

Submission by the Australian Nursing and Midwifery Federation

ANMF Submission to the Community Affairs Legislation Committee Inquiry into the Aged Care Bill 2024 [Provisions]

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Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 326,000 nurses, midwives and care-workers across the country, many of whom work in the aged care sector.
2. The ANMF thanks the Community Affairs Legislation Committee for the opportunity to provide feedback on the Aged Care Bill 2024 [Provisions] (Bill). The ANMF has for many years campaigned for meaningful and substantive change in the aged care sector. We believe that this is a once in a generation opportunity for genuine reform. While the Bill represents a long-overdue improvement over the existing Aged Care Act 1997, some significant omissions remain. It would be disappointing if failure to undertake bold and fearless reform now simply results in the need for another Royal Commission at some point in the future.
3. The ANMF takes this opportunity to identify those omissions within, or relating to, the Bill and issues, which have not been adequately addressed in the draft legislation, but which would further strengthen the sector to the benefit of those who use aged care services and those who care for them. This submission addresses these issues as follows:
 - a. Workers are crucial to achieving the objects of the Act
 - b. Care minutes
 - c. Importance of Enrolled Nurses
 - d. Responsible Person Provisions
 - e. Removal of Criminal Sanctions
 - f. Regulation of the Care Worker Workforce
 - g. Code of Conduct for Aged Care
 - h. Worker Voice Provisions
 - i. Improving workforce planning and utilisation through Quality Standards
 - j. Quality Standards framework to clearly set a workforce benchmark
 - k. Fees, Payments and Subsidies



Workers are crucial to achieving the objects of the Act

4. The ANMF expresses considerable concern that the proposed Act fails to recognise the importance of the workforce and to make explicit provisions for setting a workforce quality standard outlining the basic conditions that should be provided to ensure workers are supported to deliver high-quality care and achieve the objectives of the Bill.
5. Workers are the backbone of the aged care system and if supported to do so, can supplement the regulation of aged care, enhance transparency of direct care funding, reduce the regulatory burden and increase the cost-effectiveness of system administration, by being the ‘eyes and ears’ that enhance regulatory processes. Without primary legislation, which requires regulation to determine the minimum numbers of workers needed to deliver high quality care, provides workers with legitimate real time pathways to report risk to older people through understaffing, and avoids penalising workers for decisions outside their control, older people will remain at risk.
6. While this legislation commendably focuses on a rights-based system for older Australians, the ANMF remains concerned that the rights of the aged care workforce are still not addressed or supported, and that this in turn will hinder the delivery of high-quality care. Workers see employers persistently fail to meet mandatory direct care requirements with little or no regulatory consequence. The ANMF and its members are calling for an Aged Care Act which enables and requires the regulator to hold providers to account for meeting their obligations related to workforce management. However, in its current form, the Bill risks being less about care recipients and the workers, who provide that care, and more about provider’s business interests.
7. There is clear evidence of a disconnect between the aged care regulator and the day-to-day operation of the aged care sector. There is nothing in this Bill that closes this gap. It is imperative that the legislation contains specific obligations, which require the system regulator to engage workers as key stakeholders informing the risk based regulatory system. This can only occur if provided for in primary legislation. Supporting workers would seek, not to disempower registered providers, but to reward those who do the right thing and help identify those that don’t. For example:
 - a. A New South Wales aged care facility was found to be fully compliant with workforce requirements by the system regulator in March 2023 and is not planned for a re-accreditation review until 2026. However, workers at the facility made several reports on the Aged Care Watch¹ website during 2024 citing chronic staffing shortfalls leading to workers having to perform duties outside their scope of practice, residents left soiled for extended periods and resident injury.

¹ <https://www.agedcarewatch.org.au/#/tracker/aged-care-watch-tracker/landing/Home>



- b. A Queensland aged care facility either was not assessed against standards including human resources or found compliant across those domains in July 2023 by the system regulator with no improvements recommended. At the same time Aged Care Watch contained reports of chronic understaffing and dangerous single handling of residents needing two to assist, with reports that management had dismissed workers concerns. During the period August 2021 to March 2024, including at the time of the system regulators shortened audit, there were 54 reports detailing understaffing, staff doing unpaid work, double shifts, acting outside their scope of practice, distressed residents, residents left soiled for extended periods and not receiving adequate care.
8. The information published via Aged Care Watch, a public facing website based on the real-world experiences of workers, families and those receiving aged care services, challenges information, typically gathered from aged care providers, published through official Department channels. The disparities revealed through this comparison undermine and reduce public confidence in the regulatory system. It is imperative that the role of workers, as active participants in the regulatory system, is enshrined through the Bill to ensure consumers can have confidence in the aged care system and are not forced to seek and rely on alternative sources of information to determine provider performance.
9. The Statement of Rights for older people in the Bill fundamentally underpins the Bill, but omits to account for funding of workers, through direct care minutes or otherwise, to provide care as a pre-requisite to the rights of older people. The wording in Section 23 should be amended to reflect this. Additionally, the ordering of that point suggests it is the registered providers, not the workers who should have appropriate qualifications, skills and experience. Whilst we agree, we believe this is not the intent of that point and should be re-framed to include:
 - a. *23(d)(iii) by sufficient numbers of aged care workers who have appropriate qualifications, skills and experience, employed by registered providers.*

Care Minutes

10. The Royal Commission recommended that care minutes be an area of mandate not of guidance and the government has accepted this recommendation. The ANMF is therefore highly concerned that the Bill in its current form excludes direct mention of care minutes. We are further concerned that the Bill currently lacks a robust and enforceable requirement for registered providers to *employ adequate numbers* of well-trained and supported staff to deliver high quality direct care. Relegating direct care minutes to the Rules provides less robust measures for transparency, compliance, and enforcement of direct care requirements and increases regulatory burden, which in turn raises the cost to the taxpayer of system administration. Current regulatory mechanisms are not fit for purpose; they do not impose specific obligations on providers to ensure transparency regarding care minute compliance and have minimal direct consequences for providers and, while not the intention, increase risks for older people.



11. The ANMF has identified several potential points where the Bill could be strengthened to ensure high quality care can be achieved whilst simultaneously reducing expenditure on system administration and regulation, rewarding providers who do the right thing, and providing enhanced safeguards for older people.
12. The Bill's definition of high-quality care (Section 20) contains important provisions but fails to include the need for sufficient numbers of workers, and for those workers to be able to raise concerns about poor quality care, as conditions of high-quality care. This is a fundamental omission. As recognised by the Royal Commission, without enough workers to deliver care, the provision of high-quality care is unachievable. Hence the recommendation and subsequent implementation of mandatory direct care minutes. Section 20 should be amended to include the following provisions:
 - a. *(xiii) the delivery of high-quality nursing services by sufficient numbers of qualified and experienced direct care workers.*
 - b. *(xiv) empowers aged care workers to raise concerns.*
13. Reportable incident categories are prescribed in Section 14, *16 Meaning of a reportable incident* including neglect and restrictive practices. An additional category could be added to enable real-time reporting of poor-quality care arising from failure to comply with direct care minutes:
 - a. *i) Failure to deliver high quality care arising from understaffing.*
14. Section 176 *Delivery of direct care* should be expanded to provide clarity on specific obligations relative to care minute funding. The wording should be enhanced to include additional sub-headings as follows:
 - a. *A registered provider of a kind prescribed by the rules must deliver direct care in accordance with any requirements prescribed by the rules, including, but not restricted to: (a) the number and skill mix of direct care workers, (b) reporting on allocation of funding provided for direct care, (c) arrangements for governance of direct care funding, including how aged care workers contribute to feedback.*

Importance of Enrolled Nurses

15. In addition to direct care time, the ANMF advocates for the inclusion of provisions in the primary legislation to halt and reverse the significant reduction in enrolled nurse (EN) care minutes observed throughout the sector. While allowing providers to use a portion (10%) of the care time allotted to registered nurses for direct care from ENs might go some way towards supporting ENs in the sector, section 176 should be amended to better acknowledge the important role of ENs in delivering high-quality aged care.



Responsible Person Provisions

16. The ANMF remains highly concerned that the meaning of a responsible person is neither sufficiently robust nor defined to ensure that registered nurses, who are managing day-to-day direct care in an operational sense but have no organisational authority, are excluded from this definition. This must be rectified in the final legislation to prevent nurses, without overall decision-making authority, being inadvertently subject to the specific obligations under this section.
17. The ANMF recommends that 'day to day' management is clearly defined to ensure it does not contradict the executive level responsibilities that are outlined throughout the Bill when referring to 'responsible person'.
18. Our members report many instances where they are unable to comply with their professional obligations and expected standards of practice or to provide safe care as a direct result of decisions made by their employers over which they have no control. It is employers who create the conditions under which nurses and aged care workers operate, but all too often the risks and consequences of these conditions are shifted to the individual, with little scrutiny of employer policies and decisions. Examples of this include nurse to resident ratios of one registered nurse to 60 residents at night leading to missed or unsafe care (despite the RN24/7 and care minutes mandates); and, employers in some states illegally directing care workers, who are under the supervision of registered nurses, to administer medications including dangerous drugs of addiction to residents.

Removal of Criminal Sanctions

19. The ANMF is concerned that criminal sanctions for the most egregious acts have been removed from the bill in preference to an all-civil penalties approach. While the significant civil penalties proposed in the Bill are welcomed, the ANMF believes that criminal sanctions are necessary to deter some of the most extreme abuse (physical, sexual, and restrictive) that the Royal Commission into Aged Care Quality and Safety uncovered. While it is hoped these sanctions would be rarely used, the capacity to use these penalties must be part of regulatory pathways.

Regulation of the Care Worker Workforce

20. The ANMF is concerned that there has been a failure to adopt a robust, Australian Health Practitioner Regulation Authority (Ahpra) based regulation scheme for the currently unregulated aged care workforce. We believe that the weaker alternative proposals again miss an opportunity to improve the capacity and capability of the currently unregulated carer workforce, drive quality of care and enhance the safety of those using the aged care system.



Code of Conduct for Aged Care

21. The ANMF does not support the inclusion of the Aged Care Code of Conduct for aged care workers (specified in Subdivision B) due to its overlap with and unnecessary duplication of existing, and clearly superior, Codes and Standards of Practice for Registered Health Professionals. Instead of the Code applying only to non-registered workers, a comprehensive positive registration scheme for care workers through Ahpra should be implemented. This approach would allow for recognition of various state-based Codes for unregistered health workers while maintaining and enhancing national consistency. This approach would provide greater safety and assurance for aged care service recipients, workers, and the wider community via a tried and tested approach and experienced regulatory body.
22. The civil penalties attached to the Code in sections 173 and 174 may deter individuals from working in the aged care sector and hinder transparent reporting due to fear of unreasonable consequences. Removing these sections would help to address some of the prevalent and continuing problems in attracting and retaining staff in the sector.
23. Under the Code of Conduct aged care workers are required to promptly raise and act on concerns that may affect the quality and safety of care. Failure to do so may result in a banning order. However, the current absence of appropriate pathways to achieve this while simultaneously imposing career limiting penalties doubly disadvantages workers leaving them less empowered and at greater risk. This contradicts the objects of the Bill and the intent of the code of conduct.
24. Registered Nurses (RNs) and Enrolled Nurses (ENs) should be removed from those required to comply with the aged care code of conduct given they are already required to comply with overlapping professional codes of conduct. The ANMF has dealt with several instances where, for example, nurses have had matters finalised by the Nursing and Midwifery Council (NMC) and NSW Healthcare Complaints Commission (HCCC) only to have the aged care regulator contact the nurse seeking to investigate and revisit the same issues requesting a response and interview. It is administratively wasteful to have the same issues dealt with by several regulators, notwithstanding the unwarranted personal stress this causes nurses. The Bill must include provisions which avoid duplication or overlap of requirements relating to RNs and ENs, ideally excluding them from the aged care code of conduct obligations.
25. The Bill includes several conditions of registration, which a registered provider must comply with relative to care workers. However, the Bill does not currently make the empowerment of workers to raise concerns a condition of provider registration. This is a fundamental flaw, which could have a direct impact on the ability of the sector to meet the objectives of the Bill and which reduces transparency relative to care minute funding. Additional points should be added to subdivision E – *Conditions relating to aged care workers, 152 Workforce and aged care workers requirements* which provide for compliance with care minute funding, and which empower workers to raise non-compliance in good faith.



Worker Voice Provisions

26. The ANMF expresses significant disappointment over the planned abandonment of provisions for a Worker Voice and Quality Care Advisory Body. Such a body would have been crucial for integrating worker feedback into the delivery of aged care services. Its absence creates a gap that may allow unscrupulous providers to continue to evade their responsibilities, ultimately undermining care quality and worker conditions. The Government's abandonment of the Worker Voice provision – while still written in the current version of the Bill – is a move that sees the Bill undervaluing the worker.
27. Abandonment of the Worker Voice provision significantly undermines the objects and principles of a rights-based aged care act and the capacity for the new legislation to achieve lasting reform in the aged care sector. Additionally, it misses the opportunity to embed real-time reporting of poor-quality care, raise transparency in the way direct care funding is spent and support the ability of the system regulator to determine risk, rewarding those providers who do the right thing, by working with the aged care workforce, as the backbone and 'eyes and ears' of the sector, to support the achievement of genuine reform.
28. Abandonment of the Worker Voice provision does little to signal to aged care workers that their role is important and supported by government and regulators, while failing to offer robust alternative mechanisms.

Improving workforce planning and utilisation through Quality Standards

29. It is a condition of registration that providers comply with the Quality Standards. The Bill may require the system regulator to set Quality Standards, and the Bill identifies several matters which may be prescribed. However, this capacity excludes provision for the setting of numbers of workers, through direct care minutes or otherwise. The ANMF considers this a missed opportunity to ensure the system regulator can provide effective oversight of providers to deliver direct care minute requirements and funding and promulgate standards that meet the care needs of older Australians.
30. To address this matter an additional item should be included in Section 14, point 15 - Aged Care Quality Standards (2) (i) how registered providers must ensure sufficient numbers of qualified and experienced direct care staff members are available to deliver high quality nursing services.
31. Further, given the current poor compliance of many service providers in meeting care minutes requirements, it is essential that the Bill provides for robust mechanisms to increase provider care minute compliance within the sector. The ANMF has consistently advocated for this to be addressed through the Strengthened Quality Standards. The Strengthened Quality Standards must require Organisations to deliver quality care and services through ensuring that:
 - a. Nurses are provided with a working environment which enables and supports them to practice within professional frameworks.
 - b. Nurses and care workers are enabled and encouraged to identify situations which compromise professional standards and the aged care quality standards.
 - c. There is a system in place to ensure matters are reported and resolved within 24 hours.



- d. Employees are enabled to undertake training and education which addresses the following:
 - i. Direct care workers are provided in sufficient numbers and skills mix to meet the assessed needs of the resident cohort but not less than those numbers required through minimum care minute funding and other legislation.
 - ii. Direct care workers are provided opportunities to raise issues of concern relevant to staffing and skills mix with the regulatory authority and workforce representatives.
 - iii. Employees are educated with regard to whistleblowing policies and procedures and are enabled to raise concerns in good faith and protected against reprisal.
 - iv. Robust compliance measures are in place to ensure that employers/service providers create and maintain workplaces that foster these key workforce elements.

32. The ANMF also draws attention to the importance of appointing nursing-specific roles within Commission staff (Chapter 5) to enhance representation as a significant concern. Here, we advocate for the Chief Clinical Advisor to possess relevant clinical qualifications and aged care experience. We furthermore call for the establishment of a First Nations Aged Care Commissioner enshrined in legislation, who should have statutory powers to ensure independence and transparency.

Fees, Payments and Subsidies

33. Overall, the ANMF calls for greater transparency, accountability, and equitable access within the proposed aged care framework. In regard to Chapter 4, we have significant concerns about the Government's intent to increase consumer contributions to aged care funding. We believe this proposal undermines the principles of universality and equity in Australian health care. This Chapter marks the first opportunity for the ANMF to comment on the proposed funding mechanisms, which we highlight could be complex and potentially challenging for smaller providers to implement. While the Aged Care Taskforce did not advocate for new taxes, alternative funding methods would be preferable, such as a modest levy on financial trading, which could alleviate the burden on low- and middle-income families.
34. Aged care should be publicly funded and owned, particularly as the sector relies heavily on taxpayer support and should provide equitable access. The proposed and illogical separation of clinical and non-clinical care also creates an unnecessary distinction that can lead to financial burdens for residents while undermining comprehensive care. It is also unclear how this illogical separation will be funded and how it will impact the time nurses and care workers have to provide care. We recommend that legislation be amended to ensure holistic care is publicly funded.
35. The potential for a two-tiered system emerging from the proposed means-testing and the ability of providers to increase Refundable Accommodation Deposits (RADs) could lead to inequitable access to care. The lack of transparency regarding these increases and the financial implications for residents necessitates clearer guidelines to ensure fairness. Here, the Bill's provisions seem inadequate in supporting low-income residents, risking financial discrimination and exclusion from necessary services. There must be clear, detailed safeguards to ensure equal access for individuals regardless of their financial means.



Conclusion

36. The ANMF supports the new Aged Care Act as a long overdue replacement for the existing Aged Care Act 1997 and a once in a generation opportunity for genuine reform. However, some significant omissions remain. The ANMF reiterates its concern that our members will be extremely disappointed if failure to undertake bold and fearless reform now simply results in the need for another Royal Commission at some point in the future.
37. We believe the Government has not gone far enough to ensure that the legislation will drive a sustainable, accountable and high-quality aged care system that benefits all older Australians seeking or receiving aged care services, service providers, aged care workers, government and regulators.
38. The Act must recognise the critical importance of the workforce and make explicit provisions to ensure workers are supported to deliver high-quality care and achieve the objectives of the Act. It must reflect the role of aged care workers as honest brokers in how the aged care system is structured, run and regulated to enable a sustainable, quality and fit for purpose aged care system.