

# **EXPLANATORY STATEMENT**

**Issued by the authority of the Minister for Aged Care**

*Aged Care Act 1997*

*Aged Care Legislation Amendment (Care Minutes Responsibilities) Principles 2023*

## **Purpose**

The *Aged Care Legislation Amendment (Care Minutes) Principles 2023* (Amending Principles) amends the *Information Principles 2014* (Information Principles) and the *Quality of Care Principles 2014* (Quality of Care Principles) to provide for:

- new responsibilities (“care minutes responsibilities”) of approved providers of residential care to provide at each residential care service each quarter during a quarter of a financial year for the approved provider of the service beginning on or after 1 October 2023, at least:
  - an average amount of direct care per care recipient per day, and
  - an average amount of direct care per care recipient per day provided by registered nurses;
- a method for calculating the care minutes responsibilities; and
- a new requirement for the Secretary to make publicly available information, in relation to each residential care service each quarter, about the care minutes responsibilities and, subsequently, the actual average amount of direct care per care recipient per day that was provided.

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

## **Background**

*Royal Commission into Aged Care Quality and Safety*

Recommendation 86 of the Final Report of the Royal Commission into Aged Care Quality and Safety (Final Report) recommended, amongst other matters, that the Government should require approved providers of residential care to meet a minimum staff time quality and safety standard, including that the minimum staff time standard should require approved providers to engage registered nurses (RNs), enrolled nurses (ENs), and personal care workers (PCWs) for at least 200 minutes per care recipient per day for the average care recipient, with at least 40 minutes of that time provided by a RN.

Recommendation 86 also recommended that the minimum staff time standard should be linked to the casemix-adjusted activity-based funding model for residential care, so that approved providers with a higher-than-average proportion of high needs care recipients would be required to engage additional staff, and vice versa.

The Amending Principles, through amendments to the Quality of Care Principles, establishes care minutes responsibilities, including the method for calculating the responsibilities, as part of the response to Recommendation 86 of the Final Report.

The method to calculate the care minutes responsibilities places relative weights (through varying direct care per care recipient per day ‘amounts’) on care recipients’ casemix classifications under Part 2.4A of the *Aged Care Act 1997* (Aged Care Act).

The calculation method is intended to ensure that the care minute responsibility for approved providers in respect of its residential care service for a quarter of a financial year varies with the proportions of high needs and low needs care recipients who received care in the residential care service in the period shortly before that quarter. This is consistent with the intention of Recommendation 86 of the Final Report.

Direct care minutes per day amounts associated with each care recipient classification used in the care minutes responsibilities calculation are based on data from the *Resource Utilisation and Classification Study* (RUCS) conducted by the University of Wollongong. The RUCS identified the amount of time spent caring for persons in each classification by RNs, ENs and PCWs. These relativities, taken with data on the distribution of care recipients between classifications, are reflected in direct care minutes per day amounts that are intended to achieve provision of an overall average of 200 minutes of direct care per care recipient per day (including 40 minutes of direct care by RNs) across the residential care sector as a whole.

#### *Data sources for care minutes responsibilities calculation*

Existing reporting responsibilities of approved providers under the *Accountability Principles 2014* (Accountability Principles) ensure the relevant approved provider and the Department of Health and Aged Care (department) have the same access at the same time to the same data (being days of eligible residential care and care recipient classifications) needed to work out the result of the care minutes responsibility calculation in respect of a residential care service for a quarter. That is, both the relevant approved provider and the Secretary can work out the same care minutes responsibilities for a residential care service for a quarter, assuming the responsibility calculation is performed correctly.

#### *Publishing information about the care minutes responsibilities*

Through amendments to the Information Principles, the Secretary must make publicly available information about the care minutes responsibilities at a residential care service for a quarter and, subsequently, about the actual direct care (including direct care by registered nurses) provided at that service for that quarter. This is intended to provide care recipients and their families with clear, timely and meaningful information about approved providers and their services.

#### **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 Information Principles and the Quality of Care Principles.

Paragraph 54-1(1)(h) of the Aged Care Act provides that the responsibilities of an approved provider in relation to the quality of the aged care that the approved provider provides include such other responsibilities as are specified in the Quality of Care Principles.

Subsection 86-10(1) of the Aged Care Act provides that the Secretary must, in accordance with the Information Principles, make publicly available information in relation to aged care services.

### **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**

The instrument commences on the day after the Amending Principles is registered.

### **Consultation**

Since the July-September 2022 quarter, approved providers of residential care have been required to report the amount of direct care (including direct care by RNs) they have aimed to deliver each quarter at each of their residential care services, as a part of their responsibility to submit a Quarterly Financial Report (QFR) under Part 4A of the Accountability Principles.

The Department of Health and Aged Care (department) consulted with representatives of the residential care sector about the detail of the care minutes responsibilities in the Amending Principles, including about the responsibilities calculation and the direct care minutes per day amount for classifications that are an element of that calculation. Consultation included a meeting of the Residential Aged Care Funding Reform Working Group on 12 May 2023, a webinar on 16 May 2023 which attracted 940 attendees, and a further webinar on 5 September 2023.

No proposals for alternatives to the care minutes responsibilities or to the method for calculation of the responsibilities now reflected in the Amending Principles were received as a result of these activities.

The care minutes responsibilities, as provided in the Amending Principles, reflect the arrangements discussed at the Residential Aged Care Funding Reform Working Group meeting and the webinars referred to above.

### **Impact Analysis**

Consistent with the former Office of Best Practice Regulation (now known as the Office of Impact Analysis) requirements at the time, the department certified that an independent review undertook a process analysis for the care minutes responsibility, which was equivalent to a RIS at that time (Reference OBPR 22-02547). The department also completed a supplementary regulatory impact analysis that complemented the certification.

These processes were undertaken for, among other purposes, the purposes of the *Aged Care Amendment (Implementing Care Reform) Act 2022* (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 (Care Minutes Responsibilities) Principles 2023**

**Section 1** states that the name of the amending instrument is the *Aged Care Legislation Amendment (Care Minutes Responsibilities) Principles 2023* (Amending Principles).

**Section 2** states that the Amending Principles commence on the day after this instrument is registered.

**Section 3** states that the Amending Principles are made under the *Aged Care Act 1997* (the Aged Care Act).

**Section 4** states that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1—Amendments**

Schedule 1 amends the following legislative instruments:

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

***Information Principles 2014***

**Item 1 – At the end of Part 3**

This item inserts new section 8B into Part 3 – Information about an aged care service, of the Information Principles. Part 3 specifies information about an aged care service that the Secretary *may* make publicly available in accordance with paragraph 86-9(1)(m) of the Aged Care Act, and information in relation to an aged care service that the Secretary *must* make publicly available in accordance with subsection 86-10(1) of the Aged Care Act.

**Section 8B Information about residential aged care services that must be made publicly available – direct care responsibilities**

New section 8B requires the Secretary to make publicly available certain information about a residential care service that represents the average amount of direct care per care recipient per day that an approved provider is required to provide for a quarter.

New paragraphs 8B(1)(a) and 8B(1)(b) provide that the information that must be published for a residential care service for a quarter of a financial year are the:

- combined staff average amount of direct care per care recipient per day (as calculated in accordance with subsection 9(1) of the Quality of Care Principles; and
- registered nurse average amount of direct care per care recipient per day (as calculated in accordance with subsection 9(2) of the Quality of Care Principles).

These amounts represent the minimum amount of direct care that the approved provider must provide through the residential care service per care recipient per day in the quarter (see item 3, section 10 of the Quality of Care Principles).

New subsection 8B(2) provides that the information in paragraphs (1)(a) and (b) must be made publicly available by the Secretary as soon as practicable on or after the ‘calculation day’ (see definition at item 2, section 4 of the Quality of Care Principles), for the quarter. This requirement that the information be published as soon as practicable is intended to support the timely publication of information, while also allowing time for the Secretary to collect and prepare the information for publication.

New paragraphs 8B(1)(c) and 8B(1)(d) provide that the Secretary must also publish:

- the average amount of direct care provided through the service by direct care staff members of the approved provider per counted care recipient per day during the quarter; and
- the average amount of direct care provided through the service by registered nurse staff members of the provider per counter care recipient per day during the quarter.

This represents publication of the actual average amount of direct care that the approved provider provided through the residential care service per counted care recipient per day during the quarter, both with respect to the amount provided by direct care staff members and RNs.

The intended effect of new subsections 8B(1) and (2) is to increase transparency of the approved provider responsibilities established by the amendments at item 3 of the Amending Principles by requiring the Secretary to make publicly available information about those responsibilities. Public availability of this information will assist current and prospective care recipients to be better informed about the care minutes responsibilities of an approved provider of a residential care service. It will also assist care recipients to be better informed about the average amount of direct care that is being provided through the relevant residential care service.

For clarity, the Secretary making information publicly available about the care minutes responsibilities at a residential care service for a quarter, and subsequently, about the actual direct care (including direct care by registered nurses) provided at that service for that quarter, will not involve the publication of any personal information within the meaning of the *Privacy Act 1988*. This is also consistent with section 86-10(3) of the Aged Care Act.

New subsection 8B(3) provides that section 8B includes the following relevant definitions from the Quality of Care Principles:

***calculation day*** has the same meaning as in the Quality of Care Principles (see item 2, section 4 of the Quality of Care Principles).

***counted care recipient*** has the same meaning as in the Quality of Care Principles (see item 2, section 4 of the Quality of Care Principles).

**direct care** has the same meaning as in the Quality of Care Principles (see item 2, section 4 of the Quality of Care Principles).

**direct care staff member** has the same meaning as in the Quality of Care Principles (see item 2, section 4 of the Quality of Care Principles).

**quarter**, of a financial year for an approved provider, has the same meaning as in the *Accountability Principles 2014* (Accountability Principles).

Section 4 of the Accountability Principles defines a quarter of a financial year for an approved provider, as having the meaning given by subsection 43(7) of the Accountability Principles.

Subsection 43(7) of the Accountability Principles defines each of the following as a quarter of a financial year for an approved provider:

- (a) the period of 3 months beginning on the first day of the financial year for the approved provider;
- (b) each successive period of 3 months that occurs during the financial year for the approved provider after the end of the period in paragraph (a).

The note to subsection 43(7) of the Accountability Principles states that, under paragraph 32(1)(b) of the Accountability Principles, a financial year for an approved provider may begin on a day other than 1 July.

**registered nurse staff member** has the same meaning as in the Quality of Care Principles (see item 2, section 4 of the Quality of Care Principles).

### ***Quality of Care Principles 2014***

#### **Item 2 – Section 4**

This item inserts new definitions in section 4 of the Quality of Care Principles that are required for new sections 9 and 10 of the Quality of Care Principles (see item 3) and new section 8B of the Information Principles (see item 1).

**calculation day**, for a quarter, means the 15<sup>th</sup> day of the calendar month before the calendar month in which the quarter begins.

For clarity, the definition of calculation day does not prescribe a day upon which the calculation must be performed for working out the required amounts of direct care per care recipient per day under subsections 9(1) and 9(2) of the Quality of Care Principles (see below).

However, in practice, the Secretary will perform this calculation on the calculation day, or very soon thereafter, as new section 8B of the Information Principles (see item 1) requires the Secretary to publish the results of the calculation as soon as practicable on or after the calculation day.

This definition of calculation day is also used to identify the relevant information to be used in the calculation of the required amounts of direct care per care recipient per day.

***counted care recipient*** has the meaning given by subsection 10(4).

A counted care recipient is defined in subsection 10(4) of the Quality of Care Principles for the purposes of identifying the care recipients of a residential care service for whom an average amount of direct care per day must be provided.

This will be all care recipients of the residential care service, including both respite and non-respite care recipients subject to one exclusion in relation to extended hospital leave. Care recipients who are on the 29<sup>th</sup> or subsequent day of a period of extended hospital leave are not included as a counted care recipient – and consequently it is not necessary to provide an average amount of direct care provided in relation to care recipients for any day on or after their 29<sup>th</sup> day of hospital leave.

This definition of counted care recipient is referred to in the Information Principles (see item 1, section 8B of the Information Principles).

***day of recognised residential care*** has the meaning given by subsection 9(4).

A day of recognised residential care is defined in subsection 9(4) of the Quality of Care Principles as a day in respect of which a care recipient:

- is provided with residential care through the residential care service during the day; and
- a classification under Part 2.4A of the Aged Care Act in effect on that day.

Consequently, there will be more than one day of recognised residential care provided on a single calendar day where there is more than one care recipient with a classification under Part 2.4A of the Aged Care Act in effect at the relevant residential care service on that day.

The days of recognised residential care in a quarter are added together and used in the calculation of the required amounts of direct care per care recipient per day as worked out under subsections 9(1) and 9(2) of the Quality of Care Principles.

As the calculation of the required amounts of direct care per care recipient per day, as worked out under subsections 9(1) and 9(2) of the Quality of Care Principles, also uses the sum of daily amounts per care recipient as determined by their classification under Part 2.4A of the Aged Care Act, it is appropriate to exclude care recipients who do not have such a classification in effect from having the days they are provided with care from being a day of recognised residential care.

When a care recipient enters a residential care service for the first time, they do so without a classification under Part 2.4A of the Aged Care Act. Once the care recipient has been assessed and the Secretary has classified the care recipient, that classification will take effect from the day the care recipient entered care. However, new paragraph 9(6)(b) of the Quality of Care Principles operates so that a care recipient

who is not classified until after the calculation date will not have a classification under Part 2.4A in effect on a day in the reference period.

**direct care** means care provided to an individual care recipient that is of a kind described in item 1.11, 2.1, 2.3, 2.4, 2.5, 2.7, 2.8, 2.9 or 3.8 of Schedule 1 (other than the planning or delivery of activities to a group of care recipients).

The definition of direct care is used in subsections 10(2) and 10(3) of the Quality of Care Principles to identify the type of care, direct care, that must be provided as a part of the care minutes responsibility. The definition of direct care specifically excludes planning or delivery of activities to a group of care recipients.

Under subsection 7(1) of the Quality of Care Principles, in accordance with paragraph 54- 1(1)(a) of the Aged Care Act, an approved provider of a residential care service must, for each item in a table in Schedule 1 of the Quality of Care Principles, provide the care or services specified in column 1 of the item to the table to any care recipient who needs it.

The items and content of column 1 in Schedule 1 of the Quality of Care Principles that are included in the definition of direct care are:

- 1.11 Care recipient social activities
- 2.1 Daily living activities assistance
- 2.3 Emotional support
- 2.4 Treatments and procedures
- 2.5 Recreational therapy
- 2.7 Assistance in obtaining health practitioner services
- 2.8 Assistance in obtaining access to specialised therapy services
- 2.9 Support for care recipients with cognitive impairment
- 3.8 Nursing services.

This definition of direct care is included, by reference, in the Information Principles (see item 1, section 8B of the Information Principles).

**direct care staff member** means a staff member of an approved provider who is a registered nurse, enrolled nurse, nursing assistant or personal care worker.

The definition of direct care staff member is used in determining the responsibility of an approved provider of a residential care service in subsection 10(2) of the Quality of Care Principles, which is:

- the average amount of direct care provided through the service by *direct care staff members* of the provider per counted care recipient per day, to be at least
- the required combined staff average amount of direct care per care recipient per day as calculated under subsection 9(1) of the Quality of Care Principles.

**Staff member** of an approved provider is defined in item 1 of Schedule 1 of the Aged Care Act as an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services.

To avoid doubt, the definition of direct care staff member will exclude persons such as student nurses on a course placement at the residential care service. A person such as a student nurse can be a direct care staff member only if they are also engaged as a staff member of an approved provider in a different capacity, for example as a personal care worker. The definition is also intended to exclude volunteers.

Registered nurse is already defined in the Quality of Care Principles by reference to the *Health Insurance Act 1973* as a person registered in the nursing profession as a registered nurse under the National Law.

Enrolled nurse and nursing assistant are new defined terms inserted into section 4 of the Quality of Care Principles by the Amending Principles (see below).

A personal care worker, for the purposes of this definition, takes on its ordinary meaning. A personal care worker will be identified as a matter of fact, for example by referring to relevant employment awards, such as the Aged Care Award 2010 or an equivalent Enterprise Agreement that governs a person's employment, to assist in identifying if they are a personal care worker of an approved provider.

This definition of direct care staff member is included, by reference, in the Information Principles (see item 1, section 8B of the Information Principles).

***enrolled nurse*** means a person who is registered under the National Law in the nursing profession as an enrolled nurse.

The definition of enrolled nurse is a component of the definition of direct care staff member which is used to determine the responsibility of an approved provider of a residential care service in subsection 10(2) of the Quality of Care Principles and is defined by reference to registration as a professional enrolled nurse in accordance with the National Law, which is separately defined.

***National Law*** has the same meaning as in the *Health Insurance Act 1973*.

Adopting the definition of National Law used in the *Health Insurance Act 1973* provides that in practice, National Law means:

- for a State or Territory (other than Western Australia)—the Health Practitioner Regulation National Law set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009 (Qld)*, as it applies (with or without modification) as a law of the State or Territory; or
- for Western Australia—the *Health Practitioner Regulation National Law (WA) Act 2010 (WA)*, so far as that Act corresponds to the Health Practitioner Regulation National Law set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009 (Qld)*.

***nursing assistant*** means a person:

- (a) who is not a registered nurse or enrolled nurse; and
  - (b) who works under the direct control and supervision of a registered nurse;
- and

- (c) whose work is solely to assist a registered nurse or enrolled nurse in the provision of nursing care.

The definition of nursing assistant is a component of the definition of direct care staff member which is used to determine the responsibility of an approved provider of a residential care service in subsection 10(2) of the Quality of Care Principles.

A nursing assistant must work under the direct control and supervision of a registered nurse and their work is to assist a registered nurse or enrolled nurse.

A person who is employed in a hybrid role, that includes assisting a registered nurse as well as other duties that involve the provision of personal care, will not be a nursing assistant. However, they may be a personal care worker. This will be a question of fact based on the person's particular position and their duties.

*quarter*, of a financial year for an approved provider, has the same meaning as in the Accountability Principles.

Section 4 of the Accountability Principles defines quarter, of a financial year for an approved provider, as having the meaning given by subsection 43(7) of the Accountability Principles, as discussed above (see item 1, section 8B of the Information Principles).

*reference period*, for a quarter, has the meaning given by subsection 9(5) of the Quality of Care Principles.

*registered nurse staff member* means a staff member of an approved provider who is a registered nurse.

To be a registered nurse staff member, the registered nurse (as defined) must be an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care. Registered nurses working in a volunteer capacity, or without remuneration at a residential care service as part of a placement, work experience, or as required in obtaining a qualification, will fall outside this definition.

This definition of registered nurse staff member is included, by reference, in the Information Principles (see item 1, section 8B of the Information Principles).

### **Item 3 – At the end of Part 2**

This item inserts new sections 9 and 10 at the end of Part 2 – Residential care services of the Quality of Care Principles. Part 2 contains the responsibilities in relation to the quality of the care that an approved provider of a residential care service provides. The new care minutes responsibilities contained in new section 10, including the calculation in new section 9, is made for the purposes by paragraph 54-1(1)(h) of the Aged Care Act.

*Section 9 – What are the required amounts of direct care?*

New section 9 provides the method for calculating the required:

- combined staff average amount of direct care per care recipient per day; and
- registered nurse average amount of direct care per care recipient per day,

for an approved provider of a residential care service for a quarter of a financial year.

*Subsection 9(1) – Required combined staff average amount of direct care*

New subsection 9(1) provides that the required combined staff average amount of direct care per care recipient per day for a quarter is:

- the sum of the combined staff daily amounts for all of the days of recognised residential care provided in respect of care recipients through the residential care service during the reference period for the quarter (“reference period combined staff amount” – see representation below);

*divided by*

- the total number of days of recognised residential care provided in respect of care recipients through the residential care service during the reference period for the quarter (“reference period recognised residential days” – see representation below).

The resulting number of the above calculation is recorded to 2 decimal places (rounding up if the third decimal places is 5 or more).

To clarify the operation of this provision, this calculation can also be represented as:

$$= \frac{\text{reference period combined staff amount}}{\text{reference period recognised residential days}} \quad (\text{rounded to 2 decimal places})$$

*Subsection 9(2) – Required registered nurse average amount of direct care*

New subsection 9(2) provides that the required registered nurse average amount of direct care per care recipient per day for a quarter is:

- the sum of the registered nurse daily amounts for all of the days of recognised residential care provided in respect of care recipients through the residential care service during the reference period for the quarter (“reference period registered nurse amount” – see representation below);

*divided by*

- the total number of days of recognised residential care provided in respect of care recipients through the residential care service during the reference period for the quarter (“reference period recognised residential days” – see representation below).

The resulting number is recorded to 2 decimal places (rounding up if the third decimal places is 5 or more).

This calculated amount can also be represented as:

$$= \frac{\text{reference period registered nurse amount}}{\text{reference period recognised residential days}} \quad (\text{rounded to 2 decimal places})$$

*Subsection 9(3) – Daily amounts*

New subsection 9(3) provides identification of the relevant daily amount by reference to following table:

<b>Daily amounts</b>			
<b>Item</b>	<b>Column 1 For a care recipient classified as ...</b>	<b>Column 2 the combined staff daily amount is ... (minutes)</b>	<b>Column 3 and the registered nurse daily amount is ... (minutes)</b>
1	Class 1	317	57
2	Class 2	110	30
3	Class 3	143	32
4	Class 4	115	28
5	Class 5	157	39
6	Class 6	152	34
7	Class 7	186	36
8	Class 8	200	38
9	Class 9	202	46
10	Class 10	282	56
11	Class 11	274	41
12	Class 12	269	42
13	Class 13	317	57
14	Respite Class 1	120	31
15	Respite Class 2	165	36
16	Respite Class 3	273	48

The combined staff daily amount and registered nurse daily amount for a day in the reference period for a care recipient are identified by reference to the classification level under Part 2.4A of the Aged Care Act of the care recipient on that day.

The individual daily amounts, combined staff and registered nurse, for each care recipient provided with care in the reference period are added together to produce the reference period combined staff amount and the reference period registered nurse amount.

*Subsection 9(4) – Day of recognised residential care*

New subsection 9(4) provides that a day of recognised residential care is a day residential care is provided to a care recipient who has a classification under Part 2.4A of the Aged Care Act in effect in the reference period. See above for further discussion.

*Subsection 9(5) – Reference period*

New subsection 9(5) provides that the reference period for a quarter commences four months prior to the first day of the relevant quarter and continues for a period of 3 months.

This amendment will provide for the calculation of the care minutes responsibilities for a residential care service for a quarter using data from the period shortly before that quarter. This is intended to provide certainty to approved providers about their responsibility for the upcoming quarter before it commences, while still reasonably reflecting the care needs of the cohort of care recipients who will be present at the residential care service during the quarter. This will allow approved providers to plan appropriate staffing in advance.

*Subsection 9(6) – Information to be disregarded for calculations*

New subsection 9(6) provides information that is to be disregarded when working out the required combined staff average amount of direct care and the required registered nurse average amount of direct care. The information that is to be disregarded is:

- information about a person entering or exiting a residential care service during the reference period if that information was provided to the Secretary on or after the calculation day; and
- a change in a person’s classification, or reclassification of the person, that is made on or after the calculation day for the quarter but takes effect before the calculation day.

The effect of disregarding this information is to ensure that only information that was available to both the department and approved providers immediately before the calculation date will be used when calculating the required average amounts of direct care. Further, it ensures that the information used to calculate the required average amounts of direct care is certain and static, regardless of when the calculations are performed.

*Subsection 9(7) – Calculation if no days of recognised residential care provided during reference period*

New subsection 9(7) provides that where there are no days of recognised residential care provided during a reference period, the required average amounts of direct care will be zero minutes per care recipient per day.

The note to this subsection clarifies that this rule has been provided to avoid an undefined result from being produced from the calculation of required average amounts of direct care from dividing a number by zero.

*Example – steps for calculating required average amounts of direct care for a quarter in accordance with section 9*

Step 1: Identify the relevant reference period for the quarter.

The reference period for a quarter is the period of 3 months, commencing on the day four months before the first day of the relevant quarter.

AA Pty Ltd is an approved provider that provides aged care services through Trevor’s Aged Care Service (TACS). TACS has been providing aged care services in the Illawarra since January 2002.

AA Pty Ltd wants to calculate their required average amounts of direct care for the October 2023 quarter.

<b>JUN</b>	<b>JUL</b>	<b>AUG</b>	<b>SEP</b>	<b>OCT</b>	<b>NOV</b>	<b>DEC</b>
Reference Period				Quarter		

The reference period for AA Pty Ltd is 1 June 2023 – 31 August 2023.

Step 2: Identify the relevant calculation day.

The relevant calculation day is the 15<sup>th</sup> of the month before the quarter commences.

<b>JUN</b>	<b>JUL</b>	<b>AUG</b>	<b>SEP</b>	<b>OCT</b>	<b>NOV</b>	<b>DEC</b>
Reference Period			15 <sup>th</sup> Calculation Day	Quarter		

The relevant calculation day for AA Pty Ltd for the October 2023 quarter is 15 September 2023.

Step 3: Identify the relevant information to be included in the calculation of the required average amount of direct care.

Identify care recipients who received residential care through the residential care service in the reference period and their classification under Part 2.4A of the Aged Care Act for each such day. This should be by reference to the information provided to the Secretary immediately before the calculation day. That is, by reference to the information that has been provided to the Secretary before 15<sup>th</sup> of the month before the quarter commences.

TACS had the following care recipients at their service in the period 1 June 2023 to 31 August 2023.

Mary entered TACS on 18 January 2020. She was initially classified at Class 5 under Part 2.4A of the Aged Care Act, with this still in effect on 1 June 2023.

Mary's health declined and she was reclassified as Class 8 under Part 2.4A of the Aged Care Act with effect on and from 25 August 2023.

Fred entered TACS on 13 June 2023. He was classified at Class 10 under Part 2.4A of the Aged Care Act, with effect from 13 June 2023. Fred went to hospital on 1 July 2023 and remained there until 1 September 2023.

Adam entered TACS on 22 August 2023. He was initially classified under Part 2.4A of the Aged Care Act on 16 September 2023 as Class 9. While the effective date of the classification became 22 August 2023, in accordance with rules under Part 2.4A of the Aged Care Act, this information is disregarded as the classification was made on or after the calculation day (15 September 2023).

Jane entered TACS on 2 August 2023. She was initially classified at Class 3 under Part 2.4A of the Aged Care Act on 9 August 2023, with the effective date of the classification becoming 2 August 2023, in accordance with rules under Part 2.4A of the Aged Care Act. Her classification has not changed since that date.

Care recipient	Part 2.4A classification	Days provided with care at the service
Mary	Class 5	85
Mary	Class 8	7

Fred	Class 10	80
Adam	Not classified	10
Jane	Class 3	30

Step 4: Identify each day of recognised residential care.

Every day residential care is provided to a care recipient who has a classification under Part 2.4A of the Aged Care Act on that day is a day of recognised residential care. This means, for example, a day in the reference period where there are 97 care recipients and five of those have not yet been classified will produce 92 days of recognised residential care.

Assessment of the number of care recipients with a classification under Part 2.4A of the Aged Care Act at the residential care service must be undertaken for each day in the quarter to identify all days of recognised residential care.

Care recipients who are on leave (as defined in the Aged Care Act) are included when identifying a day of recognised residential care. They are included as a relevant part of the overall profile of care recipients of the aged care service in the reference period.

If there are no days of recognised residential care provided during the reference period, the required amounts of direct care per care recipient per day are zero minutes.

This will occur when a new residential care service opens in the month before the quarter commences. In this case there will be no days of recognised residential care for the reference period – as the reference period is before the residential care service opened.

The days of recognised residential care for TACS for the October 2023 quarter are:

Care recipient	Part 2.4A classification	Days provided with care at the service	Days of recognised residential care
Mary	Class 5	85	85
Mary	Class 8	7	7
Fred	Class 10	80	80
Adam	Not classified	10	0
Jane	Class 3	30	30

Step 5: Identify the relevant combined staff daily amount and registered nurse daily amount for each care recipient for each day of recognised residential care in the reference period.

Using the information identified in step 3 and step 4, use the table in subsection 9(3) of the Quality of Care Principles to identify the relevant combined staff daily amount and registered nurse daily amount in minutes for each care recipient. It is relevant to note that the classification under Part 2.4A of the Aged Care Act of a care recipient may change during the reference

period. Consequently, the relevant daily amounts for that care recipient for each day will also change to reference the classification under Part 2.4A of the Aged Care Act in effect on that day.

Care recipient	Part 2.4A classification	Days of recognised residential care	Combined staff daily amount (minutes)	Registered nurse daily amount (minutes)
Mary	Class 5	85	157	39
Mary	Class 8	7	200	38
Fred	Class 10	80	282	56
Adam	Not classified	0	0	0
Jane	Class 3	30	143	32

Step 6: Calculate the reference period combined staff daily amount and reference period registered nurse daily amount for the quarter.

Add together all combined staff daily amounts from step 5 to produce the *reference period combined staff amount* for the quarter.

Add together all registered nurse daily amounts from step 5 to produce the *reference period registered nurse amount* for the quarter.

Care recipient	Combined staff daily amount (minutes)	Registered nurse daily amount (minutes)	Days of recognised residential care	Aggregate combined staff amount per care recipient	Aggregate registered nurse amount per care recipient
Mary	157	39	85	13,345	3,315
Mary	200	38	7	1,400	266
Fred	282	56	80	22,560	4,480
Adam	0	0	0	0	0
Jane	143	32	30	4,290	960
<b>Reference period combined staff amount</b>				<b>41,595</b>	
<b>Reference period registered nurse staff amount</b>					<b>9,021</b>

Step 7: Calculate the reference period recognised residential days for the quarter.

Add together all the days of recognised residential care all registered nurse daily amounts from step 4 to produce the *reference period recognised residential days* for the quarter.

Care recipient	Days of recognised residential care
Mary	85
Mary	7
Fred	80
Adam	0
Jane	30

Reference period recognised residential days for the quarter	202
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Step 8: Calculate the required combined staff average amount of direct care per care recipient per day.

This amount is:

$\frac{\text{reference period combined staff amount}}{\text{reference period recognised residential days}}$  minutes (rounded to 2 decimal places)

$$= \frac{41,595}{202} \text{ minutes}$$

$$= 205.91584... \text{ minutes}$$

$$= \mathbf{205.92 \text{ minutes (rounded)}}.$$

Step 9: Calculate the required registered nurse average amount of direct care per care recipient per day.

This amount is:

$\frac{\text{reference period registered nurse staff amount}}{\text{reference period recognised residential days}}$  minutes (rounded to 2 decimal places)

$$= \frac{9,021}{202} \text{ minutes}$$

$$= 44.65841... \text{ minutes}$$

$$= \mathbf{44.66 \text{ minutes (rounded)}}.$$

### **Section 10 – What are the responsibilities of approved providers in relation to the required amounts of direct care?**

New section 10 inserts the responsibilities for an approved provider of a residential care service in relation to a quarter of a financial year for the provider that commences on or after 1 October 2023.

For clarity, the care minutes responsibilities are to deliver at least an average amount of direct care (including an average amount of direct care to be delivered by RNs). The care minutes responsibilities are not that an approved provider must provide a particular individual care recipient at least an amount of direct care on any day, or during any quarter or other period.

#### *Subsection 10(2) – Responsibility – direct care provided by direct care staff members*

New subsection 10(2) provides that the approved provider of a residential care service must ensure that:

- the average amount of direct care provided through the residential care service by direct care staff members of the provider per counted care recipient per day; *is at least*

- the required combined staff average amount of direct care per care recipient per day calculated under subsection 9(1) in respect of the residential care service for the quarter.

The note to this subsection clarifies that direct care staff members of the provider include registered nurse staff members of the provider, with reference to the definition of direct care staff member in section 4. This is intended to make clear that registered nurses are counted as directed care staff members for the purposes of the care minutes responsibilities.

*Subsection 10(3) – Responsibility – direct care provided by registered nurse staff members*

New subsection 10(3) provides that the approved provider of a residential care service must ensure that:

- the average amount of direct care provided through the residential care service by registered nurse staff members of the provider per counted care recipient per day;

*is at least*

- the required registered nurse average amount of direct care per care recipient per day calculated under subsection 9(2) in respect of the residential care service for the quarter.

*Subsection 10(4) – Counted care recipients*

New subsection 10(4) provides that a counted care recipient is a care recipient who is receiving care through a residential care service on a day unless:

- the care recipient is on extended hospital leave on the day, and
- the day is on or after the 29<sup>th</sup> day of the care recipient’s leave.

Extended hospital leave is defined in item 1 of Schedule 1 of the Aged Care Act.

The definition of a counted care recipient is relevant for the calculation of the average amount of direct care provided through the residential care service by direct care staff members of the provider. It is appropriate for the definition to exclude care recipients who are on the 29<sup>th</sup> day or after of a period of extended hospital leave, as it is unreasonable to expect the approved provider to continue to maintain staffing levels in respect of a care recipient who is absent from the residential care service due to a prolonged hospital stay.

**Item 4 – Subsection 15FC(1) (note)**

This item omits the words “Health Practitioner Regulation” from the term “Health Practitioner Regulation National Law” in the note to subsection 15FC(1) of the Quality of Care Principles. This item is a consequential amendment to the insertion of a definition of “National Law” in section 4 of the Quality of Care Principles (see item 2).

## Statement of Compatibility with Human Rights

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

### *Aged Care Legislation Amendment (Care Minutes) 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 2011*.

#### **Overview of the instrument**

The *Aged Care Legislation Amendment (Care Minutes) Principles 2023* (Amending Principles) amends the *Information Principles 2014* (Information Principles) and the *Quality of Care Principles 2014* (Quality of Care Principles) to provide for:

- new responsibilities (“care minutes responsibilities”) of approved providers of residential care to provide at each residential care service each quarter during a quarter of a financial year for the approved provider of the service beginning on or after 1 October 2023, at least:
  - an average amount of direct care per care recipient per day, and
  - an average amount of direct care per care recipient per day provided by registered nurses;
- a method for calculating the care minutes responsibilities; and
- a new requirement for the Secretary to make publicly available information, in relation to each residential care service each quarter, about the care minutes responsibilities and, subsequently, the actual average amount of direct care per care recipient per day (including direct care provided by registered nurses) that was provided.

#### **Human rights implications**

The Amending Principles engage the following human rights:

- 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;
- the right to access information in article 21 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

#### *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 a new responsibility of approved providers of residential care to provide at each residential care service each quarter of a financial year at least an average amount of direct care per care recipient per day. This includes at least an average amount of direct care per care recipient per day that must be delivered by registered nurses.

The Amending Principles therefore promote the right to health as the amendments seek to ensure care recipients in a residential care service receive a minimum average amount of direct care each day. The right to health is further promoted by the Amending Principles as a portion of the direct care to be provided each day must be provided by a registered nurse, which will specifically assist to ensure that care recipients' clinical care needs are being met each day.

In addition, the right to health is promoted by the publication arrangements as set out in the amendments to the Information Principles. These amendments will provide transparency about the required amounts of direct care per care recipient each day for each residential care service, and the average amount of direct care provided per day per counted care recipient. This will empower current and prospective care recipients, their families, and carers to make more informed choices about their aged care. Access to this information will assist care recipients to choose an approved provider and residential care service that is right for them and would be best placed to meet their aged care needs.

#### *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, including those with disabilities.

This information, which relates to approved providers' care minutes responsibilities and the average amounts of direct care provided against those responsibilities at each residential care service each quarter of a financial year, 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 residential care services.

This information about residential care services will assist current and prospective care recipients to make better informed decisions about aged care. Providing access to this information will help care recipients to choose an approved provider and residential care service that is right for them, encouraging a holistic approach to care and support better health outcomes.

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.

**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.

**The Hon Anika Wells MP**  
**Minister for Aged Care**