



# Aged Care Act Exposure Draft

## Joint submission

National organisations working with older people  
and carers

March 2024

## National organisations working with older people and carers



Council on the Ageing (COTA) Australia | peak body representing 9 million Australians over 50 years.



Older Persons Advocacy Network (OPAN) | peak body for aged care individual advocacy.



Association of Independent Retirees (AIR) | advancing the independence of those fully or partly self-funded in retirement.



Carers Australia | peak body representing Australia's unpaid carers.



Dementia Australia | supporting and empowering people living with dementia.



Elder Abuse Action Australia (EAAA) | acting to eliminate elder abuse.



Federation of Ethnic Communities' Councils of Australia | peak body for people from culturally and linguistically diverse backgrounds.



napwha | National association of people with HIV Australia.



LGBTIQ+ Health Australia | peak body for LGBT and intersex organisations.



National Seniors Australia | advancing the wellbeing of all older Australians.



PICAC Alliance | unified body of Partners in Culturally Appropriate Care (PICAC) funded organisations.



The Returned and Services League of Australia (RSL) | advocating for those who have served or are serving in the Australian Defence Force.

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## Introduction

This joint submission is the outcome of extensive feedback gathered from older people, carers and their representatives, advocates and other stakeholders by the 12 organisations listed above. These organisations have listened to and engaged with a diverse range of older people with many differing views on the Exposure Draft. However, they all agree on one overarching principle – the current Act does not meet the needs of older people seeking or receiving aged care and the new Act must uphold and enforce the rights of older people.

A human rights-based Aged Care Act is essential and urgent. Older people have waited too long to have their rights respected and upheld in aged care. It is imperative that older people's rights and the principles of choice and control (including self-determination, consumer-directed care and self-management) are reflected consistently in aged care policy, guidance material and decision-making. It is critical that this is reflected in the Act. The needs and preferences of older people must be at the core of the aged care system.

The Act must be backed by an aged care system that articulates, enables, protects and enforces the human rights of older people as well as recognising and supporting their families and carers. To this end, the Act should prescribe a positive duty on providers and government actors to uphold rights. A breach of a right must be directly enforceable rather than rights only being enforceable as a breach of the Aged Care Quality Standards or the Code of Conduct, where many rights are not reflected.

To enable older people to assert their rights, and have breaches of their rights addressed, the Act must establish an independent statutory Complaints Commissioner appointed by the Minister.

Independent professional advocates play a key role in raising the voices of older people and supporting them to have their rights upheld, make complaints and address issues in the aged care system. The role of independent professional advocates must also be enshrined within the Act.

The new Act is a major shift away from how the system currently operates and therefore it must "get things right". This includes strengthening access requirements, so they are timelier and more equitable, improving eligibility criteria for early entry into aged care, and providing protections for all people accessing the aged care system, including those who are using non-government funded

services. It is also critical that older people have the right to review decisions by government officials.

We welcome the inclusion of supported decision-making in the Act. The Act must be expanded so that principles of supported decision-making are applied by any person interacting with an older person who is seeking or accessing aged care. While we acknowledge the new roles of Supporters and Representatives, more work is needed in this area and there are differing views as to how these roles could be implemented.

In addition to the areas discussed above, more work is needed to:

- give diverse and marginalised groups greater prominence
- ensure the rights of carers are included in the Act
- enable and include support for older people with disability
- embed older people's right to visitors in all situations
- provide better protections against the use of restrictive practices, and
- include and outline legislative intentions on security of tenure.

We note that the Australian Government has committed to a National Strategy to Achieve Gender Equality. Gender analysis is now required for all New Policy Proposals (NPPs) and Cabinet submissions. Aged care is a substantial area of government investment and a critical part of the care economy. There is a gender dimension in aged care related to individuals accessing services, informal carers, workers and provider management, and governance. Gender analysis and gender impact assessment should be applied to all substantive aged care proposals and initiatives and included in the review of the new Aged Care Act. The Explanatory Memorandum of the new Act should include reference to how gender analysis and gender impact assessments will be conducted as part of the new Act.

Our submission reflects the experiences and wishes older people, their carers and families have shared with our 12 organisations. This includes feedback from 733 people who participated in online consultation forums and 647 people who participated in online polling during those forums. The results of these polls are included in our submission.

The Exposure Draft has many good aspects, however significant improvements can be made. There are still many gaps and many areas that need to be written, including subordinate legislation. In particular, releasing the details of fees and charges which will have a significant impact on the sector and older people.

In our submission we provide recommendations to address a range of substantive issues. We look forward to further engagement and consultation when the Exposure Draft is tabled in Parliament.

## **Summary of recommendations**

### **Commencement of the new Aged Care Act on 1 July 2024 with review every 3 years**

1. Introduce the Bill into Parliament in March 2024 to enable a 3-month review by Parliament.
2. Table the new Rules proposed to accompany the Act in Parliament no later than 3 weeks before submissions to a Parliamentary Inquiry close.
3. The Act should commence on 1 July 2024 (or as soon as practicable thereafter if parliamentary processes cause delays) with some consideration to transition/implementation timelines for certain aged care service groups, new enforcement activities and the Commonwealth Home Support Programme (CHSP).
4. Embed a 3-year review of the Act within the legislation conducted by an independent person or body appointed by the Minister. The instrument of appointment should be a disallowable instrument for the purposes of Section 43 of the Legislation Act. The review process should include a substantive consultation period and the review report tabled in Parliament. The review could also be expanded to include the Inspector General Act.

### **Embed and enforce human rights and focus on wellbeing and quality of life**

5. Include a declaration that the identified rights must be taken into account in interpreting the Act and any instrument made under it.
6. Strengthen Object (d) by inserting additional text about access to support and justice. The full text to read “ensure individuals accessing funded aged care services are free from mistreatment, neglect and harm from poor quality or unsafe care and have access to support and justice whenever any harm is caused to them.”
7. Include the right to access health care services in the Bill to ensure that all individuals entitled to benefits and services outside of the aged care system (such as Medicare-subsidised health care services, inpatient and outpatient rehabilitation services, Veteran entitlements to DVA medical

services and DVA medical aids) can receive them and cannot have them denied due to receiving aged care services.

8. Retain the requirement from the current Act for providers to facilitate access of individuals to health care services outside of the aged care system through inclusion in the obligations of registered providers.
9. The Act must oblige aged care providers to uphold rights. We recommend creation of a positive duty (See recommendation 15)
10. The Explanatory Memorandum must clearly articulate that the objectives of the legislation are to be read in a “strengths-based” not deficit approach. The Memorandum must emphasise the intent of aged care service delivery to provide older people with access to reablement where possible, and to enhance wellness and quality of life.
11. Include the right to aged care services in the Statement of Rights and back this up with equitable and timely access to aged care services (Item 10). Create an obligation on the System Governor to steward an aged care system capable of providing services to all eligible older people.
12. Reliance on all the available treaties to strengthen the constitutionality of the Bill to give effect to a comprehensive and holistic approach to the rights of older persons receiving aged care support including a positive approach to the right to health.
13. Include a section in the Act, in line with the Disability Royal Commission recommendation 10.1 “Embedding Human Rights” so that the Aged Care Quality and Safety Commission (ACQSC) is required to deliver a capacity-building program to support aged care providers to embed human rights in the design and delivery of their services. The program should be co-designed with older people, older people’s representative organisations and diversity peak bodies.

## **Create a positive duty to uphold rights and clear pathways to complaints**

14. Ensure the legislation has an obligation on providers to give older people plain English, accessible information about their rights in formats that are appropriate to older people from diverse backgrounds and older people with visual and hearing impairments. We note Section 105 (b) provides a generic requirement to explain information as outlined in the yet-to-be published Rules.
15. Amend Sections 21, 92 and 183 of the Act to require a positive duty on providers to uphold the rights of older people and deliver rights-based

care. The amendment should be modelled on recent changes to the Sex Discrimination Act to require a positive duty on employers to eliminate discriminatory conduct.

16. Include a clear complaints mechanism for older people to raise standalone breaches of rights.
17. Outline in the Act, or in the Rules, guidance on how to respond to and balance competing rights. This should include not only the rights of other people accessing aged care services, but aged care workers and others providing care for the individual. The Ontario Human Rights Commission Policy on Competing Rights, and in particular its articulation of key legal principles, is one such option: <https://www.ohrc.on.ca/en/policy-competing-human-rights>
18. Amend the powers of the new Independent Statutory Complaints Commissioner (see Item 7 for more detail) so that they can investigate and conciliate complaints about breaches of rights and refer to the ACQSC matters requiring enforcement of compliance.
19. Include or identify appropriate penalties under the Act for breaches of rights resulting from poor and neglectful practice and behaviour by providers, government or regulators.
20. Where the complaints process does not result in a satisfactory outcome, breaches of the Statement of Rights must be part of tribunal review process via the Administrative Appeals/Review Tribunal and where there are grounds to go to court, such breaches must be able to be part of the court's considerations.
21. Elevate the Code of Conduct into primary legislation (Section 13) to increase prominence and ensure changes are rare.

## **Embed principles of choice and control, consumer-directed care, and self-management**

22. Amend and strengthen Objects of the Act, Section 5(c) to ensure that:
23. older people seeking access to or accessing aged care services have the right to be supported to exercise choice and control rather than merely being "enabled" to do so.
24. exercising choice and control relates to matters that affect the lives of older people and this includes the assessment for and planning of aged care services, the delivery of aged care services and participating in the development and review of policy and programs.



25. Upgrade Section 44, regarding undertaking aged care needs assessment, by adding a new clause about the development of a service plan that outlines services for the individual to receive. This plan should be co-designed with the individual seeking aged care services (and their carer where relevant – see Item 16) reflecting their consent, will and preferences about the delivery of these services.
26. Amend Section 47 regarding approval of access to funded aged care services to ensure the System Governor must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services.
27. Ensure that any or all computerised and AI systems used now or in the future to generate System Governor and ACQSC decisions are subject to strict obligations including:
  - adequate risk assessment and mitigation systems
  - high quality of the datasets feeding the system to minimise risks and discriminatory outcomes
  - logging of activity to ensure traceability of results
  - detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance
  - clear and adequate information to the user
  - appropriate human oversight measures to minimise risk
  - high level of robustness, security and accuracy
28. Ensure that all uses of System Governor computer-generated decisions related to individuals seeking and accessing aged care services are monitored and audited, with specific attention to their suitability when applied to people with diverse backgrounds and from more marginalised groups, and the findings of the audit made publicly available and included in all annual reports regarding the operations of the system.
29. Ensure that breaches of rights do not require another type of action (e.g. breach of standards) to make rights enforceable or be raised as a complaint. There must be an option to directly enforce rights through either a court of law or administrative means in any instances of denial of consumer-directed care, choice and control and self-management approaches to the delivery of care in assessment, care plan agreement and service delivery.

30. Require the System Governor and the ACQSC to comply with the rights in the Statement of Rights and ensure their decisions are reviewable on the basis of a breach of the Statement of Rights.

## **Embed the right of older people to make decisions and receive support when they need it**

31. Include an outline of the supported decision-making framework in the Explanatory Memorandum.
32. Include the statement that “Every person is presumed to have capacity for making their own decisions unless proven otherwise” in the Objects.
33. Under Division 1, Definitions, include plain language definitions of Supporter and Representative in addition to references to the meanings found in Sections 374 and 376:
  - Supporters: can receive documents and information and communicate information on behalf of the older person.
  - Representatives: can do the same things as a Supporter and can make decisions on behalf of an older person when they do not have ability to do so, or they want the representative to make the decision on their behalf.
34. For the avoidance of doubt, amend Part 4 to state that no older person is required to have appointed a Supporter or Representative for the purpose of accessing aged care services and that a registered provider cannot refuse to accept an older person into their service who has not made an appointment or had an appointment made by the System Governor.
35. Provide guidance in the Explanatory Memorandum on “principles that promote supported decision-making”, by including the 10 national supported decision-making principles recommended by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission):
  - Principle 1 – recognition of the equal right to make decisions
  - Principle 2 – presumption of decision-making ability
  - Principle 3 – respect for dignity and the right to dignity of risk
  - Principle 4 – recognition of the role of informal supporters and advocates
  - Principle 5 – access to support necessary to communicate and participate in decisions

- Principle 6 – decisions should be directed by a person’s own will and preferences and rights
  - Principle 7 – inclusion of appropriate and effective safeguards against violence, abuse, neglect, and exploitation
  - Principle 8 – co-design, co-production, and peer-led design processes
  - Principle 9 – recognition of diverse experiences, identities, and needs
  - Principle 10 – entitlement to culturally safe, sensitive, and responsive decision-making support.
36. Amend Chapter 1, Part 4, Division 1 to enable an older person to have both a Supporter and a Representative and to appoint more than one person to each role, and to make different appointments for aged care financial, health care and place of residence information sharing and decision-making.
37. Amend Sections 374 and 376 on the appointment of a Representative by the System Governor ensuring that the System Governor must use the national supported decision-making principles and that a person who does not already hold relevant decision-making power under a state or territory law can only be appointed as a representative if several conditions are met, including that:
- the appointment is consistent with the “will and preferences” of the person concerned, and
  - the proposed representative has “a close and continuing relationship with the person” (borrowing a phrase that exists in Victorian medical decision-making legislation), and
  - there is no significant contention about the appointment among people with a genuine interest in the wellbeing of the person.
38. Include as a protection for older people that access to an independent professional advocate is provided when requested within Chapter 1, Part 4, Division 1 and create a new subdivision on protections for older people in line with the recommendations of the Australian Law Reform Commission Report 124, Equality, Capacity and Disability in Commonwealth Laws.
39. Amend the relevant sections of the Bill, so that supported decision-making principles must be used by all those working in aged care when working with older people. For example, Chapter 1, Part 4; Chapter 2, Part 2 Division 3; Chapter 3, Part 4, Divisions 1 & 2.

40. Include under Section 91 that a registered provider is responsible for ensuring that aged care workers are trained in the principles and practice of supported decision-making, including understanding the impact of ageism on their attitudes to working with older people.
41. Ensure that terminology and responsibilities of Supporters and Representatives is used consistently throughout the Act.
42. Amend Section 392 to ensure grant purposes includes grants to provide for community capacity building for a range of decision-making supports.
43. In line with the proposed alternate model for Supporters and Representatives:
  - reconsider the roles of Supporters and Representatives so that there is only a single role that is built on other models for supported decision-making, including the NDIS independent decision-supporters, the Swedish Personal Ombudsman Programme and the United Kingdom Care Act advocates.
  - amend the section on Supporters and Representatives so that:
    1. the key role is that of a Supporter to support an older person with decision-making
    2. there can be multiple Supporters based on the support needed e.g. financial, social etc
    3. there is clear guidance and protections around when a Supporter may transition to a “Representative” and under what circumstances.
44. A Representative is only appointed in certain circumstances and only for the shortest time possible to assist with upholding the wishes and preferences of the older person.

### **A Complaints Commissioner with direct independent statutory authority and functions**

45. Separate the Commissioner functions in the Act to provide specific functions and statutory authority to an independently appointed Complaints Commissioner, answerable only to the Minister and Parliament, with the authority to:
  - compel providers to provide information and participate in the complaints process
  - authorise an enforceable undertaking

- make determinations and rulings (including no further action determination). Determinations and rulings would be made when voluntary agreements cannot be reached and to enable appeals to occur.
46. The Complaints Commissioner should have a distinct budget and staffing group but remain as part of the ACQSC. The two Commissioners will have the ability to share information and consult with each other across both statutory office holder functions as well as the ACQSC Advisory Council.
  47. Amend the functions of the ACQS Commissioner (s141), to remove Complaints and education functions about complaints. These will be functions of the Complaints Commissioner.
  48. Re-write the complaints section of the Act to provide more detail on the responsibilities and authority of the Complaints Commissioner, including timeframes and annual reporting. Make clear the Complaints Commissioner functions include that they can receive complaints about the System Governor, ACQS Commissioner and staff delegated to act on their behalf. In the Explanatory Memorandum, make clear when systemic issues would be elevated to the Inspector-General.
  49. Create a new Division under Chapter 5, Part 3 (Aged Care Quality and Safety Commission) and transfer and replicate the relevant functions for the ACQS Commissioner to the Complaints Commissioner including:
    - appointment by the Minister for a specified period (s140)
    - Commissioner functions (s141) – including the complaints functions, engagement and education functions about complaints, and targeted and specific safeguarding functions. The Complaints Commissioner will not have the registration of provider functions
    - Safeguarding functions (s142) – focused on upholding rights and encouraging rights-based complaints practices, supporting registered providers to develop and implement effective complaint management systems, collect, correlate, analyse and disseminate information related to complaints to identify trends of systemic issues and ensure that complaints can be made about registered providers, operators of aged care digital platforms, aged care workers with obligations under the Aged Care Code of Conduct, the ACQS Commissioner and the System Governor

- engagement and education functions as they relate to complaints (s143)
  - complaint function (s144) including update (a) (ii) to include the ability to make complaints about “an aged care worker” and the obligation to facilitate outcomes as part of complaints resolutions and to include outcome results in annual reporting. Outcome measurement will include satisfaction surveys of participants in the complaint process.
  - Minister may give directions (s149)
  - Dealing with complaints (s183).
50. Transfer and replicate the relevant staffing for the ACQS Commissioner to the Complaints Commissioner including:
- deputy commissioners (s147)
  - delegation by authorised person – Commissioner functions (s252)
  - delegation by Commissioner (s370)
  - authorised Commission officers and authorised System Governor officers (Chapter 6, Part 15)
51. Transfer and replicate the relevant powers for the ACQS Commissioner to the Complaints Commissioner including:
- Commissioner may request information or documents from persons (s146)
  - Commissioner may vary or revoke required action notices (as they pertain to determinations) (s266)
  - Commissioner may give compliance notices relating to Commissioner’s functions (as it relates to the Complaints Commissioner’s functions) (s269).
52. Ensure that the structure of powers under Chapter 6 (Regulatory mechanisms) and Chapter 8 (Enforceable undertakings under Part 6 of the Regulatory Powers Act) are appropriately extended to the Complaints Commissioner and their staff, including powers:
- to require persons to attend before authorised officers to answer questions or give information or documents in relation to their functions

- compel the production of documents
  - that enable an enforceable provision to agreed undertakings during the complaints process
  - to be an authorised person to endorse complaints
  - to make determinations about a complaint (comparable to action notices and compliance notices).
53. Allocate responsibility to the independent Complaints Commissioner 2 functions currently allocated to the ACQS Commissioner:
- complaints handling
  - education about complaints handling.
54. Amend Chapter 5, Part 3, Division 3 Administration to refer to the ACQS Commissioner and the Complaints Commissioner.
55. Amend Division 4 Staff of the Commission – amend 157 (2) (a) when defining who is the statutory authority to refer to Complaints Commissioner. Consider the appropriateness of also referring to the Advisory Council.
56. Embed application of restorative justice principles (inclusive of open disclosure) throughout all aspects of complaints handling in primary legislation with reference to Rules. These principles and process must be followed for all complaints, in addition to any escalation steps such as the below which should also be included:
- restorative outcome conference
  - conciliation
  - mediation.
57. Amend Division 5 Reporting and Planning to ensure the annual report of the Commission “set out the Complaints Commissioner’s priorities for work to be undertaken during the next reporting period” (Clause 160 (2) (b) and that the operational plan must consult the Complaints Commissioner (160 c).
58. Amend the functions of the Advisory Council to replicate the references to the ACQS Commissioner, with the Complaints Commissioner (s169)
59. Ensure Complaint Commissioner is a person to whom whistleblowers may disclose (s355 Disclosures qualifying for protection)
60. Ensure “an official or delegate of the Complaints Commissioner” is included in relevant limits regarding confidentiality of information (under

s323 Basic limits on recording, use and disclosure of protected information)

61. Ensure that disclosures of protected information for the purposes of managing complaints (Division 3—Authorisation of recording, use or disclosure of protected information; Subdivision B—Authorisation of System Governor, Complaints Commissioner and Commissioner). Ensure that disclosure can extend beyond a person’s death to their representative who may be investigating the cause of their death.

## **Include the new Complaints Framework in the Act**

62. Reflect all aspects of the Complaints Framework in the Act in the relevant sections including Chapter 5, Part 3 and Part 5. This includes:
  - transparency of the complaints process – making reports publicly available
  - legislate restorative justice pathways (including arbitration, conciliation and open disclosure)
  - clearly set timelines and review processes
  - annual public reporting on the Complaints Commissioner functions
  - ability to publish and report on continuous improvement and emerging insights and intelligence (including in conjunction with the ACQS Commissioner)
63. Ensure that the timeframes for Complaints Commissioner processes are subject to service-level agreements which are published and reported on.

## **Whistleblowers**

64. Amend Section 355 Disclosures Qualifying for Protection so that a disclosure made to an independent professional advocate and a trade union official are included in the list of who a protected disclosure can be made to.
65. Amend Section 357, Confidentiality of Identity of Disclosers, section (2) so that an individual who discloses to an independent professional advocate or a union representative is protected under Section 357(1).
66. Amend Part 5 Whistleblower protections so that if an individual discloses to an independent professional advocate or a union representative and asks the advocate or representative to disclose on their behalf, both the



individual and the advocate and representative are protected under this section.

## **Guarantee equitable, timely access to aged care services within 30 days of application**

67. Amend the Statement of Principles to include the principle of an aged care system in which the System Governor is responsible for facilitating equitable and timely access to aged care services in accordance with assessed needs.
68. Expand equitable access to include equitable access to aged care services regardless of geographic location or need as per Object b (3).
69. Amend relevant sections of the Act, such as in the section on the System Governor, to ensure Object b (3) is embedded in the Act.
70. Clearly outline a guaranteed timeframe, so the Act can deliver an aged care system where services are provided to eligible older people within 30 days of application for aged care.
71. Ensure equitable access to services is a key criterion in public reporting undertaken by the System Governor.
72. Embed a legislative requirement that the System Governor must publicly report on quarterly wait times from application through to needs assessment to when services commence.

## **Expand eligibility for early access to aged care services**

73. Amend the section on eligibility to outline a clear pathway to approve exceptional cases for anyone experiencing the early onset of aging-related chronic conditions that fall outside the arbitrary age rules.

## **An absolute right to visitors in all situations for aged care residents**

74. Insert a new section in the Key Concepts division of the new Act on visitation rights that:
  - Establishes administrative processes to provide aged care access and authorisation to a Named Visitor. An individual designated as a Named Visitor is authorised for unrestricted access to the private quarters of an individual receiving aged

care services at any time after completing the approved form outlined in the Rules.

- Ensures that no conditions applied by aged care providers prevent or unreasonably hinder the Named Visitor from fulfilling their authorised role and that aged care facilities cooperate and work with Named Visitors to ensure visits are seamless. Cooperation should be extended with due regard to the privacy, safety, and dignity of all residents in aged care facilities.
- Provisions of this section will prevail over any conflicting common law principles, including common law trespass. This is only applicable to the provisions in this section.

75. Insert a new clause to Right No. 12 in the Statement of Rights regarding the right of an individual to opportunities and assistance to stay connected. The new clause enables a person receiving aged care to stay connected with:

- a Named Visitor, chosen by the older person, or their carer or representative where the person is unable to make a decision or has not left directions, who can visit them even when infectious disease outbreaks occur. Where a person receiving aged care services has palliative care needs or is at the end of their life, family and close friends can visit and remain at the person's side.

These provisions should be clearly expressed to override any restrictions on visits or visitors provided for by or under State and Territory legislation.

## **Recognise the role of independent professional advocates in the Act**

76. Include and amend relevant clauses in the current Act with respect to the role of independent professional advocates in educating people about their aged care rights and supporting them to have these rights respected and protected.
77. Embed the right of entry to residential aged care by independent professional Aged Care Advocates for the purpose of rights education, as well as to act on behalf of (at the direction of) the older person.
78. Clearly establish that all people seeking and receiving aged care services have the right to independent professional advocacy regardless of any

questions about their decision-making ability, and whether there is a substitute decision-maker appointed.

79. Create an obligation on registered providers to inform people using their services about advocacy services, provide accessible contact details and facilitate access to and communication with an advocate.

## **Further strengthen diversity**

80. Include in the Objects – “Ensure that all individuals entitled to benefits and services outside of the aged care system (such as Medicare-subsidised health care services, inpatient and outpatient rehabilitation services, Veteran entitlements to DVA medical services and DVA medical aids) can receive them and cannot be denied them due to receiving aged care services”.
81. Amend Right 8 – “An individual has a right to communicate in the individual’s preferred language or method of communication, with access to interpreters and communication aids as required” so that it stipulates who is responsible for funding and arranging these supports.
82. Amend Principle 4 to include ability: “Funded aged care services, if required by an individual and based on the needs of the individual, regardless of the individual’s location, background, *ability* and life experiences.”
83. Make the First Nations Aged Care Commissioner a statutory independent appointment.
84. Include a clause in the Act with a “diversity population list” rather than a note and reference that clause in both the Statement of Rights and the Statement of Principles.
85. Use stronger, more positive language around supporting diverse needs during the assessment process within the relevant sections.
86. Review the entire Act to ensure that diversity, equity and equitable access are reflected in all relevant sections and that terminology and definitions are used consistently throughout the Act. Refer to the Aged Care Diversity Framework.
87. Amend Section 392 to ensure grant purposes may be funded for the specific populations outlined in the proposed diversity population list clause as well as to provide for community capacity building to support and advocate for culturally sensitive, culturally appropriate, trauma informed care.

88. Include under Section 91 a new sub clause that a registered provider is responsible for ensuring that aged care workers are trained in the principles and practices of culturally sensitive, culturally appropriate, trauma-informed care including understanding the impact of ageism on their attitudes to working with older people.

## Disability supports

89. Disability supports should be recognised by:

- Inserting “disability support” or alternatively “disabling condition” in all relevant sections in the legislation where “sickness” is referred to.
- Making supports for people with disability aged 65 years or older, an explicit reason for accessing aged care services by:

Amending relevant key concepts and definitions including “disability support” as part of the definition of “care needs” and “sickness”, inserting “disability supports” as part of the matters considered in prescribing services (including service list and service types), inserting “disability supports” as part of the definition and purpose of a residential care home.

Establishing “disability supports” as an entry requirement for aged care as part of aged care needs assessment, inserting “disability supports” as part of System Governor service type approvals (including standalone clause stating that services may be approved entirely on the basis of supporting someone’s disability).

- The Explanatory Memorandum should clearly:

explain the background and reason for references to “sickness” and “illness” as a legal and legislative requirement

describe the intention and purpose of the aged care system in

providing services for older people requiring disability supports

demonstrate the legislative commitment to supporting reablement, rehabilitation and maintaining and improving quality of life as required by Article 26 of the Convention on the Rights of Persons with Disabilities.

## **Include rights for carers**

90. Legally recognise carers within the Act as eligible for support within the aged care system in accordance with assessed need.
91. Include the rights of carers as stipulated by the Royal Commission.
92. Reflect the role of carers, their importance to the older people they support, and the carer's individual needs, in the relevant sections of the Act (e.g. under Section 44 (2) – assessors must also consider the needs of the carer in co-designing the service plan, including equitable and timely access to respite care and other supports for the caring role).
93. Amend Section 392 to ensure grant purposes includes grants to provide timely, equitable support for carers.

## **Audit providers stating they provide 'high-quality care'**

94. Include the right to high-quality care in the Statement of Rights. Update Section 143 on the safeguarding functions of the ACQS Commissioner to include a specific clause enabling the ACQSC to assess providers who voluntarily agree and opt-in to an assessment process to determine whether providers are meeting requirements in the definition of high-quality care.
95. Update Division 5 regarding reporting and planning of the ACQSC to ensure that outcomes of the high-quality care assessment process are publicly available to enable the "high-quality care" status of providers to be clear (i.e. achieved, not achieved, opted out).
96. Update Section 19 defining the meaning of high-quality care, Section 99 on continuous improvement as part of provider registration and Section 132 on the System Governor by adding references or links to the ACQSC high-quality assessment process and outcome to emphasise that there is a systemic mechanism to support the delivery of high-quality care.
97. Amend Section 19 defining the meaning of high-quality care in the Exposure Draft to enable a more detailed understanding of high-quality care and the way it can be applied and operationalised to be detailed in the Rules.
98. Update section on the functions of the Complaints Commissioner to enable complaints about providers not delivering high-quality care under the definition to be received, processed and responded to.
99. Enable the definition of high-quality care to be reviewed every 3 years, regardless of the timeframe for the legislated review of the Act.

100. Amend Section 19 defining the meaning of high-quality care to prioritise and include references to “culturally safe and appropriate” services and ensuring staff are “culturally competent” to deliver quality outcomes for people with diverse backgrounds and life experiences. Refer to the Diversity Framework and Action Plans and add the need to maintain contact in a manner that respects the access and communication needs of the individual.

## **Audit providers’ service improvement initiatives**

101. Amend Section 143 (Engagement and education functions), Section 144 (Complaints functions) and Section 145 (Registration of providers function) to include references to continuous improvement emphasising its importance in the work of the ACQSC.
102. Insert reference to continuous improvement in Section 19 on the meaning of high-quality care. This would demonstrate that delivering high-quality care is an ongoing, active “continuous improvement” process.

## **Protections for older people using government-funded and private aged care services**

103. Update Section 8 on the Aged Care service list and funded aged care services to include a clause incorporating all services under the aged care system including “top-up” and private services that are linked to the service list but not receiving funding payable under the Act.
104. Provide substantive details in the Explanatory Memorandum on all services delivered by the aged care system covered by the legislation and how consumer protections and rights are applied to all service contexts.
105. Review and update all sections of the Exposure Draft related to “funded aged care services” and “associated providers” to ensure that consumer protections are provided to all people accessing services under the aged care system.
106. Insert a mechanism in provider obligations and System Governor requirements to ensure that older people accessing services receive consistent information about the agreement between them and service providers by enabling standardised contract templates, in plain English and with accessible language options, to be developed and approved. Agreements and contracts would include information about rights, including the right to make complaints, and service requirements to meet quality standards.

## Ensure consistent transparency of information

107. Amend relevant sections of the Act to establish 2, publicly available, decision-making registers, one about workers and one about providers. In these registers, historical information must be preserved and published. The registers must be linked to NDIS registers. Amendments are required to:
- sections of Chapter 3 in the proposed Bill and Sections 166 and 167 to upgrade the worker screening database to a register
  - Section 134 to include coroner report information in the 2 registers
  - Section 296 to include banning order information in the 2 registers.
108. Amend all clauses in the Act regarding decision “registers” (which record relevant decisions) to ensure they are consistently made public.
109. Amend Section 322 to remove references to prejudice and insert wording that states that protected information is “information having a commercial value, whose disclosure would be, or could reasonably be expected to be, destroyed, or diminished if the information were disclosed”. This wording is in line with federal Freedom of Information (FOI) legislative guidelines. This will raise the bar for protected information making it clearer and more relevant. The definition could also incorporate a public interest test (i.e. insert at the end “and for which it is not in the public interest to disclose”).
110. Alternatively, replace prejudice with “have a substantial and adverse effect” and insert at the end “and for which it is not in the public interest to disclose”.
111. Update Right No. 6 in the Statement of Rights and other sections of the legislation to ensure that individuals have a right to access all personal care and service delivery information and decisions related to them. (e.g. even if something is deemed to be protected information, it must be disclosed to the individual to whom it relates or their representatives upon request“.)
112. Amend Section 105 on the delivery of aged care funded services and Section 89 on Conditions imposed by the Commissioner to establish a requirement for the development and use of an industry contract template, approved by the Aged Care Quality and Safety Commission, which will include those items as stipulated in the Rules including Statement of Rights, terms and conditions etc. A standardised, plain

English contract template is essential to assist older people to make informed choices.

113. Amend Chapter 5 of the proposed Bill to ensure there are clear and specific timeframes for respective decision made by the System Governor, Complaints Commissioner and ACQS Commissioner regarding service-level agreements. These service-level agreement (SLA) should be required in the Act and allow the Rules to outline the specific SLA timeframes. Currently the Act only includes timeframes for when a response will be sent once a decision has been made. Reporting how often the decision met the SLA timeframe should be reported as part of the System Governor, Commissioner and Complaints Commissioner's annual reports.
114. The annual report on the operation of the Aged Care Act must continue in addition to the proposed annual reporting on the performance of the System Governor's functions.
115. A public commitment by the Australian Government to implement a Home Care Star Ratings Program no later than the introduction of Support at Home. This commitment should be made in or prior to the May 2024 budget to provide time for its development.
116. Ensure star rating systems and their calculations evolve and mature to build confidence in their reported outcomes.

### **Transparent, fair and equitable consumer fees and government funding to provide quality services – responding to the Aged Care Taskforce recommendations**

117. Fees should be established and implemented under an Aged Care Guarantee. The guarantee should ensure that, at a minimum, the Australian Government will fund and be accountable for delivering aged care. The Guarantee should cover all services listed below which build on the Specified Care and Services Schedule and ensure that funding allocated to aged care providers is based on the individual assessed needs of participants and is used to provide core services.
118. All aged care fees, including costs for bundles of additional services in residential aged care, should be transparent and be additional to the Aged Care Guarantee. Registered providers should not be able to refuse to accept a resident unable to afford additional services charges or who is unable to use or does not wish to make use of additional services. Aged care service participants and their families should not be pushed or



coerced into paying for additional services as a precursor to accessing a place in the aged care home.

119. The Australian Government should review the proportion of the Age Pension used for the Basic Fee for aged care. The amount left over is insufficient for some full pensioners without other means to meet the cost of necessary personal items.
120. Means testing calculations and financial assessment should include consideration of housing costs, medical costs, and documented debt to ensure that participants have consistent funds to pay for pharmaceutical and other personal expenses.
121. The Australian Government should consider changing how an individual's home is used in determining contributions towards accommodation costs in residential care, provided there are protections for spouses, partners and carers who remain living in the home, a robust means testing approach protecting older Australians, and a range of payment options available.
122. Implement one mandatory fee for personal contributions towards aged care services. The fee should be transparent and should include the base level percentage of the pension (currently the basic daily care fee) and any applicable means tested components.
123. Expand payment options for personal contributions or accommodation payments to include personal savings, cash from superannuation, insurance/aged care products, investment of a lump sum, social insurance type products, homeowner equity access/release models, money from an estate.
124. Current funding for diverse and marginalised populations should be retained.
125. Implement a capital investment approach, where Government prioritises the development of alternative aged care accommodation models for older people including less institutionalised cottage style developments and seniors co-housing when coinvesting in new builds.
126. Establish legislative requirements on aged care providers that government funding is used for the purposes that it is intended for and include transparent accountability mechanisms to ensure this occurs.
127. Review government decisions related to Aged Care Taskforce recommendations in the Bill as part of the Senate inquiry.
128. Maintain current measures of transparency and enhance these in the Bill so that it is clear where funding goes to and what it is expended on.

129. The Act must state that government funding and any co-contributions and/or fees are used for the purpose for which they are given, are linked to the delivery of high-quality care and must be publicly reported on.

## **Better protections against use of restrictive practices**

130. Amend restrictive practices processes to include independent authorisation process in accordance with the applicable law of the state or territory in which the individual is provided with aged care services.
131. Further amend Section 17 restrictive practice requirements so that:
- review requirements and timeframes are included
  - the requirement for an individualised behaviour support plan is explicitly stated
  - representatives and independent professional advocates, when requested by the individual or representative, are included in discussions and decisions around the use of restrictive practices.
132. Ensure the Rules provide clear guidance that some people with cognitive impairment can benefit from access to pharmaceutical interventions, that could be deemed a restrictive practice, with appropriate protections and review timeframes in place.

## **New security of tenure provisions**

133. Include security of tenure provisions in the Act with the Rules outlining the detail of the processes modelled on the current laws.
134. Include a new provision allowing a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative care and/or housing solution before suspending the security of tenure of any individual accessing aged care services.

## **Procedural fairness for older people in individual review and appeals decision-making processes**

135. Subject to the Chapter 8 section on Review of Decisions being drafted, amend all clauses that refer to how individuals "may apply for

reconsideration of a decision” to “how the individual may seek an internal review of the decision”. This would include sections on applying for access to funded aged care services, aged care assessment and reassessments, approval of access to funded aged care services, revoking eligibility determinations and access approvals, classification assessments and reassessments and the use of computer programs to make decisions.

136. Amend any clause where a lack of decision is taken to mean it is withdrawn and, instead, state clearly that the decision is to deny services.
137. Amend the Effect of the Statement of Rights (Section 21) to ensure that all government actor decisions are subject to the Statement of Rights and are reviewable.
138. Amend the Inspector General Act to have scope for review and/or oversight of computer-generated decisions.
139. In the future, establish an AI Oversight Committee to ensure procedural fairness for individuals accessing aged care services.

## **Remove volunteers from the definition of aged care worker**

140. Include the right of individuals to choose whether to participate or not in any aged care programs involving the use of volunteers in the Statement of Rights.
141. Include a risk-proportionate approach to volunteer screening and registration in aged care, separate to paid aged care workers, reflected in System Governor and System Regulator implementation and provider practice.
142. Create an obligation on registered providers to provide training and education for volunteers specific to their role.
143. Require the Regulator to develop improved reporting processes and data collection to provide a clear picture of the frequency and prevalence of any breaches and compliance issues by volunteers involved in aged care and of the proportion of complaints and whistleblower disclosures made by volunteers.
144. Conduct further consultation on the development of appropriate mechanisms for volunteer screening, matching and supervision, with volunteers, peak volunteering bodies, Aged Care Volunteer Visitors Scheme (ACVVS) providers and registered aged care providers that engage volunteers.

## **Address Climate Change**

145. Create obligations on registered aged care providers to:

- identify and prioritise monitoring clients at risk of the day-to-day impacts of climate change, such as heatwaves and other extreme weather events
- plan for and take actions to prevent, reduce and minimise these impacts, including prompt medical attention
- educate their workforce to enable them to recognise and respond to any deterioration in a person's condition due to these day-to-day impacts of climate change.

## **Clearer consultation timelines for Support at Home program amendments**

146. Provide clear and realistic consultation timelines for the Support at Home amendments to the new Act, giving all members of the community with an interest in aged care and a connection to older people using aged care services sufficient opportunities to ask questions, be informed and provide considered feedback on complex policy issues.

147. Provide substantive detail in the Explanatory Memorandum for the Aged Care Act on the implications of the future implementation of the Support at Home program for the Aged Care Act.

## **Consistent language that is easy to understand**

148. Strengthen Object (b) by including that the aged care system will uphold the rights of and deliver quality care to people with dementia or cognitive impairment (who are a significant cohort of aged care recipients).

149. Given the high proportion of people in the aged care system living with a cognitive impairment, it is recommended that the definition of "care needs" (s7 definition parts (a) and (b)) is amended to include both "mental" and "cognitive". This will reflect consistency with references in the definition of high-quality care subclause v, and in the Statement of Principles 3 (d).

## **Commencement of the new Aged Care Act on 1 July 2024 with review every 3 years**

*“Please forge ahead to get the Act through the parliamentary process. Amendments will always come but we have to start.”*

(Carer)

*“Not being ambitious enough is how we ended up with such a poor aged care system. We should aim for the stars I reckon.”*

(Older person)

*“I understand the urgency, but I think there are major flaws in the current draft.”*

(Older person receiving aged care services)

*“When I first read the draft, I thought I had the wrong version because I could not see how this could be a rights-based piece of legislation.”*

(Community member)

It has been 5 years since the Aged Care Royal Commission began and 3 years since it delivered its landmark report recommending the creation of a new rights-based Aged Care Act. Older people shouldn't have to wait any longer for their rights to be respected in aged care. In a recent consultation webinar held by OPAN and COTA, 74 per cent of attendees supported commencement of the new Act on 1 July 2024.

Whilst we recognise providers already meet many requirements in the proposed Bill, because of ongoing regulatory reform in the wake of the Royal Commission, any delay to the formal creation of a rights-based aged care system is unacceptable. The Albanese Government committed to the Act's commencement in its first term as one of its key election pillars. Delaying the implementation of the Act beyond 1 July 2024 would put this commitment at risk, given an Australian federal election can be called any time from August 2024. Transition arrangements for parts of the Act, or for how it applies to certain aged care service groups, should be considered.

The new Act must have built-in capability to evolve and respond to changing needs, legislative changes, or international conventions where these impact on the Act. The new Act is a major shift away from how the sector currently operates and any issues or unintended consequences need to be proactively identified and resolved.

We recognise there are older people who are opposed to commencement of the Act on 1 July 2024. Concerns raised include that the consultation period and process was not sufficient, and that there are many glaring omissions in the Exposure Draft. This is why it will be important for the Senate Inquiry process to provide enough time to review amendments to the existing Exposure Draft and any new information added into the Exposure Draft as well as the Rules (which have so far not been made public and which will impact on the delivery of rights-based care and supports).

A comprehensive review, modelled on the provisions in the Aged Care (Living Longer Living Better) Bill 2013, should be adopted for a 3-year review of the operations of the new Act. It must include a comprehensive scope of the review, clear requirement for consultations, requirements for the report to be tabled in Parliament and appointment of an independent reviewer by disallowable instrument.

### **Recommendations**

1. Introduce the Bill into Parliament in March 2024 to enable a 3-month review by Parliament.
2. Table the new Rules proposed to accompany the Act in Parliament no later than 3 weeks before submissions to a Parliamentary Inquiry close.
3. The Act should commence on 1 July 2024 (or as soon as practicable thereafter if parliamentary processes cause delays) with some consideration to transition/implementation timelines for certain aged care service groups, new enforcement activities and the Commonwealth Home Support Programme (CHSP).
4. Embed a 3-year review of the Act within the legislation conducted by an independent person or body appointed by the Minister. The instrument of appointment should be a disallowable instrument for the purposes of Section 43 of the Legislation Act. The review process should include a substantive consultation period and the review report tabled in Parliament. The review could also be expanded to include the Inspector General Act.

## **Embed and enforce human rights and focus on wellbeing and quality of life**

*“The right to an assumption of legal capacity needs to be in the rights. It is fundamental to self-management, assessment and guardianship.”*

(Older person)

*“I am in a residential aged care facility, and no information about aged care, aged care reform, Code of Conduct, Quality Indicators, or aged care consumer’s rights [has] been communicated here at the facility. How will the Act ensure information dissemination in a timely manner will be enforced?”*

(Older person)

*“You can’t lower the bar on older people’s rights just because it’s hard and staff aren’t trained well enough. Appropriate training is available for staff.”*

(Community member)

*“In Part 3, Div 1, Statement of Rights 2 (b) an individual has a right to equitable access to palliative care and end of life care when required. There needs to be clarity around ‘end of life care through palliative care or end of life including Voluntary Assisted Dying for those who request it.”*

(Older person)

92 percent of attendees at online consultation forums said their rights should be directly enforceable in the Act.

A human rights-based approach empowers people to know and claim their rights and increases the ability and accountability of individuals, corporations and institutions responsible for respecting, protecting and fulfilling those rights.

The objects of this Bill are to *“in conjunction with other laws, give effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD)’.*

The decision not to reference all conventions to which Australia is party and to include a comprehensive list of relevant rights in the Act, combined with the failure to make rights directly enforceable, means that the proposed Act falls short of “giving effect” to the full suite of Australia’s obligations under international

human rights treaties. "Giving effect" to Australia's obligations under international conventions requires:

1. a more complete list of relevant rights in the Statement of Rights, in particular those guaranteed in the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (CAT)
2. additional pathways of enforcement to be incorporated into the Act, including the provision that complaints can be based directly on an allegation of non-compliance with or violation of a right.

While the 2 listed conventions (out of 7 principal human treaties by which Australia is bound) affirm many important rights for older people, some key rights are not expressly included. For example, the right to be free from torture or cruel, inhuman or degrading treatment or punishment, right to liberty and security of person, inherent right not to be arbitrarily deprived of one's life, right to liberty of movement and freedom to choose their residence and right to freedom of thought, conscience, and religion. For this reason, the International Covenant on Civil and Political Rights must also be included within the Objects. Given the importance of the proper regulation of the use of restrictive practices and the abuses which have been documented, reference to the Convention Against Torture and its Optional Protocol appears essential.

The proposed Act does not provide for the direct invocation of rights by those alleging violations of them and allows only indirect enforcement via administrative complaints invoking the Code of Conduct, the Aged Care Quality Standards or other mechanisms in the Act and envisages promoting compliance through the exercise of regulatory powers.

There also appears to be no express requirement that public officials and institutions are bound to comply with the Statement of Rights, or the treaties referred to in the Objects clause – even the limited statement in Section 20(2) of Parliament's intention that rights be respected applies only to providers and not to the System Governor, the Aged Care Quality and Safety Commission (ACQSC) or other public officials involved. In this respect, also, the Exposure Draft falls short of clear and robust implementation of Australia's human rights obligations.

The lack of direct enforceability through court or administrative procedures means that individuals are reliant on the limited guarantees in the subsidiary documents and the uncertain, expensive, and for most people largely inaccessible remedies that may be available under the general law. There may also be some possibility of seeking a mediated or conciliated approach by



utilising the human rights complaints function of the Australian Human Rights Commission. However, the Australian Human Rights Commission's jurisdiction is limited (it does not extend to complaints of violation of the ICESCR, for example), its recommendations are non-binding, and there are few instances in which its recommendations have been accepted by government.

As a last resort, a person may be able to lodge a claim before one of the UN human rights treaty bodies under the ICCPR, CRPD, CAT or Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) conventions – but not the ICESCR as Australia has not been prepared to accept the individual complaints procedure under that treaty. These procedures require the exhaustion of domestic remedies, generally take years to be resolved and result only in recommendations that are not legally binding under international or national law, and with which the Australian Government has a mixed record of compliance.

Accordingly, the Act should provide for direct enforcement of the rights guaranteed in an expanded Statement of Rights, in conjunction with the inclusion of an explicit obligation on providers and government to comply with those rights in the performance of functions or exercise of powers under the aged care legislation.

Multiple concerns have also been raised about deferral of key issues to the Rules and many felt that recommendations of the Royal Commission must be reflected in the primary legislation. For example, the Royal Commission recommended that the Act should include a declaration that the identified rights may be taken into account in interpreting the Act and any instrument made under it. As it stands, very few members of the community would deduce from reading the Statement of Rights that if their rights were breached, they would have to refer to the Aged Care Code of Conduct or the Aged Care Quality Standards to seek the limited remedies that may exist under the legislative scheme.

## From ill health and sickness to wellbeing and quality of life

The Bill is structured around providing services to people who have “ill health” or “sickness”. This formulation is said to be necessary because of the need to anchor the constitutionality of the Bill in Section 51(xiiiA) of the Australian Constitution.<sup>1</sup> At the same time, the consultation documents indicate that the 2 treaties referred to, the ICESCR and the CRPD, expand and strengthen the constitutional foundation bill by relying on the power to legislate with respect to external affairs under Section 51(xxix) of the Constitution. It is not explained why the Bill does not draw on the holistic approach to the right to health reflected in Article 12 of the ICESCR and Article 26 of the CRPD <sup>2</sup>. Such an approach could also be bolstered constitutionally and substantively by the utilisation of the other available treaties. The current approach seems to reflect the conceptual approach of the past.

As we argued above, a more fulsome inclusion of the full range of relevant international treaties would strengthen the constitutional basis of the Act as well as its efficacy as a rights-based instrument. It would also render the reliance on powers around sickness and illness even more unnecessary.

Beyond constitutional issues, and more importantly for the efficacy of the Act, using sickness and illness framing is damaging to older people. It perpetuates a medicalised, deficit model of aged care and ageist attitudes toward older people that they are all “sick”. Many people seeking aged care supports are not in ill health nor have a “sickness” but do have needs related to frailty due to ageing or increasing support needs due to progression of a disability.

The new Act must also be framed around reablement, rehabilitation, wellness and quality of life. The benefits of staying active and healthy as individuals get older are well known and include increased wellbeing and ability to participate in social and other activities, recovering from illness more quickly and preventing falls. These principles must be embedded more clearly and effectively throughout the new Act.

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<sup>1</sup> Section 51 (xiiiA) provides that the Commonwealth Parliament has power to legislate with respect to “the provision of maternity allowances, widows’ pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances”.

<sup>2</sup> Article 12(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

The new Act also provides the opportunity to fully address Recommendation 69 of the Royal Commission, through clarifying roles and responsibilities for delivery of health care to people receiving aged care. The right to health care is a key human right and receiving aged care services should never preclude older people from receiving health care services. Currently, some aged care participants are prevented from accessing health care they would otherwise be entitled to. These access barriers occur at a policy level, (e.g. preventing program “double-dipping”), at an allocation level, (e.g. people receiving aged care allocated to lower level of priority to health care) and at a systemic level (e.g. aged care residents being unable to afford the cost of transport or escort to medical appointments).

The recently released joint statement to clarify the roles and responsibilities for the delivery of health care for people receiving aged care services attempts to provide clear delineation of clinical care by outlining when care provided to an older person is predominantly the role of the Commonwealth, States and Territories, or an aged care provider. However, while it reinforces the rights of older people receiving residential aged care services to equitable access to emergency, hospital and other health services, it appears to perpetuate uncertainty and divergent interpretations of responsibility for people accessing home and community-based health and aged care services.

A case in point is older people receiving home care packages and access to community-based palliative care services. Older people, their families and carers can be caught at the intersection of inadequate access to generalist palliative care and low priority for specialist palliative care services, leading to poor outcomes. The assumption at a policy level that generalists are willing and able to play a key role in palliative care provision is not borne out in lived experience.

## **Recommendations**

5. Include a declaration that the identified rights must be taken into account in interpreting the Act and any instrument made under it.
6. Strengthen Object (d) by inserting additional text about access to support and justice. The full text to read “ensure individuals accessing funded aged care services are free from mistreatment, neglect and harm from poor quality or unsafe care and have access to support and justice whenever any harm is caused to them.”

7. Include the right to access health care services in the Bill to ensure that all individuals entitled to benefits and services outside of the aged care system (such as Medicare-subsidised health care services, inpatient and outpatient rehabilitation services, Veteran entitlements to DVA medical services and DVA medical aids) can receive them and cannot have them denied due to receiving aged care services.
8. Retain the requirement from the current Act for providers to facilitate access of individuals to health care services outside of the aged care system through inclusion in the obligations of registered providers.
9. The Act must oblige aged care providers to uphold rights. We recommend creation of a positive duty (See recommendation 15).
10. The Explanatory Memorandum must clearly articulate that the objectives of the legislation are to be read in a “strengths-based” not “deficit” approach. The Memorandum must emphasise the intent of aged care service delivery to provide older people with access to reablement where possible, and to enhance wellness and quality of life.
11. Include the right to aged care services in the Statement of Rights and back this up with equitable and timely access to aged care services (Item 10). Create an obligation on the System Governor to steward an aged care system capable of providing services to all eligible older people.
12. Reliance on all the available treaties to strengthen the constitutionality of the Bill and to give effect to a comprehensive and holistic approach to the rights of older persons receiving aged care support including a positive approach to the right to health.
13. Include a section in the Act, in line with the Disability Royal Commission recommendation 10.1 “Embedding Human Rights” so that the Aged Care Quality and Safety Commission (ACQSC) is required to deliver a capacity-building program to support aged care providers to embed human rights in the design and delivery of their services. The program should be co-designed with older people, older people’s representative organisations and diversity peak bodies.

## **Create a positive duty to uphold rights and clear pathways to complaints**

*“What does the new Aged Care Act do to address the imbalance of power in aged care?”*

(Older person and informal advocate)

*“Hairdressing, going to a shop or having time out with friends away from the aged care facility not being approved or actively discouraged is making clients literally feel like they are in a prison. To me this is intolerable.”*

(Older person)

*“Concerned that penalties and some actions are limited to ‘serious’ failures. Very small failures in aged care can lead to real harm, particularly if repeated.”*

(Older person receiving services)

*“As a representative of my parent with dementia in aged care, I make verbal complaints almost daily, often for risky and unacceptable behaviour. My parent doesn't understand what this is about and tells me to keep my mouth shut – obviously fears retribution as well.”*

(Family member)

*“I do question why the principles do not apply to providers. Surely principles applying to providers would support the improvement of aged care services?”*

(Advocate)

We strongly support inclusion of a new Statement of Rights in the new Aged Care Act as primary legislation rather than in subordinate legislation. However, we do not support clause 21(3) outlining that these important rights are not directly enforceable by proceedings in a court or tribunal. This contradicts the commitment to a rights-based approach to the Act. Interpretation in a court or tribunal of the policy intent of the Act must be able to reference the Statement of Rights. Equally, a person should be able to rely directly on their rights being guaranteed in the Statement of Rights as the basis of a complaint lodged under the complaint's procedures in the Act, rather than hope that the operation of the Code of Conduct and Aged Care Quality Standards will give full effect to the rights listed.

It is necessary but not sufficient for rights to be enforced only when another part of the Act is not complied with (e.g. the Aged Care Quality Standards are not followed, or the Code of Conduct is not adhered to, or a provider does not do what the Act requires of them under their registration conditions or other provider obligations). Some rights are not specifically mentioned in the Standards or the Code of Conduct, meaning these rights are unenforceable. A particular area of concern is that for some types of home care services (Categories 1-3), only the Code of Conduct will apply, without a direct link to the Statement of Rights or a requirement to uphold rights generally. We recommend including an obligation in the Code of Conduct to uphold the Statement of Rights.

We do not support the current formulation of clauses 21(2), 92(1)(b), 144(a)(ii) and 183(2)(ii) which only require providers to not act in a way that is incompatible with the Statement of Rights. This is a very low bar. The second mechanism where the government has indicated it will measure providers upholding rights requires providers to provide information on rights. Neither of these 2 requirements make a provider act in a positive or proactive way with an obligation to uphold rights. As it stands, the current draft is inadequate and does not reflect a full commitment to a rights-based approach.

A system that relies on individuals to raise a complaint is inherently problematic, due to the power differential between the service user and the service provider. The power imbalance is even more pronounced where the individual has impaired decision-making ability, is from a diverse or marginalised group and/or has experienced life trauma. One way to address the power imbalance is to ensure breaches of rights have consequences. This can be done by placing a positive duty on providers to deliver rights-based care.

We support the obligation of a new “positive duty” on providers to uphold rights – using the recent amendments to the Sex Discrimination Act, following the Jenkins Review, as a model. The new sex discrimination changes were introduced in the workplace because of the ongoing power differential between institutions and individuals. This results in the ongoing abuse of the rights of those individuals and is comparable to the power imbalance that exists in aged care today.

The new positive duty imposes a legal obligation on organisations and businesses to take proactive and meaningful action to prevent relevant unlawful conduct from occurring in the workplace or in connection to work. This change requires organisations and businesses to shift their focus to actively preventing workplace sexual harassment, sex discrimination and other relevant unlawful conduct, rather than responding only after it occurs. Relevant regulatory changes

will need to be made to ensure appropriate consequences where a positive duty has not been applied.

Ensuring a positive duty on providers to deliver on the rights in the Act addresses the power imbalance between providers and older people. It also places the onus on providers to deliver rights-based care rather than the current proposal that places the responsibility on individuals to make complaints that their rights have been breached.

Rights-based care emphasises “choice and control” and “self-determination” enabling and strengthening the decision-making capacity of individuals accessing aged care services to participate in activities that improve their quality of life and wellbeing.

A corresponding change will need to be made to the role of the Independent Complaints Commissioner so that they have powers to investigate and enforce compliance with the positive duty.

## **Competing Rights**

We have heard many providers and others call for the Act to not only include rights but responsibilities. However, this ignores the reality that rights apply to everyone and that some of those rights may come into conflict with the rights of others. A better framing is to consider how to address competing rights. The Ontario Human Rights Commission describes competing rights as involving *“situations where parties to a dispute claim that the enjoyment of an individual or group’s human rights and freedoms, as protected by law, would interfere with another’s rights and freedoms”*. In a competing rights situation, there must be a process on a case-by-case basis to search for solutions to reconcile competing rights and accommodate individuals and groups, if possible. The Ontario Human Rights Commission has developed a policy on competing human rights that *“sets out a process to analyze and reconcile competing rights that emphasizes specific objectives and considerations.”* This policy is based on:

- dignity and respect
- encouraging mutual recognition of interests, rights and obligations
- facilitating maximum recognition of rights, wherever possible
- helping parties to understand the scope of their rights and obligations

- addressing stigma and power imbalances and help to give marginalised individuals and groups a voice, and
- encouraging cooperation and shared responsibility for finding agreeable solutions that maximise enjoyment of rights.

In addition, workers already have some rights protections under the Work Health and Safety Act, which outlines a worker's right to a safe workplace. A note referencing this could be made in the Aged Care Act.

## Recommendations

14. Ensure the legislation has an obligation on providers to give older people plain English, accessible information about their rights in formats that are appropriate to older people from diverse backgrounds and older people with visual and hearing impairments. We note Section 105 (b) provides a generic requirement to explain information as outlined in the yet-to-be published Rules.
15. Amend Sections 21, 92 and 183 of the Act to require a positive duty on providers to uphold the rights of older people and deliver rights-based care. The amendment should be modelled on recent changes to the Sex Discrimination Act to require a positive duty on employers to eliminate discriminatory conduct.
16. Include a clear complaints mechanism for older people to raise standalone breaches of rights.
17. Outline in the Act, or in the Rules, guidance on how to respond to and balance competing rights, this includes not only the rights of other people accessing aged care services, but aged care workers and others providing care for the individual. The Ontario Human Rights Commission, Policy on Competing Rights and in particular its articulation of key legal principles, is one such option: <https://www.ohrc.on.ca/en/policy-competing-human-rights>
18. Amend the powers of the new Independent Statutory Complaints Commissioner (see Item 7 for more detail) so that they can investigate and conciliate complaints about breaches of rights and refer to the ACQSC matters requiring enforcement of compliance.
19. Include or identify appropriate penalties under the Act for breaches of rights resulting from poor and neglectful practice and behaviour by providers, government or regulators.



20. Where the complaints process does not result in a satisfactory outcome, breaches of the Statement of Rights must be part of tribunal review process via the Administrative Appeals/Review Tribunal and where there are grounds to go to court, such breaches must be able to be part of the court's considerations.
21. Elevate the Code of Conduct into primary legislation (Section 13) to increase prominence and ensure changes are rare.

## **Embed principles of choice and control, consumer-directed care and self-management**

81 per cent of older people participating in online consultation forums strongly agreed that providers should be required to listen to older people about what their needs are and what care and supports they want (choice and control).

*"I note that much of the draft new Act and standards use 'person-centred care'. I use the analogy for the difference in terms to likening person-centred care to being driven around to where you want to go by your parents. But consumer-directed care relates to that sense of independence you have when you can drive yourself wherever and whenever you want. There's such a difference. Stick to consumer-directed care!"*

*(Older person receiving aged care services)*

*"The consumer MUST be afforded knowledge of just WHAT is available by the assessor in everyday language. On the first assessment, one is overpowered by paperwork, and then nothing for quite a while. Prior to that first interview, would there be a booklet provided to peruse for the consumer to note services?"*

*(Volunteer)*

*"The [draft Act] supports my rights to access services from a service list. Not what I need to meet my need."*

*(Older person receiving aged care services)*

*"What happens if a provider wants a care plan which the recipient does not agree with?"*

*(Older person receiving aged care services)*

*"Self-determination is not used or understood by care workers."*

*(Family member)*

*“I find again and again that the resident is too afraid to bring up any issue so as not to make waves. There must be an avenue to quietly be reassured that choice and control IS important for every resident, and not to wait for something small to become a problem.”*

(Volunteer)

Central to the work of all our organisations are principles that advance the rights of older people who participate in the aged care system, to enable and empower them to make informed decisions and choices about their care services, protect and safeguard them from poor practice, deliver high quality health and quality of life outcomes and transform aged care service culture to focus on their needs, choices and preferences. The lived experience voice of older people and their carers should always remain at the heart of the aged care reform process.

The Exposure Draft recognises that an objective of the Aged Care Act is to “enable individuals accessing funded aged care services to exercise choice and control in the planning and delivery of those services”. This is critical and fundamentally important. However, it is insufficiently clear and needs to be expanded. The legislation should do more than “enable” older people to exercise choice and control but should ensure that all people, regardless of their diverse backgrounds or lived experience, are supported by the aged care system and service providers to do so. Exercising choice and control should relate to all aspects of the aged care system that impact on the lives of older people including assessment, service planning, service delivery and the review of policy and programs.

While we acknowledge “planning” might be taken to include the assessment process, it equally may be interpreted to simply refer to government planning processes at a higher level. We propose that the individual’s choice and control over their services (even if within the confines of their assessed needs) must be explicitly included. No older person should be required to receive a service they do not wish to receive because their wishes, views and preferences were not acknowledged and incorporated in the assessment process.

This amendment to the object of the Act, expanding and clarifying choice and control, should then be reflected in changes to Section 44 regarding undertaking aged care needs assessments. Assessors should be required to apply “choice and control” principles and support older people accessing or seeking access to aged care services to co-design their service plan that determines the types and levels of services required based on assessed needs.

The Act must explicitly refer to older people accessing aged care services as active participants and decision-makers in service planning. In the current Exposure Draft this section merely requires a discussion between assessors and the individual seeking services. There is no requirement for the individual's consent, wishes or preferences to be reflected and, in later sections for the approval process, to have regard for their will and preferences when approving the proposed services. There is also no requirement for the person's carer to be involved in developing a service plan that will also support their needs in caring for the older person (refer to recommendations on rights for carers).

The demonstration and application of choice and control should extend to a clearly identified and specific role and function for older people using aged care services in the development and review of aged care policy and programs at both a system and provider level. System Governor and provider obligations for this should be detailed in the Rules of the Aged Care Act.

We are encouraged to see that "choice and control" type principles are reflected in both the Statement of Rights and Statement of Principles. It is also a priority under the aspirational goal of delivering high-quality care.

The principles of "choice and control" are widely valued by older people who use aged care services. For the purposes of the Aged Care Act, "choice and control" should be viewed as inclusive of other related concepts such as "self-determination", "dignity of risk", "consumer directed care", "co-design" and "self-management". They broadly reflect that older people have power to make decisions over the aged care services they use and can determine their own life direction. They can make choices that are right for their goals and needs. The link between "choice and control" and the other terms mentioned above should be outlined in the Explanatory Memorandum of the Act.

Whilst "choice and control" principles are articulated in the Objects, Statement of Rights and Statement of Principles of the draft legislation, they are not sufficiently reflected in other chapters of the Exposure Draft related to access and assessment, provider obligations and decisions, System Governor and Commissioner determinations, complaints functions and information management. Examples of where "choice and control" is insufficiently referenced include:

- No reference to "choice and control" principles and rights in the detailing of general entry requirements process for aged care.
- In making determination on the approval of access to funded aged care services (Section 47), the System Governor should

have regard to the wishes and preferences of older people as expressed in the service plan. However, this is not referred to.

- In providing information to older people accessing aged care services, providers should have regard to rights and choice and control principles (as in Section 105), but this is not mentioned.
- Information and changes in information about older people accessing aged care services regarding assessment, reassessment, service plan and service delivery should be provided to them. This is not reflected in the Act.
- Older people accessing aged care services must have control over who their representatives are, not the System Governor. Older people should also have the ability to appoint both Supporters and Representatives. This should be reflected in Sections 387 and 388.
- The use of computer programs, and in the future potentially AI technology, to make decisions has potentially serious implications for choice and control and self-determination of older people accessing aged care services. There appears to be no oversight, or publication requirements of systemic usage and accuracy of decision-making.

The strengthening of “choice and control” can also be achieved by elevating the Code of Conduct into the primary legislation. Under the Code, workers are expected to act with respect for people’s rights to freedom of expression, self-determination, and decision-making in accordance with applicable laws and conventions. Having the Code of Conduct as a key feature of the Act is a way of embedding choice and control and self-determination in legislation, providing for parliamentary oversight of its operation and limiting the capacity of future governments to change or amend this protection out of the Act.

## **The use of Computer Systems and AI**

The Exposure Draft allows for computer automation of System Governor decisions related to AN-ACC classification and prioritisation of aged care service access. The Exposure Draft also provides for similar use of computer automation for some functions by the ACQS Commissioner. It is critical to establish mechanisms to ensure support for the wishes and preferences of older people accessing aged care services in these System Governor and ACQS Commissioner determinations.

There are risks of bias and discrimination being generated using algorithms, and when the data is poor, outcomes are equally problematic. Potentially, population groups under-represented in the data (such as members of CALD and LGBTIQ+ communities) are discriminated against. We understand that a full assessment of this issue can't be made without further details on classification and prioritisation of services.

The European Commission is implementing an AI regulatory framework and plan to address risks and avoid undesirable outcomes such as the subject of a decision being unable to find out why an AI system has made a decision or taken an action. The proposed rules consider *"AI systems intended to be used by public authorities or on behalf of public authorities to evaluate the eligibility of natural persons for public assistance benefits and services, as well as to grant, reduce, revoke, or reclaim such benefits and services"* to be high-risk and therefore subject to extensive and strict obligations.

Similarly, the Australian Human Rights Commission has identified Australia must build upon the capacity of existing regulators to assist in promoting human rights-centred AI and avoid the harms caused by algorithmic discrimination and automation bias. We seek these regulatory safeguards for any use of AI systems under the Aged Care Act.

## Recommendations

22. Amend and strengthen Objects of the Act, Section 5(c) to ensure that:
  - older people seeking access to or accessing aged care services have the right to be supported to exercise choice and control not merely "enabled" to do so.
  - exercising choice and control relates to matters that affect the lives of older people and this includes the assessment for and planning of aged care services, the delivery of aged care services and participating in the development and review of policy and programs.
23. Upgrade Section 44 regarding undertaking aged care needs assessment by adding a new clause about the development of a service plan that outlines services for the individual to receive. This plan should be co-designed with the individual seeking aged care services (and their carer where relevant – see Item 16) reflecting their consent, will and preferences about the delivery of these services.

24. Amend Section 47 regarding approval of access to funded aged care services to ensure the System Governor must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services.
25. Ensure that any or all computerised and AI systems used now or in the future to generate System Governor and ACQSC decisions are subject to strict obligations including:
  - adequate risk assessment and mitigation systems
  - high quality of the datasets feeding the system to minimise risks and discriminatory outcomes
  - logging of activity to ensure traceability of results
  - detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance
  - clear and adequate information to the user
  - appropriate human oversight measures to minimise risk
  - high level of robustness, security and accuracy
26. Ensure that all uses of System Governor computer or AI generated decisions related to individuals seeking and accessing aged care services are monitored and audited, with specific attention to their suitability when applied to people with diverse backgrounds and from more marginalised groups and the findings of the audit made publicly available and included in all annual reports regarding the operations of the system.
27. Ensure that breaches of rights do not require another type of action (e.g. breach of standards) to make rights enforceable or be raised as a complaint. There must be an option to directly enforce rights through either a court of law or administrative means in any instances of denial of consumer-directed care, choice and control and self-management approaches to the delivery of care in assessment, care plan agreement and service delivery.
28. Require the System Governor and the ACQSC to comply with the rights in the Statement of Rights and ensure their decisions are reviewable on the basis of a breach of the Statement of Rights.

## **Embed the right of older people to make decisions and receive support when they need it**

76 per cent of attendees at online consultation forums said that workers should also be required to use supported decision-making when working with older people.

*“Supported decision-making needs clear framework and structure and education for staff – e.g. many people with early dementia have capacity to make decisions but many care workers/medical staff see a diagnosis and assume [lack of] capacity. There is more understanding of this in the disability sector and aged care staff need education and support to understand this.”*

(Aged care worker)

*“[When] care workers comment on recipients’ capabilities, what specific training do they undertake to be qualified to make informed decisions about the clients that are then recorded and lead to outcomes? This is a possible life-changing situation for clients.”*

(Older person)

*“As a carer for my parent who lives with dementia in Residential Aged Care, I am currently not allowed a copy of their care plan. I can read it on the computer but not allowed to take away and digest. I imagine it is the same for other residents who do not have dementia who may like to review their records.”*

(Carer and representative)

*“Staff needed training in how to speak with the resident on day-to-day matters, but they shouldn’t be advising residents.”*

(Family member)

*“I would be concerned that care workers could make decisions or be involved, as in the past I have seen this abused. It is out of their scope of practice.”*

(Health care worker)

*“So many times, you hear the organisation state ‘we know what is in best interest’.”*

(Family member)

In General Comment No. 1 (2014) Article 12: Equal recognition before the law, the CRPD, states that: *“The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.”*

## **Autonomy, independence and supported decision-making**

As with all adults, older people have the right to make decisions about the care and services they receive and the risks they are willing to take. The presumption must always be that older people have the ability to make decisions. This is part of individuals’ right to respect as a person before the law and the enjoyment of legal capacity, which are guaranteed by Articles 14, 16 and 26 of the International Covenant on Civil and Political Rights and, in the case of persons with disabilities, reaffirmed by Article 12 of the Convention on the Rights of Persons with Disabilities.

Supported decision-making (SDM) is *“a central principle of the United Nations Convention on the Rights of Persons with Disabilities. People with disability should receive the support necessary to enable them to make and implement the decisions that affect them.”*

The benefits of supported decision-making summarised by Piers Gooding in 2015 include: *“the promotion of personal autonomy, authority and control for people over their own lives; the use of a more realistic account of autonomy and decision-making which take into account a person’s social context and interdependence; providing a clear structure for addressing decision-making by people who may require support to make decisions, or whose will and preference is unclear.”*

Supported decision-making can mean the difference between offering the older person the respect we would all seek (respect for a lifetime of decisions, one’s values, will and preferences) and a substitute decision being imposed, which includes the risk of those rights being denied. It is a commonly reported event that, regardless of the parameters of an order or the powers offered to a substitute decision-maker, systems and services will seek and consult the substitute decision-maker as a convenience to avoid communication support needs, because it takes less time, or because interests are aligned with theirs rather than those of an individual.



Supported decision-making should be the first and preferred option, with substitute decision-making seen as a last resort that would only need to be implemented in rare and exceptional cases.

It is positive to see the proposed Bill recognises that individual older people have the right to make decisions for themselves and, where they need assistance in making decisions, that the principles of supported decision-making must be followed. In addition, the proposed Bill recognises that the older person's will and preferences must be upheld (i.e. what would the person have decided for themselves if they were going to make a decision). It is also positive to see that Guardians and Powers of Attorney under state or territory law will be given representative status if they ask for it, unless there's a good reason not to.

## **Supported decision-making must be applied in every interaction with an individual**

Supported decision-making should be applied at every interaction and every assessment or decision-making point about a person's care. Inclusion of a definition of supported decision-making in the Act provides important guidance for anyone applying the principles of supported decision-making within the aged care system. Explicit inclusion of the presumption of capacity within the statement of rights – where it does not currently appear – will reinforce the importance of support for decision-making and that supported decision-making principles need to be observed at all points within the aged care system. Embedding that supported decision-making is a focus into the Objects of the Act, will make it clearer to everyone.

All aged care workers providing care and support to older people must understand and be required to use supported decision-making principles and to uphold the will and preferences of the people they work with in daily interactions, wherever a person needs support with day-to-day decision-making.

## **Supporters and Representatives**

However, there are limitations in the proposed Bill. Older people cannot have both a Supporter (to help them obtain and understand information) and a Representative (to assist the older person or make decisions in line with their will and preferences when they can't) at the same time.

Where the System Governor may be required to appoint a Supporter or a Representative on an older person's behalf, the System Governor should be

required to consider the strength and currency of the relationship of that individual to the older person. If the older person has an ongoing relationship with a carer, family member and/or friend, then they must also be consulted. Any directives in Advance Care Directives or other written documentation must be considered.

In addition, there is no requirement for an independent professional advocate to be involved if the older person has issues with their Supporter or Representative or has a cognitive impairment and has no Supporter or Representative acting for them. This must be addressed.

An older person can appoint a representative to “make the decision on their behalf.” This needs to be explicitly recognised as an area that needs to be operationalised and monitored carefully – it could lead to a checkbox approach to maintaining the current system. For example, if an organisation or facility has 90 or 100 per cent of clients who have mysteriously ticked the box that they choose for someone else to make decisions on their behalf, then there is obviously a problem. We are aware of some people working in aged care around Australia who are already planning their adherence to the new Act by holding onto this one part of the sentence.

The description and application of terms to describe Supporters and Representatives are inconsistently applied throughout the Act. These are important concepts for the progress of the Bill and their roles should be clearly articulated.

## **Will and preferences**

The practice of making decisions on “behalf” of someone is only relevant in rare cases where it is impossible for anyone, including the representative, to ascertain the current will and preferences of an individual. This is not at all clear in the Act. Quite simply, a Representative exists to assist in ascertaining the current will and preferences of an individual. If the individual has already expressed their will and preference, either verbally or non-verbally, then this must be supported. The only situation where currently expressed will and preferences can be ignored or overridden is where there is clear **imminent** and **serious** risk of harm to the individual. In rare cases where the current will and preferences of the individual cannot be ascertained, then all resources and contacts must be sought, including Advanced Care Directives, to help make a decision that best reflects the individual’s will and preference.

## **Interaction with State and Territory-appointed representatives**

It is especially vital that the Bill clarify the interaction between aged care Supporters and Representatives and appointments made under State and Territory laws. Older people were adamant that if they have already appointed someone as their nominated attorney for example, that there needed to be a guarantee that the attorney or guardian must not just be consulted but listened to if the System Governor determines that a Representative or Supporter needs to be appointed for navigating the aged care system. The concern is that otherwise there is a risk of reinforcing the status quo that once someone is in aged care, they are not a fully autonomous person.

There must be clear guidance as to what are “aged care” decisions and what decisions are outside the purview of the Representative. For example, what happens when someone receiving aged care services goes to hospital and state guardianship, or similar laws, come into play and these laws permit or require the guardian to adopt a substitute decision-making approach giving effect not to a person’s will and preferences but to the guardian’s assessment of their “best interests”? Is the Representative able to argue the case that the older person has told them they do not want X and yet the guardian is now requiring X to happen. What happens on return to aged care for the individual?

The draft outlines that where a previously appointed person seeks to be an aged care Representative, the System Governor must make that appointment. To avoid the situation of an older person not being able to participate in making a decision until the System Governor says they can, the Bill should outline the process of involving the older person in decision-making where a guardian has been appointed that the older person didn’t agree with or didn’t want, or where the relationship has broken down. We note that the conduct and responsibility standards are mostly about informing the System Governor, and not about informing the older person. We consider that an aged care representative should have similar obligations to those under state guardianship legislation principles to keep the represented person informed.

It is also unclear how the introduction of a Commonwealth substitute decision-maker for aged care will affect state and territory substitute decision-makers. The Australian Law Reform Commission has stated that in their view, the

Commonwealth Representative's authority would override the authority of a state or territory appointee where the scope of their appointments overlap (ALRC (2014) Equality, Capacity and Disability in Commonwealth Laws). That is, where a matter concerns a decision being made for the purposes of the Commonwealth legislation, the Commonwealth representative is responsible. This is due to the fact that in some circumstances, Section 109 of the *Australian Constitution* may operate to ensure that the responsibility of a state or territory appointed decision-maker extends only to those areas not covered by the decision-making powers of the Commonwealth representative.

## **Supporting culturally and linguistically diverse people**

Many community advocates, particularly in the multicultural sector, have long advocated for a community-based, integrated navigation approach that has been found to be effective for many older people. Community-based alternatives assist not only in "navigating the system" but assist with building trust, education, and linking to services outside of aged care. The role and responsibilities of Supporters should be complemented by a community-based, culturally appropriate approach to supporting the knowledge and understanding of older people who might need help to make informed decisions.

In aged care, CHSP-funded access and equity programs have built community capacity and social capital over time through:

- working in partnership with cultural and language groups
- addressing generation gaps and age discontinuity in migrant communities
- supporting social connections, continuity of roles and meaningful engagement
- learning care and advocacy skills as volunteers supporting older people accessing services

These capacity-building supports provide mutual benefit for the older people seeking care and the community members and volunteers engaged in supporting them and must continue to be a feature of our future aged care system.

## **An alternate model**

*“I prefer the new proposals, removing the requirement for appointment of a Representative on accessing aged care.*

*“I personally found it demeaning, that my free will was disregarded, upon entering residential aged care; all decisions, regarding care, financial matters, had to be referred to my daughter.*

*“I am responsible for my own well-being and finances, all accounts are now forwarded to me for payment, and I have retained autonomy and independence.*

*“My family fulfil the role of supporters, and my daughter will step up, if and when the need arises.”*

(Older Person)

An alternate model has been proposed for the new Act. This model is based on having only one category – namely, Supporters – except as a last resort. The advantage of a model privileging the role of Supporters is that it both enables and promotes the use of supported decision-making by an individual. At the same time, it contemplates that, over the course of an individual’s life, this may need to progress to that of a Representative (as currently described in the Exposure Draft) in exceptional circumstances. This Supporter model also closely aligns with a human rights-based approach.

By contrast, the present approach of having Representatives as an option alongside Supporters would tend to reinforce a substitute decision-making model. Requiring an older person to have a Representative immediately on accessing aged care is inconsistent with Australia’s human rights obligations relating to the exercising of legal capacity and undermines the culture change that is required to ensure supported decision-making is embedded with the aged care sector.

It may also be appropriate to have different Supporters for different decisions. For example, the person may have a financial decision-making supporter who has financial skills and someone else to support decisions around social interactions. Whatever role the Supporter has, the person must be able, or be supported, to communicate with the older person in their language or via the older person’s preferred means of communication. This includes access to interpreters where needed.

There are circumstances where the role of Representative could be kept and applied for short periods of time such as:

- to allow for those circumstances where an older person is not able to make decisions or have their will and preferences understood
- they have no relevant substitute decision-maker appointed under state and territory legislation, and
- they require an interpretation of their will and preferences.

Using the role of a Representative in these types of circumstances would be preferable to a substitute decision-maker being appointed under state or territory legislation. If a person already has a substitute decision-maker appointed under state or territory legislation for relevant matters, that appointment should automatically be recognised without requiring the substitute decision-maker to apply to be a Representative under the Act (where there is a need for a Representative as described above).

We also recognise the need for protection and clear guidance around when a Supporter may transition to a Representative and under what circumstances. For example, the person may need a Representative for complex financial decisions such as aged care agreements, but still only need a Supporter for day-to-day decisions on accessing the community.

Removing the need for Representatives to be appointed under the aged care Act except in certain circumstances, alongside introducing the role of Supporters, would be a transformational approach to upholding the human rights of older persons. A concerted public awareness-raising campaign around the nature of supported decision-making, as well as targeted awareness-raising campaigns for the health and aged care sectors, will be necessary to increase the use and understanding of supported decision-making. Alongside this, supported decision-making training and guidance for all staff in the aged care sector and health sector will be necessary. These combined efforts would reduce the perceived need for substitute decision-makers, as well as reducing the number of applications for substitute decision-makers by staff of aged care providers and staff of hospitals.

The NDIS review has proposed that independent decision-supporters should be funded under the NDIS for those people who may not be able to access anyone for supported decision-making (to avoid a substitute decision-maker being appointed). This should also be introduced for aged care, preferably the

independent decision-supporters would be independent professional advocates. This is consistent with General Comment No. 1 in Article 12 of the Convention on the Rights of Persons with Disabilities, which states that: *“The right to support in the exercise of legal capacity shall not be limited by the claim of disproportionate or undue burden. The State has an absolute obligation to provide access to support in the exercise of legal capacity.”*<sup>3</sup>

The Swedish Personal Ombudsman Programme supports decision-making for persons with severe mental or psychosocial disabilities through the appointment of personal ombudsmen who are funded by the government.<sup>4</sup> The Personal Ombudsman can support clients in all kinds of matters and advocate for the client’s rights in front of various authorities or in court. The program has been recommended by the UN CPRD Committee as specifically useful for persons with psychosocial disabilities. Another example of independent decision supporters is in the UK, where independent Care Act advocates support people to understand their rights under the Care Act and to be fully involved in the local authority assessment, care review, care and support planning or safeguarding process.<sup>5</sup>

The NDIS Review final report highlights the support and training required for all stakeholders on the principles and practice of supported decision-making. It also highlights the need for access to a range of individual and community-based decision-making supports to meet people’s needs rather than just introducing Supporters and Representatives, such as peer-advocacy, and facilitator support for engagement of families, friends and community members via Circles of Support and Microboards, etc.

## Recommendations

29. Include an outline of the supported decision-making framework in the Explanatory Memorandum.
30. Include the statement that “Every person is presumed to have capacity for making their own decisions unless proven otherwise” in the Objects.
31. Under Division 1, Definitions, include plain language definitions of Supporter and Representative in addition to references to the meanings found in Sections 374 and 376:

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<sup>3</sup> (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElementit>)

<sup>4</sup> ENNHRI European Network of National Human Rights Institutions and MHE Mental Health Europe (2020)

<sup>5</sup> (<https://www.voiceability.org/about-advocacy/types-of-advocacy/care-act-advocacy>)

- Supporters: can receive documents and information and communicate information on behalf of the older person.
  - Representatives: can do the same things as a Supporter and can make decisions on behalf of an older person when they do not have ability to do so, or they want the representative to make the decision on their behalf.
32. For the avoidance of doubt, amend Part 4 to state that no older person is required to have appointed a Supporter or Representative for the purpose of accessing aged care services and that a registered provider cannot refuse to accept an older person into their service who has not made an appointment or had an appointment made by the System Governor.
33. Provide guidance in the Explanatory Memorandum on “principles that promote supported decision-making”, by including the 10 national supported decision-making principles recommended by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission):
- Principle 1 – recognition of the equal right to make decisions
  - Principle 2 – presumption of decision-making ability
  - Principle 3 – respect for dignity and the right to dignity of risk
  - Principle 4 – recognition of the role of informal supporters and advocates
  - Principle 5 – access to support necessary to communicate and participate in decisions
  - Principle 6 – decisions should be directed by a person’s own will and preferences and rights
  - Principle 7 – inclusion of appropriate and effective safeguards against violence, abuse, neglect and exploitation
  - Principle 8 – co-design, co-production and peer-led design processes
  - Principle 9 – recognition of diverse experiences, identities and needs
  - Principle 10 – entitlement to culturally safe, sensitive and responsive decision-making support.
34. Amend Chapter 1, Part 4, Division 1 to enable an older person to have both a Supporter and a Representative and to appoint more than one person to each role, and to make different appointments for aged care financial,



health care and place of residence information sharing and decision-making.

35. Amend Sections 374 and 376 on the appointment of a Representative by the System Governor ensuring that the System Governor must use the national supported decision-making principles and that a person who does not already hold relevant decision-making power under a state or territory law can only be appointed as a representative if several conditions are met, including that:
  - the appointment is consistent with the “will and preferences” of the person concerned, and
  - the proposed representative has “a close and continuing relationship with the person” (borrowing a phrase that exists in Victorian medical decision-making legislation), and
  - there is no significant contention about the appointment among people with a genuine interest in the wellbeing of the person.
36. Include as a protection for older people that access to an independent professional advocate is provided when requested within Chapter 1, Part 4, Division 1 and create a new subdivision on protections for older people in line with the recommendations of the Australian Law Reform Commission (ALRC) Report 124, Equality, Capacity and Disability in Commonwealth Laws.
37. Amend the relevant sections of the Bill, so that supported decision-making principles must be used by all those working in aged care when working with older people. For example, Chapter 1, Part 4; Chapter 2, Part 2 Division 3; Chapter 3, Part 4, Divisions 1 & 2.
38. Include under Section 91 that a registered provider is responsible for ensuring that aged care workers are trained in the principles and practice of supported decision-making, including understanding the impact of ageism on their attitudes to working with older people.
39. Ensure that terminology and responsibilities of Supporters and Representatives is used consistently throughout the Act.
40. Amend Section 392 to ensure grant purposes includes grants to provide for community capacity building for a range of decision-making supports.
41. In line with the proposed alternate model for Supporters and Representatives
  - reconsider the roles of Supporters and Representatives so that there is only a single role that is built on other models for

supported decision-making including the NDIS independent decision-supporters, the Swedish Personal Ombudsman Programme and the United Kingdom Care Act advocates.

- amend the section on Supporters and Representatives so that:

the key role is that of a Supporter to support an older person with decision-making

there can be multiple Supporters based on the support needed e.g. financial, social etc.

there is clear guidance and protections around when a Supporter may transition to a “Representative” and under what circumstances.

42. A Representative is only appointed in certain circumstances and only for the shortest time possible to assist with upholding the wishes and preferences of the older person.

## **A Complaints Commissioner with direct independent statutory authority and functions**

87 per cent of attendees at online consultation forums agreed or strongly agreed with the statement that the Complaints Commissioner should be independent of the Quality and Safety Commissioner and report directly to the Minister for Aged Care.

*“The ACQSC is sadly referred as the toothless tiger. The Commissioner can’t/shouldn’t wear multiple hats. I cannot honestly say I have ever heard anyone say they were satisfied with the ‘resolution’ of their complaint. Many feel the ACQSC is provider oriented and not there to protect the residents/complainants.”*

*(Carer and informal advocate)*

*“ACQSC needs to side with the complainant. Vulnerable people and families don’t have the power or support to stand up to an aged care provider. ACQSC needs to be funded to forensically investigate complaints. Providers often provide inaccurate information and ACQSC accepts this information without proof.”*

*(Community member)*

*“I am concerned about representation of persons with lived experience of receiving aged care being represented on advisory and other committees in aged care. They are not mentioned in the advisory committee for the Commissioner.”*

(Older person)

*“The best regulator is the one who is on site and intervenes early. Why are we only addressing issues after they have become a big enough problem for people to risk victimisation by complaining?”*

(Older person and informal advocate)

*“Time is of the essence in solving complaint issues.”*

(Older person receiving services)

The Albanese Government committed to a dedicated, accessible, and accountable process to help residents, families and aged care workers report and resolve issues and complaints together with new civil penalties to protect people who make a complaint from retaliation.

Compliance activities and complaints handling are related but separate activities. Greater separation of these functions is required to help restore consumer confidence in the aged care system. The shift to risk-proportionate and relational regulation of registered providers (provider compliance focus) by the ACQSC is incompatible with the level of consumer-focus and independence of complaints handling sought by older people and their representatives.

We note that there are a range of views whether the Complaints Commissioner should be an entirely separate entity, but we share concerns about ACQSC culture and reporting ultimately to be a regulatory mindset. For this, and other reasons articulated in the submission, we provide our support for independent statutory functions combined with seamless information sharing and collaboration between staff that would allow the Complaints Commissioner to remain part of the ACQSC as one entity.

The Complaints Commissioner must have direct independent statutory authority and functions. They would be a statutory office holder within the Aged Care Quality and Safety Commission (ACQSC), with ACQSC staff continuing to support both the Complaints Commissioner and the ACQSC Commissioner and share information between both functions.

The key difference is that the Complaints Commissioner would not report through, or be responsible to, the ACQSC Commissioner. The positions would operate

collaboratively but independently. They should be appointed by, and be accountable to, the Minister for Aged Care and have the powers to compel information provision, provider participation in the complaints process and certify enforceable undertakings. Having the ACQS Commissioner judged on the performance of providers creates an inherent conflict of interest in relation to complaints about providers and relegates older people's complaints to a secondary consideration.

There are some existing models of multiple independent commissioners within an existing authority that could be drawn on, for example the Australian Human Rights Commission, which has multiple independently appointed Commissioners with thematic responsibilities, while the President of the Commission has the sole responsibility for considering complaints made to the Commission under the legislation administered by the respective subject-matter Commissioners and other frameworks. Another example is The Office of the Australian Information Commissioner, which has an independent Freedom of Information (FOI) Commissioner and an independent Privacy Commissioner.

## **The need for independence from the direct experience older people's concerns with the "combined" complaints and regulation**

We regularly receive feedback that the ACQSC is very reliant on undertakings given by service providers and does not follow up sufficiently to ensure actions have been completed before finalising complaints. This feedback includes experiences and perspectives of older people who have made complaints but feel that no, or insufficient, action is taken and there is an inadequate resolution. Complaints should be dealt with more effectively. Processes and outcomes of the complaints system should be separate from providers. Issues raised from complaints should result in systemic change providing confidence in the aged care system for both older people and the community. Following are a series of case studies that highlight key issues with the current complaints process experienced by older people.

### **Case Study 1 – Case closure without review**

A consumer sought advocacy assistance regarding their spouse's care in a residential aged care facility. A complaint was initially raised and finalised with ACQSC, but concerns remained unresolved. The advocate attempted to re-open the case with ACQSC and sought clarity on actions taken regarding the facility. However, the advocate received conflicting responses and was advised to lodge a new complaint. Despite a new complaint being filed, the case was closed without review. The family experienced frustration due to inconsistent communication from the ACQSC and the lack of a satisfactory resolution. The situation only improved when the client's spouse moved to another facility.

### **Case Study 2 – *Not following through on actions***

The client contacted an advocate as their complex dietary requirements were not being met by their RACH. The client directed the advocate to escalate the matter through the service provider's internal complaints process and to also lodge a complaint with the ACQSC. The service provider gave assurances to the ACQSC that the matter had been resolved, however the client reported it had not been resolved and was still not receiving suitable meals, or choice of meals. The client experienced adverse reactions to meals which at one point, led to them being hospitalised. Despite the client reporting things had not changed or resolved, the ACQSC moved to close the complaint. The service provider gave an undertaking that the matter would be resolved immediately, which the ACQSC relied on. The situation only improved with a change in management who began taking steps to resolve the client's issue.

### **Case Study 3 – *Need for advocacy support to engage the ACQSC***

A Financial Advocacy Officer raised a complaint with the Aged Care Quality and Safety Commission (ACQSC) on behalf of an older person relating to their home care provider incorrectly charging GST of \$4,000 and not progressing appropriate refunds to the package funds. The older person had been unsuccessful in having a complaint opened with the ACQSC. It was unclear why the ACQSC declined to proceed, citing a timing issue. The advocate's support prompted the ACQSC to open an investigation, resulting in a refund, allowing the older person to receive additional essential services.

## The argument for separation of compliance and complaints

As noted by Gerard Brody, Chair, Consumers Federation of Australia in his response to the NDIS Review, it is common in other regulated markets for the responsibility for complaints resolution to be housed in a different agency to the agency responsible for setting standards and ensuring compliance with standards. Complaints handling and compliance activities are related but separate activities. We note that the separation of functions as highlighted by Mr Brody apply to having two separate agencies. However, we believe that these are still relevant and applicable to an independent statutory appointed Complaints Commissioner within the ACQSC.

**Independence and impartiality:** By having a separate agency responsible for complaints handling, there is a greater likelihood of independence and impartiality in the process. This separation helps avoid conflicts of interest that may arise when the same agency or division is responsible for both investigating complaints and enforcing compliance. It allows for a fair and unbiased assessment of complaints without any potential influence or bias from the enforcement side.

**Accessibility and trust:** A separate complaints handling agency can foster greater accessibility and build trust among stakeholders. Individuals or organisations making complaints may feel more comfortable coming forward if they believe their concerns will be handled independently and transparently. Separating the complaints process can enhance public confidence in the system and encourage broader engagement in reporting non-compliance or issues.

**Focus on resolution:** A dedicated complaints handling agency can prioritise the resolution of complaints in a timely and effective manner. By having a distinct focus on addressing complainants' concerns, the agency can work towards finding resolutions, mediating disputes, or facilitating appropriate remedies. This emphasis on resolving complaints rather than solely enforcing penalties can contribute to more meaningful outcomes for affected parties.

**Expertise and specialised knowledge:** Establishing a separate agency for complaints handling allows for the development of specialised expertise in managing complaint processes. Staff members can receive specific training and acquire the necessary skills to effectively investigate, analyse, and address complaints. This specialisation can result in more accessible, efficient, trauma-informed and fair complaint handling procedures.

**Transparency and accountability:** Separating complaints handling from compliance and enforcement functions contributes to greater transparency and accountability in the overall regulatory process. It enables clearer delineation of roles and responsibilities, allowing for better oversight and scrutiny. The independent complaints agency can report on complaint trends, outcomes, and systemic issues, which can inform policy improvements and enhance the accountability of all stakeholders involved.

We believe these identified advantages of independent complaint handling can still be achieved through separation of key functions, responsibilities and powers while retaining the efficiency of shared systems and functions within the one agency.

## **Responsibilities of the ACQSC Commissioner relative to the Complaints Commissioner**

Under our proposal, the ACQS Commissioner would remain responsible for public governance and accountability purposes but must have obligations to consult with the Complaints Commissioner.

- The Complaints Commissioner must have their own funding and staffing allocation, with no restrictions to report on their activities because it involves data from the ACQS Commissioner's activities.
- All relevant powers and authorities throughout the Act for the ACQS Commissioner would also be given to Complaints Commissioner (e.g. information handling exemptions), excluding those that would be considered specific to the ACQS Commissioner.

Any regulatory actions deemed necessary from the determinations of the Complaints Commissioner would remain in the hands of the ACQS Commissioner, including compensation orders.

It is unclear in the current legislation why there are separate parts in the legislation for the ACQSC Advisory Council and the Complaints Commissioner, rather than being embedded within the part discussing the ACQSC. With the introduction of an independent Complaints Commissioner as a member of the ACQSC, the ACQS Commissioner should be moved to a separate part or all elements of the ACQSC (Council, Commissioner, Complaints Commissioner) treated equally under the ACQSC part.

The following recommendations propose how the model could be adjusted, achieving the greater level of independence required but within a single agency.

## Recommendations

43. Separate the Commissioner functions in the Act to provide specific functions and statutory authority to an independently appointed Complaints Commissioner, answerable only to the Minister and Parliament, with the authority to:
  - compel providers to provide information and participate in the complaints process
  - authorise an enforceable undertaking
  - make determinations and rulings (including no further action determination). Determinations and ruling would be made when voluntary agreements cannot be reached and to enable appeals to occur.
44. The Complaints Commissioner should have a distinct budget and staffing group but remain as part of the ACQSC. The two Commissioners will have the ability to share information and consult with each other across both statutory office holder functions as well as the ACQSC Advisory Council.
45. Amend the functions of the ACQS Commissioner (s141), to remove complaints and education functions about complaints. These will be functions of the Complaints Commissioner
46. Rewrite the complaints section of the Act to provide more detail on the responsibilities and authority of the Complaints Commissioner, including timeframes and annual reporting. Make clear the Complaints Commissioner functions include that they can receive complaints about the System Governor, ACQS Commissioner and staff delegated to act on their behalf. In the Explanatory Memorandum, make clear when systemic issues would be elevated to the Inspector General.
47. Create a new Division under Chapter 5, Part 3 (Aged Care Quality and Safety Commission) and transfer and replicate the relevant functions for the ACQS Commissioner to the Complaints Commissioner including:
  - appointment by the Minister for a specified period (s140)
  - Commissioner functions (s141) – including the complaints functions, engagement and education functions about complaints, and targeted and specific safeguarding functions.



The Complaints Commissioner will not have the registration of provider functions.

- Safeguarding functions (s142) – focused on upholding rights and encouraging rights-based complaints practices, supporting registered providers to develop and implement effective complaint management systems, collect, correlate analyse and disseminate information related to complaints to identify trends of systemic issues and ensure that complaints can be made about registered providers, operators of aged care digital platforms, aged care workers with obligations under the Aged Care Code of Conduct, the ACQSC Commissioner and the System Governor.
- engagement and education functions as they relate to complaints (s143)
- complaint function (s144) including update (a) (ii) to include the ability to make complaints about “an aged care worker” and the obligation to facilitate outcomes as part of complaints resolutions and to include outcome results in annual reporting. Outcome measurement will include satisfaction surveys of participants in the complaint process.
- Minister may give directions (s149)
- dealing with complaints (s183).

48. Transfer and replicate the relevant staffing for the ACQS Commissioner to the Complaints Commissioner including:

- deputy commissioners (s147)
- delegation by authorised person – Commissioner functions (s252)
- delegation by Commissioner (s370)
- authorised Commission officers and authorised System Governor officers (Chapter 6, Part 15)

49. Transfer and replicate the relevant powers for the ACQS Commissioner to the Complaints Commissioner including:

- Commissioner may request information or documents from persons (s146)

- Commissioner may vary or revoke required action notices (as they pertain to determinations) (s266)
  - Commissioner may give compliance notices relating to Commissioner's functions (as it relates to the Complaints Commissioner's functions) (s269).
50. Ensure that the structure of powers under Chapter 6 (Regulatory mechanisms) and Chapter 8 (Enforceable undertakings under Part 6 of the Regulatory Powers Act) are appropriately extended to the Complaints Commissioner and their staff, including powers:
- to require persons to attend before authorised officers to answer questions or give information or documents in relation to their functions
  - compel the production of documents
  - that enable an enforceable provision to agreed undertakings during the complaints process
  - to be an authorised person to endorse complaints
  - to make determinations about a complaint (comparable to action notices and compliance notices).
51. Allocate responsibility to the independent Complaints Commissioner 2 functions currently allocated to the ACQS Commissioner:
- complaints handling
  - education about complaints handling.
52. Amend Chapter 5, Part 3, Division 3 Administration to refer to the ACQS Commissioner and the Complaints Commissioner.
53. Amend Division 4 Staff of the Commission – amend 157 (2) (a) when defining who is the statutory authority to refer to the Complaints Commissioner. Consider the appropriateness of also referring to the Advisory Council.
54. Embed application of restorative justice principles (inclusive of open disclosure) throughout all aspects of complaints handling in primary legislation with reference to Rules. These principles and process must be followed for all complaints, in addition to any escalation steps such as the below which should also be included:
- restorative outcome conference
  - conciliation
  - mediation

55. Amend Division 5 Reporting and Planning to ensure the annual report of the Commission “sets out the Complaints Commissioner’s priorities for work to be undertaken during the next reporting period” (Clause 160 (2) (b) and that the operational plan must consult the Complaints Commissioner (160 c).
56. Amend the functions of the Advisory Council to replicate the references to the ACQS Commissioner, with the Complaints Commissioner (s169)
57. Ensure Complaint Commissioner is a person to whom whistleblowers may disclose (s355 Disclosures qualifying for protection).
58. Ensure “an official or delegate of the Complaints Commissioner” is included in relevant limits regarding confidentiality of information (under s323 Basic limits on recording, use and disclosure of protected information).
59. Ensure that disclosures of protected information for the purposes of managing complaints (Division 3—Authorisation of recording, use or disclosure of protected information; Subdivision B—Authorisation of System Governor, Complaints Commissioner and Commissioner). Ensure that disclosure can extend beyond a person’s death to their representative who may be investigating the cause of their death.

## **Include the new Complaints Framework in the Act**

Only 24 per cent of attendees at online consultation forums believed the Aged Care Quality and Safety Commissioner would have enough powers under the new Act to take action and make sure providers who did the wrong thing faced consequences. 33 per cent disagreed and 43 per cent were unsure.

*“Audit and triggering of audit for performance needs to be in the hands of both aged care residents, homecare recipients and carers.”*

*(Older person)*

*“My parent is an aged care resident who does not like to complain personally, due to the risk of retribution. However, as their POA, long-term carer and nominated representative, I have no trouble with lodging a formal complaint. I believe it should be possible for me (or appropriate person) to lodge a complaint on their behalf.”*

*(Family member)*

*“Providers do not have to provide evidence of their statements to the Commission [ACQSC]. Penalties have to reflect the degree of non-compliance and clearly need to be enforceable. As soon as government money is involved, the oversight of use of that money must be done. At the moment the client is helpless in getting any redress.”*

*(Older person)*

*“I don't think we should ever accept 'oh, we can't do that because it would set a precedent' as an argument that is sufficient in and of itself. Sometimes, precedents need to be set. Certainly, a powerful accountability mechanism in aged care is a precedent to be fought for.”*

*(Family member)*

The Australian Government has confirmed the new Complaints Framework will have restorative outcomes like requiring providers to exercise open disclosure and for parties to participate in mediation and conciliation. However, not all of these outcomes are included in the Act. The new features of the Complaints Framework must be included in the Act and endorsed by Parliament. If they are only addressed in the Rules (subordinate legislation), they can be altered by the responsible Minister at their discretion.

## **Recommendations**

60. Reflect all aspects of the Complaints Framework in the Act in the relevant sections including Chapter 5, Part 3 and Part 5. This includes:
  - transparency of the complaints process – making reports publicly available
  - legislate restorative justice pathways (including arbitration, conciliation and open disclosure)
  - clearly set timelines and review processes
  - annual public reporting on the Complaints Commissioner functions
  - ability to publish and report on continuous improvement and emerging insights and intelligence (including in conjunction with the ACQS Commissioner)
61. Ensure that the timeframes for Complaints Commissioner processes are subject to service-level agreements which are published and reported on.

## Whistleblowers

The new Act should include provision for protected disclosure avenues to journalists and MPs/Senators in cases of serious risk of harm to health/safety, or where issues have been raised and not dealt with. This is consistent with the approach taken in the private sector generally (see 1317AAD of the *Corporations Act*) and in federal public sector whistleblower protections – in the *Public Interest Disclosure Act*. These other laws have such provisions on the basis that sometimes internal/regulatory whistleblowing does not work and there can be a need, in appropriate circumstances, for public accountability. It's hard to see how such a rationale is not equally applicable in aged care.

In relation to protecting family members and carers, there is good precedent here in the *Corporations Act* – see s1317AAA, which extends to relatives and dependents, and then the broad scope of anti-victimisation (s1317AC) extending beyond the whistleblower themselves.

In relation to union officials and independent professional advocates, the *Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023*, part of the Australian Government's response to the PWC scandal, expands the scope of eligible recipients for whistleblowing in the tax sector to doctors, GPs and professional associations (unions etc), as prescribed by regulations. It is particularly important that who an individual can disclose to is broadened to provide greater protection for people in locked dementia units who are especially vulnerable and have limited access and opportunity to speak with anyone safely in the current list at section 355.

A major failing of federal whistleblowing law at the moment is the absence of a regulator to oversee/enforce the laws and support whistleblowers. It is the primary recommendation of the Human Rights Law Centre [reform roadmap](#). It would make it easier for whistleblowers to speak up and receive guidance/support.

We note the Human Rights Law Centre is calling for consistency and harmonisation in whistleblower protections and recommend the Department of Health and Aged Care support the Parliamentary Joint Committee's 2017 recommendation to bring all Commonwealth-regulated entities and employers under a common Whistleblower Protection Act (replacing the *Corporations Act*, *Taxation Administration Act* and other provisions, which would naturally include the *Aged Care Act*) – rather than re-legislating a duplicated and potentially inconsistent scheme for the aged care system alone.

The legitimate need to adapt some protections to account for the vulnerability in the aged care sector does not prevent their suggested uniform approach.

Appropriate exceptions and adapted provisions could be drafted into the new Aged Care Act that could otherwise simply reference and trigger, rather than duplicating, the Commonwealth's core whistleblower protection legislation.

This action is potentially something that could be explored in the first review of the Act if a single consistent law has been developed.

## **Recommendations**

62. Amend Section 355 Disclosures Qualifying for Protection so that a disclosure made to an independent professional advocate and a trade union official are included in the list of who a protected disclosure can be made to.
63. Amend Section 357, Confidentiality of Identity of Disclosers, section (2) so that an individual who discloses to an independent professional advocate or a union representative is protected under section 357(1).
64. Amend Part 5 Whistleblower protections so that if an individual discloses to an independent professional advocate or a union representative and asks the advocate or representative to disclose on their behalf, both the individual and the advocate and representative are protected under this section.

## **Guarantee equitable, timely access to aged care services within 30 days of application**

48 per cent of attendees at online consultation forums reported they or someone they knew had to wait between 6 months and over 2 years from when they applied to My Aged Care until their aged care services started.

*“After assessment by My Aged Care, I was approved for a package, placed on waiting list. After a long wait, I was forced into residential aged care, and the same week, I was granted a package. Far too late for me, due to my frailty.”*

(Older person)

*“Why is the package waiting so long? I was a primary carer for a family member who was on level 1, when their needs required level 3 and 4, they had to wait 12 months or more, due to this they ended up in an aged care facility.”*

(Former carer)

*“I was told by a hospital social Worker that I really needed immediate aged care help, yet it took almost 2 years to access services.”*

(Older person)

*“It took me over 18 months to even get an assessment as I had falls which put me into hospital and each time that happened my application was cancelled, and I had to reapply.”*

(Older person)

*“Assessment teams are overwhelmed and have their own triage system. This can and does discriminate against people who still have some abilities even though they have a right to an assessment.”*

(Carer of older person)

One of the objects of the Act, stated in Object b (3), is to ensure “equitable access to, and flexible delivery of, funded aged care services that put older people first and take into account the needs of individuals, regardless of their location, background and life experience.”

We acknowledge and welcome the inclusion of the emergency provision that enables access to support without assessment in emergency situations.

However, the draft legislation does not guarantee equitable or timely access to aged care services across Australia, nor address thin markets. It only guarantees equitable access to an aged care assessment. After older people have been declared eligible for aged care services, and in most instances allocated a funding classification, their access to service delivery in an equitable manner is just one of the considerations of the System Governor. We know some older people wait more than 12 months for Commonwealth Home Support Programme (CHSP) services in some areas. Sadly, some people have died or been forced to enter residential aged care while waiting for home care or other services in their local community.

While the System Governor will be responsible for considering equitable access issues, such as thin markets, there is no guarantee that even basic services

available in one place will be available in another. Neither is there a guarantee that these service options are appropriate for older people from diverse and marginalised groups or that they will be able to exercise choice and control over their own care.

There are currently no timeframes in the draft legislation for how long various decisions will take. We need service-level agreements across all the steps to getting access that add up to less than 30 days from the date of application to timely access to aged care services.

## **Recommendations**

65. Amend the Statement of Principles to include the principle of an aged care system in which the System Governor is responsible for facilitating equitable and timely access to aged care services in accordance with assessed needs.
66. Expand equitable access to include equitable access to aged care services regardless of geographic location or need as per Object b (3).
67. Amend relevant sections of the Act, such as in the section on the System Governor, to ensure Object b (3) is embedded in the Act.
68. Clearly outline a guaranteed timeframe, so the Act can deliver an aged care system where services are provided to eligible older people within 30 days of application for aged care.
69. Ensure equitable access to services is a key criterion in public reporting undertaken by the System Governor.
70. Embed a legislative requirement that the System Governor must publicly report on quarterly wait times from application through to needs assessment to when services commence.



## **Expand eligibility for early access to aged care services**

*“Strongly agree with need for an exceptional circumstances mechanism for younger people < 65 years who may require access to residential care due to conditions with premature ageing – currently in hospitals for extended period of time, not an appropriate care setting for that person.”*

(Health care worker)

*“[What] about the interface issues between aged care and other systems like health and disability?”*

(Community member)

*“What about someone at age 30 with early onset dementia, will they fall into a gap between Aged Care supports and the NDIS?”*

(Aged care worker)

Ageing is not a linear process. As noted by the World Health Organisation: “At the biological level, ageing results from the impact of the accumulation of a wide variety of molecular and cellular damage over time . . . These changes are neither linear nor consistent, and they are only loosely associated with a person’s age in years.”

The Act refers to “older individuals” but also includes a limited cohort of people aged 50–64 years (homeless or at risk of homelessness and First Nations people). We envisage the need for some flexibility to take into account exceptional circumstances for some other groups and individuals under the age of 65. We suggest the creation of clear supporting guidance detailing age exception pathways and evaluation of assessment processes and decisions relating to these instances.

Examples where there may be a strong case for an exemption to made to the 65-age barrier include some populations who may experience the early onset of ageing-related chronic conditions due to particular personal attributes or medical issues, such as some people living with HIV (not eligible for support under the NDIS) and those who survived war or forced displacement, including some veterans or Forgotten Australians.

Many people in the early stages of dementia do not meet the eligibility criteria for the NDIS but would benefit from access to community-based cognitive

rehabilitation and other supports, including carer supports that may prevent or delay their entry to residential aged care. We also note that the disability service system is currently not always able to meet the needs of people living with younger onset dementia, and that they and their carers should not be refused access to funded aged care supports purely on the basis of age.

Finally, Aboriginal and Torres Strait Islander people have noted that the additional requirements that must be fulfilled before being deemed eligible for aged care under the age of 65 could result in delay to accessing services and removes their choice in accessing aged care services to meet their needs with a trusted provider.

### **First nations: Eligibility from age 45**

Aboriginal and Torres Strait Islander people are more likely to use aged care services earlier in life than other Australians. A higher proportion of Aboriginal and Torres Strait Islander people using residential care are in younger age groups, compared with the broader population. In addition, Aboriginal and Torres Strait Islander people (who are homeless/at risk of homelessness or living with hoarding behaviour or in a squalid environment) have been eligible for assessment from age 45 for some time.

Support and care is often provided to Aboriginal and Torres Strait Islander people under the age of 50. This care can include meals and social supports and is not limited to residential aged care. In this context, the reason for changing the age range appears to be solely based on the Royal Commission recommendation that younger people should not be in residential aged care. However, it is not only residential aged care services that are being accessed by Aboriginal and Torres Strait Islander people under the age of 65. This clause therefore limits access to all forms of funded aged care services.

We do not believe a rights-based Act should limit the choices available to Aboriginal and Torres Strait Islander people. To remove access to all aged care services, for Aboriginal and Torres Strait Islander people from 45 years of age living with ageing-related health conditions means limiting the choice and control over how they live their lives.

If the new Aged Care Act is genuinely intended to be rights-based, with a focus on the health and wellbeing of older people, then we strongly urge the Department of Health and Aged Care to re-consider its approach in relation to the aged care eligibility criteria for Aboriginal and Torres Strait Islander people.

## Recommendation

71. Amend the section on eligibility to outline a clear pathway to approve exceptional cases for anyone experiencing the early onset of aging-related chronic conditions that fall outside the arbitrary age rules.

## **An absolute right to visitors in all situations for aged care residents**

90 per cent of attendees at online consultation forums said that all aged care residents should have access to at least one visitor at all times, even during outbreaks of influenza or COVID-19.

*“A major concern I have is that the widespread elder abuse under the guise of safety and protection from COVID-19 inflicted on our older people in 2021 is never repeated again.”*

(Family member of older person)

*“I was unable to continue raising issues about my parent’s care because I was afraid the home would stop me visiting. They had stopped me speaking to nurses as they had been informing me about problems.”*

(Older person)

*“It’s not up to the provider to choose whether they will facilitate or not. Also, there should be [at least] 2 visitors to choose from, not just the same person, even though they might take turns.”*

(Family member)

Currently, the protocols and arrangements for older people receiving aged care services to have visitors in residential facilities in all situations are inconsistent, insufficient and unclear.

The experience of the COVID pandemic and the systemic lessons learnt should inform a consistent best practice response to visitation. However, visitors continue to be “locked out” of residential aged facilities and the approach taken by providers varies markedly across the country.

Older people should be able to receive visitors and experience the psycho-social, physical and emotional wellbeing benefits that this brings. This can occur at the

same time as facilities ensure the health and safety of all residents through infection control.

Older people and their families and friends have regularly informed us, during infectious disease outbreaks (including COVID, influenza and gastroenteritis), that in some facilities, there has been an outright ban on visitors. In implementing this, some providers have used common law trespassing legislation as the basis for preventing visitors and have explicitly referenced this when rejecting the visitors of older people in residential care. Visitation rights in aged care facilities should override common law trespass provisions and this should be explicit in the Act.

The language used in the Exposure Draft regarding the right to “safe” visitation is inadequate to address the issues and difficulties experienced by older people and their families and friends in arranging visits.

The right of aged care residents to have visitors in all situations must be implemented to protect the mental and emotional health and wellbeing of all older people. It will also work to address the inconsistencies of sector practices regarding visitors and to strengthen the rights approach to aged care.

The concept of a Named Visitor must be enshrined in legislation to:

- ensure providers have a requirement to facilitate at least one person who can be trained to safely visit a person in their room even during periods of disease outbreaks
- provide a legal basis for state and local public health units to have regard for such measure, as they do today with Mental Health Named Visitors in states like Victoria
- ensure there is a legal basis to override any opposition to the Named Visitor being onsite under common law trespass provisions
- make clear that while a provider can impose reasonable and necessary conditions, such conditions cannot prevent a Named Visitor from visiting.

An example of how this provision might be written is included below:

**\*\*Part X; Aged Care Access and Authorisation\*\***

1. A designated individual (herein referred to as a "Named Visitor") is authorised for unrestricted access to the private quarters of an individual receiving aged care services at any time; using the approved form outlined in the Rules to appoint a Named Visitor.

2. The aged care provider may require reasonable and necessary conditions for the Named Visitor's access, as stipulated by the aged care facility;

a. Such conditions shall only be imposed to facilitate the in-person access required by the Named Visitor.

b. No condition shall be applied that outright prevents or unreasonably hinders the Named Visitor from fulfilling their authorised role.

3. The aged care facility is mandated to provide cooperation to facilitate seamless visits by the Named Visitor in accordance with the conditions outlined in Part X;

a. Cooperation shall be extended with due regard for the privacy, safety and dignity of all residents within the facility.

4. The provisions of this Part X shall prevail over any conflicting common law principles, including common law trespass, but such override is applicable only to the provisions within this part.

## **Recommendations**

72. Insert a new section in the Key Concepts division of the new Act on visitation rights that:

- Establishes administrative processes to provide aged care access and authorisation to a Named Visitor. An individual designated as a Named Visitor is authorised for unrestricted access to the private quarters of an individual receiving aged care services at any time after completing the approved form outlined in the Rules.
- Ensures that no conditions applied by aged care providers, prevent or unreasonably hinder the Named Visitor from fulfilling their authorised role and that aged care facilities cooperate and

work with Named Visitors to ensure visits are seamless.  
Cooperation should be extended with due regard to the privacy, safety, and dignity of all residents in aged care facilities.

- Provisions of this section will prevail over any conflicting common law principles, including common law trespass. This is only applicable to the provisions in this section.

73. Insert a new clause to Right No. 12 in the Statement of Rights regarding the right of an individual to opportunities and assistance to stay connected. The new clause enables a person receiving aged care to stay connected with:

- a Named Visitor, chosen by the older person, or their carer or representative where the person is unable to make a decision or has not left directions, who can visit them even when infectious disease outbreaks occur. Where a person receiving aged care services has palliative care needs or is at the end of their life, family and close friends can visit and remain at the person's side.

These provisions should be clearly expressed to override any restrictions on visits or visitors provided for by or under State and Territory legislation.

## **Recognise the role of independent professional advocates in the Act**

*“What about older people who can't seek remedies or complain or are just too tired/sick/traumatised from the system generally and the ageing process? And older people who have lost capacity but have no advocates – is this the ongoing role of OPAN? It should be written into the Act that you don't have to do this by yourself.”*

(Community member)

*“I'm in that alone position. Quite frightening after having supported others and seen how they need advocacy.”*

(Older person)

*“The participant may not be able to express their needs, so it should be set out that they can have a carer or advocate to assist them.”*

(Older person receiving services)

*“It can be very difficult for an aged person to advocate for their voice to be heard if there are no family close, or active POA. Even more so when there are English Second Language, or non-English speaking or culturally different people.”*

(Family member)

The existing Aged Care Act includes provisions for the National Aged Care Advocacy Program. The Exposure Draft, unlike the existing Act or the NDIS Act, does not legislate the role of independent advocates.

An “Independent Professional Advocate” may be defined as an advocate, employed and trained by a provider of a government-funded aged care advocacy program, who works on behalf of the older person, is free of charge and is independent of an aged care provider.

Independent professional advocates should be guaranteed the right of entry into residential aged care when an older person has requested the support of an advocate, or for an advocate to deliver education on the Statement of Rights to residents. The new Act must require the Government to fund an independent advocacy program and protect the role of advocates. This will ensure that all organisations in the aged care system, including providers and the ACQS Commissioner, recognise and respect their vital role.

OPAN currently delivers advocacy services and OPAN Service Delivery Organisations (SDOs) receive a large proportion of their referrals from participants in the National Aged Care Advocacy Program (NACAP) education sessions. Unfortunately, many aged care residents do not get the opportunity to learn about advocacy and the supports available to them through the NACAP. Whilst OPAN SDOs individually contact all residential aged care facilities across the nation to offer free education sessions for both staff and residents, there are many residential care facilities which refuse to accept this offer. OPAN has concerns for the residents who do not have support of family and friends to assist them in raising and addressing concerns, and who also do not have access to the NACAP. OPAN notes the Carnell and Paterson Review of National Aged Care Regulatory Processes recommended “All approved providers must ensure all staff undertake regular Older Persons Advocacy Network education on consumer rights”.

Both England and New Zealand have Acts in place that specify the role and rights of independent professional advocates, which could be drawn from:

- New Zealand – Health and Disability Commissioner Act 1994

- England – The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014.

The current Act includes the **following provisions**, which could be built on in the new Act:

- 56-1, Responsibilities of approved providers—residential care
  - (k) to allow people acting for care recipients to have such access to the service as is specified in the User Rights Principles;
  - (l) to allow people acting for bodies that have been paid \*advocacy grants under Part 5.5, or \*community visitors grants under Part 5.6, to have such access to the service as is specified in the User Rights Principles;
  - Division 1—Purpose of this Part
- (1) For section 56-1 of the Act, this Part specifies responsibilities of an approved provider of a residential care service in relation to care recipients to whom the provider provides, or is to provide, residential care, including in relation to the following:
  - (b) the access that persons acting for care recipients, advocates or community visitors may have to the service (see paragraphs 56-1(k) and (l) of the Act);
  - (c) the rights of care recipients (see paragraph 56-1(m) of the Act);
  - (ca) not acting inconsistently with the legal and consumer rights of care recipients (see paragraph 56-1(m) of the Act);
- 8 Access to residential care service by people acting for care recipients, advocates and community visitors
- Access by people acting for care recipients
  - (1) For paragraph 56-1(k) of the Act, if a care recipient in a residential care service has asked a person to act for the care recipient, the approved provider of the service must allow the person access to the service at any time.



- Access by advocates and community visitors
  - (2) For paragraph 56-1(1) of the Act, an approved provider of a residential care service must allow a person mentioned in subsection (3) access to the service:
    - (a) during normal business hours; or
    - (b) if a care recipient to whom the provider provides residential care has asked the person to assist the care recipient—at any time.
  - (3) For subsection (2), the persons are the following:
    - (a) a person acting as an advocate for a body that has been paid an advocacy grant.

The vital role of independent professional advocates can be further strengthened by facilitating access by older people to community legal services part funded by the Attorney-General's Department and State and Territory funded health/justice partnerships. This could take the form of specific funding targeted towards improved access by older people using aged care services and enabling aged care residents to provide instruction to a lawyer. Upholding the rights of older people must include having an equal right to access legal advice as well as advocacy.

## Recommendations

74. Include and amend relevant clauses in the current Act with respect to the role of independent professional advocates in educating people about their aged care rights and supporting them to have these rights respected and protected.
75. Embed the right of entry to residential aged care by Aged Care Advocates for the purpose of rights education, as well as to act on behalf of (at the direction of) the older person.
76. Clearly establish that all people seeking and receiving aged care services have the right to independent professional advocacy regardless of any questions about their decision-making ability, and whether there is a substitute decision-maker appointed.
77. Create an obligation on registered providers to inform people using their services about advocacy services, provide accessible contact details and facilitate access to and communication with an advocate.

## **Further strengthen diversity**

*“The eligibility criteria for Forgotten Australians and LGBTIQ was not mentioned under the thin market grant.”*

*(Older person)*

*“I want to ensure that socio-economic disadvantage is central in terms of equity of access. Affordability and equity of the standard of care available to socio-economically disadvantaged must be listed in the Act explicitly.”*

*(Health care worker)*

*“Choice can only be realised when there are genuinely accessible options available. Must be in the Act that it is necessary that sufficient genuine care options be available to all consumers in all geographic locations.”*

*(Community member)*

We acknowledge and welcome the specific rights that relate to culturally safe, culturally appropriate, trauma aware and healing-informed care within the Act, as well as having individual’s identity, culture, spirituality, and diversity valued and supported. However, diversity is only identified within the Statement of Principles (which applies to the System Governor, not to providers) and only has the status of a “note”.

Diversity needs to be strengthened within the Act. We believe that the whole system needs to be designed so that vulnerable older people and older people from diverse and marginalised groups are at the centre of the Act rather than add-ons. Without specific mechanisms throughout the Act making diversity core business, it is unlikely that systemic forms of discrimination will be addressed, and equity secured.

Particular attention also needs to be given to diversity within diversity or intersectionality, recognising that different forms of discrimination can interact with each other and can result in reinforcing barriers to access. An approach which focuses on and addresses the unique challenges that those who sit at the intersections of overlapping systems of discrimination face is required. It is also important to ensure that the Act, policies, practices and programs are designed and reviewed with an “intersectionality” lens so that unintentional exclusion does not occur. The people most affected by the policy or practice must be central to consultation and co-design.

A Diversity Framework was developed in 2017 and this is not reflected in the Act. We would welcome reference in the Act to the Diversity Framework with the Rules outlining how the Framework may be implemented as part of a rights-based approach to aged care.

Consideration is also required of legislated consequences if providers do not provide inclusive services. Many older people have expressed their frustration that a provider that fails to be inclusive doesn't face any consequences as a result. Where a provider cannot demonstrate that they are providing high quality, culturally safe, inclusive services, this should be reported and acted upon as a serious failure in meeting the requirements of the Act. Failing to be inclusive can cause significant harm to older people who are members of the diversity groups.

## **First Nations Aged Care Commissioner**

It is concerning that there is no mention whatsoever of the First Nations Aged Care Commissioner, as recommended in the Aged Care Royal Commission. An interim First Nations Aged Care Commissioner has recently been appointed and we are aware that they are currently developing the role.

The Act should clearly delineate the interaction of roles and functions between the First Nations Commissioner and the Inspector General, System Governor, ACQS Commissioner and Complaints Commissioner to ensure seamless oversight and representation for First Nations people and their aged care providers. In addition, the First Nations Aged Care Commissioner should be empowered to ensure that aged care delivered to First Nations peoples aligns with the UN Convention of the Rights of Indigenous Peoples.

## **Recommendations**

78. Include in the Objects – “Ensure that all individuals entitled to benefits and services outside of the aged care system (such as Medicare-subsidised health care services, inpatient and outpatient rehabilitation services, Veteran entitlements to DVA medical services and DVA medical aids) can receive them and cannot be denied them due to receiving aged care services.
79. Amend Right 8 – “An individual has a right to communicate in the individual’s preferred language or method of communication, with access to interpreters and communication aids as required” so that it stipulates who is responsible for funding and arranging these supports.
80. Amend Principle 4 to include ability: “Funded aged care services, if required by an individual and based on the needs of the individual,

regardless of the individual's location, background, *ability* and life experiences."

81. Make the First Nations Aged Care Commissioner a statutory independent appointment.
82. Include a clause in the Act with a "diversity population list" rather than a note and reference that clause in both the Statement of Rights and the Statement of Principles.
83. Use stronger, more positive language around supporting diverse needs during the assessment process within the relevant sections.
84. Review the entire Act to ensure that diversity, equity and equitable access are reflected in all relevant sections and that terminology and definitions are used consistently throughout the Act. Refer to the Aged Care Diversity Framework.
85. Amend Section 392 to ensure grant purposes may be funded for the specific populations outlined in the proposed diversity population list clause as well as to provide for community capacity building to support and advocate for culturally sensitive, culturally appropriate, trauma-informed care.
86. Include under Section 91 a new sub clause that a registered provider is responsible for ensuring that aged care workers are trained in the principles and practices of culturally sensitive, culturally appropriate, trauma-informed care including understanding the impact of ageism on their attitudes to working with older people.

## **Include explicit reference to disability supports**

90 per cent of attendees at online consultation forums agreed or strongly agreed that the language around access to aged care based on ill health or sickness should be changed to reflect that people can also access aged care for disability supports.

*"My spouse has high support needs and is excluded from the NDIS due to age. We need Royal Commission Recommendation 72 – Equity for people with disability receiving aged care implemented from 1 July 2024."*

(Older person and carer)

*"The Royal Commission recognised that the level of support the current aged care system provides is inadequate for disabled people who have high care needs. This results in heavy burdens being placed on family (and friends) to*

*care for the disabled person at home. When that burden becomes too great, moving to residential aged care is undesirable, but likely the only alternative.”*

(Older person)

To be compliant and consistent with the Australian Constitution, the language of the Exposure Draft infers that the purpose of aged care services and the reasons older people require services is due to sickness or illness.

In the Definitions section of the Exposure Draft, sickness is defined as infirmity, illness, disease, incapacity, or impairment.

Whilst this is legislatively understandable, the references to sickness are problematic. It does not sit well with aged care legislation based on rights supporting choice and control, self-determination and consumer directed care. We are concerned that legislation referring to sickness implies a deficit approach to aged care and does not highlight the positive goals of reablement and rehabilitation which should be reflected in government-funded aged care programs.

The Exposure Draft also fails to recognise that some older people seek aged care services for disability supports. These people have a disability but are not sick. Government policy mandates that all people who acquire a disability on or after the age of 65 years must receive support for their disability from the aged care system. The supports available should be of the same extent and quality as those provided under the NDIS or other systems of support to ensure the guarantee of non-discrimination on the basis of age and disability embodied in Article 5 and other articles of the Convention on the Rights of Persons with Disabilities.

The Act should recognise, and reference disability supports as a key criterion for entry to the aged care system and a significant reason for older people requiring aged care services.

The *National Disability Insurance Scheme Act 2013 (Cth)* uses the term “disability support”. This demonstrates that the term can be used in Commonwealth legislation and therefore in aged care legislation whilst detailing distinctions between the aged care and disability systems.

We acknowledge that individuals with a disability or mental ill-health are listed as a “special needs” group in the note under Principle 4 in the Exposure Draft. Whilst all these groups should be raised into the main text of the Act, disability supports should be established as a mainstream eligibility and purpose for aged care service provision in the legislation.

The Independent Review of the NDIS refers to the Australian Government implementing legislative change "to allow participants once they turn 65 to receive supports in both the NDIS and the aged care system concurrently and clarify when aged care supports are reasonable and necessary." We understand that Government has not yet provided a response to this recommendation.

We consider that it is critical for older people with disability, irrespective of when their disability was acquired, to be able to concurrently access supports from both the aged care system and the NDIS, depending upon their individual needs and circumstances. This flexibility needs to be built into the new Aged Care Act.

We also support the recommendations to implement legislative or process change to allow access to the NDIS for Disability Support for Older Australians (DSOA) program participants. We are concerned that people in the DSOA program who are receiving less than \$50,000 funding each year will be automatically moved out of the program and instead must apply for an assessment for in-home aged care via CHSP or a home care package.

## Recommendations

87. Disability supports should be recognised by:

- Inserting "disability support" or alternatively "disabling condition" in all relevant sections in the legislation where "sickness" is referred to.
- Making supports for people with disability aged 65 years or older, an explicit reason for accessing aged care services by:
- Amending relevant key concepts and definitions including "disability support" as part of the definition of "care needs" and "sickness", inserting "disability supports" as part of the matters considered in prescribing services (including service list and service types), inserting "disability supports" as part of the definition and purpose of a residential care home.
- Establishing "disability supports" as an entry requirement for aged care as part of aged care needs assessment, inserting "disability supports" as part of System Governor service type approvals (including standalone clause stating that services may be approved entirely on the basis of supporting someone's disability).
- The Explanatory Memorandum should clearly:

- explain the background and reason for references to “sickness” and “illness” as a legal and legislative requirement.
- describe the intention and purpose of the aged care system in providing services for older people requiring disability supports.
- demonstrate the legislative commitment to supporting reablement, rehabilitation and maintaining and improving quality of life as required by Article 26 of the Convention on the Rights of Persons with Disabilities.

## **Include rights for carers**

*“I’m the primary carer for my parent who lives with dementia. I have often been dismissed or excluded. Please ensure (unpaid) carers are listened to!”*

(Carer)

*“Are there to be any entitlements for unpaid carers?”*

(Older person and carer)

*“Carer rights and needs are very, very neglected.”*

(Carer)

The recommendations of the Royal Commission regarding the rights of carers to support for their caring role have been completely ignored in the Bill. The Royal Commission identified that “the inclusion of entitlements for informal carers in the new Act is consistent with the principles expressed in the Carer Recognition Act 2010 (Cth). However, unlike the Carer Recognition Act, the new Act should provide means of enforcing those entitlements.” In its recommendations on the new rights-based Act, the Royal Commission stipulated:

- Under Recommendation 2: Rights of older people receiving aged care that “for people providing informal care, the right to reasonable access to supports in accordance with needs and to enable reasonable enjoyment of the right to social participation.”
- Under Recommendation 3: Key principles “informal carers of older people should have certainty that they will receive timely and high-quality supports in accordance with assessed need.”

Carers are referred to in the Statement of Rights, Clause 11: ‘An individual has a right to have the role of persons who are significant to the individual, including carers, be acknowledged and respected.’

The Statement of Principles, Clause 7 provides a bit more detail but again this is simply recognising carers rather than responding to the care responsibilities of carers and their needs for support to sustain their role: “The Commonwealth aged care system recognises the valuable contribution carers make to society, consistent with the Carer Recognition Act 2010, and carers should be considered partners with registered providers who deliver funded aged care services.” If carers are to be genuinely viewed as partners, then their role and needs should receive support and their role be respected in law.

Carers, especially spouses/partners of people living with dementia and adult children of older people from culturally and linguistically diverse backgrounds, currently fill many gaps in the aged care system. In addition to providing direct care, they assist older people to understand and navigate the system and negotiate and advocate with providers. The risk of failing to legally recognise carers in the new Act is that progressively unsupported responsibilities and expectations will be placed on carers, leading to burnout and premature entry of the people they care for to residential aged care.

A recent example of responding to the recommendations of the Royal Commission of providing carers of people living with dementia with “reasonable access to supports in accordance with needs” is the grant-funded Staying at Home program. It is specifically designed to introduce respite care as a means of sustaining care relationships. It does this through tailored, individual support to people living with dementia, and a focus on carer wellbeing and self-care to enable their carers to support them to remain at home for as long as possible. While there remains no right for carers to access these types of programs, the investment in rolling it out across Australia will not help to improve carer certainty that they will receive the support they need to sustain care at home.

The draft Bill as it stands does not provide either older people or their carers with the certainty that they will receive timely and high-quality supports specific to their needs. Nor does it specify that grants can be used to provide carers with access to supports in accordance with needs, including their right to social participation while undertaking the caring role. Therefore, the rights of carers are not protected in the draft Bill nor in the Carers Recognition Act 2010.



The role and needs of carers in supporting older people to access aged care and in complementing formal aged care services must be addressed to fulfil a person-centred and carer-inclusive future vision for aged care.

## **Recommendations**

88. Legally recognise carers within the Act as eligible for support within the aged care system in accordance with assessed need.
89. Include the rights of carers as stipulated by the Royal Commission.
90. Reflect the role of carers, their importance to the older people they support, and the carer's individual needs in the relevant sections of the Act (e.g. under Section 44 (2) assessors must also consider the needs of the carer in co-designing the service plan, including equitable and timely access to respite care and other supports for the caring role).
91. Amend Section 392 to ensure grant purposes includes grants to provide timely, equitable support for carers.

## **Audit providers stating they provide 'high-quality care'**

The definition of high-quality care is entirely aspirational. Older people are dissatisfied with leaving this up to an aspiration of an individual provider. They believe that high-quality care should be included in the Statement of Rights (as in a right to high-quality care). This will strengthen the efforts of the System Governor and the System Regulator to encourage all providers to deliver high-quality care.

The Exposure Draft provides no details on enforcement provisions and penalties if aged care providers fail to deliver high-quality care. There are no direct references to high-quality care with any obligations on providers.

Apart from defining high-quality care amongst the key concepts of the Exposure Draft, there is little reference to it in the rest of the document. There are brief references to continuous improvement in the Statement of Principles and in conditions of provider registration. In the Exposure Draft, the System Governor "encourages" high-quality care as part of their functions and the Aged Care Quality and Safety Commissioner is to "promote" the delivery of high-quality care in their safeguarding functions.

A strength of the definition of high-quality care in Section 19 is its reference to upholding the rights of the individual under the Statement of Rights. Also important is the person-centred "choice and control" principles relating to the

high-quality care definitional priority of “kindness, compassion and respect for the life experiences, self-determination, dignity, quality of life, mental health, and wellbeing of the individual.”

If the Act contains a definition of high-quality care, it must take responsibility for how that term is used by providers. If a provider self-identifies as delivering high-quality care, its practices must align with however this is defined in the Act. The capacity of providers to deliver high-quality care should be monitored and assessed with outcomes transparent and publicly available. Older people accessing services should be supported to make complaints to the Complaints Commissioner if high-quality care is not being delivered. This could replicate the current ACQSC independent verification process for providers making claims to provide specialised care to diverse groups, complemented by mechanisms to hold providers accountable when they do not provide high-quality care.

The primary legislation should include a mechanism to determine if providers are delivering high-quality care. We propose that any provider seeking to promote themselves as delivering high-quality care should be obligated to be assessed by the ACQSC against the definition of high-quality care provided in the Exposure Draft and receive and/or manage complaints if not delivering on its promise. Providers will be able to opt-in to this assessment process to determine whether they are meeting the requirements of delivering high-quality care.

The definition of high-quality care requires regular review and is likely to evolve over time. Reviewing the meaning and definition of high-quality care should be able to occur regardless of the legislated review of the Act. It should also be a key part of any review of the legislation. The ACQSC should be able to develop benchmarks and criteria for assessment purposes and strengthen this over time. Mapping high-quality care against the rights could also be explored.

## **Recommendations**

92. Include the right to high-quality care in the Statement of Rights. Update Section 143 on the safeguarding functions of the ACQS Commissioner to include a specific clause enabling the ACQSC to assess providers who voluntarily agree and opt-in to an assessment process to determine whether providers are meeting requirements in the definition of high-quality care.
93. Update Division 5 regarding reporting and planning of the ACQSC to ensure that outcomes of the high-quality care assessment process are

publicly available to enable the “high-quality care” status of providers to be clear (i.e. achieved, not achieved, opted out).

94. Update Section 19 defining the meaning of high-quality care, Section 99 on continuous improvement as part of provider registration and Section 132 on the System Governor by adding references or links to the ACQSC high-quality assessment process and outcome to emphasise that there is a systemic mechanism to support the delivery of high-quality care.
95. Amend Section 19 defining the meaning of high-quality care in the Exposure Draft to enable a more detailed understanding of high-quality care and the way it can be applied and operationalised to be detailed in the Rules.
96. Update section on the functions of the Complaints Commissioner to enable complaints about providers not delivering high-quality care under the definition to be received, processed and responded to.
97. Enable the definition of high-quality care to be reviewed every 3 years, regardless of the timeframe for the legislated review of the Act.
98. Amend Section 19 defining the meaning of high-quality care to prioritise and include references to “culturally safe and appropriate” services and ensuring staff are “culturally competent” to deliver quality outcomes for people with diverse backgrounds and life experiences. Refer to the Diversity Framework and Action Plans and add the need to maintain contact in a manner that respects the access and communication needs of the individual.

## **Audit providers service improvement initiatives**

*“I agree that the contract should be underpinned by the Act, but it is more important that the contracts have regulations which unpack the Act for the provider and for the resident. There should also be a requirement that by 3 or 6 months, the contract be reviewed with the resident having an appropriate advocate. When the contracts are signed, the older person and their families are under enormous stress so reviewing would be very useful.”*

(Family member)

It is important that continuous improvement is referred to as an object of the Act and features in the Statement of Principles in relation to supporting aged care workers, regulation, feedback and complaints.

Apart from generic references to continuous improvement as part of provider registration conditions and the promotion of continuous improvement by the

Commissioner as part of their safeguarding functions, there is no detail on how continuous improvement is “operationalised” or applied in the aged care system.

Compliance is important and a key feature of the Act as it shapes and guides the obligations and registration of providers and regulatory mechanisms for assessment against these. However, more references to continuous improvement could be made throughout the legislation to emphasise and enhance this as a key objective for both aged care providers and the aged care system, balanced with compliance objectives.

A key area where this could be “operationalised” is in the functions of the ACQS Commissioner, particularly those related to engagement and education, complaints, and registration of providers. The work of the ACQSC could be linked to continuous improvement in a more consistent and explicit way through:

- processes consulting and engaging with older people, their families, carers, Supporters and Representatives
- developing and promoting best practice models
- providing information about rights for individuals in the Statement of Rights
- informing and promoting the objectives of the Aged Care Act
- data collection, analysis and dissemination
- promoting the value and importance of complaints information and processes at the provider and systemic level and developing a culture of raising concerns leading to service and system improvement.

Continuous improvement should also be referenced in the Act in the key concept detailing the meaning of high-quality care and be included as an objective in our proposed ACQSC high-quality care assessment process where providers opt in to demonstrate whether they are delivering high-quality care.

## **Recommendations**

99. Amend Section 143 (Engagement and education functions), Section 144 (Complaints functions) and Section 145 (Registration of providers function) to include references to continuous improvement emphasising its importance in the work of the ACQSC.
100. Insert reference to continuous improvement in Section 19 on the meaning of high-quality care. This would demonstrate that delivering high-quality care is an ongoing, active “continuous improvement” process.

## **Protections for older people using government-funded and private aged care services**

*"I think that residential agreements being standard contracts is really important, so people don't get 'duped'."*

(Family member)

*"I also like the idea of a standard contract, so you have a list of services possible and you know if you are not getting them."*

(Older person seeking aged care services)

The Exposure Draft states that the Act provides for the delivery of funded aged care services to individuals under the Commonwealth aged care system. A funded aged care service is any service on the prescribed service list to which funding is payable under the Act.

We are concerned that not all services provided as part of the aged care system are covered by the proposed Bill. It appears that only services supported by the Government (including any client contributions) fit under the scope of the Act. It is unclear whether clients who "top-up" their government-funded aged care services with additional privately funded home care or residential care services, where no government funding is payable, are included in the definition of funded aged care services. This means older people would not receive the critical protections contained in the Statement of Rights, Complaints Framework and Aged Care Standards. We are concerned that the rights of these older people may sit outside the Act and are limited to basic consumer and contract law.

The Exposure Draft does not clearly and consistently detail the rights and protections of older people for services delivered by associated providers and other privately registered providers with a relationship with a registered aged care provider.

This appears to be at odds with the stated intent in the consultation paper of a new system that "will focus on the safety, health and wellbeing of older people, and put their needs and preferences first." Older people accessing private health care enjoy a range of protections under the Private Health Insurance Act 2007 (Cth), the National Safety and Quality Health Service (NSQHS) Standards and the Australian Charter of Healthcare Rights. However, the Exposure Draft appears not to offer any protections to older people accessing private aged care services, even when delivered by a registered aged care provider.

Full consumer protections and rights should relate to all services under the “aged care system” delivered by a “registered provider.” This may be linked to the service list but should not be linked to funding payable under the Act.

The scope of the Act and full consumer protection and rights related to all services in the aged care system is critically important as the legislative underpinning for the implementation of the new Support at Home program where older people will be able to choose multiple services and service providers to meet their needs under their independently assessed and co-designed service plan.

## **Recommendations**

101. Update Section 8 on the Aged Care service list and funded aged care services to include a clause incorporating all services under the aged care system including “top-up” and private services that are linked to the service list but not receiving funding payable under the Act.
102. Provide substantive details in the Explanatory Memorandum on all services delivered by the aged care system covered by the legislation and how consumer protections and rights are applied to all service contexts.
103. Review and update all sections of the Exposure Draft related to “funded aged care services” and “associated providers” to ensure that consumer protections are provided to all people accessing services under the aged care system.
104. Insert a mechanism in provider obligations and System Governor requirements to ensure that older people accessing services receive consistent information about the agreement between them and service providers by enabling standardised contract templates, in plain English and with accessible language options, to be developed and approved. Agreements and contracts would include information about rights, including the right to make complaints, and service requirements to meet quality standards.

## **Ensure consistent transparency of information**

*“Facilities make you jump through hoops to get care notes. They try very hard not to hand them over. You have to ask several times before they provide them.*

*Then when you get them, the notes are lacking. I was told that they only document 'exceptions' but not sure what that means.”*

(Family member)

*“Is there a link to the FOI policy that is in place in business? Not sure about how transparency works when an electronic health monitoring system is used in an aged care facility where staff are completing online notes about residents during every staff shift. And this is currently private info for the facility, and they use this to log incidents which creates pathways for people in this system.”*

(Carer)

*“There should be transparent validation processes and appeal pathways back to real people in the case of any automated decision process.”*

(Older person)

*“It should be made mandatory where money is being spent. Currently it's not transparent. Financial statements must be available to consumers and their representative or to the public.”*

(Community member)

*“Information on their background, finances etc. Private equity firms may have dreadful records overseas re labour hire, aged care service delivery etc and we would never know. Is there a way of this being made public as part of the Act?”*

(Community member)

*“I would also like to see information about the owners/investors if they are not the provider. There are private equity funds etc buying aged care services. In the same way super funds are beginning to give information on ethical investments.”*

(Older person receiving services)

The Exposure Draft of the new Act contains a broad commitment to transparency and the provision of publicly available information. This is encapsulated in Principle 8 of the Statement of Principles (Section 22) of the Exposure Draft which

states that “The Commonwealth aged care system is transparent and provides publicly available information, about funded aged care services, that is understandable, accessible and communicated through a variety of methods and languages.”

## **Clarity and consistency on information to be made publicly available**

However, the application of this principle in other relevant sections of the proposed legislation is unclear, particularly the distinction between information that must be made publicly available and where publicly disclosed information is at the discretion of the System Governor and ACQS Commissioner. For example, the ACQS Commissioner may make information from the banning order register “whole or in part” or “specified information” publicly available whereas the System Governor must make information about exemptions for at least one registered nurse on residential sites publicly available.

There are also differences in the way information is made available to the public. For example, in Section 134, information from the Register of Coroner’s Report is to be “made available for public inspection on the internet” whilst it is presumed that other information collected through various registers be publicly presented through reports.

The collection of information regarding aged care services and the aged care system in the Exposure Draft through various registers is confusing. We propose that 2 registers are established. One about requirements and obligations on workers and one about requirements and obligations on providers. All other relevant documents (e.g. coroner’s reports) and relevant decisions (e.g. conditions of registration on a specific registered provider) must be included in these two public-facing documents. Historical information must be preserved and published. These aged care registers must be linked to NDIS registers. All registers should be co-designed with older people to be user-friendly.

## **Protected information should not lead to avoidance of provider accountability**

We are particularly concerned about the definition of protected information (Section 322) that states that protected information “is information whose disclosure could reasonably be expected to prejudice the financial interests of an entity.” This appears to be a very broad protection. Arguably, any negative



information could be prejudicial to the financial interests of providers and has the potential to shield providers from being transparent and accountable. References to prejudice should be removed and replaced with a new definition of protected information, that is “information having a commercial value, whose disclosure would be, or could reasonably be expected to be, destroyed, or diminished if the information were disclosed”. This wording change would ensure that protected information is in line with exemptions in Freedom of Information (FOI) legislation (s47) that has been subject to interpretation by the courts and provides a clearer and higher standard. More detail is required in the Explanatory Memorandum to explain what “reasonably” should be taken to mean and include the types of information that can be publicly disclosed in contrast to what is protected.

The consultation paper accompanying the Exposure Draft refers to the definition of protected information being more limited in the new Act compared with the current Act to respond to criticisms made by the Royal Commission.

## **Enabling a Standard Contract template to support transparency and rights**

*“I have just signed a contract for a Level 2 Package and the contract was 44 pages. Way too much for a person to go through and actually be able to understand all of the clauses.”*

(Older person)

In the Exposure Draft, there is no reference to an agreement or contract between individuals accessing aged care services and registered providers. As part of conditions on provider registration, Section 105 on the delivery of funded aged care services provides a general clause stating that services will be delivered “in accordance with any applicable requirements prescribed by the rules.” However, this does not refer to an agreement or contract. The current Aged Care Act 1997 allows for a resident agreement, accommodation agreement, extra services agreement and home care agreement. The User Rights Principles of the 1997 Act provide requirements for resident and home care agreements.

Understanding there will be variations, the implementation of standard terms for all agreements or formalised arrangements between an individual accessing aged care services and providers would strengthen consumer protections and support transparency, rights and person-centred aged care. We propose that there be references in provider registration conditions sections of the primary

legislation that enable a standardised contract template between individuals accessing aged care services and registered providers. A function or role of the ACQSC should be to provide a standardised contract or agreement template and to monitor the implementation of this by providers.

A standardised contract template should include:

- costs
- dates
- access to individual, professional advocacy
- how and where to make internal complaints
- right to external complaint information, written in plain English and available in a comprehensive range of community languages.

Standard terms and conditions should be differentiated from special terms and conditions, such as additional services charges, so that it is clear to older people accessing services what is consistent across all providers and what are the specific arrangements with this provider.

A standardised contract template should include an appendix that includes the:

- Aged Care Quality Standards
- Aged Care Code of Conduct
- Statement of Rights
- My Aged Care listed prices
- a full price list
- procedures for making internal complaints
- ACQSC complaints factsheet
- information about the local independent professional advocacy service
- Aged Care Diversity Consumer Action Plan(s), as relevant.

## **Timeframes for service-level agreements**

The Exposure Draft contains no substantive reference to timeframes for decisions made by the System Governor, ACQS Commissioner and Complaints Commissioner related to decision-making processes impacting on individuals accessing aged care services.

The decision-making process of these system governance and regulatory actors impacting on older people accessing aged care services should be described in

the Act as a service-level agreement (SLA) to enable a decision timeframe for all decisions in law and also for the Rules to outline specific SLA timeframes. These SLAs would describe the metrics by which the effectiveness of key processes such as assessment, review and complaints are monitored and approved.

Clear maximum timeframes must be imposed on all decisions, and all decisions that are not taken within that timeframe must be deemed to be denied, and a notice of that denial must be sent. Such provisions would then enable internal review and external review and appeal processes to commence. We note that notices taken to be withdrawn are not afforded the same review and appeal rights.

As a principle we submit that no more than 14 days should be taken to make a decision and no more than 7 days should be allowed to give notice of a decision, once taken. The Exposure Draft only includes timeframes for when a response will be sent once a decision has been made. Reporting how often the decision met the SLA timeframe should be reported as part of the System Governor, ASQS Commissioner and Complaints Commissioner's annual reports.

Reporting should include:

- a benchmark set on what percentage of decisions will be completed within that timeframe
- data and information on the timeframe of decisions based on a performance measure.

A critical mechanism for ensuring greater transparency and accountability of aged care services is the Star Rating System. This has been implemented for residential care services and is providing useful performance information and data to older people accessing services and providers. It is essential that this be extended to the Support at Home and implementation commenced prior to May 2024.

## **Recommendations**

105. Amend relevant sections of the Act to establish 2, publicly available, decision-making registers, one about workers and one about providers. In these registers, historical information must continue to be preserved and published. The registers must be linked to NDIS registers. Amendments are required to:

- Sections of Chapter 3 in the proposed Bill and Sections 166 and 167 to upgrade the worker screening database to a register

- Section 134 to include coroner report information in the 2 registers
  - Section 296 to include banning order information in the 2 registers.
106. Amend all clauses in the Act regarding decisions “registers” (which record relevant decisions) to ensure they are consistently made public.
  107. Amend Section 322 to remove references to prejudice and insert wording that states that protected information is “information having a commercial value, whose disclosure would be, or could reasonably be expected to be, destroyed, or diminished if the information were disclosed”. This wording is in line with federal Freedom of Information (FOI) legislative guidelines. This will raise the bar for protected information making it clearer and more relevant. The definition could also incorporate a public interest test (i.e. insert at the end “and for which it is not in the public interest to disclose”).
  108. Alternatively, replace prejudice with “have a substantial and adverse effect” and insert at the end “and for which it is not in the public interest to disclose”.
  109. Update Right No. 6 in the Statement of Rights and other sections of the legislation to ensure that individuals have a right to access all personal care and service delivery information and decisions related to them. (e.g. “even if something is deemed to be protected information, it must be disclosed to the individual to whom it relates or their representatives upon request”.)
  110. Amend Section 105 on the delivery of aged care funded services and Section 89 on conditions imposed by the Commissioner to establish a requirement for the development and use of an industry contract template, approved by the Aged Care Quality and Safety Commission, which will include those items as stipulated in the Rules including Statement of Rights, Terms and Conditions etc. A standardised, plain English contract template is essential to assist older people to make informed choices.
  111. Amend Chapter 5 of the proposed Bill to ensure there are clear and specific timeframes for respective decisions made by the System Governor, Complaints Commissioner and Commissioner regarding service-level agreements. These service-level agreements (SLAs) should be required in the Act and allow the Rules to outline the specific SLA timeframes. Currently the Act only includes timeframes for when a response will be sent once a decision has been made. Reporting how often the decision met the SLA timeframe should be reported as part of

the System Governor, ACQS Commissioner and Complaints Commissioner's annual reports.

112. The annual report on the operation of the Aged Care Act must continue in addition to the proposed annual reporting on the performance of the System Governor's functions.
113. A public commitment by the Australian Government to implement a Home Care Star Ratings Program no later than the introduction of the Support at Home program. This commitment should be made in or prior to the May 2024 budget to provide time for its development.
114. Ensure star rating systems and their calculations evolve and mature to build confidence in their reported outcomes.

## **Transparent, fair and equitable consumer fees and government funding to provide quality services – responding to the Aged Care Taskforce recommendations**

Means testing, subsidies and payments and fees are critically important to older people who use, and will use, aged care services. This is particularly important as user contributions are likely to be increased in the future. However, the legislation's Chapter 4 on fees payments and subsidies was not included in the Exposure Draft legislation, while Government considers its response to the Aged Care Taskforce's report and recommendations.

The departmental consultation paper on the Exposure Draft of the proposed Bill states that:

*'Provisions in this chapter are generally expected to mirror the current legislative framework. This is because it is anticipated that funding under the new Act will remain largely the same until the introduction of Support at Home.'*

*'Minor changes will be made to resolve issues within the current system and to align it with the new Act's structure and terminology. The provisions will also be presented differently in the new Act and form part of a new, clearer subsidy framework.'*

*'More significant changes to funding and means testing arrangements will be considered once the government considers the recommendations of the Aged Care Taskforce.'*

The lack of public information and content in the Exposure Draft erodes confidence in the new legislation and makes it difficult for stakeholders to offer significant feedback.

Older people need to know, and be reassured, that government funds and participant contributions are not being used by providers to gain excess profits. Public reporting should detail the level and proportion of funding spent on care services and aged care system requirements and if any funding is diverted to private corporate or shareholder trusts.

We also seek inclusion in this section of consumer protections for the widespread practice of compulsory additional services fees (distinct from extra services fees). Currently low means older people are dissuaded from applying for residential aged care that is conditional on agreeing to payment for additional services they cannot afford. For many, this means being forced to seek care geographically distant from their local community. Others have already signed, without informed consent, agreements that include additional service fees. Their only recourse is to apply to the ACQSC to direct the provider to remove additional services charges if they can prove that they cannot access the service (not that they do not want it) or would not receive benefits if they were to access it.

The Australian Government should also review the proportion of the Age Pension used for the Basic Fee for aged care. The amount left over is insufficient for some full pensioners without other means to meet the cost of necessary personal items. By comparison, while Aged Care requires an 85% of the pension contribution, a maximum of 75% of the pension is used in the NDIS room and board formula for disability accommodation,<sup>6</sup> This could be considered for residential aged care. It is unclear what the public policy rationale is for this ageist difference in amounts. The current 17.5% of the age pension charged in home care fees should be examined considering increased cost of living pressures. Older people should be able to retain some disposable income to support their engagement in the community and pursuit of individual goals. Modelling to demonstrate how the proposed amount leaves sufficient funds for groups of people including full age pensioners should be published.

As part of the Aged Care Guarantee, which ensures that older Australians with limited wealth and resources continue to receive equitable care and services, those with the capacity to pay will be asked to contribute more to the funding of the aged care system. Means testing calculations and financial assessment should include consideration of housing costs, medical costs, and documented debt to ensure that participants have consistent funds to pay for pharmaceutical

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<sup>6</sup> <https://www.ndis.gov.au/providers/housing-and-living-supports-and-services/specialist-disability-accommodation/sda-pricing-and-payments>

and other personal expenses. The means tested calculation will need to have regard to the products available to liquidity assets used in the calculation of the value of their family home. Amounts set as part of the reform must be indexed, based on the Age Pension indexation rules, to ensure rates remain contemporary. Older people and carer organisations to this submission suggest that a three-tier approach could be used to calculate personal contribution amounts. This should be considered and based on actuarial modelling. For example:

- Full Pensioners (evidenced by their pension card and bank statement) would contribute no more than the designated % of the Age Pension in residential care and no more than a designated % of the Age Pension to access home care services.
- Part pensioners up to Commonwealth Seniors Health Card (CSHC) (provide card as evidence) should be asked to contribute no more than the designated % of the Age Pension in residential care and no more than the designated % of the Age Pension to access home care services along with a means tested contribution assessing both income and assets.
- Non-Commonwealth Seniors Health Card holders will have the same approach as Part Pensioners & CSHC but use a slightly higher means testing amount. We note that this distinction assumes that no interest changes to earnings in superannuation as part of the retirement phase occur, however if such additional costs were to be charged, then this third tier should be collapsed into the same calculation as part pensioners recognising that additional costs would be incurred by this cohort.

A review and analysis of the Aged Care Taskforce's recommendations will be completed if and when they become publicly available.

While we are unable to comment therefore on the specific legislation, we submit relevant recommendations built from our joint submission to the Taskforce's consultation on the Funding Principles as a way to express our views on what we anticipate this Chapter should achieve. We would argue that our recommendations could be implemented without the Taskforce Report being publicly released. Regardless of the Taskforce report being released, there must be public consultations on any changes to fees and charges. Our recommendations are summarised in this section with more details in the table at the end of the written submission.

## Recommendations

115. Fees should be established and implemented under an Aged Care Guarantee. The guarantee should ensure that, at a minimum, the Australian Government will fund and be accountable for delivering aged care. The Guarantee should cover all services listed below which build on the Specified Care and Services Schedule and ensure that funding allocated to aged care providers is based on the individual assessed needs of participants and is used to provide core services. We discuss this in more detail under Chapter 4 of Appendix A).
116. All aged care fees, including costs for bundles of additional services in residential aged care, should be transparent and be additional to the Aged Care Guarantee. Registered providers should not be able to refuse to accept a resident who is unable to afford additional services charges, or who is unable to use or does not wish to make use of additional services. Aged care service participants and their families should not be pushed or coerced into paying for additional services as a precursor to accessing a place in the aged care home.
117. The Australian Government should review the proportion of the Age Pension used for the Basic Fee for aged care. The amount left over is insufficient for some full pensioners without other means to meet the cost of necessary personal items.
118. Means testing calculations and financial assessment should include consideration of housing costs, medical costs, and documented debt to ensure that participants have consistent funds to pay for pharmaceutical and other personal expenses.
119. The Australian Government should consider changing how an individual's home is used in determining contributions towards accommodation costs in residential care, provided there are protections for spouses, partners and carers who remain living in the home, a robust means testing approach protecting older Australians, and a range of payment options available.
120. Implement one mandatory fee for personal contributions towards aged care services. The fee should be transparent and should include the base level percentage of the pension (currently the basic daily care fee) and any applicable means tested components.
121. Expand payment options for personal contributions or accommodation payments to include personal savings, cash from superannuation, insurance/aged care products, investment of a lump sum, social



insurance type products, homeowner equity access/release models, money from an estate.

122. Current funding for diverse and marginalised populations should be retained.
123. Implement a capital investment approach, where Government prioritises the development of alternative aged care accommodation models for older people including less institutionalised cottage style developments and seniors co-housing when co-investing in new builds.
124. Establish legislative requirements on aged care providers that government funding is used for the purposes it is intended for and include transparent accountability mechanisms to ensure this occurs.
125. Review government decisions related to Aged Care Taskforce recommendations in the Bill as part of the Senate inquiry.
126. Maintain current measures of transparency and enhance these in the Bill so that it is clear where funding goes to and what it is expended on.
127. The Act must state that government funding and any co-contributions and/or fees are used for the purpose they are given and are linked to the delivery of high-quality care and must be publicly reported on.

## **Better protections against use of Restrictive Practices**

*“Protecting the rights of the most vulnerable residents in memory care wings needs a separate section in the legislation. I believe the extra funding going to these residents is not quarantined to the memory ward. The staff-to-patient ratio is near enough the same as the quieter wards. Staff don’t want work in memory wards because of residents’ behaviour and the worry of assaults.”*

(Older person and carer)

*“Difficult behaviour in RACFs, usually related to dementia, the onus must be on facilities to improve their systems’ care and responses to minimise the chances of things going wrong.”*

(Family member)

The starting point of the NDIS Act is that there are no restrictive practices. In any instances these are needed, processes must be followed to independently authorise, implement and monitor the use of restrictive practices. Older people must have the same starting point. There is no justifiable reason for older people to be treated differently simply because of their age. This is ageism.

Labelling restrictive practices as a “last resort” is insufficient to protect older people from their use. Restrictive practices should not just be a last resort, but also be proportional to the risk of not undertaking these practices. Review requirements on the ongoing use of restrictive practices must also be put in place.

Similarly, the generic “the use of restrictive practices is documented” is insufficient and the requirement for an individualised behaviour support plan should be explicitly stated in the Act. Representatives must also be included in discussions on the initiation, time -limited use and plan to reduce or cease any restrictive practices.

While it may be odd to seek the informed consent of the person in using the restrictive practice, this should be a first step where the person is able to articulate their decision either verbally or non-verbally, using a supported decision-making process. However, we acknowledge that there are issues and limitations with this. In addition, asking someone else to consent on the individual’s behalf can be problematic, especially when we are increasingly requiring (as indeed this Bill does) that substitute decision-makers make decisions that accord with the “will and preferences” of the individual. There are a couple of potential models that could be used:

- The Bill simply require that restrictive practices can only be used where they are authorised according to the “applicable law of the state or territory in which the care recipient is provided with aged care” services; and/or
- Have regard to the person’s Advance Care Directive such that they consent, or do not consent, to some restrictive practices in the same way they make a binding directive for acceptance or rejection of medical treatment.

As John Chesterman notes: “Authorisation processes should utilise a senior practitioner authorisation model, which is increasingly accepted to be superior to a consent-based model. The final report of the Disability Royal Commission provides further support for this stance”.

The Act must, consistent with the Australian Commission on Safety and Quality in Health Care Psychotropic Medicines in Cognitive Disability or Impairment Clinical Care Standard, differentiate between treatment of mental health conditions and use of medication as a restrictive practice. When used appropriately for diagnosed mental illnesses, antipsychotic medications can benefit people.

However, where they are inappropriately used as a chemical restraint, they can cause significant harm.

## Recommendations

128. Amend restrictive practices processes to include independent authorisation process in accordance with the applicable law of the state or territory in which the individual is provided with aged care services.
129. Further amend Section 17 restrictive practice requirements so that:
  - review requirements and timeframes are included
  - the requirement for an individualised behaviour support plan is explicitly stated
  - representatives and independent professional advocates, when requested by the individual or representative, are included in discussions and decisions around the use of restrictive practices.
130. Ensure the Rules provide clear guidance that some people with cognitive impairment can benefit from access to pharmaceutical interventions that could be deemed a restrictive practice with appropriate protections and review timeframes in place.

## New security of tenure provisions

82 per cent of attendees at online consultation forums agreed with the proposition that the Act should ensure people are not moved to another bed or location or lose services in their home (security of tenure), except in exceptional circumstances and with independent authorisation.

*“An adult child called because their parent was in hospital and the residential aged care provider had stated that due to behavioural issues, they will not accept their parent back post hospitalisation, and the caller is required to relocate them. The advocate explained security of tenure and reassured the caller that the provider could not refuse to accept their parent back without them having somewhere to go that adequately supports their care needs.”*

(Advocate)

*“Behaviours of concern is often a terminology that is used by organisations when moving clients. Management of behaviours of concerns is different to security of tenure.”*

*(Older person)*

*“I am currently being threatened by my parent’s facility that, because I don’t trust the provider, they can ask them to move to another facility. The facility is not providing the services that it claims to provide and when you call them out, they threaten you.”*

*(Family member)*

*“There needs to be a separate body as part of the Quality of Standards where you can apply for a [relocation] decision that will be in the interest of all parties.”*

*(Older person)*

*“There must be investigations regarding any decision made by aged care facility provider when a resident has to be moved. When I lodged a complaint to ACQSC about the quality of service my loved one is getting, the CEO told me that my loved one can move somewhere else, but I put my foot down. He has no authority to get rid of people if they complain to the Commission.”*

*(Family member)*

*“I witnessed my parent being abused by another resident in aged care. All they did was to promise to try and keep them separated ....”*

*(Older person seeking services)*

The current Aged Care Act provides for security of tenure where, once an aged care provider accepts a person as a resident or client, there are limited grounds for them to cease providing accommodation or services. For residential aged care services, these provisions apply to the specific room/bed that the person is accepted into. This means that if there are egregious examples of abuse, including sexual abuse, the aged care provider has limited options to relocate residents into a solution that protects the victim/survivors of abuse.

It is appropriate that providers are prevented from automatically removing an older person who may be the aggressor of abuse, especially noting the unique challenges around people experiencing dementia, or cognitive decline, who may not have a usual understanding of their actions.

To balance competing rights of aggressors and victims of abuse, providers should continue to have security of tenure obligations to all older people, with an exceptions process for situations, such as resident-to-resident abuse, where an agreed outcome cannot be reached or where an aggressor continues to place the safety, health and wellbeing of the victim/survivor and other residents and/or staff at risk.

This pathway must include access to and provision of independent behaviour support service and advocacy services to balance the competing rights of all parties, with suspension of an individual's security of tenure only available subject to strict safeguards that prioritise the safety, health and wellbeing of the victim/survivor.

## **Recommendations**

131. Include security of tenure provisions in the Act with the Rules outlining the detail of the processes modelled on the current laws.
132. Include a new provision allowing a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative care and/or housing solution before suspending the security of tenure of any individual accessing aged care services.

## **Procedural fairness for older people in individual review and appeals decision-making processes**

There should be a strong link between "choice and control", a rights-based approach to aged care at both the provider and system level, and procedural fairness and protections. The Exposure Draft clearly articulates strong procedural safeguards for providers throughout the proposed Bill. Procedural protections for individuals accessing and receiving aged care are generally not as clear. For example, Section 112 provides clear procedural protections for providers regarding determinations relating to the suitability of responsible persons. In contrast Section 41 provides limited detail on the notice of decision not to make an eligibility determination for an aged care needs assessment for an individual.

Substantive and procedural rights to challenge or apply for reconsideration of a decision should be included in the primary legislation. Individuals seeking and

accessing aged care services and supporters and representatives should receive equal weighting to registered providers in the articulation of clear, transparent review and appeal mechanisms.

The language in the Exposure Draft about reviewable decisions, appeals and decision outcomes is unclear. There are references to how an individual accessing aged care services “may apply” for reconsideration of a decision. The implication of this is the rights of the individual to appeal and review decisions is at the whim of the governance decision-maker after an application process. In the absence of any details under Part 2 – Review of decisions in Chapter 8, it is difficult to provide comprehensive feedback on this. All older people accessing aged care services should be able seek an internal review of decisions that impact on them and know how this can be undertaken. Clauses should be amended to reflect this.

We are concerned that, in many clauses regarding decision-making processes, the lack of a decision is taken to mean that it is withdrawn and therefore is not subject to review or appeal. This should be amended to ensure that it is clear, in these circumstances, that a decision has been taken to deny services. All reference to the lack of a decision should be removed.

To ensure transparency and consistency, clear maximum timeframes must be imposed on all decisions, and all decisions that are not taken within that timeframe must be deemed to be denied, and a notice of that denial must be sent. Such provisions would then enable internal review and external review and appeal processes to commence. Notices taken to be withdrawn are not afforded the same review/appeal rights.

Decision-making review processes must include consideration of the roles of Supporters, Representatives and advocates in assisting an older person with this process.

Reviews must be timely and at no cost to the individual. Provision should be made for access to interpreters and other supports that enable people to participate. Long wait times for internal reviews and for decisions reviewable by civil and administrative tribunals can be overly and unnecessarily procedural and stressful for people, creating a significant access barrier for many, especially for people with a history of trauma or institutional abuse.

Section 23 on the Effect of the Statement of Principles states that it is the intention of Parliament that the Minister, the System Governor, the ACQS Commissioner and any other person or body, performing functions or exercising powers under this Act, must have regard to the principles. It then limits administrative law

implications by stating that “A failure to comply with this Division does not affect the validity of any decision and is not a ground for the review or challenge of any decision.” It is our understanding that, as the Statement of Principles link the System Governor, ACQS Commissioner, Pricing Authority and Inspector General to the Statement of Rights, the operations of these grounds would mean breaches of rights by one of these people would not be reviewable or grounds for challenges. This is highly inappropriate for situations related to the behaviour of ACQSC staff or contractors or a delegate of the System Governor, such as an aged care assessor.

If the broader Statement of Principles are unable to be the grounds where review or challenge of decisions is to be maintained, we propose that an explicit link under the Effects of Statement of Rights (s21) be included to ensure they apply and are reviewable for all government actors. There should be a rational narrative and clarity about how rights are enforced and applied to the administrative and regulatory mechanisms for the aged care system under the Act.

## **Recommendations**

133. Subject to the Chapter 8 section on Review of Decisions being drafted, amend all clauses that refer to how individuals “may apply for reconsideration of a decision” to “how the individual may seek an internal review of the decision”. This would include sections on applying for access to funded aged care services, aged care assessment and reassessments, approval of access to funded aged care services, revoking eligibility determinations and access approvals, classification assessments and reassessments and the use of computer programs to make decisions.
134. Amend any clause where a lack of decision is taken to mean it is withdrawn and, instead, state clearly that the decision is to deny services.
135. Amend the Effect of the Statement of Rights (Section 21) to ensure that all government actor decisions are subject to the Statement of Rights and are reviewable.
136. Amend the Inspector-General Act to have scope for review and/or oversight of computer-generated decisions.
137. In the future, establish an AI Oversight Committee to ensure procedural fairness for individuals accessing aged care services.

## **Remove volunteers from the definition of aged care worker**

*“I have a concern about the issue of volunteering in Aged Care, what is recommended, how it is managed and valued. I think they need a separate section which covers qualifications e.g. WVP cards, Agencies need to identify who they are responsible to, how communicated with, how they are supported, how they can offer and receive feedback, that residents can opt into a volunteer program or not.”*

(Volunteer)

*“Each facility has a volunteer program but often rely on residents’ families. When the resident passes on, the volunteer usually moves on. Is there a better way? Yes. Use a volunteer program run externally. These people are key to creating consistency of care, identifying issues and whistleblowing. This is a critical aspect of aged care.”*

(Family member and volunteer)

We support that both volunteers and volunteer managers must adhere to the Aged Care Code of Conduct, but do not consider it is appropriate for unpaid volunteers to be described as aged care workers in the Bill. Many older people are volunteers in aged care, through the Aged Care Volunteer Visitors Scheme (ACVVS) and directly with providers and were alarmed to see they would be considered aged care workers.

Consistent with the position of Volunteering Australia, we consider that volunteers are an essential but distinct component of Australia’s aged care workforce and have a key role to play in enhancing the experience of care across the aged care sector. It is vital that volunteer roles are clearly differentiated from those of paid workers to ensure that volunteers are not exploited and do not perform duties which are the responsibility of paid aged care workers. If the aged care system is to promote and support volunteer engagement, the Bill must clearly differentiate between paid and volunteer roles.

### **Recommendations**

138. Include the right of individuals to choose whether to participate or not in any aged care programs involving the use of volunteers in the Statement of Rights.
139. Include a risk-proportionate approach to volunteer screening and registration in aged care, separate to paid aged care workers, reflected in



System Governor and System Regulator implementation and provider practice.

140. Create an obligation on registered providers to provide training and education for volunteers specific to their role.
141. Require the regulator to develop improved reporting processes and data collection to provide a clear picture of the frequency and prevalence of any breaches and compliance issues by volunteers involved in aged care and of the proportion of complaints and whistleblower disclosures made by volunteers.
142. Conduct further consultation on the development of appropriate mechanisms for volunteer screening, matching and supervision, with volunteers, peak volunteering bodies, aged care volunteer visitor scheme (ACVVS) providers and registered aged care providers that engage volunteers.

## **Address Climate Change**

The Australian Government, Department of Health and Aged Care, has recently released its National Health and Climate Change Strategy. The Government notes that the Strategy's purpose is to *"lay out a program of work on climate and health to be undertaken over the coming decades, and to identify priority action over the next 5 years to reduce emissions from the health system and to support adaptation to the impacts of climate change."* (p.11) They note that for the Strategy to be effective in response to the health impacts of climate change it must *"encompass action by all parts of the health system, which includes: ... aged care ..."*. (p.11)

The Strategy includes a section dedicated to *"Protecting health by building a climate-resilient aged care sector."* It states that *"The new Aged Care Act, planned for 2024, will incorporate a strengthened set of Quality Standards that will include requirements for aged care providers to prepare for and respond to emergencies and disasters and to manage environmental risks to care and services"*. This is not reflected in the current outline of the Standards in the Act. In addition, there are ongoing day-to-day impacts of climate change that may not be *"disasters"*. For example, the documented risks to health for older people of multiple days of high temperatures (heatwaves) on individuals who cannot afford cooling appliances and are prevented under the current guidelines from

purchasing them with package funds, including utilising their basic daily and means-tested fees.

The impact of climate change on health and wellbeing, particularly of older people, is well documented. The Aged Care Act should include reference to mitigating the day-to-day impacts of climate change on older people, not just disasters and emergencies. ([National Health and Climate Strategy – Resources collection | Australian Government Department of Health and Aged Care](#))

## Recommendations

143. Create obligations on registered aged care providers to:

- Identify and prioritise monitoring clients at risk of the day-to-day impacts of climate change, such as heatwaves and other extreme weather events
- Plan for, and take actions to prevent, reduce and minimise these impacts, including prompt medical attention
- Educate their workforce to enable them to recognise and respond to any deterioration in a person's condition due to these day-to-day impacts of climate change.

## Clearer consultation timelines for Support at Home program amendments

*“It’s not clear what is happening, or is envisaged, for the actual implementation of Support at Home. We’re told that the actual changes will commence in July 2025. But what steps are envisaged for that interim period? You’re saying we have the opportunity to influence the way this turns out at the end, but I can’t see exactly how we can be involved, especially those of us, like me, who are struggling to survive at home, because my HCP is exhausted and I’m now without support some of the time.”*

(Older person receiving services)

*“How are the Support at Home changes going to be communicated to the current consumer base or will this responsibility be placed on service providers? or a buyer beware type set up? I find consumers have little understanding of what is to come and how this will impact them in the future.”*

(Community member)

*“...the government says that they want to keep us in our homes for as long as possible so we can interact as much as possible as we normally do. Why is it then that once someone moves from CHSP to an actual package, it costs so much more to socialise as prices normally charged are much higher? I don't have family here, so I relied on community transport for my social life. I can now no longer afford to use them because of the higher cost.”*

(Older person receiving services)

*“Equitable costs for rural and regional. Friend pays more transport costs from her HCP for workers to come to her, go shopping etc than those in urban areas. Also, when being supported/transported to health appointments in the nearest city approx. 200-300 kms away.”*

(Community member)

The new Aged Care Act will pave the way for an amendment Bill to introduce the new Support at Home program from 1 July 2025.

There are many sections of the Exposure Draft that have significant implications for the new Support at Home program, particularly sections regarding the aged care service list, prioritisation on the basis of need and System Governor decisions about individual's priority for service groups.

It is acknowledged that further legislative changes in 2025 will accompany the introduction of the new Support at Home program.

We are concerned about the timeframe for the incorporation of Support at Home program details into the Act. The legislative details regarding the Support at Home program need to be in the Aged Care Bill if the passing of the Act is delayed beyond 1 July. It is our understanding that the KPMG consultation report regarding the program won't be received until the end of March 2024. This indicates an inadequate timeline to update the legislation, introduce the Bill into Parliament, conduct a Senate inquiry and pass by 1 July.

It is noted that the Aged Care Taskforce has been considering matters relevant to the service list for the new Support at Home program, including how services might be means tested and this is reflected in the Taskforce interim report provided to Government.

It is understood that classification provisions in the Exposure Draft have been adapted to work as much as possible across the whole aged care system in anticipation of upcoming Support at Home changes.

Communication regarding future funding arrangements for the Support at Home program and the entire aged care system and how this will be framed in legislation is confusing. The Exposure Draft consultation paper states that fees, payments and subsidies will largely remain the same until the introduction of the Support at Home program. However, the paper also states that more significant changes to funding and means testing arrangements will be considered once the Government considers the recommendations of the Aged Care Taskforce and that provisions for these parts are still under development and subject to ongoing drafting discussions.

A new subsidy framework is being proposed that differs from what is in the proposed Bill. The new subsidy framework will comprise 2 types of subsidies: a person-centred subsidy and a provider-based subsidy. These subsidies are proposed to operate alongside the existing home care subsidy, which will continue only until the new Support at Home program is introduced. This will provide subsidies that:

are based on the type of costs required to deliver funded aged care services (i.e. fixed costs vs variable costs), and

reflect the extent to which the subsidies are specifically linked to funded aged care services delivered to a particular individual.

Whilst the Support at Home design details and the Taskforce report have not been released and important sections of the proposed Bill regarding prioritisation and fees and funding have not been drafted, the available text in the Exposure Draft raises many questions and issues including:

- The limitation or challenge of “service groups” or a “service setting” requiring more detail to cover a range of circumstances and scenarios where older people need and access care.
- The legislative framework of “services” or “service type” and “service group” does not seem to enable aged care services, and the Support at Home program in particular, to be responsive and flexible to the requirements of older people accessing services. For example, where an older person is approved for domestic assistance” and “social support” services and then, on a particular day where “domestic assistance” services are allocated, they request “social support” services. How will this be reflected in a “service type” or “service group”?

- It is understood that Section 50 in the Exposure Draft regarding conditions on approvals of service types or services in certain service groups is expected to be used when the Support at Home program commences to provide flexibility for people to access additional services within their allocated budget (classification) without requiring a new needs assessment. However, there is insufficient detail as to how this would work in practice.
- It is unclear how services to “individuals who have been prioritised on the basis of need for funded aged care services, taking into account the availability of resources and the needs of the individuals relative to other individuals” will work in practice across the system and in the Support at Home program, particularly in response to “thin markets”.
- It is presumed that a new “Support at Home” service group will be created and be different from the current home care and home support service groupings. The legislative service listing and grouping framework in the Exposure Draft enables this but more detail is required.

There is a lack of information in the Exposure Draft and in other documentation about the future Support at Home program regarding how self-management will be supported in the new system from 1 July 2024 and after the Support at Home program is implemented. There should be a firm commitment to older people who choose to self-manage their home care services that they are able to reasonably determine which workers come into their home, at what time, and the nature of the activities that are undertaken. This is a critical step to implementing “choice and control” principles, respecting and empowering older people to direct service, and care planning and service delivery.

## Recommendations

144. Provide clear and realistic consultation timelines for the Support at Home amendments to the new Act, giving all members of the community with an interest in aged care and a connection to older people using aged care services sufficient opportunities to ask questions, be informed and provide considered feedback on complex policy issues.

145. Provide substantive details in the Explanatory Memorandum for the Aged Care Act on the implications of the future implementation of the Support at Home program for the Aged Care Act.

## **Consistent language that is easy to understand**

The draft legislation is inconsistent in its references to “mental”, “mental health” and “cognitive” and should be reviewed in its totality to ensure consistent terminology is applied. The International Classification of Diseases-11 applies a hierarchy in which “mental conditions” encompass cognitive, biological, psychological or developmental dysfunction, while “cognitive” and “neurocognitive” conditions refer specifically to processes related to attention, memory, judgment, reasoning, problem solving, decision-making, or comprehension.

## **Recommendations**

146. Strengthen Object (b) by including that the aged care system will uphold the rights of and deliver quality care to people with dementia or cognitive impairment (who are a significant cohort of aged care recipients).
147. Given the high proportion of people in the aged care system living with a cognitive impairment, it is recommended that the definition of “care needs” (s7 definition parts (a) and (b)) is amended to include both “mental” and “cognitive”. This will reflect consistency with references in the definition of high-quality care subclause v, and in the Statement of Principles 3 (d).

## Appendix A: Recommended wording changes to selected clauses

### Things that apply across multiple locations in the Act

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>aged care worker</b> of a registered provider	Remove all instances of “of a registered provider” where it appears following “aged care worker	<p>A lay person’s read of “aged care worker of a registered provider” would appear to exclude workers of an “associated provider” in the context of where it appears in the exposure draft.</p> <p>While tracing through to s10 (4) definition of “aged care worker of a registered provider” explicitly includes reference to associated provider, it is misleading to follow the term aged care worker with “of a registered provider” and sends a misleading signal in the context of the clauses where it appears.</p>
			Sickness	Add “disability support”	<p>People requiring disability support are not sick. The concept does not cover all people eligible for aged care. The word “sickness” may cover this legally, but a clearer explanation should be considered. We note it is possible for the NDIS Act to use the term “disability</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>support” and the Aged Care Act should be able to as well.                      “Sickness” and “Disability support” to be clearly explained in the Explanatory Memorandum</p>
			<p>Independent Complaints Commissioner</p>	<p>After “the Commissioner”, insert “the Complaints Commissioner.”</p> <p>Reassign Complaint functions and education about the Complaints Functions of the Commissioner to the Complaints Commissioner</p> <p>Ensure Complaints Commissioner can compel people to produce documents, appear to participate in complaints process, authorise voluntary enforceable undertakings and have determination powers to resolve a complaint.</p>	<p>We recommend an independent Complaints Commissioner (appointed by the Minister). We recommend provisions / modelled on the Australian Human Rights Commission with the ACQS Commissioner remaining the senior member of the agency responsible for reporting, staff etc.</p> <p>The entire Act will need to be reviewed to consider where references to the Complaints Commissioner should be inserted.</p> <p>The Act should make clear that information/duties between the Complaints Commissioner and Commissioner functions can be shared within the ACQSC and between staff.</p>
			<p>Any clause where a lack of decision is</p>	<p>Delete clause or amend to state it is taken to be denied.</p>	<p>We are concerned that the lack of a decision is taken to be withdrawn and</p>



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			taken to be withdrawn		therefore is not subject to review or appeal. We therefore propose this subclause is removed or amended to ensure it is taken as a decision to deny services.
			Any clause that refers to "how the individual may apply for reconsideration of the decision"	<p>Subject to a review of the Review of Decisions clauses yet to be drafted/consulted on change to "How the individual may seek an internal review of the decision"</p> <p>And add after</p> <p>"How the individual may seek a review of the decision"</p>	<p>The language of "may apply" for reconsideration of the decision, implies that their rights to appeal and review are arbitrarily at the whim of the decision maker.</p> <p>In the absence of the chapter on review of decisions, it is not possible to make full comments on this.</p> <p>Language like an "internal review" of the decision may be more appropriate.</p> <p>We also note that at all locations where this appears, language around requirements to explain "how the individual may seek a review of the decision" must also be included.</p>
			Timeframes to be introduced for the maximum possible	No more than 14 days should be taken to make a decision.	All decisions of the System Governor or the Commissioner have no timeframes outlined in the Exposure Draft. If a

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>time to make a decision.</p> <p>And reduce all timeframes for providing notice of a decision once taken</p>	<p>No more than 7 days should be allowed to give notice of a decision, once taken.</p>	<p>decision is not made it is taken to be withdrawn. This is an unacceptable loop of leaving older people in a no-man's land without the knowledge that a decision was not made.</p> <p>Clear maximum timeframes must be imposed on all decisions, and all decisions that are not taken within that timeframe must be deemed to be denied, and a notice of that denial must be sent. Such provisions would then enable internal review and external review/appeal processes to commence.</p> <p>Notices taken to be withdrawn are not afforded the same review/appeal rights.</p> <p>As a principle we submit that no more than 14 days should be taken to make a decision and no more than 7 days should be allowed to give notice of a decision, once taken.</p>

**Objects of this Act**

<b>Section No.</b>	<b>Clause No.</b>	<b>Sub - clause</b>	<b>Current wording</b>	<b>Change</b>	<b>Rationale</b>
5	(a)		in conjunction with other laws, give effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities; and	<p>Add International Covenant on Civil and Political Rights (ICCPR) to listed conventions.</p> <p>Amend to not merely “give effect” but to also “protect rights” under the international conventions.</p>	Necessary for rights which are not included under ICESCR or the CRPD such as the right to be free from torture or cruel, inhuman, or degrading treatment or punishment; right to liberty and security of person, inherent right to life, right to liberty of movement and freedom to choose their residence and right to freedom of thought, conscience, and religion.
5	(c)		enable individuals accessing funded aged care services to exercise choice and control in the planning and delivery of those services;	<p>Amend:</p> <p>support people seeking to or accessing funded aged care services to exercise choice and control in matters that affect their lives, including:</p> <ul style="list-style-type: none"> <li>i. the assessment for and planning of those services;</li> <li>ii. the delivery of those services;</li> <li>iii. participating in the development and review of policy and programs</li> </ul>	<p>Choice and Control needs to be strengthened in the Act – in the following ways:</p> <p>It is insufficient for the Act to “enable” it, rather it is necessary to ensure that people receive “support” to exercise their choice and control.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>While we acknowledge “planning” might be taken to include the assessment process, it equally may be interpreted to simply refer to government planning processes at a higher level. We propose that the individual’s choice and control over their services (even if within the confines of their assessed needs) must be explicitly included. No older person should be required to receive a service they do not wish to receive because their voice was not listened to during the assessment process.</p> <p>In addition, we propose a consistent approach to that the Parliament took to the recently passed “Disability Services and Inclusion Bill 2023”:</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>By ensuring the broad understanding of this object to apply across “matters that affect their lives”.</p> <p>As well as specifically identifying older people should participate in the development and review of policy and programs.</p>
5	(b)	(iii)	ensure equitable access to, and flexible delivery of, funded aged care services that put older people first and <b>take into account the needs of individuals, regardless of their location, background and life experience;</b> and	<p>Rephrasing text in bold:</p> <p>Rephrase the clause “takes into account the needs of individuals, regardless of their location, background, life experience <b>and their level of care needs</b>”</p>	Note this Object speaks of equitable access to aged care services however this is not reflected anywhere else in the Act
	(d)		ensure individuals accessing funded aged care services are free from	Maintain the word “mistreatment” and add the word “abuse”	To raise the legal bar. The word “mistreatment” is not defined and does not have any

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>mistreatment</b> , neglect and harm from poor quality or unsafe care; and		established or customary legal definition.
5	(e)		(e) provide a robust and risk-based regulatory framework for the delivery of funded aged care services, including accessible complaint mechanisms for individuals accessing those services, that will promote public confidence and trust in the Commonwealth aged care system; and	Separate into 2 separate objects and renumber: (e) provide a robust and risk-based regulatory framework for the delivery of funded aged care services, that will promote public confidence and trust in the Commonwealth aged care system  (f) implement an effective and accessible independent complaints mechanism that upholds the rights of older people. and	Separating the 2 out to support the role of an independent statutory Complaints Commissioner.
5	(f)		(f) provide and support education and advocacy arrangements that can assist individuals accessing funded aged care services to understand their rights,	Reword: provide and support education and independent professional advocacy arrangements that can assist individuals seeking, and accessing, funded aged care services to understand their rights, make decisions and provide feedback on the delivery of their services without reprisal	The role of independent professional advocates needs to be clearly reflected in the Act as it is these advocates that have the skills and knowledge to support older people to understand and exercise their rights. In addition, the Act

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			make decisions and provide feedback on the delivery of their services without reprisal; and		covers both those seeking and accessing aged care and the object should reflect this.
5	(h) new			Insert: (h) provide and ensure the delivery of aged care services in line with an individual's assessed needs, as and when they may change, by a workforce that meets any registered nurse and care minute requirement and skill mix (however titled) as prescribed by the rules.	
6			The objects of the Act, the Statement of Rights and the Statement of Principles underpin the system and are aimed at ensuring quality and safe care for individuals.  Eligible individuals undergo an aged care	Change to: The objects of the Act, the Statement of Rights and the Statement of Principles underpin the system and are aimed at ensuring quality and safe care <b>that is consumer directed</b> .  Eligible individuals to participate as <b>partners</b> in an aged care needs assessment and <b>jointly identify with the assessor</b> which funded aged care services are needed.	The simplified outline of the Act is being interpreted as implying there is no longer consumer directed care nor choice and control. A rights-based approach by its very nature should include both of these principles. We recommend that the wording is changed to ensure that even in the "outline" these principles are not lost.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			needs assessment which identifies which funded aged care services are needed.		
6			The system is governed by the Aged Care Quality and Safety Commissioner and by the Secretary (referred to as the System Governor). There is also a Complaints Commissioner.	Amend: "There is also a Complaints Commissioner" to "There is an independent Complaints Commissioner under the ACQSC with their own budget and reporting requirements"	

## Definitions and key concepts

### Definitions

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
7			<b>Aged Care Code of Conduct</b> means the rules made for the purposes of subsection 13(1).	Raise to primary legislation	Parliamentary oversight should be used to outline the key areas of the Code of Conduct.



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
7			<b>aged care worker</b>	Remove: (including as a volunteer) from the definition of worker	Ensuring that volunteers are not exploited and do not perform duties which are the responsibility of paid aged care workers.
7			<b>aged care worker screening check</b> means an assessment, under an aged care worker screening law, of whether a person who works, or seeks to work, with individuals accessing funded aged care services poses a risk to such individuals.	Add: "and possesses any qualification and training requirements as prescribed by the rules and required to carry out their duties as an aged care worker."	.
7			<b>aged care worker screening law</b> means a law of a State or Territory prescribed by the rules for the purposes of this definition.	Add: Commonwealth transition measure until State and Territory laws passed	Clarity on the status of aged worker screening law
7			<b>approved form:</b> (a) in relation to a function of the System Governor— see section 400; or	Legislation must make sure that digital and verbal solutions are captured by the definition of the approved form	Clarity is sought whether the interpretation of approved form will extend to telephone discussions (e.g. applications by phone).

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(b) in relation to a function of the Commissioner—see section 401.		
			<b>Authorised Professional Advocacy officer</b> means a person appointed as an authorised Advocacy officer under section XXX	New term and definition:	Create the role of a Professional Independent Advocacy Officer to provide status of right to entry when Commission authorises entry without permission. The Act will need an Advocacy Grants section to link the officer being an employee nominated by the Chief Executive of an organisation awarded an advocacy grant (or similar)
			<b>care</b>	efforts made to maintain, restore, or promote someone's physical, mental, or emotional well-being especially when performed by trained and licensed professionals	If a right to high-quality care is not agreed to, then a definition of what type of care is being delivered distinct from High-Quality Care will be needed
			<b>Care minutes</b>	New definition:	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				Amount of direct care that care recipients living in residential care services receive from: <ul style="list-style-type: none"> <li>• registered nurses (RNs)</li> <li>• enrolled nurses (ENs)</li> <li>• personal care workers (PCWs) or assistants in nursing (AINs) – also known as nursing assistants.</li> </ul>	
			<p><b>care needs</b> means one or both of the following apply in relation to an individual:</p> <p>(a) the individual has difficulty (whether physical, mental or social) undertaking any daily living activities;</p> <p>(b) the individual requires help from another person, or the assistance of one or more aids, to maintain their physical, mental or social</p>	Add: “disability support”. Review use of the word “mental”. We recommend adding or replacing with the word “cognitive”	A more comprehensive definition is required that addresses the high proportion of people living with dementia and other cognitive impairments using aged care services.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			capacity to function independently.		
			<p><b>carer</b> means a person who:</p> <p>(a) provides personal care, support and assistance to another individual who needs it because that other individual is an older individual; and</p> <p>(b) does not provide the personal care, support and assistance to the individual:</p> <p>(i) as an aged care worker of a registered provider; or</p> <p><b>(ii) in the course of doing voluntary work for a charitable, welfare or community organisation;</b></p> <p><b>or</b></p> <p>(iii) as part of the requirements of a course of education or training.</p>	<p>In relation to (ii) and text in bold add “engaged directly by a registered provider as a volunteer”</p>	<p>A more comprehensive definition is required.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>High-quality care:</b> see section 19	New term and definition	Consistency with Section 19. Alignment of high-quality care as a key concept and definition
			<b>Independent professional advocacy</b>	Insert new term and definition A national funded advocacy program that provides free, independent and confidential support, information and advocacy to individuals that are seeking or accessing aged care services, and education to individuals about their rights	Advocacy functions should be mandated in the primary legislation as a requirement under the Act.  Officers of the professional advocacy organisations should be granted access rights to aged care homes, including where the Commission staff are granted powers to enter without permission.
			<b>independent contractor</b>	New term and definition	Consistency and alignment with reference in Section 10 drafting note on definition of aged care worker
			<b>nursing</b> means the provision of services by or <b>under the supervision of</b> a registered nurse acting within the registered nurse’s scope of practice.	Change: “under the supervision of” to “under the direct supervision of”.	Address concern that a registered provider will be able to charge for nursing services at the priced level of nurses, while delivered by an AIN. This is particularly concerning where remote supervision may occur in home-based care.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>older individual</b> for the purposes of this Act includes people covered under section 40 (Eligibility determination for an aged care needs assessment).	New term and definition	Without a definition, the links to “older people” throughout the legislation, it is not clear that this includes people otherwise eligible for aged care but not commonly seen as “older” (e.g. 50-64 First Nations & Homeless)
			<b>operator</b> for the purposes of this Act refers to an <b>aged care digital platform operators</b>	New term and definition	Use of the term “operator” alone occurs in the Act – new definition is proposed to ensure it is clearly understood always as referring to the platform operators.
			<b>Palliative care</b>	New definition: Person and family-centred care provided for a person with an active, progressive, advanced disease, who has little or no prospect of cure and who is expected to die, and for whom the primary goal is to optimise their quality of life.	We note feedback from several consumers that future references to palliative care, in the context of rights, should include reference to end-of-life rights including relevant voluntary assisted dying laws in relevant jurisdictions.
			<b>protected information:</b> see section 322.		See comments to the definition of protected information below.
			<b>serious injury or illness</b> of an individual means an	Amend “immediate treatment as an in-patient in a hospital” to	Current definition sets a potentially low bar for “serious injury or illness” which could lead to unintended

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>injury or illness requiring the individual to have:</p> <p>(a) <b>immediate treatment as an in-patient in a hospital</b>; or</p> <p>(b) immediate treatment for:</p> <ul style="list-style-type: none"> <li>• the amputation of any part of the individual's body; or</li> <li>• a serious head injury; or</li> <li>• a serious eye injury; or</li> <li>• a serious burn; or</li> <li>• the separation of the individual's skin from an underlying tissue (such as degloving or scalping); or</li> <li>• a spinal injury; or</li> <li>• the loss of a bodily function; or</li> <li>• serious lacerations; or</li> </ul>	<p>"immediate, unplanned and emergency treatment as an in-patient in a hospital"</p>	<p>consequences of providers being further reluctant to transfer residents to hospital for appropriate treatment because "serious injury or illness" would trigger elevated compliance actions including compensation clauses.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(c) medical treatment within 48 hours of exposure to a substance; and includes any other injury or illness prescribed by the rules but does not include an illness or injury of a kind prescribed by the rules.		
			<b>Sickness</b>	Update to include “disability supports”	As discussed above ensure that for the purposes of this Act, all references to sickness include “disability supports” either in a drafting note or the Explanatory Memorandum.
			<b>Supported Decision-Making</b>	Add definition: the process whereby an individual is enabled to make and communicate decisions with respect to personal or legal matters	For clarity and broad understanding of what this means



## Key Concepts

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
Chapter 1,	Part 2	Div 2	New Clause	<p>Supported Decision-Making Principles.</p> <p>The following principles underpin the delivery of care and the use of supported decision- making in this Act:</p> <ol style="list-style-type: none"> <li>a. As with all adults, older people have the right to make decisions about the care and services they receive and the risks they are willing to take.</li> <li>b. The presumption must always be that older people have the ability to make decisions.</li> <li>c. There must be access to support for people who need help communicating and participating in decisions.</li> </ol>	<p>The National Decision-Making Principles identify four central ideas in all recent law reform work on capacity. These are that:</p> <ul style="list-style-type: none"> <li>• everyone has an equal right to make decisions and to have their decisions respected;</li> <li>• persons who need support should be given access to the support they need in decision-making.</li> <li>• a person’s will and preferences must direct decisions that affect their lives; and</li> <li>• there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support</li> </ul> <p>The CRPD, on which the new Act is based, in Article 12 (1), (2) and (3) clearly stipulates that</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>d. Older people may nominate a formal supporter or may be supported informally.</p> <p>e. An older person may express their will and preference through verbal, non-verbal or written methods.</p> <p>f. Decisions are directed by a person’s own current will, preferences and rights.</p> <p>(2) If an older person cannot express their will and preference, despite all practicable support, then a best interpretation of their will and preference should be used.</p> <p>(a) A “best interpretation” of the older person’s will and preference should be made in consultation with the relevant people who have been:</p> <p>(i) nominated by the older person,</p> <p>(ii) have maintained a close and continuing relationship with the older person; and</p>	<p>1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.</p> <p>2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.</p> <p>3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.</p> <p>The current Act only references supported decision-making in relation to Supporters and Representatives. A rights-based Act would ensure that supported decision-making principles underpin all interactions with older people throughout the aged care journey and system.</p> <p>Please also see further detail in our submission.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>(iii) have a genuine interest in upholding the older person's rights</p> <p>(b) A 'best interpretation' of the older person's will and preference will endeavour to resolve discrepancies between will, preference and rights, by considering previous expressions of will and preference, enduring patterns of behaviour, and current preferences and behaviours</p> <p>(3) The only situation in which an older person's will and preference can be overridden is when there is a clear, imminent and serious risk of harm to the individual or those providing care for them.</p> <p>(a) If an older person's will and preference is overridden for any decision this should be done in a way that is:</p> <p>(i) as a last resort;</p> <p>(ii) tailored to the needs of the individual;</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				(iii) proportionate to the risks at hand	
8	(1)		<p>The <b>rules must prescribe a list of services for</b> which funding may be payable under this Act. The rules must:</p> <ul style="list-style-type: none"> <li>(a) list each service; and</li> <li>(b) describe each service; and</li> <li>(c) specify the service type that the service is in; and</li> <li>(d) specify each service group a service type is in; and</li> <li>(e) specify each service type as a service type that is delivered in a residential care home, or a home or community setting, or both; and</li> <li>(f) specify any specialist aged care program under</li> </ul>	<p>Inclusion of wording to enable “services” to mean “goods” or to add the word “goods”</p>	<p>To ensure that home modification and assistive technology is included and funded ensure that any “good” delivered is seen as a type of funded aged care service.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			which a service type can be delivered; and (g) specify each provider registration category under which a service type can be delivered.		
8	(3)		For the purposes of paragraph (1)(d), a <b>service group</b> means any of the following: (a) home care; (b) home support; (c) permanent residential care; (d) residential respite care; (e) short term restorative care; (f) transition care; (g) any other group prescribed by the rules.	Potential change of language of this clause	Subject to Support at Home design details and release of Taskforce report. Issues of the service group being a service setting. What will groups of services that allow older people to swap hours on a given day between those services be called? (e.g. older person is approved for 'domestic assistance' and 'social support' services. On a particular day of "domestic assistance" they ask for "social support". The legislative framework of "services" or "service type" and "service group" does not seem to have a term for this in-between grouping.
8	(4)		A <b>funded aged care service</b> means a service	Amend to state that a funded aged care service means "any	Concern that not all services are covered by the proposed Bill.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			included on the list referred to in subsection (1) in relation to which funding is payable under this Act.	service delivered as part of the aged care system”.	<p>It appears that only services supported by the Government (including any client contributions) will be covered by the Act. This reflects the relationship between government and providers in the current Act, rather than a new Act with the rights of older people at its centre.</p> <p>“Top up services”, “private services” (especially where someone is waiting for government services) and “additional services” where no government funding is payable under the Act, seems to be excluded from funded aged care services, and therefore various provisions like standards, complaints, provider obligations are not triggered.</p> <p>Protections such as these should relate to all services under the “Aged Care System”, delivered by a</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>“registered provider”. This may be linked to the service list but should not be linked to funding payable under the Act.</p>
8	(5)		<p>The Minister must ensure that for each service group for which the service types in that group are specified as delivered in a residential care home, <b>nursing</b> is a listed service that is in at least one service type that is in that group.</p>		<p>Why is nursing elevated over other equally important care and support services?</p> <p>Provision of 'nursing' services requires delivery by or direct supervision of an RN. Therefore, adding it will inform funding allocation and specific requirements to the fund-recipient, i.e. workforce, environment, etc. to ensure meeting clinical requirements and standard of care.</p> <p>Also, may support elevating allied health services and non-clinical services/care when an older person does not require (much of) nursing, to retain/support continuation of quality of life with other services.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
8	(6)	(a)	The Minister must ensure that funded aged care services in a service type that is specified as a service type that is delivered in a residential care home for the purposes of paragraph (1)(e) are services of the following kind: (a)services for the care of persons who are experiencing <b>sickness</b> ;	Add: "disability support"	People requiring disability support are not sick. Concept does not cover all people eligible for aged care. The word "sickness" may cover this legally. The Explanatory Memorandum would need to provide details. It is possible for the NDIS Act to use the term "disability support" and the Aged Care Act should be able to as well.
8	(7)	(a)	The Minister must ensure that: (a)for each service group (other than the <b>transition care service group</b> )—all service types that the Minister specifies under paragraph (1)(d) as being in the group are service types that are delivered in the same setting <b>and not a mix of settings</b> ; and	Remove "transition care service group". Add text to enable residential care providers/workers to deliver outreach services, respite care or offsite clinics	Remove "transition care service group" as it is not listed in the Exposure draft service group list. Enable flexibility regarding delivery of services not exclusively being in the same setting.



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
9	(2)		A <b>residential care home</b> means a place that:	Add: a “registered” residential care home	If the purpose of the Act is to ringfence registered and funded from non-registered and non-funded aged care activities, this principle should be applied consistently.
9	(2)	(a)	is the place of residence of individuals who, by reason of <b>sickness</b> ,	Add: “disability support”	Alternatively, could ask for detail in the Explanatory Memorandum
9	(3)	(b)	To avoid doubt, a <b>residential care home</b> includes any of the following places: <b>a place within a retirement village that has been converted</b> to a place described by subsection (2);	Remove reference to retirement village conversion	It is unclear why a retirement village is explicitly included. An approved aged care home can be located anywhere. The key point is the home is operated by a registered provider for the registration category of 6 – residential care. There is some concern that this clause could lead to parts of a retirement village being seen as a residential care home, unintentionally. Stemming from this there is concern that technical removal from “retirement village” to “residential aged care” can trigger payout requirements under retirement village contracts.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					If this were to occur while still living in your same location this could be financially problematic for individuals.
9	(4)		To avoid doubt, a <b>residential care home</b> does not include any of the following places: (a) a private home; (b) a retirement village (other than a place referred to in paragraph (3)(b)); (c) a facility for which a declaration under subsection 1215(6) of the <i>Private Health Insurance Act 2007</i> is in force (other than a place referred to in paragraph (3)(a)); (d) a hospice or facility that primarily provides palliative care; (e) any other place prescribed by the rules.	Add “rehabilitation service locations” and “a cottage respite care facility” to the list.	To highlight the importance of rehabilitation services and respite care services for older people and their carers. Alternatively, they could be included under (e).

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
9	(7)	(a) (b)	<p>Despite subsection (6), a <b>home or community setting does not include</b> any of the following places:</p> <p><b>(a) a group home funded under the National Disability Insurance Scheme;</b></p> <p><b>(b) a hospital;</b></p> <p>(c) a psychiatric facility;</p> <p>(d) a prison or detention centre;</p> <p>(e) a hospice or facility that primarily provides palliative care;</p> <p>(f) any other place prescribed by the rules.</p>		<p>Older people funded to live in a NDIS funded group home may in the future be required to seek “ageing related needs” from aged care. Given NDIS Review recommendations it is concerning that Government is legislating a requirement for older people to be forced to choose between their NDIS supports and their aged care supports.</p> <p>The inclusion of hospitals within the list of excluded locations may present challenges with the reach in and establishment phase of home care services for both transition care and the establishment of home care services. Will an older person be able to receive a care management visit in a hospital if that setting is excluded from the home and community settings?</p>
10	(1)		Funded aged care services are delivered by	Remove: “of registered providers”	As discussed above

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			registered providers (and associated providers of registered providers) and <b>the aged care workers of registered providers.</b>		
10	(3)		A registered provider is registered in one or more provider registration categories which are: (a) <b>the residential care category</b> ; and (b) any other category prescribed by the rules.		We note that this section should be updated in the primary legislation to include all provider categories (e.g. Home Care, Home Support etc) and not have them left entirely to the rules outside of residential care.
10	(4)		An aged care worker <b>of a registered provider</b> means:		As discussed above – remove “of registered providers”
10	(4)	(b) (i)	(b) an individual who: (i) is employed or otherwise engaged <b>(including as a volunteer) by an associated provider of the registered provider;</b> and	Remove: (including as a volunteer)	There is concern about aged care volunteers being defined as an aged care worker. Doing so would require them to be trained to be in compliance with the Code of Conduct and open them to personal liability if they were not, which may have an adverse impact on the number of available volunteers.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>If volunteers remain in the definition of aged care worker, the provider should only be responsible for those volunteers they directly engage. For example, where a third-party volunteer (such as aged care volunteer visitors scheme) come on site, the ACVVS provider is responsible for them. They should not be seen as an “associated provider”, nor should the aged care provider believe they will be required to onboard them as their own organisation’s volunteer. Their current inclusion in the definition of worker would imply they will be.</p>
10	(4)	(c) (Note)	(c) an individual who is a registered provider. Note: An individual engaged by a registered provider includes an <b>independent contractor</b> .		As proposed above a definition of independent contractor is required.
10	(5)		Despite subsection (4), an aged care worker of a	Insert: “does not include a responsible person of the provider,	While sympathetic to the intention, we would ask the Department to

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			registered provider <b>does not include a responsible person</b> of the provider.	except in circumstances where they are performing the duties of an aged care worker on shift.”	consider a scenario where the residential aged care manager (who would be a responsible person) is also the registered nurse on shift. Does their exclusion from “aged care worker” obligations, a function they are performing at the time limit the intended operations of the Act?
10	(6)		If an entity (an <b>associated provider</b> ) engages in conduct under an arrangement with a registered provider relating to the registered provider’s delivery of funded aged care services, this Act <b>applies in relation to the registered provider</b> as if the registered provider had engaged in the conduct.		As discussed above regarding volunteers, an in-reach organisation should not be seen as an associated provider. For example, the Aged Care Volunteer Visitors Scheme.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
11	(1)	(c) (i)	Each of the following is a <b>responsible person</b> of a registered provider: (c) if the registered provider delivers, or proposes to deliver, a funded aged care service: (i) any person who has responsibility for overall management of the nursing services delivered by the registered provider, or overall management of the nursing services delivered at an approved residential care home of the registered provider, <b>and who is a registered nurse;</b> and	Delete: "and who is a registered nurse". Add: "and who is a Director of Nursing or manager of nursing service	Responsibility should lie with the person with management responsibilities and not frontline nurses.
11	(1)	(c)(ii)	any person who is responsible for the day-to-day operations of the registered provider.		There is concern that "day-to-day" operations could be deemed to include a Sunday shift nurse in charge under the new 24/7 requirements.
12	(1)	(d)	Each of the following matters is a <b>suitability</b>	The definition of suitability matters should include coercive behaviour,	It is unclear that the suitability matters sufficiently cover off

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>matter</b> in relation to an individual: (d) whether the individual has at any time been convicted of an <b>indictable offence</b> ;	financial abuse, intervention orders involving the individual - i.e. elder abuse coverage.	coercive behaviour, financial abuse, intervention orders involving the individual - i.e. elder abuse coverage.
12	(1)	(g) (viii)	whether the individual is, or has at any time been, the subject of adverse findings or enforcement action by any of the following: (viii) the <b>Australian Health Practitioner Regulation Agency</b> ;		Are all actions of State/Territory Health Complaints Commissioner/Ombudsman sufficiently covered – noting their link to actions taken via AHPRA Boards?
12	(1)	(g) (x)	a State or Territory authority (including, but not limited to, a body that is equivalent to a body mentioned in subparagraphs (ii) to (viii));		We seek confirmation that this clause has sufficient coverage of State/Territory safeguarding laws. e.g. NSW Ageing Commissioner; SA Adult Safeguarding Unit within the Office of the Public Advocate.
13	(1)	(a) (b)	(a) <b>registered providers</b> ; (b) aged care workers of <b>registered providers</b> ;		As discussed above – remove “of registered providers”. Inclusion of the words “of registered providers” implies associated provider staff



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>are not required to comply with the Code of Conduct.</p> <p>Ensure via drafting note or Explanatory Memorandum that “self-determination” is inclusive of “choice and control”, “consumer directed care” and “self-management” principles.</p> <p>It is unclear that individuals registered on platforms will be required to comply with the Code of Conduct – while it is presumed they would be captured by an “associated provider” status under the definition of registered providers – this could be clearer by stating the Code of Conduct applies to workers on aged care platforms –defined along the lines of language in 129 (2) (a) “a person represents via the platform that the person can perform work involved in the delivery of a service in the aged care system “</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
14	(2)	(a)	how registered providers must treat, and engage with, individuals seeking to access, accessing, funded aged care services;	Reword: the rights of older people, respecting their autonomy and ensuring choice and control in the way that providers engage with, and provide services and supports to, individuals seeking or accessing funded aged care services.	This is a rights-based Act and is meant to be about placing the older person at the centre of aged care, but this is not reflected in the way this section on standards is written. If Standard One is the most important standard placing the older person at the centre, then this needs to be reflected in this section.
14	(2)	(e)	how registered providers must deliver food and drink to meet the nutritional needs and preferences of individuals;	Reword: how registered providers must deliver food and drink to meet the nutritional needs, <b>cultural and dietary</b> preferences of individuals;	Access to culturally appropriate food consistently arises as an issue.
14	(2)	(f)	how registered providers must support individuals accessing funded aged care services in approved residential care homes;	Amend: how registered providers must deliver care and services that support <b>the health, wellbeing, reablement and connections</b> of individuals accessing funded aged care services in approved residential care homes;	
14	(2)		New Clause	How registered providers will address the impacts of climate change on individuals they are	The Australian Government, Department of Health and Aged Care, has recently released its

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>providing care and services to and ensure care and services mitigate these impacts</p>	<p>National Health and Climate Change Strategy which encourages aged care providers to include strategies and procedures for addressing climate change and disasters. It states that “The new Aged Care Act, planned for 2024, will incorporate a strengthened set of Quality Standards that will include requirements for aged care providers to prepare for and respond to emergencies and disasters and to manage environmental risks to care and services”. This is not reflected in the current outline of the Standards in the Act. In addition, there are ongoing day to day impacts of climate change that may not be “disasters”. For example, the impact of multiple days of high heat on individuals who do not have cooling appliances. Another example is ensuring access to</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					bathroom/shower facilities warm enough and providing warm water.
14	(2)		Without limiting subsection (1), the rules may prescribe <b>standards</b> about the following matters:	Add sub-clause 2 (i) (or a new clause) that would permit additional areas listed in the Rules.	While this clause accurately reflects today's aged care standards, the Act should enable the Rules to add additional areas under the standards by regulation.
17	(1)	(a)	(a) require that a restrictive practice in relation to the individual is used only: (i) as a last resort to prevent harm to the individual or other persons; and (ii) after consideration of the likely impact of the use of the practice on the individual; and	Amend: new point (iii) <b>only as prescribed by a person's behaviour support plan</b>	
17	(1)	(c)	The rules made for the purposes of section 106 relating to the use of restrictive practices in relation to an individual to whom a provider is	Amend to add the words in bold. documented <b>in the Behaviour Support Plan,</b>	Documentation regarding restrictive practices should be explicitly required to be outlined in a "behaviour support plan" not merely documented in case notes as the current wording would permit.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			delivering funded aged care services must: (c) require that alternative strategies that have been considered or used in relation to the individual are <b>documented</b> ; and		
17	(1)	(f)	require that <b>informed consent</b> is given to the use of a restrictive practice in relation to the individual; and	Add a new subclause (h)  (h) Inform in writing, any Representative and or Supporter of restrictive practice outcomes and consents obtained.	It is unclear if “informed consent” is sufficient to ensure that providers involve Representatives and where appropriate Supporters.  We recommend there be an explicit obligation on providers to notify all representatives and supporters of any restrictive practice outcomes/consents
17	(1)	(f)	require that <b>informed consent</b> is given to the use of a restrictive practice in relation to the individual; and	Amend wording and add 2 sub points. (f) informed consent must be given to the use of a restrictive practice in relation to the individual  (i) By the individual using supported decision-	A rights-based model would always include the individual in all decisions. Restrictive practices can deprive people of their liberty and dignity –basic legal and human rights.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>making if needed (due to their impaired decision-making ability)</p> <p>(ii) By a representative (or independent authoriser) in consultation with the individual</p>	
17	(1)	(g)	(g) make provision for, or in relation to, the monitoring and review of the use of a restrictive practice in relation to the individual.	Amend: make provision for, or in relation to, the <b>regular</b> monitoring and review of the use of a restrictive practice in relation to the individual. <b>Reviews must, at a minimum, be conducted every 6 weeks and recorded in the individual's behaviour support plan.</b>	
17	(4)			New clause and renumbering to occur: <b>The rules made for the purposes of section 106 will include the right of the individual, on whom the restrictive practice is being used, or their representative or a professional independent advocate to seek and have independently reviewed</b>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<b>the use of the restrictive practice on the person.</b>	
18			Meaning of significant failure and systematic pattern of conduct		Why would systematic pattern of conduct require the number of people affected? E.g. If provider policies were not permitting people with a disability to be included and they only had one person with a disability - would this be sufficient? Does the number and period of time for systematic pattern of conduct mean that a period of time is needed before these clauses could be triggered?
19			Meaning of high-quality care		Currently high-quality care has no enforcement provisions or penalties for failure to deliver it. There is no direct reference to high- quality care with any obligation on Providers.  It is entirely aspirational and references to high-quality care only on System Governor and Commissioner in Section 22 on the

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					Statement of Principles, in Section 99 on continuous improvement, Section 132 on functions of System Governor, Section 142 on Safeguarding Functions. We recommend in our submission that any registered provider seeking to promote themselves as delivering high-quality care should be obligated to be assessed by the ACQSC against this definition of high-quality care and receive/manage complaints if not delivering on its promise.
19	(c)		Add new clause to the definition of high-quality care	Add clause: (xii) "provides access to the highest attainable standard of physical, psychological, sensory, oral, emotional and mental health"	Propose definition of high-quality care includes right to access health care and Rights include receiving high-quality care
19	(c)		Add new clause to the definition of High-Quality Care	Add: "Embeds the individual's choice and control over all aspects of their care and supports"	Choice and control are key to high-quality care.
19	(c)		Add new clause to the definition of high-quality care	"Embeds and ensures the right of individuals as being able to make decisions; to use advocacy	High-quality care should reflect the principles of supported decision-making and access to all the



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				services and to have the use of supported decision-making when needed as well as developing the individual’s decision-making ability.”	services that a person requires to enable them to be supported to make decisions when needed.
19	(c)			Add: “, prioritises sufficient number and skills mix, qualifications,”	
19	(c)	x	bilingual aged care workers and interpreters being made available if requested by the individual;	Amend: bilingual aged care workers and interpreters, including sign language, being made available by the registered provider if requested by the individual;	
19	9 (c)	ix and xi	(ix) prioritises the following: adapting policy, practices and environments to ensure that services are culturally appropriate for the diverse life experiences of individuals, including by engaging workers with lived experience of diversity in the provider’s workforce and governing body;	Amend clause: ix) adapting policy, practices and environments to ensure that services <b>are inclusive, culturally safe, trauma informed and appropriate for individuals of culturally diverse backgrounds, those with diverse life experiences.</b>  ...well skilled, <b>culturally competent</b> and empowered	In the new definition of high-quality care (2.19), equity has not been fully considered. It is difficult to adapt language throughout, that is centred on the individual, not the aged care system. On the other hand, the Act’s objective explicitly refers to equitable access to funded aged care services.  When culturally appropriate is referred to, it is linked to diverse life experiences, rather than being

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(xi) worker retention and training to facilitate the delivery of 29 the service by well-skilled and empowered aged care 30 workers who are able to develop and maintain a 31 relationship with the individual.		clearly associated with culturally diverse needs.
NEW (after 19)			Introduce a new section on visitation rights	<p><b>**Part X; Aged Care Access and Authorisation**</b></p> <p>1. A designated individual (herein referred to as a 'Named Visitor') is authorised for unrestricted access to the private quarters of an individual receiving aged care services at any time; using the approved form outlined in the Rules to appoint a Named Visitor.</p> <p>2. The aged care provider may require reasonable and necessary conditions for the Named Visitor's access, as stipulated by the aged care facility;</p>	<p>The concept of a Named Visitor must be enshrined in legislation. The purpose of this clause is to:</p> <p>a) Ensure providers have an obligation to facilitate at least one person who can be trained to safely visit a person in their room even during periods of outbreaks.</p> <p>b) Provide a legal basis for state and local public health units to have regard for such measure, as they do today with Mental Health Named Visitors in states like Victoria</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>a. Such conditions shall only be imposed to facilitate the in-person access required by the Named Visitor.</p> <p>b. No condition shall be applied that outright prevents or unreasonably hinders the Named Visitor from fulfilling their authorised role.</p> <p>3. The aged care facility is mandated to provide cooperation to facilitate seamless visits by the Named Visitor in accordance with the conditions outlined in Part X;</p> <p>a. Cooperation shall be extended with due regard for the privacy, safety and dignity of all residents within the facility.</p> <p>4. The provisions of this Part X shall prevail over any conflicting common law principles, including common law trespass, but such override is applicable only to the provisions within this part.</p>	<p>c) Ensure there is a legal basis to override any opposition to the named visitor being onsite under common law trespass provisions</p> <p>d) Make clear that while a provider can impose reasonable and necessary conditions, such conditions cannot be imposed that would prevent a named visitor from visiting.</p> <p>We want to make it explicit that this requirement overrides common law trespass and provides guidance for the state/territory public health rules as they did during COVID in Victoria due to Victoria’s Mental Health Act 2014 Nominated Person provisions.</p> <p>Rules around how a visitor may visit, should not result in the visitor being restricted from visiting in person, in the resident’s room.</p>

## Statement of Rights

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
20	New clause			Add new clause on Right to aged care services	The right to aged care services to be included in the Statement of Rights. There is an obligation on the aged care system to provide services for all older people assessed as needing them.
20	New clause			Security of tenure is missing	Security of tenure provision to be included in the new Act with the Rules outlining the detail of the processes modelled on the current laws. A new provision should be included that allows a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative housing or support at home solution before suspending the security of tenure of any individual accessing aged care services.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
20	(1)	(a)	An individual has a right to: (a) exercise choice and make decisions that affect the individual’s life,		Noting that the Code of Conduct uses the language “self-determination” a clear explanation in the Explanatory Memorandum, must include reference that “self-determination” encompasses the rights outlined in 20 (1) (a)
20	(1)	(b)	(b) be supported (if necessary) to make those decisions, and have those decisions respected; and	Amend wording: (a) <b>Have their will and preferences upheld</b> and (if necessary) be supported to make decisions, <b>using the principles of supported decision-making</b> , and have those decisions respected.	There is nowhere in the rights that currently enforces the right of will and preference and using supported decision-making principles. It is only referenced in regards of Supporters and Representatives. These need to be included as rights to ensure these underpin all aspects of the Act.
20	(2)		An individual has a right to equitable access to: (a) <b>have the individual’s need for funded aged care services assessed, or reassessed, in a manner which is:</b>	Equitable access to funded aged care services including assessment. Include a new clause (b) and then renumber “funded aged care services”. Delete (i) and (ii) New clauses <b>“Have equitable access to funded aged care services,</b>	(Section 3 (d) talks about how services are delivered including culturally appropriate etc)

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(i) culturally safe, culturally appropriate, trauma-aware and healing-informed; and (ii) accessible and suitable for individuals living with dementia or other cognitive impairment; and 26 (b) palliative care and end-of-life care when required	<b>including in respect of location and individuals who have diverse life experiences;” (d) ensure all items in subsection a-c are, delivered in a manner which is: (i) culturally safe, culturally appropriate, trauma aware and healing informed; and (ii) accessible and suitable for individuals living with dementia or other cognitive impairment.</b>	
20	(3)		An individual has a right to:	Add (a) receive high-quality care.  Change lettering of listing	The Act should make it clear that older people have the right to receive high-quality aged care services, this should be included in the Statement of Rights.
20	(6)		An individual has a right to seek, and be provided with, information about the individual’s rights under this	Insert: (6) An individual or their representative has a right to seek, and be provided with, information “about themselves” and about the individual’s rights under this section and the funded aged care	In addition, the definition of Protected information (not an exemption to the protected definition) must state protected information does not apply as it pertains to the individual and given to the individual.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			section and the funded aged care services the individual accesses, including the costs of those services	services the individual accesses, including the costs of those services	
20	(10)		An individual has a right to be supported by an advocate or a person of the individual's choice, including when exercising the individual's rights in this section, voicing the individual's opinions, making decisions that affect the individual's life and making complaints.	Insert: "An individual <b>has a right to access and use a professional independent advocate</b> of the individual's choice, including when exercising the individual's rights in this section, voicing the individual's opinions, making decisions that affect the individual's life and making complaints".	
20	(11)		(11) An individual has a right to have the role of persons who are significant to the	Insert: new subclause (a) or a new clause (13) <b>an individual who is a carer has the right to have their</b>	Australia co-sponsored Resolution 54/6 that was adopted by the UN Human Rights Council on the 11 October 2023 – Centrality of care and Support from a

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			individual, including carers, be acknowledged and respected.	<b>rights upheld in line with the Statement of Rights</b>	Human Rights Perspective, which states “Highlighting the need to invest in the care economy and to create robust, resilient and gender-responsive, disability-inclusive and age-sensitive care and support systems with full respect for human rights, with a view to recognizing, valuing, reducing and redistributing unpaid care, domestic work and support, <i>1. Recognizes the importance of respecting, protecting and fulfilling the human rights of paid and unpaid caregivers and care and support recipients</i>
20	(12)		(12) An individual has a right to opportunities, and assistance, to stay connected ( <b>if the individual so chooses</b> ) with: (a) significant persons in the individual’s life and pets, <b>including</b>	Insert new clause (b) and reorder numbering underneath: “(b) a named visitor chosen by the older person, or their carer or representative where the person is unable to make a decision or has not left directions, who can visit them, even when outbreaks occur.	



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>through safe visitation</b> by family members or friends where the individual lives and visits to family members or friends; and	Remove “if the individual so chooses” (rights should not be qualified)  Remove the word “safe” and introduce a new provision for Named Visitors as outlined above.	
21	(1)		An individual is <b>entitled to the rights</b> specified in section 20 when accessing, or seeking to access, <b>funded aged care services.</b>	New Clause at (1) and reorder number underneath  The Statement of Rights must be taken into account in interpreting the Act and any instruments made under it.	The Royal Commission recommended that the Act should include a declaration that the identified rights <i>may</i> be taken into account in interpreting the Act and any instrument made under it.... We recommend this declaration must be in the Act, replacing <i>may</i> with <i>must</i> ;  Consideration must also be given to enforcement mechanisms for registered providers that fail to deliver care based on arguing “we’re not funded to deliver the service in that way”.
21	(2)		It is the intention of the Parliament that registered providers delivering funded aged care services to individuals must	Edit Clause 21 (2) to remove reference to “that is not incompatible with” and shift issues around balancing to the positive duty clause.	An individual has a right to raise a complaint with the Complaints Commissioner about their rights being breached and to have their complaint dealt with fairly and effectively.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p><b>not act in a way that is incompatible with the rights specified in section 20,</b> taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals.</p>	<p>Introduce a positive duty on the Provider, in the form of a provider obligation along the lines that:</p> <p>(a) the registered provider must take reasonable and proportionate measures to ensure, as far as possible:</p> <p>(i) care and supports are delivered in accordance with the Statement of Rights; and</p> <p>(ii) elimination of conduct that breaches these rights</p> <p>(b) a defence against non-compliance with clause a may be that the provider necessarily limited rights having due regard to balancing competing or conflicting rights including the rights and freedoms of other individuals.</p> <p>(c) the provision of clause b may not be relied upon, unless the provider explicitly stated their reasons for limiting rights to the affected individual, and offered</p>	<p>See submission section 0 and reference the Sex Discrimination Act 1984 Section 47C for precedence.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>alternate solutions, at the time of doing so.</p> <p>(d)For the purposes of paragraph (a) this subsection covers:</p> <ul style="list-style-type: none"> <li>i. Responsible Persons</li> <li>ii. Aged Care Workers</li> <li>iii. Registered Providers</li> <li>iv. the Commissioner</li> <li>v. the Complaints Commissioner</li> <li>vi. the System Governor</li> </ul> <p>The provider must establish effective processes for reporting and responding to breaches of an individual's rights</p>	
21	(3)		Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal	Delete clause and replace with: "It is the intention of Parliament that the Minister, the System Governor, the Commissioner, Inspector General and any other person or body, performing functions or exercising powers under this Act, must have regard to the rights specified in section 21 when performing those functions or exercising those powers."	<p>Government actors have regard to the rights specified.</p> <p>It should also be a reviewable ground (especially for assessments)</p> <p>If the principles were to remain unenforceable (s 23), then the enforceability of rights on government actors must be incorporated directly in the Statement of Rights not merely in the Statement of Principles.</p>

## Statement of Principles

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
22	(1)		(1) The safety, health, wellbeing and quality of life of individuals is the primary consideration in the delivery of funded aged care services.	Amend: (1) The safety, health, wellbeing, <b>autonomy</b> and quality of life of individuals is the primary consideration in the delivery of funded aged care services.	The Statement of Principles does not include concern for autonomy. Care cannot be person-centred without autonomy of the person within the Statement of Principles. Useful to link with "self-determination", "choice and control" mentioned above, to ensure consistency across the Act.
22	(4)	Note	The Commonwealth aged care system offers accessible, culturally safe, culturally appropriate, trauma aware and healing informed funded aged care services, if required by an individual and based on the needs of the individual, regardless of the individual's location, background and life experiences. <b>Note: This may include individuals who:</b>	Groups listed in Note 1 to S22 (4) be elevated into the primary legislation, with the ability for other groups to be added via subordinate legislation.	Downgrading groups into a "note" reduces the legal basis for targeted grants or programs in the future. It also provides the ability for future Governments to not support some groups in the list as it is merely an interpretation tool.  See s132 System Governor Functions reference to "Individuals of Diverse Backgrounds" and consider whether to create new principle around this (with definition link)?

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
22	(7)		The Commonwealth aged care system recognises the valuable contribution carers make to society, consistent with the Carer Recognition Act 2010, and carers should be considered partners with registered providers who deliver funded aged care services.		<p>We note with appreciation the inclusion of reference to the Carers Recognition Act.</p> <p>Consideration is required in the Quality Standards guidance of aged care service models that effectively involve registered providers partnering with carers and to distinguish these from the COVID Partnerships in Care (PIC) program ensuring residents continue to be supported by someone they choose even during periods of outbreak.</p>
22	(10)		Individuals accessing funded aged care services are expected to <b>meet some of the costs</b> of those services if those individuals have the financial means to do so.	Ensure greater clarity via the rules and Explanatory Memorandum as to what meeting “some of the costs” means and in what context.	We note the discussion of the role of Government in relation to paying for aged care services and await the release of the Aged Care Taskforce Report and any advice on this matter. However, noting this section is about particular services, consideration will need to be given to its appropriate wording if a) meet some of the costs could be interpreted to meet all the costs,

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					and b) if there are any services where the individual is not required to meet any of the costs for those services.
22	(11)		The Commonwealth aged care system focusses on the needs of <b>older people</b> and should not be used inappropriately to address service gaps in other care and support sectors preventing individuals from accessing the best available services to meet the needs, goals and preferences of those individuals.		As discussed above – older people must be defined and this paragraph in particular notes the importance of ensuring it includes all people eligible for aged care services.
23	(1)		It is the intention of Parliament that the Minister, the System Governor, the Commissioner, and any other person or body, performing functions or exercising powers under this Act, must have regard to the principles specified in section 22 when performing those functions or exercising those powers.	After “the Commissioner”, insert “the Complaints Commissioner”	As discussed above

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
23	(3)		A failure to comply with this Division does not affect the validity of any decision and <b>is not a ground for the review or challenge of any decision.</b>	Link under the Effects of Statement of Rights (s21) to be included to ensure they apply and are reviewable for all government actors.	<p>As the Principles link the System Governor, Commissioner, Pricing Authority and Inspector General to the Statement of Rights the operations of this grounds would mean breaches of rights by one of these people would not be reviewable or grounds for challenges.</p> <p>This is highly inappropriate for situations like complaints about the behaviour of a Commission staff member or contractor, or a delegate of the System Governor, such as an aged care assessor.</p> <p>If in the broader list of Principles, the inability for there to be grounds for review or challenge of decisions is maintained, our preference is for an explicit link under the Effects of Statement of Rights (s21) to be included to ensure they apply and are reviewable for all government actors.</p>

## Supporters and Representatives

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
24			Supporters and representatives	Amend section 24 to only have Supporters (folding in the function of representatives into a continuum of support – see submission text above)	<p>Please refer to the submission where there is a recommendation to remove the idea of two separate entities of Supporter and Representative and instead see the role along a continuum from Supporter through to Representative.</p> <p>The concern is that a person with capacity is being required to name a Representative as soon as they enter aged care. This undermines the whole concept of presumed capacity, equal recognition before the law, the CRPD and the principles of Supported Decision- Making.</p> <p>A rights-based Act would work along a continuum rather than</p>



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					a binary model of capacity and no capacity.
26	(2)	(a)	If the supporter is doing a thing under section 24 to support the individual to do a thing under, or for the purposes of, this Act, it is a duty of the supporter to act in a manner that promotes the will, preferences and <b>personal, cultural and social wellbeing</b> of the individual; and	Amend: If the supporter is doing a thing under section 24 to support the individual to do a thing under, or for the purposes of, this Act, it is a duty of the supporter to act in a manner that <b>enables, supports</b> and promotes the will and preferences of the individual. <b>If they are unable to ascertain will and preferences then they should consider all documented information and the personal, cultural and social wellbeing</b> of the individual; and	There is a risk that broadening “will and preferences” to include “personal, cultural and social wellbeing” can weaken the scope of what a supporter must consider This amendment is required to ensure the full weight of will and preferences is maintained and to reduce the risk of defaulting to assumed ‘cultural and social wellbeing’ preferences.  Further it is noted that subsequent representative duties only reference ascertaining the will and preferences, not these additional criteria.
26	(2)	(c)	(c) support the individual <b>only to the extent necessary for the</b>	(c) support the individual <b>to the extent necessary for the individual to do the thing</b> , applying the supporter’s best endeavours to	It is necessary to consider possible divergent interpretations of this qualifier limiting a supporter’s actions

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p><b>individual to do the thing</b>, applying the supporter’s best endeavours to maintain the ability of the individual to make the individual’s own decisions.</p>	<p>maintain the ability of the individual to make the individual’s own decisions.</p>	<p>to the extent necessary. Will a provider say you can’t have that as it doesn’t relate to the thing you’re supporting the person to make a decision on?</p>
27	(5)		<p>If an individual is required under, or for the purposes of, this Act to do a thing, failure by a representative of the individual to comply with the requirement on behalf of the individual is taken, for the purposes of this Act (other than this Part), to be a failure of the individual to comply</p>	<p>Provide details in the Explanatory Memorandum referring to examples</p>	<p>It is necessary to consider this impact of this clause with the context of the Explanatory Memorandum. We would encourage a number of examples to be included.</p> <p>There is some concern that the individual may lose their entitlements if a Representative doesn’t do a thing they were not informed they needed to do by a certain time. As a principle, the individual should be protected from loss of entitlements and</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			with the requirement.		rights by the absence of action being taken.
28			Role of guardians etc.	Propose a note is included linking to 376's presumption of appointment of guardians etc.	When this clause is read first, in isolation, as it is above section 376, it implies that state and territory appointed guardians etc do not apply. Referencing the clause that provides a presumption of appointment as a representative if applied for by the people listed under subsection 2 would remove this confusion.
28	(2)		Subsection (1) applies even if the person:	Review to ensure the full list of interaction with state laws are covered.	Given the various titles used in state legislation for these roles, clear mapping will ensure all the various terms are covered. These will need to cover off the areas of financial, personal and health decision makers (e.g. Medical Decision Maker, Power of Attorney, Guardian, Administrator, Medical Treatment Substitute Decision Maker, health attorney,

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>personal attorney, financial attorney)</p> <p>It is unclear how the word “person” will be read in this subclause when considering the appointment of an organisation (such as a public trustee) into these roles.</p>
28	(2)	(c)	holds an <b>enduring power of attorney</b> granted by the individual; or	enduring power of attorney <b>or general power of attorney.</b>	We propose that both enduring powers of attorney and general powers of attorney should be included.
30	(2)	(a)	(2) It is a duty of the representative to: (a) apply the representative’s best endeavours to maintain the ability of the individual to make the individual’s own decisions;	Reword: (2) It is a duty of the representative to: (a) apply the representative’s best endeavours to <b>provide supported decision-making to enable the individual to make their own decisions.</b>	The duty is badly worded, it should explicitly state that the representative is to ‘provide supported decision-making’, if that is the intent of this duty.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
30	(3)	(c)	<p>If the representative is doing a thing, or refraining from doing a thing, on behalf of the individual under section 27, it is a duty of the representative to (c) <b>make reasonable efforts</b> to ascertain the will and preferences of the individual in relation to the thing or, if the individual's will and preferences cannot be ascertained, to ascertain the individual's likely will and preferences based on all the information available to the representative; and</p>	<p>Amend to read <b>all</b> reasonable efforts.</p>	<p>Representatives should be required make <b>all</b> reasonable efforts to ascertain the wills and preferences of the individual.</p> <p>We note with appreciation the fail-safe around the "likely" will and preference.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
30	(3)	(d) (iii)	take reasonable steps to consult the following: (iii) when appropriate, <b>any other person</b> who assists the individual to manage the individual's day to day activities or, if there is no such person, any family members or other persons who have a close continuing relationship with the individual; and	Insert: ""(other than an aged care worker)" after "any other person"	We do not consider it is appropriate that a Representative be required to consult with aged care workers, which this broad clause could require them to do.
33			Protection of <b>individual</b> against liability for actions of supporter or representative	Good faith clause to be included	Could an individual be liable for a thing done in good faith? We submit that consideration of a good faith clause be included.
35	(1)		A <b>person</b> commits an offence if:	Add: "or entity" after "person"	Noting the Acts Interpretation Act s2C defines person to include "include a body politic

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>or corporate as well as an individual” it is unclear whether a person includes partnerships and other legal structures that may not be deemed “corporate”. Appointments of law firm partnerships to act as a guardian come to mind for the operation of this clause, as well as the appointment of statutory agencies such as a public trustee.</p>
30	(1)		60 penalty units	Add “up to” before “60 penalty units”	Clarity is sought in the Explanatory Memorandum to make clear that the application of penalty units under the Act are an “up to” maximum, with the actual amount at the discretion of the relevant enforcement agency to set the penalty for the individual circumstance, no higher than that amount.
Part 5			New Part	<u>Functions of Independent Professional Advocacy</u>	The current Aged Care Act references aged care

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>Independent Professional Advocacy has the following functions:</p> <ul style="list-style-type: none"> <li>(1) to act as an advocate for individuals seeking or accessing aged care services who request advocacy support</li> <li>(2) to inform and educate individuals on their rights under the Statement of Rights and their rights in aged care</li> <li>(3) promote awareness of the rights of individuals in aged care</li> <li>(4) promote awareness of the processes available for the resolution of complaints and supporting individuals, where requested, with these processes</li> <li>(5) ensuring supported decision-making principles, and the wishes and preferences of the individual, underly all decision-making processes</li> <li>(6) to make a representation to the System Governor, the Inspector</li> </ul>	<p>advocates, but this draft does not, leaving people without access to the independent support they may require when trying to resolve issues with providers, or others, or making complaints.</p> <p>The sections in the current Act are:</p> <ul style="list-style-type: none"> <li>• Division 56, Section 56-1 (k) and (l)</li> <li>• User Rights Principles Division 1(5)(b)(c) and (ca) and (8)(2) and (3)</li> </ul> <p>These also enable compliance with the right to an advocate as per the statement of rights (and as referred to in the aged care quality standards).</p>



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>General, ACQS Commissioner, Complaints Commissioner or any other body or person in respect of any systemic matter that is or appears to be in breach of the Act</p> <p>(7) to exercise and perform such other functions, powers, and duties as are conferred or imposed on advocates by or under this Act or as described in the Rules</p> <p>Independent professional advocates have the right to:</p> <p>(1) Enter residential aged care services to:</p> <ul style="list-style-type: none"> <li>i. Provide education and information to residents on their rights</li> <li>ii. Provide independent advocacy support to residents that have requested this</li> </ul> <p>(2) Aged care providers may not deny access to an independent</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>professional advocate and where outbreaks are occurring, will adhere to Section XXX in relation to visitation</p> <p>(3) Aged care providers and the system governor will promote independent professional advocacy services to individuals seeking or receiving aged care services</p> <p>The System Governor, ACQS Commissioner and Complaints Commissioner must have regards for professional independent advocates in executing their functions</p>	

## Entry to the Commonwealth aged care system

### Introduction

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
36		Line 19, p48	For some service groups, such as home support, the approval may be limited to <b>particular service types, or to particular services</b> , in the service group	More detail in Explanatory Memorandum	It is unclear from the legislation the difference between “service types” and “services” more detail in the Explanatory Memorandum will be required for this outline.
36		Line 8, p49	For the <b>home care</b> or permanent residential care service groups, a decision about the individual’s priority for that service group is made by the System Governor.	More detail in Explanatory Memorandum	We note it would be helpful in the Explanatory Memorandum to consider the future role of Support at Home and how it is envisaged to be incorporated into the Act. For example, we presume a new “Support at Home” Service Group will be created to distinguish from the current Home Care or Home Support groupings.

## Eligibility for Entry

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
37			<p>General <b>requirements</b> for entry to Commonwealth aged care system</p> <p>An individual can access a funded aged care service if:</p> <p>(a) the individual makes an <b>application for funded aged care services</b>; and</p> <p>(b) the System Governor makes an <b>eligibility determination</b> for the individual and that determination remains in effect; and</p> <p>(c) the individual undergoes an <b>aged care needs assessment</b>; and</p> <p>(d) an <b>access approval</b> that covers the service is in effect for the individual; and</p> <p>(e) if the service is in a service group other than permanent residential</p>	<p>Restructure ordering of this clause as follows:</p> <p>a) application for funded aged care services</p> <p>(i) eligibility determination</p> <p>b) aged care needs assessment/ reassessment</p> <p>(i) access approval</p> <p>(ii) classification decision</p> <p>(iii) individual's priority</p> <p>c) place allocation</p> <p>d) service commencement.</p>	<p>While we appreciate that legislation is different to process, we submit it may be advantageous to structure these sections with an implementation consideration.</p> <p>For example, the journey of the older person is such that they apply for aged care services and an eligibility determination is the outcome of that application's first phase. Similarly, the outcome of an assessment is an access approval including classification decisions, and an individual's priority. Finally, a person's place is allocated to them. There are in addition the stage of they and their service plan being accepted by a provider which are not listed in this section for entry.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>care—a <b>classification decision</b> is in effect under subsection 59(1) for the individual for the service group; and                      (f) if the service is in a service group for which the System Governor must determine the <b>individual’s priority</b> under section [to be drafted]—a decision under that subsection for the individual for the service group is in effect; and                      (g) if the service is in a service group for which the System Governor must allocate the individual a place under Part 4—a <b>place has been allocated</b> to the individual under that Part.</p>		
38			<p>An individual may apply, <b>in an approved form</b>, to the System Governor for access to funded aged care services if the individual</p>	<p>Detail to be provided in Explanatory Memorandum about what an “approved form” is and how it is applied</p>	<p>Confirmation is sought that completing the approved form may be undertaken over the phone to ensure that phone-based applications can continue.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			does not have an eligibility determination that is in effect.	allowing for the inclusion of phone-based applications	A copy of that application, however made, must be available to the individual (e.g. through the My Aged Care portal). This is important when considering the eligibility determination.
39	(2)		The decision must be made within the period prescribed by the rules.	Amend to include the words “no later than 7 days after lodging application”	We submit that maximum timeframes for the legislative steps must be included in the primary legislation.  In this regard “no later than 7 days after lodging application” should be included.
39	(3)		If <b>the System Governor decides not to make a determination</b> under subsection (1), the individual’s application for access to funded aged care services is taken to be withdrawn.	Delete clause or amend to state it is taken to be denied.	We are concerned that the lack of a decision is taken to be withdrawn and therefore is no subject to review or appeal. We therefore propose this subclause is removed or amended to ensure it is taken as a decision to deny services.
40	(a)	(i) (ii) (iii)	The System Governor must not make an eligibility	Amend to include (iv) is experiencing early onset of	The section must be amended so that the Act outlines a clear pathway

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			determination for an aged care needs assessment under section 39 for an individual unless the System Governor considers that: (a) the individual: <b>(i) is aged 65 or over; or</b> <b>(ii) is an Aboriginal or Torres Strait Islander person and is aged at least 50; or</b> <b>(iii) is homeless, or at risk of homelessness, and is aged at least 50; and</b>	ageing related chronic conditions as outlined in the Rules	to approve exceptional cases for anyone who experiences the early onset of aging-related chronic conditions that fall outside the arbitrary age rules. Known current examples of this include some people living with younger onset dementia or HIV (and not eligible for support under the NDIS) and those who survived war or forced displacement, including some veterans or Forgotten Australians.
41	(2)	(b)	The notice under subsection (1) must include: (a) a statement that the effect of the decision is that the individual's application for access to funded aged care services is <b>taken to be withdrawn;</b> and	Delete clause or amend to state it is taken to be denied.	We are concerned that the lack of a decision is taken to be withdrawn and therefore is no subject to review or appeal. We therefore propose this subclause is removed or amended to ensure it is taken as a decision to deny services.
41	(2)			New clause:	All references to notices of decisions MUST include in the legislation a requirement to provide information

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				“(d) how the individual may seek a review of the decision.”	on how reviews of decisions, and appeals to reviews of decisions occur
Div 3					<p>Division 3 (Aged care needs assessments and 1 reassessments)</p> <p>There is no explicit mention to <i>equitable access to assessment</i> (secured as a ‘right’), or to the <i>objective of the Act that includes equitable access to aged care services</i>.</p>
43	(2)		Despite subsection (1), the aged care needs assessment must not be undertaken, and the individual’s application for funded aged care services, or application under paragraph 46(1)(b) for reassessment, is taken to be <b>withdrawn</b> , if:	Delete clause or amend to state it is taken to be denied.	We are concerned that the lack of a decision is taken to be withdrawn and therefore is no subject to review or appeal. We therefore propose this subclause is removed or amended to ensure it is taken as a decision to deny services.



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
43	(2)	Note	Examples of circumstances in which it may not be reasonably possible to undertake an assessment include where the <b>individual</b> does not provide consent to the assessment.	Add "or their appointed substitute decision-maker" (or similar)	<p>At the point of assessment an individual may not have appointed a Representative, given that this onboarding process for representatives may occur at the point of assessment and not at the point of application.</p> <p>Accordingly, mechanisms may be needed to consider how a Guardian may provide substituted decision-making consent may need to be considered in this clause.</p>
43				<p>New clauses:                      (3) If the System Governor decides that an assessment of an individual's need for funded aged care services is not required, denied or is taken to be withdrawn, the System Governor must, within 14 days after the decision is made, give notice to the individual of the decision.</p>	<p>There does not appear to be a requirement to notify the person seeking a reassessment if their request has been denied or is not needed.</p> <p>If a clause cannot be identified requiring this, we propose such a clause be included.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				(4) A notice under subsection (3) must include: (a) the reasons for the decision; and (b) how the individual may apply for reconsideration of the decision; and (c) how the individual may seek a review of the decision	
44			Undertaking aged care needs assessments		Noting above the discussion that the Statement of Rights should be enforceable, and the Statement of Principles which apply to the System Governor and their delegate the Assessors.  Should these recommendations not be adopted, specific reference that assessments will be conducted taking into account the Statement of Rights should be included.
44			The aged care needs assessment must be carried out by the approved needs assessor using an assessment tool prescribed	Add: The aged care needs assessment must be carried out in a manner that:	If our recommendations to make rights enforceable are accepted, this won't be necessary, however if not, a clear inclusion about these components from the assessment

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			by the rules and in accordance with any other requirements prescribed by the rules	<p><b>(i) is culturally safe, culturally appropriate, trauma-aware and healing-informed;</b></p> <p><b>(ii) is accessible and suitable for individuals living with dementia or other cognitive impairment.</b></p> <p><b>(iii) in partnership with the individual, and their carer where relevant</b></p>	<p>should be listed in the area about how assessments are conducted.</p> <p>Provides a means to give effect to the Carer Recognition Act statement item 7 that states that Carers should be considered as partners with other care providers in the provision of care, acknowledging the unique knowledge and experience of carers.</p>
44	2	New C	Add new section	<p>Insert into 44 (2) the following:</p> <p><b>c) a service plan outlining the services that are proposed for the individual to receive, co-designed with the individual seeking aged care services and reflecting their consent, will and preferences about the</b></p>	<p>Section 44 (2) merely requires a discussion between assessors and the individual seeking services. There is no requirement for the individual's consent, will or preferences to be reflected and in later sections for the approval process to have regard for their will and preferences when approving the proposed services.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<b>services they wish to receive based on the discussion outlined in subclauses a and b.</b>	
45			Aged care needs assessment reports	Add reference to the service plan	<p>We are concerned by the fact the legislation contains no requirement for a service plan to be developed, as this is the key document where an older person can be included in the co-design of their services as an expression of their wishes and preferences.</p> <p>We recommend the needs assessment report (or other mechanism) must specifically include the requirement to have a support plan that has been developed in a co-design approach with the individual and/or their carer (if no Representative has been appointed).</p>
45	2	(a)	The report must include information about: (a) the funded aged care services the assessor	Amend: The report must include information about: (a) the funded aged care services the assessor	Links back to the objectives

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			considers the 17 individual needs in order to meet the individual’s care needs; 18 and	considers the individual needs in order to meet the individual’s care needs and <b>to ensure equitable access;</b>	
46	(1)	(c) (i)	The System Governor must decide if a reassessment of an individual’s need for funded aged care services is required if: (c) either: (i) the System Governor is satisfied that a <b>significant change</b> in circumstances prescribed by the rules applies in relation to the individual; or	Delete: “significant”	The pathway for assessment corrections other than reassessment is unclear. Accordingly, use of the word “significant” change may present too high a bar for situations where simple corrections need to occur.
46	(1)	(c) (ii)	<b>other circumstances prescribed by the rules</b> apply in relation to the individual.		Further information about the other circumstances intended to be included in the Rules for reassessment is sought.
46	(4)		A notice under subsection (3) must include: (a) the reasons for the decision; and	Subject to a review of the Review of Decisions clauses yet to be drafted/consulted on, change to	On a lay persons read the language of “may apply” for reconsideration of the decision, implies that their rights to appeal and review are arbitrarily at the whim of the decision maker.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(b) how the individual may apply for reconsideration of the decision;	"How the individual may seek an internal review of the decision" And add after "How the individual may seek a review of the decision"	In the absence of the chapter on review of decisions, full comment is not possible to be made.  Language like an "internal review" of the decision may be more appropriate.  We also note that at all locations where this appears, language around requirements to explain "how the individual may seek a review of the decision" must also be included.
47	(2)	(b)	If the System Governor decides under subsection (1) that an individual requires access to funded aged care services, the System Governor must decide whether: <b>(b) if the individual is not an Aboriginal or Torres Strait Islander person</b> and subsection (3) applies to the service group:		Further explanation is sought why Aboriginal and Torres Strait Islander persons are excluded from this process.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
47	(3)		This subsection applies to a service group if: (b) the service group is <b>home support</b> or a service group prescribed by the rules.		The purpose of subsection 3 is unclear as to what it is intended to achieve. It may be that further drafting is required, but currently it reads as if it applies to home support but doesn't say what actually applies.
47	(4)		Timing of decisions (4) The decisions under subsections (1) and (2) must be made within the period prescribed by the rules.	Amend to include the words "no later than 14 days after lodging application"	We submit that maximum timeframes for the legislative steps must be included in the primary legislation.  In this regard "no later than 14 days after lodging application" should be included.
47	(1) & (2)		Approval of access to funded aged care services	In all approval decisions, the System Governor "must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services"	Amend section 47 to ensure the System Governor must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services.
48	(b)		The System Governor must not approve a service group		Further explanation is sought why Aboriginal and Torres Strait Islander

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>under paragraph 47(2)(a) for an individual unless the System Governor is satisfied that:</p> <p>(b) <b>if the individual is not an Aboriginal or Torres Strait Islander person</b> and the service types in the group are delivered in an approved residential care home—the individual has, by reason of sickness, a continuing need for funded aged care services (including nursing services) in those service types.</p>		<p>persons are excluded from this process.</p>
49	(1)	(a)	<p>The System Governor must not approve a service type, or a service, in a service group under paragraph 47(2)(b), for an individual unless the System Governor is satisfied that:</p>	<p>Delete “long-term” and replace with “assessed”</p>	<p>Further information is sought about the implications of the inclusion of the words “long-term” in particular with regards to the purposes of rehabilitation. Early intervention strategies should not be hindered by a requirement for a condition to be long-term before supports can be</p>



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(a) the individual has a <b>long-term</b> physical, mental, sensory or intellectual impairment and the impairment may hinder the individual’s participation in society on an equal basis with others as a result of the impairment’s interaction with various barriers; and		provided, in order to maintain, or regain a level of activities of daily living. We note its inclusion may cause issues with the grounds on which can be approved in sub clause 49 (1) (b) (v) for “habilitation or rehabilitation service”
49	(1)	(b)	(b) any of the following apply:	No longer is there an option of home support to prevent or delay access to residential aged care?  While none speak about disability - the themes underpinning disability appear to be included - would we want a diagnosed disability to be mentioned?	We are concerned that the exposure draft has removed the criteria that services were necessary to prevent or delay access to residential aged care.  We recommend in addition, that a standalone clause be inserted designed to recognise that services may be approved entirely on the basis of supporting someone’s disability.
49	(1)	(b) (iii)	the funded aged care services in the service type each involve, or the funded aged care service involves, a		The AT-HM service type should be allowed to be delivered in residential care. Structuring it under the Home and Community Care setting may

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>mobility aid or device, or assistive technology</b> , live assistance or intermediaries that will facilitate personal mobility of the individual;		prevent this. (e.g. a person with vision loss needing specialised tools may not be purchased by (or funded by) the residential care provider.
50	(2)	(a)	Without limiting subsection (1), conditions included on an approval of a service type or a funded aged care service for an individual may include any of the following: (a) that the individual must provide to a registered provider that will deliver funded aged care services in the service type, or the funded aged care service, <b>information of a kind prescribed by the rules;</b>		Further information is sought on what information will be prescribed by the rules that an individual must give to an approved provider.
50	(2)	(b)	that the individual can only access the funded aged care services in the service type, or the funded aged care service, through a	After “registered provider” add “or associated provider”	We recommend that it is necessary for clarity that Clause 50 (2) (b) make explicit reference to associated providers – that is services may be delivered by an associated provider of a registered provider.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			registered provider of a kind prescribed by the rules;		
51			Notice of decision		A copy of the service plan, along with the assessment contents must also be provided with the notice of decision, both for rejected and accepted assessments.
51		b		New clause: (c) how the individual may seek a review of the decision.	
55	(3)	(b)	The notice must: (b) invite the applicant to make submissions, in writing, to the System Governor in relation to the matter <b>within 14 days after receiving the notice</b> , or such longer period as is specified in the notice; and	Take account of recent changes to Australia Post delivery schedules in notice of information periods.	
55	(5)		If, after considering an individual's submissions under subsection (4), the System Governor decides to revoke the individual's	Subject to a review of the Review of Decisions clauses yet to be drafted/consulted on Change to	On a lay persons read the language of "may apply" for reconsideration of the decision, implies that their rights to appeal and review are arbitrarily at the whim of the decision maker.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>eligibility determination, or access approval, or both, the System Governor must, within 14 days after the day the decision is made, give written notice of the following to the individual:</p> <ul style="list-style-type: none"> <li>(a) the decision.</li> <li>(b) the reasons for the decision;</li> <li>(c) how the individual may apply for reconsideration of the decision.</li> </ul>	<p>“How the individual may seek an internal review of the decision”</p> <p>And add after</p> <p>“How the individual may seek a review of the decision”</p>	<p>In the absence of the chapter on review of decisions, full comments on this are not possible to be made.</p> <p>Language like an “internal review” of the decision may be more appropriate.</p> <p>We also note that at all locations where this appears, language around requirements to explain “how the individual may seek a review of the decision” must also be included.</p>

## Classification

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
57	(1)	(c) (i)	A classification assessment for an individual for a service group must be carried out: (c) for a classification assessment required under paragraph 56(1)(b): (ii) if <b>circumstances prescribed by the rules</b> apply and information of a kind prescribed by the rules is given to the System Governor—by the System Governor in accordance with any requirements prescribed by the rules.	TBD	Further information about the other circumstances intended to be included in the Rules for reassessment is sought.
60	(1)		The System Governor must give written notice of a classification decision under section 59 for a service group to the individual <b>within 28 days</b> after the decision is made	Amend to read within 7 days.	We refer to our preferred policy position that all people receive aged care services within 30 days of application. That is from the day they apply to My Aged Care, through to their assessment being conducted, their approval to services granted, their place allocated, their service onboarding occurs and the day that their first aged care service

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					<p>commences, should be no longer than 30 days.</p> <p>We are therefore concerned by the lack of timeframes around how long assessments/decisions make take to be made and the period of time allowed for notice of those decisions to be made.</p> <p>Currently this clause’s 28 days for a notice of classification, along with s51’s notice on a decision of approval of access (14 days) would alone exceed the entire stated goal of services within 30 days.</p> <p>Given elsewhere in the Act providers and older people are given 14 days to provide information when requested, it is appropriate that no longer a period be allowed for the System Governor to advise the outcome of their decision (let alone make the decision).</p> <p>As a principle we submit that no more than 14 days should be taken to make a decision and no more than 7 days should</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					be allowed to give notice of a decision, once taken.
60	(2)		The notice under subsection (1) must include: (a) the individual’s classification level for the service group; and (b) details about when the classification decision did, or will, come into effect; and (c) the reasons for the decision; and (d) how the individual may apply for reconsideration of the decision	Subject to a review of the Review of Decisions clauses yet to be drafted/consulted on. Change to “How the individual may seek an internal review of the decision”  And add after  “How the individual may seek a review of the decision”	On a lay persons read the language of “may apply” for reconsideration of the decision, implies that their rights to appeal and review are arbitrarily at the whim of the decision maker.  In the absence of the chapter on review of decisions, full comment on this is not possible to be made.  Language like an “internal review” of the decision may be more appropriate.  We also note that at all locations where this appears, language around requirements to explain “how the individual may seek a review of the decision” must also be included.
61	(1)	(d)	A classification decision under section 59 for an individual for a service group takes effect on the day worked out in accordance with the method prescribed by the rules for the	Substantive details must be provided in the rules	We are concerned about the practical application of this clause.  Thinking about the process for a person currently receiving “home support” service group services, seeking a

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>service group and remains in effect until the earliest of the following:</p> <p>(d) for a service group other than a service group to which paragraph (e) applies—<b>another classification decision is made for the individual</b> and the service group under section 59;</p>		<p>reassessment for “residential care” service group services.</p> <p>It would appear at the point the new classification decision is made, the original classification would cease, and thus they would no longer be eligible for those original services.</p> <p>We submit that that a period of time would be needed to allow them to receive their notice of the determination (currently 28 days), find an aged care home, and be accepted to commence receiving those services. During this time, it is appropriate that the person continue to be supported under their original “home support” classification.</p>
63	(1)	(b) (i)	<p>An individual, or a registered provider that is delivering funded aged care services in the permanent residential care service group to an individual in an approved residential care home (other than under a specialist aged care program),</p>		<p>Further information is sought as to what is the envisaged maximum number of permissible applications for classification assessments that is envisaged to occur under the rules, and over what period?</p>



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			may apply to the System Governor for a classification assessment of the individual's classification level for that service group to be undertaken if: (b) either of the following apply: (i) if the rules prescribe a time period—not more than the <b>number of applications</b> prescribed by the rules have been made for the individual under this section in that time period;		

### Prioritisation

*Still to be drafted – not in the Exposure Draft.*

### Place allocation

*Still to be drafted – not in the Exposure Draft.*

## Registered providers, aged care workers and aged care digital platform operators

### Introduction

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
65			To <b>deliver</b> funded aged care services, an entity must apply and be registered as a registered provider by the Commissioner.	Include note on associated providers with relevant links	Include reference to associated providers.
65			The registration period is <b>generally 3 years</b> , with providers needing to apply and be re-assessed by the Commissioner and re-registered to continue to deliver funded aged care services after the expiration of the initial registration period. Providers can also apply to vary their registration where required during a registration period.	Delete "generally".	

## Provider registration process

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
66	(1)		An <b>entity</b> may apply to the Commissioner to be registered as a registered provider.	Entity to include an individual providing services as a sole trader.	
66	(2)	(b)	The application must: (a) be in an approved form; and (b) be accompanied by the <b>application fee</b> (if any) prescribed by the rules.	Delete “application fee”	
66	(4)		Despite subsection (1), an entity may not make an application under that subsection if, at the time of making the application, the entity is already a registered provider, and the remaining registration period is more than the period prescribed by the rules.	Drafting note on variation of registration category.	What flexibility is there for providers to expand the services under their registration to meet demand and need? Drafting note on variation of registration category.
68	(1)	(b) (ii)	The Commissioner must not register an entity as a registered provider unless the Commissioner is satisfied that:		Need to clarify whether the banning order is against an entity or individual. Is this covered in (c) and Section 12 on suitability matters?

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			the entity is suitable to deliver funded aged care services having regard to the following: (ii) whether a banning order or an NDIS banning order against the <b>entity</b> is, or has at any time been, in force		
69	(1)		The rules <b>may prescribe requirements</b> relating to conducting an audit of an entity’s ability to comply with the Aged Care Quality Standards for a provider registration category.	Add: the rules may prescribe separate requirements for audit by the Commission of providers in registration categories not required to comply with all Aged Care Quality Standards.	Not all types of registration categories have an audit against the Standard. Only residential aged care providers are subject to the full suite of Quality Standards and there are no Quality Standards audits for registration categories 1-3.
71	(2)	(a)	The certificate of registration given to the entity must specify: (a)the name of the entity; and	Amend to: Legal name of entity and ‘known as’ name	References to legal name alone may cause confusion for older people. Inclusion of the ‘known as’ name in addition to legal name will make this clearer who the certificate relates to.
72			Constitutional corporations	Provide definition of constitutional corporations	There is a need to establish a clear understanding of what is a constitutional corporation.
74	(1)	(a)	For the purposes of paragraph 71(2)(c), the registration period	Delete “the end of the” and replace with “up to”	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			for a registered provider is the period that starts on the day the decision is made to register the provider under section 67 and ends at: (a) <b>the end of the period of 3 years;</b> or		
75	(2)	(b)	The determination under subsection (1) must specify in relation to the entity: (b) the registration period, <b>being 3 months or such longer period</b> as is specified in the determination; and	Strengthen timeframe criteria and process in the rules	If registration is up to 3 years – we seek confirmation that deemed registration doesn’t provide a backdoor to this timeframe given there is no limit.

### Variations, suspensions, and revocations of registration

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
87	(2)		The Provider Register may be kept in any form that the Commissioner considers appropriate.	Add the Provider Register must be publicly accessible.	
87	(3)	(a)	The Provider Register must include each of the following in relation to the registration of a registered provider in a registration category: (a)the <b>name</b> of the registered provider;	Add: "legal" in front of "name". Add: (b) the "trading name" of the registered provider.	Facilitates public searchability of providers on the register.
87	(3)	(g)	if the provider delivers funded aged care services in a home or community setting—each <b>local government area</b> in which the provider delivers those services;	Add "suburb", "PHN", "ACPR", "SA3"	
87	(3)	(k)	<b>if a banning order against the provider is in force</b> under section 286—information about the banning order;	Add historic banning orders to Provider Register	
87	(5)		The Provider Register must include each of the following in relation to a responsible person, or <b>an aged care worker, of a registered provider</b> against whom a banning order is in force under section 287:	Add "workers associated with a registered provider". How long does a worker who receives a banning order remain on the Provider Register?	

87	(7)	(b)	The rules may make provision for and in relation to the following: <b>(b) the publication of the Provider Register in whole or part, or of specified information entered on the Provider Register;</b>	Delete "in part".	Require that the whole Provider Register be published.
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### Obligations of registered providers etc and conditions on registration of registered providers

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
89	(3)		The conditions may include, but are not limited to, conditions relating to the following matters:	Add to this list "Rights of individuals" as outlined in Section 12.	
90			Compliance with Aged Care Code of Conduct	Extension of Code of Conduct to workers of associated providers	Does not apply to associated providers. Does it apply to aged care workers of associated providers?
90	(b)		It is a condition of registration that a registered provider must: <b>(b) take reasonable steps</b> to ensure that the aged care workers, and the responsible persons, of the registered provider comply with the Aged Care Code of Conduct.	In the rules and Explanatory Memorandum more detail is required on what constitutes "reasonable steps"	Greater clarity will be needed either by amendment to the draft or in the Explanatory Memorandum about what constitutes reasonable steps.
91	(b)		It is a condition of registration that a registered provider must:	Provide a definition of worker screening that	Legal definition

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(b) ensure that aged care workers and responsible persons of the provider comply with the <b>worker screening</b> requirements prescribed by the rules; and	covers both aged care and NDIS	Both NDIS and aged care screening or just aged care. Reference S166 and S167.
92			Rights and principles	Add additional text to all clauses in this section to clearly state that adherence to rights and principles is an obligation of providers and is ongoing extending beyond registration approval	Condition of registration not an obligation on providers?
92	(1)	(b)	have in place practices designed to ensure <b>delivery of funded aged care services by the registered provider is not incompatible with the rights of individuals under the Statement of Rights.</b>	Positive duty (b) the approved provider must take reasonable and proportionate measures to ensure, as far as possible: (i) care and supports are delivered in accordance with the Statement of Rights; and (ii) elimination of conduct that breaches these rights	See Submission section on Providers being required to have a positive duty to uphold rights. (See Sex Discrimination Act 1984 Section 47C as <u>example text</u> .)



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
92	(1)			<p>New Clause (c)                      Allow access by independent professional advocates to deliver information and education on rights, and advocacy support to individuals:                      (i) Promote independent professional advocacy services</p>	See Submission for details of rationale for independent professional advocates.
96			<p>(a) implement and maintain a complaints and feedback management system in accordance with any requirements prescribed by the rules; and                      (b) manage complaints and feedback in accordance with that system and any other requirements prescribed by the rules; and</p>	<p>New Clause:                      (e) Ensure that the role of independent professional advocates are part of the complaints and feedback mechanism and whistle blower policy to support individuals</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(c) not victimise or discriminate against anyone for making a complaint or giving feedback; and (d) maintain a whistleblower policy in accordance with any requirements prescribed by the rules.		
100	(1)		This section applies to a registered provider that is an entity other than: (a) a government entity; or (b) a local government authority; or (c) <b>a registered provider of a kind prescribed by the rules.</b>	Further text added to this clause to indicate types of registered providers under the rules	What types of Registered Providers are prescribed under the rules? Amend to be clearer. Is this a loophole via the rules?
100	(3)		Subsection (2) does not apply in relation to a registered provider at a particular time if both of the following apply at that time:	Link (a) and (b) to ensure that this only applies to small providers	Address the issue that a publicly listed or private company could just appoint 4 directors and would not need to comply with the requirements.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>(a) <b>the governing body of the provider has fewer than 5 members;</b></p> <p>(b) the provider delivers funded aged care services to fewer than 40 individuals accessing funded aged care services.</p>		
100	(4)		Subsection (2) does not apply in relation to a registered provider at a particular time if, at that time, the provider is a kind of body that is <b>known as</b> an Aboriginal Community Controlled Organisation.		Explanatory Memorandum to outline the reasons for the ACCO exemption. Noting elsewhere there is a requirement for them to be recognised under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
101	(4)		It is a condition of registration that a <b>registered provider that is of a kind prescribed by the rules</b> must:	Delete “that is of a kind prescribed by the rules”	Why not all registered providers? Which registered providers would this not apply to?
101	(4)	(b) (i)	<p>(b) if one or more consumer advisory bodies are established—require the governing body of the provider:</p> <p>(i) to consider any such feedback given by the body or bodies when making decisions <b>in relation to the quality of the</b></p>	Add: or any other matter the consumer advisory body may wish to communicate to the governing body for its consideration	Consumer advisory bodies narrowly defined to advice ONLY in relation to quality of services delivered. Consider the ability to provide broader advice.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<b>funded aged care services</b> delivered by the provider; and		
102			Determination that certain conditions relating to the governing body of a registered provider do not apply	Add new clause stating that the Commission will publish their determinations in the provider register	Commission being able to remove the independence and clinical requirement if they are satisfied it is reasonable to do so? Add transparency requirement on the Commission to publish their determination into the register of providers.
102	(5)	(c)	If the Commissioner decides to make the determination in relation to the registered provider, the Commissioner must give the provider written notice of the following: (a) the making of the determination; (b) the governance condition to which the determination relates; (c) <b>the period for which the determination is in force.</b>	Prescribe a timeframe for determinations	Allows for any period of time for registration.
105			Delivery of funded aged care services	Add a subclause stating registered providers must implement contracts with individuals that adhere to	Allow for the introduction of a Standardised Contract.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				a standardised template authorised by the Rules.	<p>Authorisation of a contract should be made by the System Governor and their use monitored by the Commissioner.</p> <p>Non-adherence to standardised contract template should be grounds for complaints by individuals accessing aged care services</p>
105	(b)		Provide and explain, in accordance with any requirements prescribed by the rules, information to an individual accessing funded aged care services; and	Provide and explain, in plain English, or a language and/or format appropriate to the individual accessing funded aged care services, information, including information on their rights;	See Submission Section 0
116	(5)		If an exemption from subsection (1) is granted to a registered provider in relation to an approved residential care home, <b>the System Governor must make publicly available</b>		Noting the role of the Commissioner to provide a register of provider registration, we believe such information as to be made available by the System Governor in relation to this item should be required to be published in the single register about

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			information about the exemption, including: (a) the name of the registered provider and the approved residential care home; and (b) the period for which the exemption is in force; and (c) any conditions that apply to the exemption; and (d) any other information of a kind prescribed by the rules.		providers. It may be necessary therefore to amend this clause to require this to occur, rather than simply permit the System Governor to publish in any format.
117	(1)	(a) (i)	A registered provider must ensure the protection of personal information, relating to an individual to whom the registered provider delivers funded aged care services, including as follows: (a) the personal information must not be used other than: (i) for a purpose connected with the <b>delivery of</b> a funded aged care service to the individual by the registered provider; or		Ensure that the rules cover all aspects of “delivery of” including the scenario of seeking a quote/onboarding a prospective individual.
117	(1)	(c)	the personal information must be protected by security		The Act does not include any requirement that a provider who

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			safeguards that it is reasonable in the circumstances to take against the loss or misuse of the information.		experience a breach of personal information must inform the regulator. Consideration as to how to place such an obligation, beyond the general privacy Act requirements of reports to the OAIC should be considered.
118			Aged care workers <b>of registered providers</b> must comply with Aged Care Code of Conduct	After “registered” insert “and associated”	Misleading – associated providers are included in the definition of aged care worker.

## Statutory duty and compensation

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
120	(6)		Fault based offence – death or serious injury or illness		Note link with the Regulatory Powers Act to be clear about distinction between strict liability offence and fault-based offence
120	(6)		Penalty: (a) in the case of an offence committed by a registered provider that is an individual – 1000 penalty units or 5 years imprisonment or both; or		A registered provider that is an individual goes to jail. This seems to be a disparity of additional penalty on sole contractors beyond those of other types of aged care workers and/or registered providers.
120	(7)		General defence of reasonable excuse (7) Subsection (3), (5) or (6) does not apply if the registered provider has a <b>reasonable excuse</b> .	Reasonable excuse should be defined, and further details contained in the rules	We are concerned that reasonable excuse may not be a satisfactory exemption.
127	(1)	(a)	the entity is <b>found guilty of an offence</b> against this Part;		We are concerned about the potential narrow framework for individuals accessing aged care to receive compensation. The claim of compensation can only be made when a person is convicted of an offence of breach of duty. That means that the evidence requires proof “beyond reasonable doubt”. Normally



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					when a person makes a claim for injury, the evidence requires proof “on the balance of probability”. So aged care recipients will have a barrier confronting their claim which requires the [higher] criminal onus of proof.
127	(2)	(a) (i)	The court may make the order only if: (a) either: (i) the Commissioner applies for an order under this section with the <b>consent of the individual</b> ; or	Add: allow consent of the executor of their estate.	How does this apply when a person dies?

### Aged care digital platform operators

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
General					Why is this only for digital platforms – why was the duty on all organisations supplying aged care staff to registered providers not included?
128	(1)		An <b>aged care digital platform</b> means an online enabled application, website or system operated to facilitate the delivery of services in the <b>aged care system</b> (whether funded aged care services or not), where:		Registration of providers is ONLY for funded aged care service. Scope re: both private and Commonwealth funded services.
130	(1)	(b)	An entity that is a constitutional corporation and the operator of an aged care digital platform must: implement a <b>complaints management system</b> and manage complaints in accordance with that system and any other requirements prescribed by the rules; and		Platform to provide a complaint system or is it a complaints system for the individual provider of services? Who would be liable to action a complaint?

## Governance of the aged care system

### Introduction

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
131			The Commonwealth aged care system is governed by the Secretary (known as the System Governor) and the Aged Care Quality and Safety Commissioner (the Commissioner). There is also a Complaints Commissioner and an Aged Care Quality and Safety Advisory Council (the Advisory Council).	Add Aged Care Complaints Commissioner (the Complaints Commissioner). Delete Complaints Commissioner	
131			The Commissioner’s functions include the following: (a) safeguarding functions; <b>(b) engagement and education functions;</b> <b>(c) complaints function</b> (d) registration of providers functions.	For (b) “engagement and education functions” add after “for providers” Delete (c) “complaints function”  Add: The Complaints Commissioner’s functions include the following: (a) complaints functions; (b) engagement and education functions for individuals. Add - The Complaints Commissioner’s functions include the following: (a) complaints functions;	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				(b) engagement and education functions for individuals.	
131			The Commission consists of the Commissioner and the staff of the Commission. The Commission has the function of assisting the Commissioner in the performance of the Commissioner’s functions. The Commissioner may also be assisted by certain other officers and employees and may engage consultants.	Add: “Complaints Commissioner, Advisory Council”	
131			The Complaints Commissioner is a member of the staff of the Commission who has the function of assisting the Commissioner in the performance of the Commissioner’s complaints functions.	Delete this clause	See Complaints Commissioner recommendations
131			The Advisory Council’s functions include the following: (a) monitoring the performance of the Commissioner’s functions; (b) providing advice to the Commissioner and the Minister about matters arising in relation to those functions; (c) supporting the development of the strategic objectives of the Commission and identifying systemic performance issues within the Commission.	Add new function: “Monitoring the performance of the Complaints Commissioner’s functions;” Add to (b) providing advice to “Complaints Commissioner”	

### System Governor

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
132	(1)	(a)	The System Governor has the following functions: <b>(a) to facilitate equitable access to funded aged care services, including in respect of location and individuals who identify with a number of diversity characteristics</b>	Add: "ensure that the right to equitable access to funded aged care services is achieved"	System Governor function but not a right for individuals to have equitable access to services
132	(1)	(c) (i)	to provide stewardship of the Commonwealth's administration of the aged care system and encourage the delivery of high-quality care by: <b>(i) developing policy to make ongoing improvements to the Commonwealth's administration of the aged care system, including by consulting with individuals of diverse backgrounds and individuals who identify with a number of diversity characteristics; and</b>	Note the link to Section 22, Principle 4	Link with Principle 4

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
132	(1)	(c) (iv)	providing education to build the capacity of registered providers to adopt best practice in the delivery of funded aged care services;	Note that education being a dual System Governor and regulator function	Education being a dual System Governor and regulator function
132	(1)	(e)	to monitor and encourage the training and development of aged care workers;	Delete: "encourage" then add "facilitate the providers for the provision of" then delete "the"	
132	(d)	(i)	(i) collecting, maintaining and providing accurate information about the Commonwealth's administration of the aged care system, including on expenditure by registered providers on the delivery of funded aged care services	Add: "and aged care workforce expenditure;"	Inclusion of responsibility for information on aged care workforce (employees and contractors) expenditure
132	(e)		to monitor and encourage the training and development of aged care workers;	After "to monitor and" insert "help providers to facilitate, including through the provision of funding," Insert "attraction, retention", before "training and development of aged care workers;"	Inclusion of attraction and retention of workers as part of System Governor function

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
134	(1)	(a)	The System Governor is to maintain a register of reports that: (a) are received by the Department from a coroner about the death of an individual <b>accessing funded aged care services</b> ; and	System Governor responsibilities – aged care system or funded aged care services.	
134	(5)		The register is to be made available for public inspection on the internet.		Meaning in relation to other clauses referencing “publicly available” and Regulator choosing public availability. Should link to Provider Register

### Aged Care Quality and Safety Commission

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
137	(1)	(c)	(c) the following persons are officials of the Commission:	Add: as (ii) "the Complaints Commissioner"	
138			The Commission consists of: (a) the Commissioner; and (b) the staff of the Commission.	Add: "(b) the Complaints Commissioner" and the staff of the Commission	
139			The Commission's function is to assist the Commissioner in the performance of the Commissioner's functions.	After "Commissioner" add "the Complaints Commissioner and the Age Care Quality and Safety Advisory Council. Delete "Commissioner's" and add "their respective"	
141	(1)	(b) (c)	The Commissioner has the following functions: (a) the safeguarding functions; (b) the engagement and education functions; (c) the complaints functions;	To (b) add the engagement and education functions I "regarding their functions" Delete "(c) complaints functions"	
141	(1)			Add:	



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>(X) The Commissioner is responsible for managing the administrative affairs of the Commission.</p> <p>(X) For the purposes of the Public Governance, Performance and Accountability Act 2013, the Commissioner is the accountable authority of the Commission.</p> <p>(X) The functions of the Commissioner mentioned in subsection (1) are to be performed by the Commissioner on behalf of the Commission.</p>	
141	(5)		<p>(5) In performing functions under this section, the Commissioner may consult with the following:</p> <p>(a) the System Governor;</p> <p>(b) the Inspector General of Aged Care;</p> <p>(c) the Pricing Authority</p>	<p>Add:</p> <p>(d) the Complaints Commissioner</p> <p>(e) the Advisory Council.</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
142	(a)	(i)	The <b>safeguarding functions</b> of the Commissioner are the following: (b) to protect continuity of care through: (i) monitoring the <b>financial viability and sustainability</b> of registered providers; and	Provide details in the Explanatory Memorandum and further details in the rules on how financial matters are a safeguarding function	Financial matters as a safeguarding function?
142	(b)	(iii)	to protect continuity of care through: <b>(iii) taking proactive steps to mitigate prudential and financial risks;</b>		Prudential requirements to the Commission and no longer System Governor?
142					Note that Complaints Commissioner will have specific safeguarding functions in the relevant Division
143			Engagement and education functions	Add to heading Engagement and education functions "of providers, responsible persons and workers"	
143	(a)		(a) to engage with individuals accessing funded aged care	Delete: Include for Complaints Commissioner	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			services and their supporters, representatives or other people supporting those individuals, to learn about their experiences with aged care services;		
143	(b)		(b) to develop, in consultation with individuals accessing funded aged care services and their supporters, representatives or other people supporting those individuals, best practice models for the engagement of registered providers and aged care workers with the individuals accessing those services;	Delete: Include for Complaints Commissioner	
143	(c)		to promote <b>those</b> best practice models to registered providers and responsible persons and	Complaints Commissioner	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			aged care workers of registered providers;		
144			Complaints' function	Move to Complaints Commissioner	
144			Complaints' function		We support stronger and clearer disclosure authorisations for complaints process. Ensure that disclosures of protected information for the purposes of managing complaints (Division 3— Authorisation of recording, use or disclosure of protected information; Subdivision B—Authorisation of System Governor, Complaints Commissioner and Commissioner). Ensure that disclosure can extend beyond a person's death to their representative who may be investigating the cause of their death.
144			The <b>complaints functions</b> of the Commissioner are the following:		As discussed in our recommendations in the narrative above, links to alternative processes such as mediation and conciliation and promoting restorative justice outcomes (not only open disclosure) are all missing from the primary legislation. Hooks should be inserted with expansion in Rules.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
144	(a)	(ii)	<p>The <b>complaints functions</b> of the Commissioner are the following:</p> <p>(a) to uphold the rights under the Statement of Rights, and protect and enhance the safety, health, wellbeing and quality of life, of individuals accessing funded aged care services, by maintaining independent, transparent, accountable, accessible, safe and culturally safe processes for:</p> <p>(ii) <b>making complaints about a registered provider acting in a way that is incompatible with the Statement of Rights; and</b></p>	<p>After “making complaints about a registered provider” add “or aged care worker”</p> <p>At (ii) change acting in a way that is incompatible with to “breaches the rights of individuals in the Statement of Rights”</p>	
144	(a)		(a) to uphold the rights under the Statement of Rights, and 27 protect and enhance the safety,	New Clause: (iv) engaging with independent professional	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			health, wellbeing and quality 28 of life, of individuals accessing funded aged care services, by 29 maintaining independent, transparent, accountable, 30 accessible, safe and culturally safe processes for:	advocates and their role in supporting individuals	
144	(b)		(b) to deal with complaints and feedback received by the Commissioner; and	Amend: to deal with complaints and feedback received by the Commissioner in a <b>timely and transparent way, keeping all parties regularly informed of the progress of the complaint</b>	
144	(c)			New clause and then reorder numbering underneath: (c) To determine the best process for resolving the complaint with the individual including conciliation, mediation, restorative justice,	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				arbitration or formal complaints mechanisms	
144	(d)		(d) for complaints and feedback that is better dealt with by other persons or bodies—to refer the complaints and feedback to those persons or bodies;	Amend to include: Those bodies to keep the Complaints Commissioner informed of the referred issue and promptly advise the Commissioner of the outcome of its consideration or examination of the complaint.	Necessary powers to provide personal protected information to the other bodies.
144	(e)		(e) to promote a culture for registered providers and aged care workers of raising concerns, open disclosure (including of complaints and feedback), and best practice in handling complaints and feedback, including by developing educational material and <b>promoting the use of advocates;</b>	Amend wording “ <b>ensuring</b> the use of <b>independent professional</b> advocates”.  Amend the wording to add “ <b>restorative justice</b> ” following open disclosure	We note with appreciation that restorative outcomes in the complaints handling framework. We understand this to be both a principle of how to approach complaints and the potential for a restorative outcome conference for some complaints. We believe therefore the complaints handling system must be legislated to apply these restorative outcomes into the processes of providers, along with the complaints process itself.  In addition, an obligation should be to ensure the use of independent professional advocates.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
144	(l)		(l) to give the Minister written reports on complaints received by the Commissioner as prescribed by the rules.	Amend: (l) to give the Minister written reports on complaints received by the Commissioner as prescribed by the rules <b>and to make these publicly available</b>	
144	New clause after (f)			'To promote and apply procedural fairness for any provider, responsible person or worker making or subject to a complaint'	Ensuring procedural fairness for all parties
144	New clause after (f)			'To provide training and education to aged care workers on incident reporting, complaints management and their rights and responsibilities when making a report or complaint, or when subject to a report or complaint'	Include training and education for workers
New Section				Appointment of First Nations Aged Care Commissioner The Commissioner must, in writing, appoint a person who is a member of the staff of the Commission, as the First Nations Aged Care	We note that our preference is for the First Nations Commissioner to be an Independent Commissioner appointed by the Minister.



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				Commissioner to assist the Commissioner in the performance of the Commissioner’s functions in relation to First Nations individuals.	
Add New Division			Establishment and functions of the Complaints Commissioner	<p>Transfer sections on Complaints functions (s144) and dealing with complaints (s183) from the Commissioner to the Complaints Commissioner.</p> <p>Replicate the relevant functions of the Commissioner to the Complaints Commissioner:</p> <ul style="list-style-type: none"> <li>• Appointment by the Minister for a specified period (s140)</li> <li>• Commissioner Functions (s141) – including the complaints functions, engagement and education functions and</li> </ul>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>targeted and specific safeguarding functions.</p> <ul style="list-style-type: none"> <li>• Safeguarding functions (s142) – focused on upholding rights and encouraging rights-based complaints practices, supporting registered providers to develop and implement effective complaint management systems, collect, correlate analyse and disseminate information related to complaints to identify trends of systemic issues and ensure that complaints can be made about registered providers, operators of aged care digital platforms and aged care workers with obligations under the Aged Care Code of Conduct.</li> <li>• Engagement and education functions (s143)</li> </ul>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<ul style="list-style-type: none"> <li>Complaint function (s144) including update (a) (ii) to include the ability to make complaints about “an aged care worker”.</li> <li>Minister may give directions (s149)</li> <li>Dealing with complaints (s183)</li> </ul>	
150			The Minister may, by written instrument, appoint a person to act as the Commissioner: (a) during a vacancy in the office of the Commissioner (whether or not an appointment has previously been made to the office); or (b) during any period, or during all periods, when the Commissioner:	Add reference to Complaints Commissioner	
151				Add: (X) The Complaints Commissioner is to be paid the remuneration that is	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Commissioner is to be paid the remuneration that is prescribed by the rules. (X) The Complaints Commissioner is to be paid the allowances that are prescribed by the rules.	
152	(1)		The Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.	Add: Complaints Commissioner	
	(2)		The Minister may grant the Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.	Add: Complaints Commissioner	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
153			The Commissioner must not engage in paid work outside the duties of the Commissioner's office without the Minister's approval.	Add: Complaints Commissioner	
154			The Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined, in writing, by the Minister.	Add: Complaints Commissioner	
155				Add (2) The Complaints Commissioner may resign the Commissioner's appointment by giving the Minister a written resignation.	
156	(1)		The Minister may terminate the appointment of the Commissioner	Add: "or Complaints Commissioner"	
156	(1)	(b)	(b) if the Commissioner is unable to perform the duties of the	Delete: "Commissioner is" then add "are" add "their" office	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			Commissioner's office because of physical or mental incapacity.	and delete "Commissioner's" office	
	(2)		The Minister may terminate the appointment of the Commissioner if:	After Commissioner add "or Complaints Commissioner"	
	(2)	(a)	The Minister may terminate the appointment of the Commissioner if: (a) the Commissioner:	Add: "they" and delete "Commissioner"	
	(2)	(a) (iii)	(iii) compounds with the Commissioner's creditors; or	Delete: "Commissioner's"	
	(2)	(a) (iv)	(iv) makes an assignment of the Commissioner's remuneration for the benefit of the Commissioner's creditors; or	Delete: "Commissioner's" and add their in front of remuneration	
	(2)	(b)	(b) the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or	Delete: "Commissioner" and add "if they are absent ...."	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
	(2)	(c)	(c) the Commissioner engages, except with the Minister's approval, in paid work outside the duties of the Commissioner's office (see section 153); or	Delete: "Commissioner's" and add "they engage, except ...."	
157	(2)	(a)	For the purposes of the Public Service Act 1999: (a) the Commissioner and the staff of the Commission together constitute a Statutory Agency; and	After the Commissioner, add "Complaints Commissioner", "Advisory Council",	
158			Persons assisting the Commissioner	Reference to Advocacy officer to get access	
New section				Composition of the Staff of the Commission The staff (employees and contractors) of the Commission must be appropriately and diversely skilled, including holding any relevant training and qualifications required to effectively carry out the roles	Include capability and qualifications section to Division 4 about the Staff of the Commission.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				and functions of the Commission.	
160	(1)		The annual report prepared by the Commissioner and given to the Minister under section 46 of the Public Governance, Performance and Accountability Act 2013 for a period (the reporting period) must include the following:	Add new subsection after (g) 'analysis of the registration of providers and any suspensions, revocations or variations, particularly where they have occurred alongside any reportable action taken under subsections (f) and (g)'	Include provider registration analysis.
160	(2)	(a)	For the purposes of subparagraph (1)(h)(i), the operational plan must: (a) set out particulars of the action that the Commissioner intends to take during the next reporting period to give effect to, or further, the objectives set out in the plan; and	Delete: Commissioner and replace with "Commission"	
160	(2)			New clause – (X) set out the Complaints Commissioner's priorities for	



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				work to be undertaken during the next reporting period; and	
160	(2)	(c)	set out how the Commissioner will apply the resources of the Commission to achieve those objectives; and	Update to refer to both the Complaints Commissioner and Commissioner’s priorities	
160	(3)		For the purposes of subparagraph (1)(h)(ii), in preparing the operational plan, the Commissioner must consult the Minister and the Advisory Council.	Add: “Complaints Commissioner, the” after consult the	
161	(1)		(1) The Minister may, by notice in writing given to the Commissioner, request the Commissioner to inquire into and report to the Minister on a matter mentioned in section 141.	Add: “The Minister may, by notice in writing given to the Complaints Commissioner, request the Commissioner to inquire into and report to the Minister on a matter mentioned in section 18X.”	
161	(2)		When a request is made under subsection (1), the Commissioner must inquire into the matter and give the Minister a	After the Commissioner add “or Complaints Commissioner”	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			report in writing on that matter.		
162			In preparing a corporate plan under section 35 of the Public Governance, Performance and Accountability Act 2013, the Commissioner must consult the Minister and the Advisory Council.	After consult add "Complaints Commissioner, the"	
162	(2)	(a)	The standards may only deal with the following: (a) requirements in relation to the liquidity and <b>capital adequacy</b> of registered providers that:		Should capital adequacy only be restricted to residential care?
162	(2)	(b)	(b) requirements in relation to the keeping of financial records relating to the delivery of funded aged care services, including records about refundable deposits, accommodation bonds, fees and payments;	Not defined. Inclusion of client contributions? Relating to both funded services and private services?	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
163	(2)	d	Requirements in relation to the disclosure and reporting, by registered providers, of information that may assist the Commissioner to: (i) monitor the financial viability and sustainability of registered providers; and (ii) monitor the compliance of registered providers with the other applicable requirements in the standards; and (iii) quantify prudential and financial risk relating to registered providers;	Add new clause: (iv) 'monitor a provider's expenditure of funding for its intended purposes'	Ensure the effectiveness of funding
164	(2)		The Commissioner must consult the System Governor before making standards under subsection 163(1).	After System Governor, add "the Complaints Commissioner and the Advisory Council"	The financial standards can relate to fees – the Complaints Commissioner should be consulted about that.
166	(2)		The aged care worker screening database must be kept in electronic form.	Add: "and published on the internet"	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
166				Add: (3) The aged care worker screening database must be accessible at no charge by older individuals accessing aged care services to search for aged care workers providing them funded aged care services.	
166	(5)	(e)	information relating to each screening applicant in respect of whom a decision (an <b>exclusion decision</b> ) (however described) is in force, under an aged care worker screening law, to the effect that the person, in working, or seeking to work, with individuals accessing funded aged care services does pose a risk to such individuals and information relating to the decision;	Rules and Explanatory Memorandum to provide more details on exclusion decisions	Is it clear that a banning order is an automatic exclusion decision and that it will appear in the worker screening register (as opposed to the register of banning orders)?

### Aged Care Quality and Safety Advisory Council

Section No.	Clause No.	Sub-clause	Current wording	Change	Rationale
172	(2)		An Advisory Council member holds office for the period specified in the instrument of appointment. <b>The period must not exceed 4 years.</b>	Add text about reappointments	Can reappointments occur?
172	(3)		A person is not eligible for appointment to the Advisory Council unless the Minister is satisfied that the person has substantial experience or knowledge in at least one of the following fields:	Add sub-clause stating substantial experience and knowledge in human rights, complaints management and processes and alternative dispute resolution including restorative practices	No reference to rights, complaints, restorative practices – missing requirements that would allow an appointment.
172	(4)		A person is not eligible for appointment to the Advisory Council if the person is a registered provider or a responsible person of a registered provider.	Add: after responsible person “or an aged care worker”	While individuals and entities regulated by the ACQSC should not be eligible for the Advisory Council, individuals with expertise (e.g. retired providers, union officials) not under regulation by the ACQSC should be. Therefore, current aged care workers should not be eligible to sit on the Advisory Council

## Complaints Commissioner

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
182			Appointment of Complaints Commissioner The Commissioner must, in writing, appoint a person who is an SES employee of the staff of the Commission as the Complaints Commissioner to assist the Commissioner in the performance of the Commissioner’s complaints functions.	Remove this section	New Complaints Commissioner to be independent and appointed by the Minister
183	(1)		The rules may make provision in relation to dealing with complaints made, or information provided, to the Commissioner about an entity’s compliance with this Act.	Add: “Complaints” Commissioner	
183	(2)	(a)	Without limiting subsection (1), the rules may make provision in relation to the following: (a) how complaints may be made to the Commissioner about:	Add: “Complaints” Commissioner	
183	(2)	(g)	(g) how the Commissioner may evaluate the effectiveness of actions taken to address complaints, including by following up on a sample of complaints;	Add: “Complaints” Commissioner	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
New section				<p><b>New Section: Minister may give directions</b></p> <p>(1) The Minister may, by legislative instrument, give written directions to the Complaints Commissioner about the performance of the Commissioner’s functions.</p> <p>Note: Section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the <i>Legislation Act 2003</i> do not apply to the directions (see regulations made for the purposes of paragraphs 44(2)(b) and 54(2)(b) of that Act).</p> <p>(2) A direction given by the Minister under subsection (1):</p> <p>(a) must be of a general nature only; and</p> <p>(b) must not relate to a particular registered provider or individual accessing, or seeking to access, funded aged care services.</p> <p>(3) The Complaints Commissioner must comply with a direction under subsection (1).</p>	

## Regulatory mechanisms

### Introduction

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
184			[ <b>Critical powers</b> —to be drafted.]		What are examples of critical powers envisaged?
184				<p>Add text in 184 Simplified outline of this Chapter on additional powers for the Complaints Commissioner. The additional powers of the Complaints Commissioner include:</p> <ul style="list-style-type: none"> <li>a) to require persons to attend before authorised officers to answer questions or give information or documents in relation to their functions;</li> <li>b) compel the production of documents;</li> <li>c) that enable an enforceable provision to agreed undertakings during the complaints process;</li> <li>d) to be an Authorised person to endorse complaints;</li> <li>e) to make determinations about a Complaint (comparable to action notices and compliance notices);</li> </ul>	



### Monitoring under Part 2 of the Regulatory Powers Act

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
196	(1)		The second reference to the occupier of premises in subsection 24(2) of the Regulatory Powers Act is taken to include a reference to any other person on the premises.	Explanatory Memorandum to provide examples of the practical use of this clause on both visitors and residents	Practical use of this on visitors and residents

### Monitoring and investigating under authorisation by Commissioner

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
215			Entering approved residential care homes under monitoring authorisations	Extended to advocacy officers	
216			Entering approved residential care homes under investigation authorisations	Extended to advocacy officers	
222			Protection from liability for authorised Commission officers and persons assisting	Similar protections for advocacy officers	

### Civil penalties under Part 4 of the Regulatory Powers Act

Section No.	Clause No.	Sub-clause	Current wording	Change	Rationale
229			Authorised applicant— Commissioner functions	Include Complaints Commissioner	

### Enforceable undertakings under Part 6 of the Regulatory Powers Act

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
General					The Complaints Commissioner to have enforceable undertaking power to conclude a complaint without reference to the Commissioner
New clause				Authorised person: Complaints Commissioner functions For the purposes of Part 6 of the Regulatory Powers Act, the Complaints Commissioner is an authorised person in relation to the provisions mentioned in section 246 of this Act that relate to a function of the Complaints Commissioner.	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
New clause	252			<p>Delegation by authorised person—Complaints Commissioner functions</p> <p>(1) The authorised person under section 247 may, in writing, delegate the authorised person’s powers and functions under Part 6 of the Regulatory Powers Act in relation to the provisions mentioned in section 246 of this Act that relate to a function of the Complaints Commissioner to a member of the staff of the Commission who is:</p> <p>(a) an SES employee or acting SES employee; or</p> <p>(b) an APS employee who holds, or is acting in, an Executive Level 2, or equivalent, position.</p> <p>(2) However, the authorised person under section 247 must not delegate a function or power to a person under subsection (1) of this section unless the authorised person under section 247 is satisfied that the person has suitable training or experience to properly perform the function or exercise the power.</p> <p>(3) A person exercising powers or performing functions under a delegation under subsection (1) must comply with any written directions of the authorised person under section 247.</p>	

**Notices requiring action**

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
General				Complaints Commissioner to have notice powers	
New clause				<p><u>26X Complaints Commissioner may give required action notices relating to Complaints Commissioner’s functions</u></p> <p>The Complaints Commissioner may give a registered provider a written notice (a required action notice) in relation to a matter that relates to the Complaints Commissioner’s functions if the Complaints Commissioner is satisfied of any of the grounds mentioned in section 264 in relation to the matter.</p>	
New clause				<p><u>26X Complaints Commissioner may vary or revoke required action notices</u></p> <p>(1) The Complaints Commissioner may, by written notice given to a registered provider, vary a required action notice given to the provider by the Commissioner if, at the time of the variation, the Commissioner considers that the variation is appropriate.</p> <p>(2) The Complaints Commissioner may, by written notice given to a registered provider, revoke a required action notice given to the provider by the Commissioner if, at the time of the revocation, the Commissioner considers that the notice is no longer appropriate.</p> <p>(3) In deciding whether to vary or revoke a required action notice given to a registered provider, the Complaints Commissioner must consider any written response received from the provider before the end of the period set out in the notice under paragraph 265(e).</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
New clause				<p>26X <u>Complaints Commissioner may give compliance notices relating to Complaints Commissioner’s functions</u>                      The Complaints Commissioner may give a registered provider a written notice (a <b>compliance notice</b>) if:</p> <p>(a) the Complaints Commissioner:</p> <p>(i) is satisfied that the provider has not complied, or is not complying, with this Act; or</p> <p>(ii) is aware of information that suggests that the provider may not have complied, or may not be complying, with this Act; and</p> <p>(b) the non-compliance or possible non-compliance relates to a matter that relates to the Complaints Commissioner’s functions.</p>	
New clause				<p>27X <u>Complaints Commissioner may vary or revoke compliance notices</u></p> <p>(1) The Complaints Commissioner may, by written notice given to a registered provider, vary or revoke a compliance notice given to the provider by the Commissioner if the Commissioner considers that it is appropriate in all the circumstances to do so.</p> <p>(2) In deciding whether to vary or revoke a compliance notice given to a registered provider, the Complaints Commissioner must consider any written response received from the provider before the end of the period set out in the notice under paragraph 271(e).</p>	
276+			Division 3— Adverse action warning notices	Do we envisage the Complaints Commissioner giving adverse warning notices - or referring to the Commissioner?	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
New clause				<p>27X <u>Notice to attend to answer questions etc. relevant to Complaints Commissioner’s functions</u></p> <p>(1) This section applies if the Complaints Commissioner reasonably believes that a person has information or documents relevant to:</p> <p>(a) whether a registered provider, or a former registered provider, is complying with this Act in relation to a matter that relates to the Complaints Commissioner’s functions; or</p> <p>(b) whether an individual who is or was an aged care worker of a registered provider, or a former registered provider, is complying, or has complied, with a provision of this Act that applies or applied to the individual.</p> <p>(2) The Complaints Commissioner may, by written notice, require the person to attend before an authorised Commission officer to do either or both of the following:</p> <p>(a) to answer questions relating to the matter;</p> <p>(b) to give such information or documents (or copies of documents) as are specified in the notice.</p> <p>(3) The notice must:</p> <p>(a) specify the authorised Commission officer before whom the person is required to attend; and</p> <p>(b) specify the day on which, and the time and place at which, the person is required to attend; and</p> <p>(c) if the person is a registered provider—inform the registered provider that it is a condition of the registered provider’s registration under section 115 that the registered provider must</p>	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				cooperate with a person who is performing functions, or exercising powers, under this Act. (4) The day specified under paragraph (3)(b) must be at least 14 days after the notice is given.	
New clause				<u>28X Notices to give information or produce documents required for Complaints Commissioner’s functions</u> (1) The Complaints Commissioner may, by notice in writing given to a person, require the person, within a reasonable time stated in the notice, to: (a) give the Complaints Commissioner any information; or (b) produce to the Complaints Commissioner any documents (or copies of documents); Specified in the notice that the Complaints Commissioner requires for the performance of the Complaints Commissioner’s functions. (2) The Complaints Commissioner may, by notice in writing given to the person, extend the time within which the information must be given, or documents or copies of documents must be produced in accordance with the notice under subsection (1).	
	285+		Subdivision C—Privilege against self-incrimination		What is the impact of this clause for open disclosure? How will it impact complaints?

### Critical failures powers

*Not in Exposure Draft – still to be drafted.*

### Banning orders

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
287	(2)	(a)	The Commissioner may make an order under subsection (1) affecting an individual (the affected individual) only if: (a) if the order is to prohibit or restrict the involvement of the affected individual in the delivery of funded aged care services generally— the Commissioner reasonably believes that the individual is unsuitable to be involved in the delivery of <b>funded aged care services</b> generally; or	Implications of “funded aged care services”. Are all pathways to service partners protected from this person being a subcontracted outsourced platformed non-registered service deliverer?	This is problematic, given that the regulations on platforms extend beyond “funded” aged care services.
288	(3)	(b)	The notice must: (b) invite the entity to make submissions, in writing, to the Commissioner in		No power to immediately stand down or suspension power. How does it work with AHPRA processes?



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			relation to the matter <b>within 14 days</b> after receiving the notice; and		
296			Division 3—Register of banning orders		Why a separate register - why not worker screening for workers, and if organisations is retained - registered provider register for organisations? See our recommendation for two registers, one for providers and one for workers.
297	(2)		Without limiting subsection (1), matters that assurance activities could relate to include the following: (a) how registered providers are using subsidy or grants and charging for funded aged care services, including justifications for amounts charged to individuals; (b) how registered providers are structuring their financial accounting for delivering	Add new subsection after (d) "how registered providers are expending funds and grants provided for specified purposes".	System Governor assurance activities include focus on the effectiveness of funding.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			funded aged care services; (c) how registered providers are delivering funded aged care services; (d) the nature and type of dealings that registered providers have with individuals to whom they are delivering funded aged care services; (e) the procedures and documentation of registered providers in relation to matters mentioned in any of the above paragraphs.		

### System Governor functions assurance activities

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
301			Civil penalty: 30 penalty units.	Lift the number of penalty units	This is less than \$10,000 which seems low for an organisation which is large and doesn't want to open their books. The least worst outcome is to pay a fine.

### Recoverable amounts

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
302	(2)	(a) (i)	Without limiting paragraph (1)(b), an entity is taken not to have been entitled to the payment of an amount if the payment should not have been made for one or more of the following reasons: (a) the payment was made as a result of: (i) <b>a computer error or an administrative error</b> ; or		What is the impact of this clause with now allowing System Governor decisions by a computer?
306	(2)		<i>Notice about payment made to account of deceased person after their death</i>		Can we confirm this is just to deal with registered provider who are individuals - nothing to do with any individual accessing aged care?

### Authorised Commission officers and authorised System Governor officers

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
313			<b>Appointment</b> of authorised Commission officers		Amendments are required to ensure that the Complaints Commissioner can delegate to any commission staff/officer. Consideration about the appropriateness of some officers holding delegations from both the Complaints Commissioner and the ACQS Commissioner should be considered.

## Information management

### Introduction

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
322	(2)	(b)	<p>This subsection covers the following:</p> <p>(a) personal information;</p> <p>(b) information that:</p> <p>(i) is information whose disclosure could reasonably be expected to <b>prejudice</b> the financial interests of an entity; and</p>	<p>Remove the words “whose disclosure could reasonably be expected to prejudice the financial interests of an entity”.</p> <p>Replace with “is information having a commercial value, whose disclosure would be, or could reasonably be expected to be, destroyed, or diminished if the information were disclosed.</p> <p>Alternatively, replace with “have a substantial and adverse effect”.</p> <p>Insert at the end ‘and for which it is not in the public interest to disclose’</p>	<p>On a plain English read – Any negative information can reasonably prejudice the financial interests of an entity.</p> <p>This appears to be a big exemption for providers – not much different to the problems that occur today.</p> <p>This wording change would ensure that protected information is in line with exemptions in Freedom of Information (FOI) legislation that has been subject to interpretation by the courts and provides a clearer and higher standard. The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation and there must be at least a real, significant or material possibility of prejudice. In the FOI guidelines the meaning of the wording is settled. An “adverse effect” is sufficiently serious or significant to cause concern to a properly concerned</p>

					reasonable person. The word “substantial” has been interpreted as “loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal”.
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### Confidentiality of information

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
323			A person commits an offence if: (a) the person records, uses or discloses information; and	Add/insert: (x) an official or delegate of the Complaints Commissioner;	Consider our recommendations on the legislated role of independent professional advocates and whether this clause has any impact on advocates (especially if they are a delegate of the Commissioner): a) generally b) if they are approved to get right of access under the orders of the regulator.
323	(4)		Paragraphs (1)(a) and (2)(a) do not apply to:	Add/insert: (c) an older individual accessing aged care, their supporter or representative in relation to matters involving the older individual.	Do Whistleblowers need an exemption to this or does the protection for Whistleblowers essentially protect from this? (We are

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(a) conduct of registered providers; or (b) conduct of aged care workers or responsible persons of registered providers in the course of performing their duties as aged care workers or responsible persons.		concerned this could prevent them disclosing the issue)
			Subdivision A— Authorisation of persons generally		Does this cover all aspects of complaints (including conciliation and mediation given clauses are missing)?
324			<b>Recording</b> , use or disclosure connected with function, duty or power under this Act		It is unclear whether the older person and their family retain a right to record their own environment.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
333			Recording, use or disclosure to <b>avert or report serious threat</b> to individual seeking or accessing funded aged care		Does including this imply that lesser non-compliance can't be disclosed. What's the impact on SIRS, complaints processes and / or whistleblowing?
New section				Disclosure for banning order register The Systems Governor may record, use or disclose protected information for the purpose of working out or publishing a banning order register of funded aged care services	Inclusion of disclosure for banning order register in the authorisation of recording, use or disclosure of protected information
336+			Subdivision B— Authorisation of System Governor, and Commissioner	Add/insert "Complaints Commissioner" after "System Governor"	
339	(2)		Each of the following is a <b>receiving</b> Commonwealth body:	Add/insert: Australian Competition and Consumer Commission (ACCC) Health Complaints bodies in each State and Territory	Why is the Australian Competition and Consumer Commission (ACCC) missing (noting referral to other complaint handling process better suited clause)?



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					Also, Health Complaints bodies in each State and Territory
343			Disclosure for State or Territory complaints process		Noting historically State and Territory Trade Practices dealt with complaints but now the ACCC will also have pathways to receive complaints.
344				<p>New clause:            34X <u>Disclosure to individuals and representative of individuals in the course of managing complaints.</u>            (1) The Complaints Commissioner, System Governor or Commissioner may disclose protected information pertaining to a registered provider, a responsible person, an aged care worker, data held by the System Governor, the Commissioner or the Complaints Commissioner, as it relates to an individual accessing, or seeking access, to funded aged care services, if the information is relevant to the Complaint Investigation process.            (2) For the avoidance of doubt, the disclosure in sub section (1) may occur to:            a) An individual accessing, or seeking access, to funded aged care services</p>	Older people should have access to their own data without restriction. This must include their medical file, care plan and case notes. There is ongoing disagreement at aged care service outlets whether older people and their representatives have this right, and the new Act must make this clear.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				b) Their supporter and/or representative of the individual, c) The legal representative of their estate following their death d) Their next of kin as at the time of their death e) Any person nominated to support the person through their complaints process, including but not limited to a legal representative, advocate or other person.	
350			Disclosures in public interest identified by Commissioner	Comparable powers for the Complaints Commissioner	
354			Limit on requirements to produce documents or answer questions		Consideration should be given to how to better operationalise open disclosure. We note that in the health system their 'Root Cause Analysis' process' enables open discussion amongst medical professionals with the security of those discussions not being discoverable. It is unclear whether such protections

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
					would extend to aged care, and consideration of whether they must be given to enable greater participation in open disclosure processes.
354	(a)		A court, or any other body or person that has power to require the production of documents or the answering of questions, may require a person to disclose protected information only if one of the following applies: (a) the disclosure is required for the purposes of this Act;		Is this sufficient for the Complaints process?

## Whistleblower protections

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
355	(a)	(i)	A disclosure of information by an individual (the discloser) qualifies for protection under this section if: (a) the disclosure is made to one of the following: (i) the Commissioner, or a member of the staff of the Commission;	Add/insert: "the Complaints Commissioner," after "the Commissioner"	
355	(a)			Add/insert: (x) an independent professional advocate	This is another reason why advocates need a recognisable function - so they can be afforded status for whistle blower disclosures. Often advocates can be the first person an individual discloses to when they contact the advocate for support.
356			Protections	Insert: "older person associated to the individual"	Suggest this needs to be updated to include an older person associated to the individual as well as the individual or is 358 (1) sufficient?

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
358	(1)	(b)	<p><i>Actually, causing detriment</i>                      (1) An entity is liable to a civil penalty if:                      (a) the entity engages in conduct; and                      (b) the entity's conduct causes any detriment to an individual (the first individual) <b>or to another individual</b> or to another entity that employs or is otherwise associated with the first individual; and</p>		<p>Not specific enough to make it clear</p>
358	(3)		<p><i>Threatening to cause detriment</i>                      (3) An entity is liable to a civil penalty if:                      (a) the entity makes to an individual (the first individual) a threat to cause any detriment to the first individual or to another individual or to another entity that employs or is otherwise associated with the first individual; and                      (b) the entity:</p>		<p>This clause while supported, is worded in a very difficult way which may result in confusion and misunderstanding of its intent. Given the likely audience relying on these provisions, efforts to make this clause clearer should be considered.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			(i) intends the first individual to fear that the threat will be carried out; or (ii) is reckless as to causing the first individual to fear that the threat will be carried out; and (c) the entity engages in the conduct because the entity believes or suspects that the first individual or another individual has, may have, or intends to make, a disclosure that qualifies for protection under section 355		
360			<i>Ensuring aged care worker disclosers are not victimised</i>	Add/insert: "Ensuring older people accessing aged care services and their carers who are disclosers are not victimised"	Include older people accessing services and their carers.
360	(2)		<i>Protecting discloser identities</i> (2) If an individual makes a disclosure to a registered provider that qualifies for protection under section 355, the provider must take reasonable measures to ensure that the fact that the individual was the maker		Does the representative need to be listed here, or is their status as doing things as the individual sufficient?

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			of the disclosure is not disclosed, <b>except</b> to one or more of the following:		
360	(2)	(a)	(a) the Commissioner	After "the Commissioner" add/insert "Complaints Commissioner and System Governor;"	

## Miscellaneous

### Delegation provisions

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
370			Delegation by Commissioner	Replicable powers for the Complaints Commissioner	

## Appointment of supporters and representatives

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
Part 4				New Section or Statement at 374 then re-order numbering: Nothing in these sections makes it a requirement that an individual must have a Supporter or Representative when accessing aged care. Providers cannot refuse or reject an application for their services if an individual does not have a supporter or representative.	An individual should not be required to have a supporter/representative/guardian/administrator/attorney to be accepted to receive aged care. There is concern that providers will attach these new roles to the current policy of not accepting applicants without EPOAs. It should be clear in the legislation that supporter/representatives should be offered, but a provider should not be able to reject an application only because someone does not have one.
374	(5)		The System Governor must not appoint a person to be a supporter of an individual if an appointment of a representative of the individual is in effect.	Removal	Older people should have the ability to have both supporters and representatives.



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
374	(5)	Note	If the System Governor intends to appoint a person as a supporter but there is already a representative of the individual, the System Governor <b>must</b> cancel the appointment of the representative: see subsection 388(3).	Removal	Should never happen
376	(2)		(2) The appointment may be made: (a) on the request of a person (including the individual) or body; (b) on the initiative of the System Governor	Amend: The appointment may be made: (a) On the request of the individual (b) At the request of another person or body (c) On the initiative of the system governor (d) Paragraphs (b) and (c) only apply where an individual has been independently assessed as no longer having	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				decision-making ability	
376	(6)		<p>(6) The System Governor must not appoint a person under 11 subsection (1) to be a representative of an individual unless: 12</p> <p>(a) the System Governor is satisfied that the person is able to comply with the duties of representatives referred to in subsection 30(1); and</p> <p>(b) the person has given consent to the appointment; and</p> <p>(c) the System Governor has taken into consideration the wishes (if any) of the individual regarding the making of the appointment; and</p> <p>(d) the System Governor has taken into</p>	<p>Reword this section:</p> <p>The System Governor must take the following into account, among other things, when appointing a representative</p> <p>(a) that the appointment of a representative is consistent with the will and preferences of the individual and</p> <p>(b) the desirability of preserving existing relationships with family and any other carers; and</p> <p>(c) whether the proposed Representative is compatible with the individual including culture, language, and other diversity characteristics; and</p> <p>(d) whether the proposed representative has a close</p>	<p>We recommend that provisions of the ACT Guardianship and Management of Property Act 1991 should be adapted and included in the System Governor’s considerations when appointing representatives.</p> <p>Under that Act, when appointing Guardians, the ACT Civil and Administrative Tribunal (ACAT) must take into account, among other things:</p> <p>(a) the views and wishes of the person (the protected person) for whom a guardian or manager is to be appointed; and</p> <p>(b) the desirability of preserving existing relationships with family and any other carers; and</p> <p>(c) whether the proposed guardian or manager is compatible with the protected person, including</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>consideration any other matters prescribed by the rules.</p> <p>Note: The consent of the individual is not required for the appointment of a person as a representative of the individual.</p>	<p>and continuing relationship with the person</p> <p>(e) whether the proposed representative lives close to the individual</p> <p>and</p> <p>(f) whether the proposed representative will be available and accessible to the individual</p> <p>(g) there is no significant contention about the appointment among people with a genuine interest in the wellbeing of the person.</p> <p>(h) the System Governor is satisfied that the person is able to comply with the duties of representatives referred to in subsection 30(1); and</p> <p>i) the person has given consent to the appointment; and</p> <p>(j) the System Governor has taken into consideration any</p>	<p>culture, language, and other diversity characteristics; and</p> <p>(d) whether the proposed guardian or manager lives in the ACT; and</p> <p>(e) whether the proposed guardian or manager will be available and accessible to the protected person. (Part 1A 4 (2))</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<p>other matters prescribed by the rules.</p> <p>Note: The consent of the individual is not required for the appointment of a person as a representative of the individual where the individual has been independently assessed as not having decision-making ability.</p>	
376	(4)		<p>If:</p> <p>(a) there is a person referred to in subsection 28(2) (which deals with guardians and persons in other similar positions) in relation to the individual; and</p> <p>(b) the person makes a request to be appointed as a representative of the individual;</p> <p>the System Governor must, subject to subsections (6) and (7),</p>	<p>Note: Link with Section 28 on Role of Guardians</p> <p>Note: The System Governor must not appoint someone who does not understand or value the person’s history, individuality, and preferences.</p>	<p>Linking note to Section 28 regarding guardians</p> <p>The System Governor must not appoint someone who does not understand or value the person’s history, individuality, and preferences.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			appoint the person under subsection (1).		
376	(7)		The System Governor must not appoint a person to be a representative of an individual if an appointment of a supporter of the individual is in effect.	Remove	Older people should have the ability to have both supporters and representatives.
377			The appointment of a person as a representative of an individual does not prevent the individual from doing a thing that the individual may otherwise do under, or for the purposes of, this Act.	Wording to include: <ul style="list-style-type: none"> <li>• How it works if a person has multiple representatives</li> <li>• How "jointly or severally" will work (is it a System Governor decision, or are all representatives able to act independently (with consultation with others))</li> </ul>	
378	(1)		If the System Governor <b>decides not to appoint</b> a person under subsection 376(1) to be a representative of an	Add: "provider should be notified"	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			individual, the System Governor must give notice of the decision to: (a) any person who, or body which, made a request to the System Governor to appoint the person; and (b) the individual.		
379			(i) The System Governor must give written notice of the appointment of a supporter or representative of an individual to the following: (a) the supporter or representative; (b) the individual; (c) each registered provider that delivers funded aged care services to the individual; (d) for an appointment of a representative—each other representative (if any) of the individual.	Amend: (a) the supporter or representative; (b) the individual; <b>(c) any appointed guardian, Enduring Power of Attorney or other decision- making body that has been appointed</b> <b>(d) carer, family members, representatives</b> (e) each registered provider that delivers funded aged care services to the individual; (f) for an appointment of a representative—each other	

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				representative (if any) of the individual.	
380	(1)	(a)	For the purposes of section 379, the information to be included in a notice given under that section is as follows: (a) the contact details of the supporter or representative appointed in relation to an individual;	Text regarding the notice of one appointment, advise the appointee of the contact details of all other supporters and representatives (as they have an obligation to consult with them)	
382				New Clauses and then re-number: <b>(6) A circumstance is that an independent professional advocate notifies the system governor of significant concerns about the behaviour of the representative, and the system governor</b>	Independent advocates are often contacted by individuals seeking support where an appointed substitute decision-maker is abusing them or denying them basic rights such as freedom of association. The role of an advocate should be embedded within this section to support the individual.  The appointment of a representative can be made at the request of an

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
				<b>reasonably believes this is occurring (7) The individual requests the suspension of the representative</b>	individual. Therefore, there need to be corresponding clauses that enable the individual to have choice and control over who the representative is and to have that person removed.
384	(3)	(b) (iii)	If the System Governor decides not to cancel the appointment under subsection (1): If: the other appointment being in effect after the suspension is revoked under subparagraph (a)(i) would result in a contravention of subsection 374(5) or 376(6);	Removal	Older people should have the ability to have both supporters and representatives.
387			(1) If an individual makes a written or verbal request to the System Governor to cancel the appointment of a person as a representative of the	Re-write: <b>(1) The System Governor must cancel the appointment of a person as a representative of an</b>	If the Act is rights-based and about choice and control, then the individual must have control over who the representative is, not the System Governor. If a request is made it must be followed through



Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>individual, the System Governor must consider the request and decide whether to cancel the appointment.</p> <p>(2) The System Governor must make the decision within:</p> <p>(a) if the System Governor requests further information or a document under subsection (3) in relation to the request— 9 days after receiving the further information or document; or 10</p> <p>(b) otherwise—28 days after receiving the request.</p> <p>(3) The System Governor may request further information or a document from any entity in relation to a request under subsection (1) if the</p>	<p><b>individual as soon as practicable if:</b></p> <p><b>(a) the individual makes a written or verbal request to the System Governor to cancel the appointment; or</b></p> <p><b>(b) an independent professional advocate on behalf of the individual makes a written or verbal request to the System Governor to cancel the appointment.</b></p>	<p>and not left up to the System Governor to decide.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>System Governor has reason to believe that the entity has information or a document that is relevant to the consideration of that request.</p> <p>(4) If the System Governor decides not to cancel the appointment, the System Governor must give written notice of the System Governor's decision to the individual and the representative</p>		
388	(2)		<p>A circumstance is that the System Governor intends to appoint a person as a representative of the individual but there is an appointment in effect of a person as a supporter of the individual.</p>	Remove	<p>Older people should have the ability to have both supporters and representatives.</p>

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
	(3)		A circumstance is that the System Governor intends to appoint a person as a supporter of the individual but there is an appointment in effect of a person as a representative of the individual.	Remove	Older people should have the ability to have both supporters and representatives.

## Grants

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
Overall				Ensure grants for National Aged Care Advocacy Program	
392	(2)		(1) The System Governor may, on behalf of the Commonwealth, make, vary or administer a grant of financial assistance to any person or body in relation to the carrying out of activities by the person or body for a	“(f) for specific populations as outlined in Section 22 (4)” (g) for timely, equitable supports for carers; (h) any other purpose prescribed by the rules.	Amend to ensure grant purposes may be funded for specific populations outlined in the proposed diversity population list clause.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			<p>purpose referred to in subsection (2).                      (2) The purposes are the following:                      (a) to initiate, sustain, support or increase the delivery of services to individuals in the aged care system, including during times of emergency;                      (b) to strengthen the capability of, and raise awareness among, registered providers and aged care workers and responsible persons of registered providers about the specialised complex needs of individuals accessing funded aged care services;                      (c) to provide additional support to address such specialised complex needs of individuals accessing those services;                      (d) to support and uphold the rights and entitlements of individuals accessing services in the aged care system;                      (e) to address aged care worker shortages and retention issues, including addressing capability and</p>		

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			qualification gaps in relation to the delivery of funded aged care services; (f) any other purpose prescribed by the rules.		
392	(2)		Power to enter into arrangements	Add: (f) provide timely, equitable support for carers	Amend to ensure grant purposes may be funded to provide timely, equitable support for carers
395	(g)		with respect to implementing any of Australia's international obligations under any of the following:		It appears the listed conventions for the purposes of grants do not cover the full gamut of opportunities. Consideration should be given to updating to include CEDAW for LGBTI, ICCPR for rural and remote, ICEARD for CALD, DRIP for First Nations.
395	(g)	(i)	with respect to implementing any of Australia's international obligations under any of the following: (i) Articles 2, 6 and 12(2) of the Covenant on Economic, Social and Cultural Rights;	Add: Article 5 (Article 5 – Equality and non-discrimination) after Article 2	This is critical for rights to be upheld and is not referenced.

### Use of computer programs to make decisions

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
Overall					This part has serious implications. There is no oversight, no publications of the systemic usage /accuracy of the decision-making (e.g. robodebt)
398	(3)		(3) The System Governor may, under section 59 or [to be drafted], 15 substitute a decision for a decision the System Governor is taken to 16 have made under subsection (2) of this section if the System 17 Governor is satisfied that the decision made by the operation of the computer program is incorrect.	Amend: (3) The System Governor may, under section 59 or [to be drafted], substitute a decision for a decision the System Governor is taken to have made under subsection (2) of this section if the System Governor is (a) satisfied that the decision made by the operation of the computer program is incorrect. <b>(b) an individual has raised a concern that the decision made by the operation of the computer program is incorrect</b>	Under a rights-based Act the older person must remain central to all parts of the Act. The use of computer programs removes older people from the centre of decisions. These clauses should be re-written to build in the rights of older people in this process.
398	(4)		(4) Subsection (3) does not limit any other provision of this Act that provides for the review	(4) Subsections <b>(1), (2)</b> and (3) does not limit any other provision of this Act that provides for the	Review and reconsideration processes should apply to all parts of this clause, including classification and prioritisation.

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
			or reconsideration of a decision.	review or reconsideration of a decision.	
398			New Clause	(5) All uses of a computer decision are monitored and audited, with the findings of the audit included in the public annual reports on the operations of the system	Transparency and effectiveness must be built in where computer programs are being used to make any decision.
399					All amendments recommended above must also apply to the Commissioner. There may be further recommended changes once it is made clear in what way a computer program may be used by the Commissioner to make decisions.

### Applications, requests, and notifications

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
400	(4)		If the System Governor approves a form under subsection (1), the System Governor must publish the form on the Department’s website.	Flexibility to have form being completed over the phone	

### Application fees and fees for services provided by the System Governor and Commissioner

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
Overall				Broad power. Is fee for service regulation back?	



## Reports on and review of this Act

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
411			Annual report on the operation of the Act	Include role for Inspector General	
412	(1)		The Minister must cause an independent review of the operation of this Act to be conducted within 6 months after the <b>fifth</b> anniversary of the commencement of this Act.	Delete "fifth" and replace with "third"	Regular review required to ensure improvements, the rights and needs of older people are met.

## Rules

Section No.	Clause No.	Sub - clause	Current wording	Change	Rationale
412	(3)		The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister.	Include "and released publicly 2 days after is has been tabled in Parliament".	
412	(4)		None – New Clause	The Minister must report to parliament and publicly on actions taken to address any identified issues in the report within 3 months of the report being tabled.	