

EXPLANATORY STATEMENT

Aged Care Act 1997 Aged Care (Transitional Provisions) Act 1997

Aged Care Legislation Amendment (Registered Nurse Supplement) Instrument 2024

Purpose and operation

The *Aged Care Legislation Amendment (Registered Nurse Supplement) Instrument 2024* (Amending Instrument) amends, with effect from 1 July 2024, aged care subordinate legislation for the *registered nurse supplement*, to provide subsidy to approved providers of residential care for registered nurses providing, or directing the provision of, care to residential care recipients.

The supplement is separately provided for in substantially the same form for residential care recipients (subject to the *Aged Care Act 1997* (Aged Care Act) and its legislative instruments) and for continuing residential care recipients (subject to the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act) and its legislative instruments).

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014*
- *Aged Care (Subsidy, Fees and Payments) Determination 2014*
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*.

Background

The Aged Care Act, the Transitional Provisions Act and the *Aged Care Quality and Safety Commission Act 2018* (the ACQSC Act) provide for the regulation and funding of aged care services. Providers who are approved under the ACQSC Act to provide aged care (approved providers) may be eligible to receive subsidy and supplement payments in respect of the care they provide to care recipients who have been approved under the Aged Care Act as recipients of aged care (approved care recipients). The Aged Care Act and the Transitional Provisions Act provide that, for each type of aged care, the Minister may determine the amount of subsidy and supplements payable to an approved provider for the provision of that type of aged care.

The introduction of the registered nurse supplement was announced through the 2022-23 Budget, with additional funding subsequently provided through measures in the 2023-24 Budget and the 2023-24 Mid-Year Economic and Fiscal Outlook (MYEFO).

The registered nurse supplement aims to support certain approved providers of residential care to provide registered nurse care to care recipients. This assists approved providers in meeting their responsibility under subsection 54-1A(2) of the Aged Care Act, which is to ensure, at all times on and after 1 July 2023, there is at least one registered nurse (within the meaning of the *Health Insurance Act 1973*) on site, and on duty, at each residential facility through which the approved provider provides residential care (the 24/7 RN responsibility).

The registered nurse supplement recognises that meeting the 24/7 RN responsibility may be more difficult for an approved provider who is operating a residential facility that, on average, has few care recipients and receives relatively small amounts of basic subsidy that can be used to employ sufficient registered nurses to meet the 24/7 RN responsibility.

Consistent with this, since 1 July 2023 the registered nurse supplement has been payable to an approved provider in respect of residential care provided to care recipients at a residential facility that meets certain criteria ('qualifying facility').

The Government's intention since announcing the registered nurse supplement has been to continuously review eligibility for the supplement as better data becomes available on registered nurse coverage in residential care, including data about variation in coverage by location and by average numbers of care recipients.

Based on analysis of trends in registered nurse coverage data since 1 July 2023, the Amending Instrument will divide qualifying facilities into two groups of facilities.

Group A facilities will meet all of the following criteria for a payment period:

- the approved provider was not exempt from the 24/7 RN responsibility in section 54-1A of the Aged Care Act with respect to the facility
- the approved provider submitted a report about 24/7 RN responsibility at the facility in accordance with s 44B of the Accountability Principles
- the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period, is no more than 60. In effect, this means that there must be, on average, 60 or fewer residential care recipients per day over the payment period
- the total number of hours, on days during the period on which residential care was provided at the facility, that a registered nurse was not on site and on duty is no more than the number of days in a payment period multiplied by 3. In effect, this means that a facility must have a registered nurse on site and on duty for no less than 21 hours per day, on average, over the payment period.

The only difference between facilities that were qualifying facilities prior to the Amending Instrument coming into effect (previous qualifying facilities) and group A facilities is the criterion relating to the hours per day a registered nurse must be on site and on duty over a payment period (registered nurse coverage). The number of hours per day a facility can have a registered nurse not on site and on duty during a payment period has decreased from 4 hours per day on average for previous qualifying facilities, to 3 hours per day on average for group A facilities. During 2023-24 average registered nurse coverage at facilities potentially qualifying for the registered nurse supplement has increased such that very few are now providing less than 21 hours per of coverage, on average. In general, except for group B facilities discussed below, there is no longer a case to provide incentives to increase coverage if coverage is less than this benchmark.

Supplement rates for group A facilities remain the same as for previous qualifying facilities. That is, the amount of supplement payable to a group A facility is the same as the supplement amount that would have been payable to a previous qualifying facility with the same average number of residential care recipients per day during a payment period.

Group B facilities will meet all of the following criteria for a payment period:

- the approved provider was not exempt from the 24/7 RN responsibility in section 54-1A of the Aged Care Act with respect to the facility
- the approved provider submitted a report about 24/7 RN responsibility at the facility in accordance with s 44B of the Accountability Principles the total number of days of eligible residential care provided in respect of care recipients at the facility during

the period, divided by the number of days in the period, is no more than 30. In effect, this means there must be, on average, 30 or fewer residential care recipients per day over the payment period in order for this criterion to be met

- the total number of hours, on days during the period on which residential care was provided at the facility, that a registered nurse was not on site and on duty is more than the number of days in a payment period multiplied by 3, but no more than the number of days in the period multiplied by 12. In effect, this means that there must have been a registered nurse on site and on duty for between 12 hours per day up to 21 hours per day, on average, over a payment period.

Funding of a registered nurse supplement for group B facilities from 1 July 2024 was included in the 2023-24 MYEFO measure “Investing in aged care and disability support”. The effect of introducing group B facilities is to assist in funding registered nurse coverage in facilities with very few care recipients (that is, 30 or fewer care recipients per day, on average, during a payment period), who may otherwise seek an exemption from the 24/7 RN responsibility.

As a further incentive to approved providers operating such facilities to increase registered nurse coverage, a group B facility with the same average number of residential care recipients per day over a payment period as a group A facility will receive a lesser amount of registered nurse supplement than that group A facility.

For example, a group B facility with a street address in the Modified Monash (MM) category MM 5, MM 6 or MM 7 with between 25 to 30 care recipients per day over a payment period will receive \$16,523 in registered nurse supplement. A group A facility located in the same MM category with the same number of care residents per day over the payment period will receive \$33,045 in registered nurse supplement.

Group A facility and group B facility criteria are mutually exclusive, so that a facility cannot be both at the same time. For example, a residential facility with 30 or fewer care recipients per day, on average, during a payment period that satisfies all other group A facility criteria will qualify only as a group A facility, not as both a group A facility and a group B facility.

Authority

Under section 96-1 of the Aged Care Act, the Minister may, by legislative instrument, make Subsidy Principles providing for matters required or permitted by Parts 3.1, 3.2 and 3.3 of the Aged Care Act, or necessary or convenient, in order to carry out or give effect to those Parts.

Under section 96-1 of the Transitional Provisions Act, the Minister may, by legislative instrument, make Principles providing for matters required or permitted by the Aged Care Act, or necessary or convenient, in order to carry out or give effect to the Aged Care Act.

The Aged Care Act and the Transitional Provisions Act provide that, for each type of aged care, the Minister may determine the amount of particular components of subsidy and the amount of supplements payable to an approved provider for the provision of that type of aged care. Specifically, subsection 44-27(3) of the Aged Care Act and subsection 44-27(3) of the Transitional Provisions Act provide that the Minister may determine by legislative instrument, in respect of each other supplement applicable in the calculation of residential care subsidy, the amount of the supplement or the way in which the amount of the supplement is to be worked out.

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 Amending Instrument commences on 1 July 2024.

Consultation

Provider, workforce and consumer representatives were consulted about the 21 hours per day registered nurse coverage threshold for group A qualifying facilities at the 15 May 2024 meeting of the Residential Aged Care Funding Reform Working Group. Members of the group had been advised at previous meetings that changes to the coverage threshold were under consideration. No feedback was received from members.

Group B qualifying facilities were developed in part in response to correspondence from approved providers operating smaller residential facilities, and their representative bodies, that residential facilities with very few care recipients (that is, 30 or fewer care recipients, on average, during a payment period) reasonably require additional support to move toward 24/7 registered nurse coverage.

Impact Analysis

The Office of Impact Analysis has assessed the registered nurse supplement as having no more than minor impacts (OIA ID OIA23-04521).

General

The Amending Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amending Instrument are set out in **Attachment A**.

The Amending Instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

Details of the Aged Care Legislation Amendment (Registered Nurse Supplement) Instrument 2024

Section 1 - Name

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Registered Nurse Supplement) Instrument 2024* (Amending Instrument).

Section 2 - Commencement

Section 2 provides that the Amending Instrument commences on 1 July 2024.

Section 3 - Authority

Section 3 provides the authority for making the Amending Instrument is the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

Section 4 - Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Amending Instrument 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

Subsidy Principles 2014

Item 1 – Section 4

This item inserts the following definitions:

group A facility, for a payment period, is defined in subsection 70AM(1A).

group B facility, for a payment period, is defined in subsection 70AM(1B).

Item 2 – Subsection 70AM(1)

This item repeals subsection 70AM(1) and inserts three new subsections.

New subsection 70AM(1) provides that a residential facility is a qualifying facility for a payment period if it is a group A facility for the payment period or a group B facility for the payment period.

New subsection 70AM(1A) provides that a residential facility is a group A facility for a payment period if all of the following criteria are met:

- an exemption from section 54-1A of the Aged Care Act in relation to the facility is not in force at any time during the period
- a report in relation to the facility and the period has been submitted in accordance with section 44B of the *Accountability Principles 2014* (Accountability Principles)
- the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period, is no more than 60

- the total number of hours, on days during the period on which residential care was provided at the facility, that a registered nurse was not on site and on duty at the facility is no more than the number of such days in the period multiplied by 3.

New subsection 70AM(1B) provides that a residential facility is a group B facility for a payment period if all of the following criteria are met:

- an exemption from section 54-1A of the Aged Care Act in relation to the facility is not in force at any time during the period
- a report in relation to the facility and the period has been submitted in accordance with section 44B of the Accountability Principles
- the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period, is no more than 30
- the total number of hours, on days during the period on which residential care was provided at the facility, that a registered nurse was not on site and on duty at the facility is:
 - more than the number of such days in the period multiplied by 3, and
 - no more than the number of such days in the period multiplied by 12.

Notes to subsections 70AM(1A) and (1B) state that residential care might be provided at a facility through more than one residential care service. An example of this is where multiple residential care services operated by the same approved provider are co-located at the same address or on the same site.

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 3 – Section 64H

This item inserts the following definitions:

group A facility has the same meaning as in the Subsidy Principles 2014.

group B facility has the same meaning as in the Subsidy Principles 2014.

The effect is that group A and group B facilities are defined with reference to the definitions contained in new subsections 70AM(1A) and 70AM(1B) of the Subsidy Principles, respectively.

Item 4 – Subsection 64ZU(3)

This item amends subsection 64ZU(3) to insert references to new subsections 64ZU(6A) and (6B). As amended, subsection 64ZU(3) provides that, subject to subsection 64ZU(4), the *service supplement amount* for a payment period for a residential care service is the sum of the facility amounts, determined under subsections 64ZU(5), (6), (6A) and (6B) for each qualifying facility for the period during which days of eligible residential care are provided in respect of care recipients during the period through that service.

Together with subsection 64ZU (4), the effect of subsection 64ZU(3) is to ensure the total amount of registered nurse supplement payable in respect of a residential care service for a payment period (that is, the service supplement amount) takes into account certain characteristics of the qualifying facilities of the service. The characteristics taken into account

include the location of the qualifying facility and the average daily care count of the facility (as discussed further below in relation to subsections 64ZU(5), (6), (6A) and (6B)). This is consistent with the policy intention to vary the amount of supplement for approved providers for the provision of registered nurse care depending on where the facility is located and the average number of eligible care recipients receiving residential care during a payment period.

Item 5 – Subsection 64ZU(5) (at the end of the heading)

This item amends the heading of subsection 64ZU(5) to limit its application to group A facilities, defined in section 64H to have the same meaning as in the Subsidy Principles.

Item 6 – Subsection 64ZU(5) Item 7 – Subsection 64ZU(5) (table heading), Item 8 – Subsection 64ZU(6), Item 9 – Subsection 64ZU(6) (table heading)

These items amend subsections 64ZU(5) and (6) and the tables within those subsections to limit their application to group A facilities, defined in section 64H to have the same meaning as in the Subsidy Principles.

The effect of these amendments is to provide the facility amount payable to group A facilities in a payment period according to Modified Monash Model categories. The facility amounts set out in the tables differ depending on the average daily care count for the facility for the period. The facility amounts contained in the table have not been changed in this amending instrument.

Item 10 – After subsection 64ZU(6)

This item inserts two new subsections, 64ZU(6A) and (6B), which provide for the facility amount for group B facilities for a payment period according to MM categories.

New subsection 64ZU(6A) provides that the facility amount for a payment period, for a group B facility for the period with a street address in the MM category known as MM 1, MM 2, MM 3 or MM 4 (that is, group B qualifying facilities in metropolitan to regional areas), is \$14,249.

The table in new subsection 64ZU(6B) sets out the facility amount for a group B facility for the period with a street address in the MM category known as MM 5, MM 6 or MM 7 (that is, group B qualifying facilities in rural to very remote areas), and the amount, depending on the average daily care count, is as follows:

- where the average daily care count is less than or equal to 5, the facility amount is \$39,698 for the payment period
- where the average daily care count is more than 5 but less than or equal to 10, the facility amount is \$35,535 for the payment period
- where the average daily care count is more than 10 but less than or equal to 15, the facility amount is \$32,703 for the payment period
- where the average daily care count is more than 15 but less than or equal to 20, the facility amount is \$27,424 for the payment period
- where the average daily care count is more than 20 but less than or equal to 25, the facility amount is \$21,759 for the payment period, and
- where the average daily care count is more than 25 but less than or equal to 30, the facility amount is \$16,523 for the payment period.

Item 11 – Subsection 64ZU(7)

This item amends subsection 64ZU(7) to insert a reference to new subsection 64ZU(6B)—that is, to the group B facility amount for residential facilities in MM categories 5 to 7.

As amended, subsection 64ZU(7) provides that, for the purposes of subsections 64ZU(5), (6) and (6B), the average daily care count for a qualifying facility for a payment period is the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period.

Days of eligible residential care is defined in subsections 70AM(2) and (3) of the Subsidy Principles.

For subsection 64ZU(7), in circumstances where there are two or more residential care services providing residential care through one qualifying facility, the total service care days (see subsection 64ZU(2)) is calculated to produce the total number of days of eligible residential care provided in respect of care recipients at each facility during the period. This amount is then divided by the number of days in the period to identify the average daily care count.

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014

Item 12– Section 81

This item inserts the following definitions:

group A facility has the same meaning as in the Subsidy Principles.

group B facility has the same meaning as in the Subsidy Principles.

The effect is that group A facility, for a payment period, is defined in subsection 70AM(1A) of the Subsidy Principles and group B facility, for a payment period, is defined in subsection 70AM(1B) of the Subsidy Principles.

Item 13 – Subsection 91S(3)

This item amends subsection 91S(3) to insert references to new subsection 91S(6A) and (6B). As amended, subsection 91S(3) provides that, subject to subsection 91S(4), the *service supplement amount* for a payment period for a residential care service is the sum of the facility amounts, determined under subsections 91S(5), (6), (6A) and (6B) for each qualifying facility for the period during which days of eligible residential care are provided in respect of care recipients during the period through that service.

Together with subsection 91S(4), the effect of subsection 64ZU(3) is to ensure that the total amount of registered nurse supplement payable in respect of a residential care service for a payment period (that is, the service supplement amount) takes into account certain characteristics of the qualifying facilities of the service.

The characteristics taken into account include the location of the qualifying facility and the average daily care count of the facility (as discussed further below in relation to subsections 91S(5), (6), (6A) and (6B)). This is consistent with the policy intention to vary the amount of supplement for approved providers for the provision of registered nurse care depending on where the facility is located and the average number of eligible care recipients care receiving residential care during a payment period.

Item 14 – Subsection 91S(5) (at the end of the heading)

These items amend the heading of subsection 91S(5) to limit its application to group A facilities, defined in section 81 to have the same meaning as in the Subsidy Principles.

Item 15 – Subsections 91S(5), Item 16 – Subsection 91S(5) (table heading), Item 17 – Subsection 91S(6), Item 18 – Subsection 91S(6) (table heading)

This item amends subsections 91S(5) and (6) and the tables within those subsections to limit their application to group A facilities, defined in section 81 to have the same meaning as in the Subsidy Principles.

The effect of these amendments is to provide the facility amount payable to group A facilities in a payment period according to Modified Monash Model categories. The facility amounts set out in the tables differ depending on the average daily care count for the facility for the period. The facility amounts contained in the table have not been changed in this amending instrument.

Item 19 – After subsection 91S(6)

This item inserts two new subsections, 91S(6A) and (6B), which provide the facility amount for group B facilities for a payment period.

New subsection 91S(6A) provides that the facility amount for a payment period, for a group B facility for the period with a street address in the MM category known as MM 1, MM 2, MM 3 or MM 4 (that is, group B qualifying facilities in metropolitan to regional areas), is \$14,249.

The table in new subsection 91S(6B) sets out the facility amount for a group B facility for the period with a street address in the MM category known as MM 5, MM 6 or MM 7 (that is, group B qualifying facilities in rural to very remote areas), and the amount, depending on the average daily care count, is as follows:

- where the average daily care count is less than or equal to 5, the facility amount is \$39,698 for the payment period
- where the average daily care count is more than 5 but less than or equal to 10, the facility amount is \$35,535 for the payment period
- where the average daily care count is more than 10 but less than or equal to 15, the facility amount is \$32,703 for the payment period
- where the average daily care count is more than 15 but less than or equal to 20, the facility amount is \$27,424 for the payment period
- where the average daily care count is more than 15 but less than or equal to 20, the facility amount is \$21,759 for the payment period, and
- where the average daily care count is more than 25 but less than or equal to 30, the facility amount is \$16,523 for the payment period.

Item 20 – subsection 91S(7)

This item amends subsection 91S(7) to insert a reference to new subsection 91S(6B)—that is, to the group B facility amount for residential facilities in MM categories 5 to 7.

As amended, subsection 91S(7) provides that, for the purposes of subsections 91S(5), (6) and (6B), the average daily care count for a qualifying facility for a payment period is the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period.

Days of eligible residential care is defined in subsections 70AM(2) and (3) of the Subsidy Principles.

For subsection 91S(7), in circumstances where there are two or more residential care services providing residential care through one qualifying facility, the total service care days (see subsection 91S(2)) is calculated to produce the total number of days of eligible residential care provided in respect of care recipients at each facility during the period. This amount is then divided by the number of days in the period to identify the average daily care count.

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 Nurse Supplement) Instrument 2024

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 Nurse Supplement) Instrument 2024* (Amending Instrument) amends, with effect from 1 July 2024, aged care subordinate legislation for the *registered nurse supplement*, to provide more subsidy to approved providers of residential care for registered nurses providing, or directing the provision of, care to residential care recipients.

The supplement is separately enacted in substantially the same form for residential care recipients (who are subject to the *Aged Care Act 1997* (Aged Care Act) and its legislative instruments) and for continuing residential care recipients (who are subject to the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act) and its legislative instruments).

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014*
- *Aged Care (Subsidy, Fees and Payments) Determination 2014*
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*.

Human rights implications

The Amending Instrument, through amending the operation of the registered nurse supplement, engages the human rights to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD).

These Articles refer to the right of individuals, including persons with disability, to the highest attainable standard of physical and mental health. The amendments to the registered nurse supplement promote standards of living and the right to health by subsidising the provision of care delivered by registered nurses to residential care recipients.

Conclusion

The Amending Principles are compatible with human rights as it promotes the rights of care recipients to an adequate standard of living and the right to health.

The Hon Anika Wells MP
Minister for Aged Care