in a timely manner, and without additional cost.

The Amending Principles promote the right to access information by requiring the Secretary of the Department of Health and Aged Care to make publicly available the information specified in the Amending Principles about approved providers of residential care services through which residential care is provided to care recipients in a residential facility, including those with disabilities. This published information, which relates to approved providers who report information about, or have an

exemption from, the 24/7 RN responsibility will provide care recipients who may have impediments to their full and effective participation in society and their families with clear, timely and meaningful information about approved providers and their services. This information about approved providers and 24/7 RN responsibility will assist current and prospective care recipients to make better informed decisions about aged care.

It is intended that this information will be made available in one location and at no cost to care recipients or their families who may wish to access the information. In addition, all information required to be published by the Amending Principles will be designed in accordance with the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) 2.0 standard, making the information on the website accessible for a wider audience.

Right to health

The right to health is contained in article 12 of the ICESCR, and in article 25 of the CRPD. These articles refer to the right of individuals, including persons with disability, to the highest attainable standard of physical and mental health.

The Amending Principles engage the right to health by providing for exemptions from 24/7 RN responsibility. While the Amending Principles provide for an exemption framework from the 24/7 RN responsibility, the impact on the right to health of an exemption being granted is appropriately mitigated by providing for robust criteria that limits the circumstances in which an exemption may be granted. Further, an exemption can only be granted where the Secretary is satisfied that the approved provider has taken reasonable steps to ensure the clinical care needs of care recipients in the residential facility will be met during the period the exemption is in force.

The exemption framework is therefore an appropriate and proportionate limitation as it recognises the difficulties approved providers of residential facilities in rural, regional and remote areas may face in accessing sufficient staff of registered nurses to consistently meet the 24/7 RN responsibility while also ensuring that the clinical care needs care recipients in a residential facility are still being met even where an approved provider is unable to meet the 24/7 RN responsibility in respect of particular residential facility.

The Amending Principles will promote the right to health through the reporting and information publication arrangements for the 24/7 RN responsibility. This will provide transparency about any exemptions from the responsibility, to empower current and prospective care recipients and their families to make informed choices about their care. Providing access to this information will help care recipients to choose an aged care provider that is right for them, encouraging a holistic approach to care and support better health outcomes.

Conclusion

The Amending Principles are compatible with human rights as it promotes the rights of care recipients to access information and to attain the highest standard of physical and mental health. To the extent that the Amending Principles may limit human rights, this is reasonable, necessary and proportionate to protect the rights of older persons living in Australia.

**[Circulated by the authority of the Minister for Aged Care,
the Hon Anika Wells MP]**