



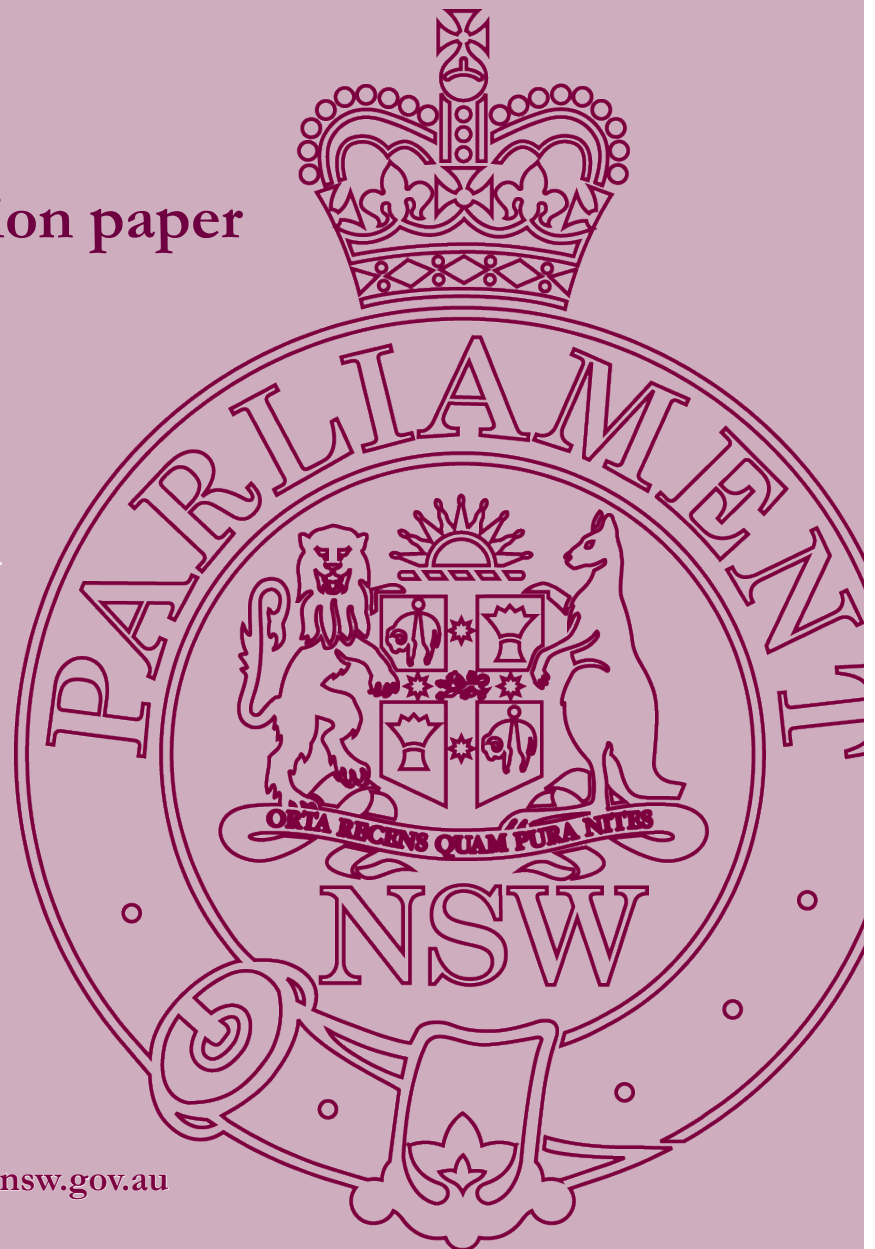
LEGISLATIVE COUNCIL

SELECT COMMITTEE ON THE PROVISIONS OF THE PUBLIC HEALTH
AMENDMENT (REGISTERED NURSES IN NURSING HOMES) BILL 2020

Provisions of the Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2020

Discussion paper

February 2021



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Select Committee on the Provisions of the Public Health
Amendment (Registered Nurses in Nursing Homes) Bill 2020

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Terms of reference

1. That a select committee be established to inquire into and report on the provisions of the Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2020, and in particular:
 - (a) the need to have a registered nurse on duty at all times in nursing homes and other aged care facilities with residents who require a high level of residential care,
 - (b) the impact registered nurses have on the safety and dignity of people in care,
 - (c) the impact on residential care of a lack of registered nursing staff on duty in a nursing home or other aged care facility at all times,
 - (d) the need for further regulation and minimum standards of care and appropriate staffing levels in nursing homes and other aged care facilities,
 - (e) the administration, procurement, storage and recording of medication by non-registered nurses in nursing homes and other aged care facilities with residents who require a high level of residential care, as compared with hospital clinical settings,
 - (f) the potential for cost-shifting onto other parts of the public health system as a result of any legislative change to the current provisions for care in nursing homes or other aged care facilities,
 - (g) the role of registered nurses in responding to critical incidents and preventing unnecessary hospital admissions and unnecessary ambulance call outs and the consequent effect of this upon the provision of ambulance services to the wider community,
 - (h) the lessons that can be learnt in New South Wales from the impact of the COVID-19 crisis on private aged care facilities where staffing ratios are not mandated, and
 - (i) any other related matter.

The terms of reference were referred to the committee by the Legislative Council on Wednesday 21 October 2020.¹

¹ *Minutes*, NSW Legislative Council, Wednesday 21 October 2020, pp 1484-1486.

Committee details

Committee members

The Hon Courtney Houssos MLC	Australian Labor Party	<i>Chair</i>
The Hon Mark Banasiak MLC	Shooters, Fishers and Farmers Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC*	The Greens	
The Hon Wes Fang MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
The Hon Taylor Martin MLC	Liberal Party	
The Hon Daniel Mookhey MLC	Australian Labor Party	
The Hon Mark Pearson MLC	Animal Justice Party	

* Ms Cate Faehrmann MLC substituted for Ms Abigail Boyd MLC from 20 January 2021 for the duration of the inquiry.

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Discussion paper

Introduction

- 1.1 The Select Committee on the Provisions of the Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2020 was established by the House on 21 October 2020. The terms of reference can be found on p iv.
- 1.2 The object of the Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2020 is to ensure that the requirement in New South Wales for a registered nurse to be on duty in a nursing home at all times is continued, by updating the definition of nursing home so that it is consistent with the terminology used under federal legislation.
- 1.3 This discussion paper provides background to the inquiry and aims to assist witnesses ahead of hearings to be held in February and March 2021.
- 1.4 The paper first provides an overview of the legislative framework governing aged care in New South Wales. In particular, it sets out how the federal legislation affects the operation of the state requirement for a registered nurse to be on duty in a nursing home at all times. The paper then provides a summary of the key themes arising from the Royal Commission into Aged Care Quality and Safety with a focus on staffing issues. Finally, the paper provides an overview of the recommendations of and government response to the 2015 inquiry into registered nurses in nursing homes conducted by the NSW Legislative Council General Purpose Standing Committee No. 3.

Legislative framework for aged care in New South Wales

- 1.5 Aged care is a federal responsibility in Australia, with the Australian Government primarily responsible for its funding and regulation. In New South Wales, residential aged care facilities are also subject to state legislation, including public health laws and laws governing the dispensation of medicine.
- 1.6 This section sets out the federal and New South Wales legislation in relation to aged care, and how the two legislative frameworks interact.

Federal legislation

- 1.7 At the federal level, the *Aged Care Act 1997* (Cth), *Aged Care Quality and Safety Commission Act 2018* (Cth) and *Aged Care Principles* provide the legislative framework for the funding and regulation of aged care. The *Aged Care Act* sets out the requirements for the approval of providers, quality of care and the rights of people receiving care, and applies to the states and territories.

1.8 The term 'aged care' is defined in the *Aged Care Act* as including residential care, home care, and flexible care. Section 41-3 defines 'residential care' as personal and/or nursing care that is provided in a residential facility. The section also clarifies what is not considered to be residential care:

- (1) **Residential care** is personal care or nursing care, or both personal care and nursing care, that:
 - (a) is provided to a person in a residential facility in which the person is also provided with accommodation that includes:
 - (i) appropriate staffing to meet the nursing and personal care needs of the person; and
 - (ii) meals and cleaning services; and
 - (iii) furnishings, furniture and equipment for the provision of that care and accommodation; and
 - (b) meets any other requirements specified in the Subsidy Principles.
- (2) However, residential care does not include any of the following:
 - (a) care provided to a person in the person's private home;
 - (b) care provided in a hospital or in a psychiatric facility;
 - (c) care provided in a facility that primarily provides care to people who are not frail and aged;
 - (d) care that is specified in the Subsidy Principles not to be residential care.

1.9 Under section 3-1, the Australian Government provides financial support through the payment of subsidies for the provision of aged care, as well as relevant grants. The process for the allocation of aged care places is set out in section 11-1 of the *Aged Care Act*:

An approved provider can only receive *subsidy for providing residential care or flexible care in respect of which a *place has been allocated. The Commonwealth plans the distribution between *regions of the available places in respect of the types of subsidies. It then invites applications and allocates the places to approved providers.

1.10 The Act also sets out the responsibility of approved providers in chapter 4. These concern:

- the quality of care provided
- user rights for those who receive care
- accountability for the care that is provided and for the suitability of key personnel.

1.11 In particular, section 54-1 of the *Aged Care Act* establishes the responsibilities of approved providers in relation to the quality of aged care. Section 54-1(b) requires that providers 'maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met'.

- 1.12** Subordinate to the *Aged Care Act* are 17 legislative instruments known as the Aged Care Principles, including the *Quality of Care Principles 2014* and the *User Rights Principles 2014*. The Aged Care Principles provide further detail on the rules for government-funded aged care including: funding; regulation; approval of providers; subsidies and fees; standards; quality of care; rights of people receiving care; and non-compliance. These regulatory arrangements apply to all approved providers operating under the *Aged Care Act*.
- 1.13** Approved providers must also comply with eight Aged Care Quality Standards: consumer dignity and choice; ongoing assessment and planning with consumers; personal care and clinical care; services and support for daily living; organisation's service environment; feedback and complaints; human resources; and organisational governance.
- 1.14** All aged care services funded by the Australian Government must meet the Aged Care Quality Standards to qualify for funding. Each quality standard includes a statement of the outcome to be realised for the consumer, expectations of the provider and requirements to be achieved. Human resources are the focus of Standard 7 which requires that: 'The organisation has a workforce that is sufficient, and is skilled and qualified to provide safe, respectful and quality care and services.'²
- 1.15** As a result, individuals are to receive quality care and services when needed 'from people who are knowledgeable, capable and caring'.³ In order to deliver this outcome, a number of requirements are specified:
- a. The workforce is planned to enable, and the number and mix of members of the workforce deployed enables, the delivery and management of safe and quality care and services.
 - b. Workforce interactions with consumers are kind, caring and respectful of each consumer's identity, culture and diversity.
 - c. The workforce is competent and members of the workforce have the qualifications and knowledge to effectively perform their roles.
 - d. The workforce is recruited, trained, equipped and supported to deliver the outcomes required by these standards.
 - e. Regular assessment, monitoring and review of the performance of each member of the workforce.⁴
- 1.16** It is important to note that the federal legislative framework does not currently mandate minimum staffing levels for residential aged care.

² Australian Government, Aged Care Quality and Safety Commission, *Aged Care Quality Standards*, Standard 7(2) – Human Resources, p 4.

³ Australian Government, Aged Care Quality and Safety Commission, *Aged Care Quality Standards*, Standard 7(1) – Human Resources, p 4.

⁴ Australian Government, Aged Care Quality and Safety Commission, *Aged Care Quality Standards*, Standard 7(3) – Human Resources, p 4.

New South Wales legislation

- 1.17** In New South Wales, aged care facilities are subject to state legislation, most notably, the *Public Health Act 2010* (NSW). Section 104 currently requires a nursing home to have a registered nurse on duty at all times:
- (1) A person who operates a nursing home must ensure that—
- (a) a registered nurse is on duty in the nursing home at all times, and
 - (b) a registered nurse is appointed as a director of nursing of the nursing home, and
 - (c) any vacancy in the position of director of nursing of the nursing home is filled within 7 days.
- 1.18** In addition, Section 104(2) provides that the regulations may prescribe the minimum qualifications to be held by a director of nursing at a nursing home. Clause 95 of the *Public Health Regulation 2012* (NSW) sets out the minimum requirements for a director of nursing at a nursing home, which include five years post-basic or post-graduate nursing experience and two years of experience in a management position in a hospital.
- 1.19** The requirement for a registered nurse to be on duty at all times in a nursing home is a longstanding one in New South Wales. Prior to the introduction of the *Aged Care Act 1997* (Cth), nursing homes were regulated by the states. Section 39 of the *Nursing Homes Act 1988* (NSW) required a registered nurse to always be on duty in a nursing home. The definition of ‘nursing home’ at the time was much broader than it is now and included not only aged care facilities but any premises at which nursing care was provided to residents.
- 1.20** The *Nursing Homes Act* was repealed by the *Health Legislation Further Amendment Act 2004* (NSW) due to the Australian Government having introduced the *Aged Care Act 1997*. The federal legislation created a situation where nursing homes in New South Wales at the time were regulated by both the NSW and Australian governments. The *Nursing Homes Act* was thus viewed as adding an ‘additional and unnecessary layer of regulation’ to the ‘comprehensive funding and regulatory regime for aged care facilities’ already provided by the Australian Government.⁵
- 1.21** Nonetheless, some of its provisions were retained. The *Health Legislation Further Amendment Act 2004* (NSW) amended the *Public Health Act 1991* (NSW) (the predecessor to the current *Public Health Act 2010* (NSW)) so as to continue the staffing requirements of the *Nursing Homes Act*, including that a registered nurse always be on duty, as the federal legislation did not include requirements for minimum nurse staffing.

⁵ Morris Iemma, Second reading speech: Health Legislation Further Amendment Bill 2004, 22 September 2004.

The interaction between federal and New South Wales legislation on the requirement for registered nurses in nursing homes

- 1.22** Nursing homes have traditionally been viewed as facilities for those with high care needs. However, use of the term ‘nursing home’ has decreased recently as the terminology used in the aged care sector has moved away from the clinical language of ‘nursing home’ towards that of ‘residential care’ or ‘in-home care’. This shift in terminology at the federal level, and the ending of a distinction between high and low care, has had a number of repercussions for the *Public Health Act 2010* (NSW) which uses terms that to some extent are no longer current.
- 1.23** A ‘nursing home’ is currently defined in Section 5(1) of the *Public Health Act 2010* (NSW) as:
- a facility at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided, being—
- (a) a facility at which that care is provided in relation to an allocated place (within the meaning of that Act) that requires a high level of residential care (within the meaning of that Act), or
 - (b) a facility that belongs to a class of facilities prescribed by the regulations.
- 1.24** The definition of ‘nursing home’ thus relies on how ‘residential care’, ‘allocated place’ and ‘high level of residential care’ are defined in the *Aged Care Act 1997* (Cth).
- 1.25** Care recipients that are approved for residential care under the *Aged Care Act 1997* are classified according to the level of care needed, with reference to the Classification Principles.
- 1.26** Prior to 1 July 2014, the *Aged Care Act 1997* had defined a ‘high level of residential care’ by the meaning given to it by the Classification Principles. The *Classification Principles 1997* (Cth) (in force until 1 July 2014) had defined a ‘high level of residential care’ as:
- residential care given to a care recipient whose classification level:
- (a) includes the following domain categories or combinations of domain categories:
 - (i) a high ADL [Activities of Daily Living] domain category; or
 - (ii) a high CHC [Complex Health Care] domain category; or
 - (iii) a domain category of medium or high in at least two of the three domain categories; or
 - (iv) a high behaviour domain category and either an ADL domain category other than nil or a CHC domain category other than nil; or
 - (b) is high level residential respite care.

- 1.27 However, in 2013 the *Aged Care Act 1997* (Cth) was amended to remove the distinction between low and high levels of residential care.⁶ Consequently, the *Classification Principles 2014* (Cth) did not include a definition for ‘high level of residential care’.
- 1.28 As a result, Section 104 of the *Public Health Act 2010* became inoperable. There was no longer a distinction between nursing homes, which provided for those who required a high level of residential care, and hostels, which provided a low level of care.
- 1.29 In response, the NSW Government agreed to maintain mandated minimum nursing requirements for facilities formerly designated as high care.⁷ It achieved this by inserting clause 95A into the *Public Health Regulation 2012*. Clause 95A clarified that a facility that was a nursing home for the purposes of the Act immediately before 1 July 2014 was to be prescribed as a nursing home for the purposes of section 5(1)(b) of the *Public Health Act 2010*. This was to ensure that certain facilities would continue to be nursing homes for the purposes of the *Public Health Act 2010* despite amendments to the *Aged Care Act 1997* (Cth).
- 1.30 This has since created a divide in the system, with a distinction between those facilities that commenced operation after 2014 and those that existed prior. The term ‘nursing home’ in New South Wales has in many ways come to refer to facilities that were previously classed as providing a high level of residential care under the Australian Government’s former classification system.⁸ Whilst residential aged care facilities that have been established since 2014 may decide to have a registered nurse on duty 24 hours a day, they are not bound by section 104 of the *Public Health Act 2010*.

Proposed federal reforms

- 1.31 Arguments have been made at the federal level for greater clarity concerning the minimum number of nursing staff required in residential aged care facilities, along with minimum staff to patient ratios, and necessary qualifications. Counsel Assisting the current Royal Commission into Aged Care Quality and Safety released their final submissions in October 2020 on the Commission’s proposed recommendations, including recommendations on staffing issues, discussed further at p 9.
- 1.32 This issue was also considered by the House of Representatives Standing Committee on Health, Aged Care and Sport which conducted an inquiry into the quality of care in residential aged care facilities in Australia, publishing its report in October 2018. The committee noted that ‘the legislative requirements for staffing of residential aged care facilities are left to the determination of aged care providers’.⁹ However, it felt that a registered nurse should be available at an aged

⁶ See the *Aged Care (Living Longer Living Better) Act 2013* (Cth). For a detailed discussion of the ‘Living Longer Living Better’ reforms see: Rebecca de Boer and Peter Yeend, *Aged Care (Living Longer Living Better) Bill 2013*, Bills Digest No 106, 9 May 2013.

⁷ Standing Committee on Community Affairs, Australian Senate, *Future of Australia’s Aged Care Sector Workforce* (2017), p 58.

⁸ General Purpose Standing Committee No. 3, NSW Legislative Council, *Registered nurses in New South Wales nursing homes* (2015), p 1.

⁹ Standing Committee on Health, Aged Care and Sport, Australian House of Representatives, *Quality of care in residential aged care facilities in Australia* (2018), p 35.

care facility at all times unless it can be demonstrated that the 'resident mix or size of a facility' does not warrant compliance with this standard.¹⁰

1.33 The committee made 14 recommendations, including recommendation 4 which sought to legislate that at least one registered nurse be available at a residential aged care facility at all times:

The Committee recommends that the Australian Government:

- legislate to ensure that residential aged care facilities provide for a minimum of one Registered Nurse to be on site at all times; and
- specifically monitor and report on the correlation between standards of care (including complaints and findings of elder abuse) and staffing mixes to guide further decisions in relation to staffing requirements.¹¹

1.34 This recommendation was reiterated by the committee in its advisory report on the *Aged Care Amendment (Staffing Ratio Disclosure) Bill 2018* (Cth) in December 2018.

1.35 The Australian Government responded to the inquiry report in October 2019. The Government 'noted' recommendation 4 but emphasised the need for flexibility in staffing levels across the aged care sector, stating that recommendation 4:

...does not account for the differing levels of support that different care recipients need. The relationship between staffing and the quality of care provided is complex and there is considerable diversity in personnel arrangements across accredited homes in Australia. This is to be expected given the variation across the sector including the nature of the residents' needs, facility size and design, the way work is organised and the extent to which some services are conducted in-house or outsourced. Consequently, there is no particular staffing mix which meets the circumstances of all care recipients in residential care facilities.¹²

1.36 It also highlighted the flexibility offered by Standard 7, Human Resources of the Aged Care Quality Standards with its requirement that an organisation have a workforce that is sufficient, skilled and qualified to provide safe, respectful and quality care and services.¹³

1.37 The Senate Community Affairs References Committee commenced an inquiry in 2017 into the effectiveness of the aged care quality assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical medical care standards are maintained and practised.

¹⁰ Standing Committee on Health, Aged Care and Sport, *Quality of care in residential aged care facilities in Australia*, p 59.

¹¹ Standing Committee on Health, Aged Care and Sport, *Quality of care in residential aged care facilities in Australia*, p 52.

¹² Australian Government response to the House of Representatives' Standing Committee on Health, Aged Care and Sport Report on the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia, October 2019, p 6.

¹³ Australian Government response to the House of Representatives' Standing Committee on Health, Aged Care and Sport Report on the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia, October 2019, p 7.

- 1.38** In its April 2019 report, the committee agreed on the need for a diverse range of aged care staff, as well as the requirement for registered nurses to be on duty at all times: 'The committee notes there is a consensus view that staffing levels should be based on residents' care needs and the service context, and should be sufficient to provide an appropriate number of care hours per day from a range of appropriately qualified staff.'¹⁴ The committee thus recommended that:

...the Aged Care Quality and Safety Commission work collaboratively with the Department of Health, the Australian Commission on Safety and Quality in Health Care and aged care stakeholders to develop benchmarks for staffing levels and skills mix, which includes the requirement to roster a Registered Nurse on duty at all times, to assist residential aged care providers in staff planning and aged care assessors in regulating safe and appropriate staffing (recommendation 8).¹⁵

- 1.39** The response of the Australian Government in June 2020 noted this recommendation and the importance of adequate, skilled staff in residential aged care. The government recognised the need for further collaborative work in this area and highlighted the establishment of the Aged Care Workforce Industry Council for this purpose.¹⁶

Royal Commission into Aged Care Quality and Safety

- 1.40** The Royal Commission into Aged Care Quality and Safety was established on 8 October 2018 and is due to hand down its final report by 26 February 2021.
- 1.41** The Commission published an interim report on 31 October 2019, which summarised the evidence to date and identified three areas for urgent action: reducing the waiting list for higher level home care, the use of chemical restraint, and younger people in residential aged care. On 25 November 2019, the Prime Minister announced actions on these three areas.¹⁷

Key themes

- 1.42** In the foreword to the interim report, the Commission noted that it had 'heard compelling evidence that the system designed to care for older Australians is woefully inadequate'.¹⁸

¹⁴ Community Affairs References Committee, Australian Senate, *Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised* (2019), p 99.

¹⁵ Community Affairs References Committee, Australian Senate, *Effectiveness of the Aged Care Quality Assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised* (2019), p 99.

¹⁶ Australian Government response to the Senate Community Affairs Committee report for the Inquiry into the effectiveness of the aged care quality assessment and accreditation framework for protecting residents from abuse and poor practices, and ensuring proper clinical and medical care standards are maintained and practised, June 2020, p 12.

¹⁷ Media release, Hon Scott Morrison MP, Prime Minister, 'Response to Aged Care Royal Commission interim report', 25 November 2019.

¹⁸ Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), p 12.

- 1.43** The key issues and themes that emerged from the evidence include:
- how people find out about what aged care is available to them and how to access it
 - the current regime for establishing and managing the waiting list for home care
 - the circumstances and challenges involved in providing culturally appropriate, safe and quality aged care to Aboriginal and Torres Strait Islander people
 - the use of both physical methods and medications to restrain and pacify people who are living in residential aged care
 - problems with recruiting and retaining people to work in aged care
 - the plight of younger people who have an acute or chronic illness, have suffered a catastrophic injury or who live with a severe disability, and who are forced into residential aged care because there is nowhere else for them to go.¹⁹

- 1.44** The Commission concluded that there are systemic problems with the aged care system in Australia:

While we have heard a number of examples of specific providers failing to meet existing standards, the problems in aged care are not just about a series of individual failures. The flaws of the aged care system as a whole are at the heart of this story. ... [T]he systemic problems with the aged care system include that it:

- is designed around transactions, not relationships or care
- minimises the voices of people receiving care and their loved ones
- is hard to navigate and does not provide the information people need to make informed choices about their care
- relies on a regulatory model that does not provide transparency or an incentive to improve
- has a workforce that is under pressure, under-appreciated and lacks key skills.²⁰

- 1.45** In its final submissions, Counsel Assisting also concluded that based on the evidence before the Commission, 'high quality aged care is not being delivered on a systemic level in our aged care system and the level of substandard care is unacceptable by any measure'. They also noted that 'at least one in five people receiving residential aged care have experienced substandard care'.²¹

Staffing issues

- 1.46** In its interim report, the Commission noted that it had received 'extensive evidence showing that aged care workers often experience excessive work demands and time pressure to deliver care'. The Commission also explained that the 'adequacy and consistency of staffing is an underlying cause of these pressures and a barrier to the capacity of workers to deliver person-centred care'.²²

¹⁹ Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), pp 122, 145, 190, 193 and 233.

²⁰ Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), p 255.

²¹ Royal Commission into Aged Care Quality and Safety, *Counsel Assisting's Final Submissions* (2020), pp 20-21.

²² Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), pp 230-231.

1.47 The question of how to ensure adequate staffing levels in residential care settings emerged as a contested issue in the evidence before the Commission:

During the second Adelaide Hearing, we received evidence from the Australian Nursing and Midwifery Federation that the Aged Care Act, the former Accreditation Standards and the current Aged Care Quality Standards are not explicit enough about what constitutes adequate staffing arrangements. This means that there is no guarantee that a nurse will be on duty at all times. A number of witnesses have argued forcefully for the introduction of mandated staffing levels and skill mix to guarantee a minimum level of care. Other witnesses have raised concerns about the possible risks of staff ratios, including that of themselves ratios do not guarantee quality, or suggested alternative means to ensure adequate staffing levels would be more effective.²³

1.48 The Commission's final report will 'give close consideration to options to ensure staffing levels, and the mix of staffing, are sufficient to ensure quality and safe care'.²⁴

1.49 Counsel Assisting's October 2020 final submissions dealt with workforce issues, and made recommendations on:

- aged care workforce planning
- the Aged Care Workforce Council
- increase in award wages
- improved remuneration for aged care workers
- education and training
- staffing levels.²⁵

1.50 With respect to staffing levels, Counsel Assisting submitted that 'a recommendation should be made that the Australian Government implement a minimum staff time quality and safety standard for residential aged care', noting that staffing levels is one aspect of reform:

We accept that increasing staffing levels on its own is not a guarantee of high quality care. But it is an important piece of the puzzle—a necessary but not sufficient reform. The other pieces include the staffing mix (especially ensuring nurses and allied health professionals are present in greater numbers), the skills of the workers, how well they are supervised and managed and how well the organisations they work for are governed.²⁶

²³ Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), pp 230-231.

²⁴ Royal Commission into Aged Care Quality and Safety, *Interim report* (2019), p 231.

²⁵ Royal Commission into Aged Care Quality and Safety, *Counsel Assisting's Final Submissions* (2020), pp 190-226.

²⁶ Royal Commission into Aged Care Quality and Safety, *Counsel Assisting's Final Submissions* (2020), p 210.

1.51 Accordingly, Counsel Assisting made the following recommendation in relation to staffing levels and engagement of registered nurses:

Recommendation 47: Minimum staff time standard for residential care

47.1. The Australian Government should require approved providers of residential aged care facilities to meet a minimum staff time quality and safety standard. This requirement should take the form of a quality and safety standard for residential aged care. The minimum staff time standard should allow approved providers to select the appropriate skills mix for delivering high quality care in accordance with their model of care.

47.2. From 1 July 2022, the minimum staff time standard should require approved providers to engage registered nurses, enrolled nurses, and personal care workers for at least 215 minutes per resident per day for the average resident, with at least 36 minutes of that staff time provided by a registered nurse.

47.3. In addition, from 1 July 2022, the minimum staff time standard should require at least one registered nurse on site per residential aged care facility for the morning and afternoon shifts (16 hours per day).

47.4. From 1 July 2024, the minimum staff time standard should increase to require approved providers to engage registered nurses, enrolled nurses, and personal care workers for the average resident for at least: 215 minutes per resident per day for the average resident, with at least 44 minutes of that staff time provided by a registered nurse, or 264 minutes per resident per day for the average resident, with at least 36 minutes of that staff time provided by a registered nurse.

47.5. In addition, from 1 July 2024, the minimum staff time standard should require at least one registered nurse on site per residential aged care facility at all times.

47.6. The minimum staff time standard should be linked to the casemix adjusted activity based funding model for residential aged care facilities. This means that approved providers with a higher than average proportion of high needs residents would be required to engage additional staff, and vice versa.

47.7. Approved providers should be able to apply to the Australian Aged Care Commission for an exemption from the quality and safety standard relating to staff skills mix, but not the standard relating to numbers of staff. Any exemption should be granted for a limited time, and details of the exemption should be published on My Aged Care...

The grounds for granting an exemption should include:

a. specific purpose residential aged care facilities, such as specialist homeless facilities, where the profile of the residents is such that it may be appropriate to substitute a registered nurse with another qualified health professional

b. residential aged care facilities that are co-located with a health service, such as Multi-Purpose Services, where registered and enrolled nurses are present at the co-located health service

c. regional, rural and remote residential aged care facilities, where the approved provider can demonstrate it has been unable to recruit sufficient numbers of staff with the requisite skills, and

d. innovative residential aged care facilities where an alternative skills mix is being trialled and it would be appropriate to substitute a registered nurse with another qualified health professional. There should be a requirement for any such trial to be comprehensively evaluated and publicly reported.

47.8. The Australian Commission on Safety and Quality in Health and Aged Care should review and update this standard as appropriate. At a minimum, this should occur in line with significant revisions of the casemix classification for residential aged care facilities, or at least every five years.²⁷

2015 inquiry into registered nurses in nursing homes

1.52 In 2015, General Purpose Standing Committee No. 3 (now referred to as Portfolio Committee No. 3 – Education) held an inquiry into registered nurses in New South Wales nursing homes. The committee tabled its report with 17 recommendations on 27 October 2015. The NSW Government provided its response to the recommendations on 29 April 2016.

1.53 The committee self-referred the inquiry to look into the potential changes at the time to the federal legislation regarding staffing requirements in nursing homes. The committee considered the reasons for and concerns about the need for registered nurses in nursing homes at all times; the adequacy of the federal aged care framework; options for legislative requirements; and alternative options in the absence of legislation.

1.54 The committee recommended that changes be made to the *Public Health Act 2010* (NSW) to retain the requirement for registered nurses to be on duty in nursing homes at all times:

Recommendation 7:

That the NSW Government:

- retain the requirement in section 104(1)(a) of the *Public Health Act 2010* for registered nurses to be on duty in nursing homes at all times, and
- amend the definition of ‘nursing home’ under the Act to read:

nursing home means a facility at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided, being:

- (a) a facility at which that care is provided in relation to an allocated place (within the meaning of that Act) to a care recipient whose classification level:
 - i. includes the following domain categories or combinations of domain categories:
 1. a high Activities of Daily Living (ADL) domain category; or
 2. a high Complex Health Care (CHC) domain category; or

²⁷ Royal Commission into Aged Care Quality and Safety, *Counsel Assisting's Final Submissions* (2020), pp 211-212.

3. a domain category of medium or high in at least two of the three domain categories; or
 4. a high behaviour domain category and either an ADL domain category other than nil or a CHC domain category other than nil; or
- ii. is a high level resident respite care.
- (b) a facility that belongs to a class of facilities prescribed by the regulations.

Recommendation 8:

That the NSW Government allow nursing homes to apply for an exemption from section 104(1)(a) of the *Public Health Act 2010* on a case-by-case basis, and that exemptions only be granted where the facility can demonstrate that it can still provide a high level of quality care.²⁸

- 1.55** The committee also recognised the importance of mandating safe staffing levels for the range of skills in the aged care workforce, and recommended:

Recommendation 4:

That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to establish minimum staffing ratios in aged care facilities.²⁹

- 1.56** In its government response, the NSW Government noted that it supported the availability of registered nurses and recognised the concerns raised before the committee. However, the government also argued that the retention and expansion of the New South Wales legislation would create a regulatory duplication without addressing broader issues:

The Government supports availability of registered nurses where appropriate for the level of care required by residents. The Government also recognises the wide range of concerns raised in evidence before the Committee. At the same time however, aged care facilities are regulated under a national system, operating under Commonwealth legislation. Retention and expansion of the NSW legislation will duplicate regulatory process without addressing these broader issues. It is also important to highlight that these recommendations would extend the 24x7 requirement to facilities not previously caught by the requirement. NSW will therefore pursue concerns about the current regulatory regime through the COAG Health Council.³⁰

- 1.57** A full list of recommendations and the government response is available at Appendix 1.

- 1.58** On 12 May 2016, the Hon Robert Brown MLC introduced the *Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2016* in the NSW Legislative Council. The intention of the Bill was

²⁸ General Purpose Standing Committee No. 3, NSW Legislative Council, *Registered nurses in New South Wales nursing homes* (2015), pp 78-79.

²⁹ General Purpose Standing Committee No. 3, NSW Legislative Council, *Registered nurses in New South Wales nursing homes* (2015), p 64.

³⁰ NSW Government response to the recommendation made by the Legislative Council inquiry into registered nurses in New South Wales nursing homes, April 2016, pp 2-3.

‘to amend the *Public Health Act 2010* to bring the definition of a nursing home into line with relevant Commonwealth legislation so as to ensure that the requirement for a registered nurse to be on duty at all times at a nursing home is continued’.³¹ Whilst it passed in the Legislative Council, the Bill did not pass the Legislative Assembly.

³¹ Public Health Amendment (Registered Nurses in Nursing Homes) Bill 2016.

Appendix 1 2015 inquiry into registered nurses in nursing homes recommendations and government response

Recommendation	Government response
<p>Recommendation 1: That the NSW Government:</p> <ul style="list-style-type: none"> • establish a consistent and compatible collection and analysis of data regarding the transfer of residents from aged care facilities to emergency departments, including reasons for admissions, to determine if this represents a cost shifting, and • that this information be provided in NSW Health annual reports to identify if further action is required. 	<p>Recommendation 1 arises from the Committee's concern that there is a lack of readily available information about residents transferring from aged care facilities to public hospitals. Data is collected on a local level, as are initiatives developed to prevent unnecessary transportation of residents from aged care facilities to hospitals: for example the GRACE program at Hornsby and the Geriatric Flying Squad operating out of Sutherland Hospital. The best way to address these issues is for local health districts to continue to work in their local communities with local aged care providers, rather than additional state wide data collections. This recommendation is therefore not supported.</p>
<p>Recommendation 2 That the NSW Government review the requirements for Advance Care Directives to be recognised when residents are transferred from aged care facilities to hospitals, and determine whether a legislative framework is required.</p>	<p>The NSW Government is committed ensuring advanced care planning is an integral element of health care planning for patients and in the community, including in aged care facilities. To this end, in 2013 the <i>Advanced Planning for Quality of Care at End of Life: Action Plan 2013-2018</i> was released. The <i>Action Plan</i> was the result of extensive work on advanced care planning and end of life care, including looking at the need for legislation. As noted in the <i>Action Plan</i>, Advance Care Directives are already lawful in NSW under a series of landmark cases in the Supreme Court, and as such there is a legislation framework is not proposed. <i>The Action Plan</i> is also designed to address the situation of residents of aged care facilities, promoting routine use of advance care planning for residents. The Plan provides for progressing changes to routine admission and discharge procedures so that prior Advance Care Plans are recognised, used and transferred between acute community and aged care settings.</p>

<p>Recommendation 3</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to ensure that its new single quality aged care framework includes:</p> <ul style="list-style-type: none"> • genuinely unannounced visits that occur at any time of the day on any day of the week, • assessment of all 44 expected outcomes under the Accreditation Standards during each unannounced visit, • greater emphasis on resident experience, and • a requirement to communicate non-compliance with residents and their advocates. 	<p>The Australian Aged Care Quality Agency Accreditation Standards and other aged care standards are currently being reviewed with a view to consolidating them into a single set of standards. This is occurring as part of an initiative under the 2015 Federal Budget. The NSW Minister for Health will include these recommendations in the Paper to be prepared for COAG Health Council, as set out in response to Recommendations 7, 8 and 9.</p>
<p>Recommendation 4</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to establish minimum staffing ratios in aged care facilities.</p>	<p>Whether minimum staffing levels would be appropriate in an aged care setting is primarily a matter for the relevant Commonwealth agency, rather than COAG. The NSW Minister for Health will refer the Parliamentary Committee Report, including this Recommendation to the federal Minister for Health and Minister for Aged Care for consideration.</p>
<p>Recommendation 5</p> <p>That the NSW Government develop a Working with Older People and/or Vulnerable Adults Check, modelled on the Working with Children Check.</p>	<p>The NSW Government supports robust mechanisms and checks to protect vulnerable groups in the community, which can include residents of aged care facilities as well as children. The Government also notes however that "working with children check" processes are generally state based, and that the Commonwealth, as part of its regulatory regime for aged care facilities, already has a national system for criminal record checking of aged care workers. The Government will therefore include this Recommendation in the issues to be raised with the COAG Health Council.</p>
<p>Recommendation 6</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to establish a licensing body for aged care workers.</p>	<p>The Government does not support further extending occupational licensing to include assistants in nursing or other aged care workers. In relation to the issue of standards for non-registered health workers, in April 2015 the COAG Health Council released the "<i>National Code of Conduct for Health Care Workers</i>". The Code establishes a series of standards non-registered health workers must comply with, and is based on the current NSW Code for Non-Registered Health</p>

	<p>Practitioners. National adoption of the Code will strengthen governance in health related fields without further formal regulation.</p>
<p>Recommendation 7 That the NSW Government:</p> <ul style="list-style-type: none"> • retain the requirement in section 104(1)(a) of the Public Health Act 2010 for registered nurses to be on duty in nursing homes at all times, and • amend the definition of ‘nursing home’ under the Act to read: <p>nursing home means a facility at which residential care (within the meaning of the <i>Aged Care Act 1997</i> of the Commonwealth) is provided, being:</p> <p>(a) a facility at which that care is provided in relation to an allocated place (within the meaning of that Act) to a care recipient whose classification level:</p> <p>(i) includes the following domain categories or combinations of domain categories:</p> <p>(1) a high Activities of Daily Living (ADL) domain category; or</p> <p>(2) a high Complex Health Care (CHC) domain category; or</p> <p>(3) a domain category of medium or high in at least two of the three domain categories; or</p> <p>(4) a high behaviour domain category and either an ADL domain category other than nil or a CHC domain category other than nil; or</p> <p>(ii) is a high level resident respite care.</p> <p>(b) a facility that belongs to a class of facilities prescribed by the regulations.</p>	<p>The Government supports availability of registered nurses where appropriate for the level of care required by residents. The Government also recognises the wide range of concerns raised in evidence before the Committee. At the same time however, aged care facilities are regulated under a national system, operating under Commonwealth legislation. Retention and expansion of the NSW legislation will duplicate regulatory process without addressing these broader issues.</p> <p>It is also important to highlight that these recommendations would extend the 24x7 requirement to facilities not previously caught by the requirement.</p> <p>NSW will therefore pursue concerns about the current regulatory regime through the COAG Health Council.</p>
<p>Recommendation 8 That the NSW Government allow nursing homes to apply for an exemption from section 104(1)(a) of the Public Health Act 2010 on a case-by-case basis, and that exemptions only be granted where the facility can demonstrate that it can still provide a high level of quality care.</p>	
<p>Recommendation 9 That the NSW Government establish a system to monitor, regulate and enforce section 104(1)(a) of the <i>Public Health Act 2010</i>.</p>	

<p>Recommendation 10</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to require aged care facilities to make information about their staffing skill sets publicly available, including for it to be published on the 'My Aged Care' website.</p>	<p>The Committee's rationale for supporting this recommendation went to the need for increased transparency to ensure residents and their families can make better, and more informed decisions about aged care options. This recommendation will be included in the issues to be raised with the COAG Health Council.</p>
<p>Recommendation 11</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to require aged care facilities to make information about their staffing skill sets publicly available, including for it to be published on the 'My Aged Care' website.</p>	<p>The Government accepts that the evidence before the Committee indicates there are grounds for more work to be undertaken at both the State and Federal level to ensure residents have better information on the complaints processes available to them.</p>
<p>Recommendation 12</p> <p>That the NSW Government establish a clear process for the lodgement and resolution of complaints about section 104(1)(a) of the <i>Public Health Act 2010</i> as part of the new system at recommendation 9, and that information about the complaints process be widely publicised throughout aged care facilities in New South Wales.</p>	<p>NSW residents of aged care facilities should have ready access to complaints processes in NSW relating to health care - such as for example, the Health Care Complaints Commission. To this end, NSW will develop information packages on the options available under NSW laws for dissemination through aged care facilities. The information will be most effective if it covers all options available to residents, including processes available through the Commonwealth. NSW will work with relevant Commonwealth agencies to develop the information, and establish processes to ensure its dissemination to residents, carers and advocates.</p>
<p>Recommendation 13</p> <p>That the NSW Government report on existing programs and incentives and investigate additional programs and incentives to support registered nurses to train and work in regional, rural and remote areas.</p>	<p>NSW Health has a range of programs and incentives in place to support nurses working and training in regional, rural and remote locations, primarily managed through the local health districts. It is important to note that in 2016 over a quarter of new graduates employed by NSW Health will be working in rural and regional NSW. NSW Health will continue to monitor supply and develop and evaluate programs on a needs basis. The current initiatives are also, necessarily confined to the NSW public health system workforce, while aged care services are primarily provided by the private sector. Recommendation 14 and 15 go directly the Commonwealth's role and functions in respect of aged care. As already indicated it is proposed that the NSW Minister for Health refer the report and these recommendations to the Federal Minister for Health and Aged Care.</p>
<p>Recommendation 14</p> <p>That the NSW Government, through the Council of Australian Governments, seek Commonwealth support to provide funding assistance for the training and engagement of registered nurses, particularly at rural and regional universities, and graduate placement opportunities in rural, regional and remote areas.</p>	
<p>Recommendation 15</p> <p>That the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to take active measures to address the wage disparity between</p>	

<p>registered nurses in aged care facilities and registered nurses in the public health care system.</p>	
<p>Recommendation 16 That the NSW Government consider rolling out the Telehealth model of care provided by the Hunter-New England Medical Local across New South Wales.</p>	<p>The Government supports rollout of Telehealth models of care in appropriate settings, including in aged care facilities. Reflecting this, a range of initiatives are already underway across the public health system, helping to embed telehealth into clinical practice in a number of settings.</p> <p>Local health districts are actively engaging with their key external stakeholders and service providers to establish arrangements for patients to access care through telehealth. Partnerships are being cultivated with local GPs, Primary Health Networks (PHNs) and Residential Aged Care Facilities (RACFs) amongst others. For example Murrumbidgee LHD is working closely with Primary Health Networks and NSW Ambulance to develop telehealth enabled inreach and outreach models of care. Outreach to Aged Care Facilities is also a priority, as part of hospital avoidance strategies. Mid North Coast, North Sydney and Northern NSW LHDs are also developing Telehealth models of care with key Aged Care Facilities within their boundaries to reduce avoidable hospital admissions.</p>
<p>Recommendation 17 That the NSW Government:</p> <ul style="list-style-type: none"> • review alternative models of housing for older persons other than aged care facilities, including cooperatives and communal living that provide an on-site caretaker, and • investigate models in other jurisdictions, including the Netherlands and Scandinavia, that could be trialled in New South Wales. 	<p>The Commonwealth aged care system already includes Home Care Packages designed to provide services to support older people to continue to live in their own homes, as well as residential aged care services. Both Home Care Packages and residential aged care services are intended to provide services from low care to high care. The Commonwealth also provides the Commonwealth Home Support Program (CHSP) offering a range of low level support services with the intention of supporting older people to live independently in the community for longer. While the need to consider new and alternative models is supported, this should occur through the Commonwealth. Recommendation 17 is therefore noted and will be forwarded the Commonwealth Minister for consideration.</p>

