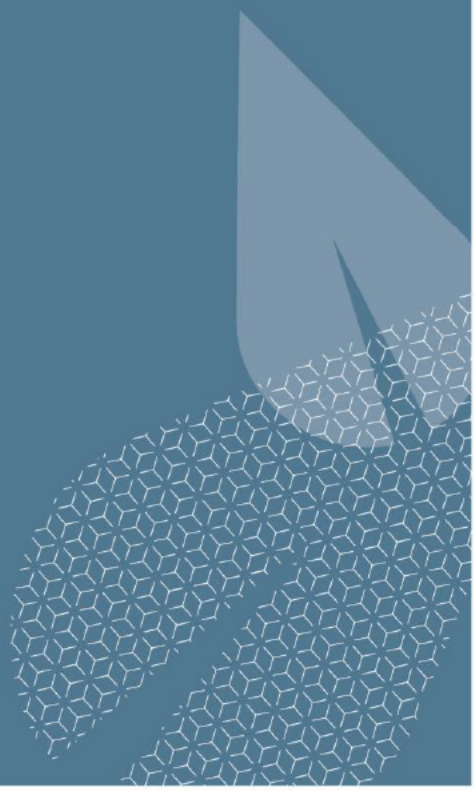
Anglicare

Response to the new Aged Care Act (Exposure Draft)

March 2024



About Anglicare Sydney

Anglicare Sydney is a leading not-for-profit faith-based provider of aged care services (including residential aged care and home care), retirement living services, and a range of community services in Sydney, the Blue Mountains, Lithgow, Southern Highlands, Illawarra, Shoalhaven, the Far South Coast, Norfolk Island and the New England and North-West regions of New South Wales.

We support over 4,500 clients living in the community and over 5,000 residents in residential care and retirement villages. Anglicare Sydney employs about 4,000 committed and skilled staff and is supported by about 1,500 volunteers.

In more than 70 years of providing aged care services, Anglicare Sydney has been guided by a commitment to quality service provision both clinically and holistically. This is underpinned by principles of dignity and choice, hope and compassion and supported by trained and caring staff.

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Executive Summary

Anglicare Sydney welcomes the opportunity to respond to consultation on the new Aged Care Act (Exposure Draft). We support initiatives that will create a more sustainable, resilient, and enduring aged care sector that delivers better quality care to older Australians. We also support a regulatory regime that ensures providers are held to account for how they treat their customers.

It is of great importance to stress that, as proposed in the Exposure Draft, the regulatory changes would most likely severely and adversely impact the aged care services that we all agree need strengthening. The sector operates under considerable pressure as a result of low margins, an ageing population, robust regulation, and a scarce workforce with high turnover. The proposed statutory criminal liability for individuals not only in the boardroom but extending to those at the bedside is an accountability that far exceeds those governing and working in our public health system, in the disability sector and other adjacent allied health services.

If enacted there will be an exodus of personnel from the aged care sector, services will necessarily be discontinued, and our public health system will be paralysed as it struggles with the ensuing demand. These unintended consequences are real. The Exposure Draft in its current form requires significant adjustment, it appears to have been drafted without appreciation of the sector and lacking the foresight to ensure that aged care flourishes rather than fails. We urge that the necessary time and revisions are given to the Bill.

Anglicare Sydney is promoting a number of recommended changes to the draft bill, many of which can be grouped into the following areas.

a. The promotion of the rights of individuals and their freedom of choice is important and the Bill seeks to do that. At the same time, **a sustainable, resilient, and enduring aged care sector** is also important. We ask that this be recognised in the objects of the new Act. This was a recommendation of the Aged Care Royal Commission (Royal Commission) and provides a critical balance of individual choice and sustainable service provision.

b. **Statutory liability** in the Exposure Draft is draconian. Our concern is threefold.

   First, liability for breach of statutory duty by responsible persons is criminal, not civil, and in the context where there is neither a requirement of gross negligence or recklessness nor inclusion of commensurate protections found in model Work Health and Safey laws (Model WHS Law). This is without precedent in any other sector – the asymmetric nature of this proposed regulation creates real risk of regulatory distortion with (amongst other things) an exodus of talent and skills from aged care to adjacent (unregulated) sectors (including NDIS and public / private health care).

   Second, the broad definition of responsible persons means that these duties are imposed on persons other than officers, including for example the head nurse at a residential care home. These persons should act diligently in carrying out their duties as workers; however, they should not be at risk of criminal liability (and a compensation pathway) for breach of statutory duty. This too in circumstances where criminal laws already apply for unlawful acts by responsible persons (and others).

Third, the proposed statutory duties means that responsible persons are personally at risk of civil action for breach of statutory duty. This will result in increased litigation, detract from restorative justice, prejudice insurance, further encourage a skills and talent flight from aged care and discourage volunteering.

c. **Clarity of definitions** is important. In our reading of the draft, we believe that homes within retirement villages may be inadvertently classified as a "residential retirement home" for instance; and that home care cannot be delivered to residential care. We do not expect that this is the intent of the legislation, but it is the effect of it. Anglicare Sydney believes that the principle which should apply, and in fact which we believe the government wishes to apply, is that regulation should follow funding (i.e. regulate the service that is being delivered, regardless of where it is being delivered) to ensure that individuals in receipt of care are able to choose where and how to live.

d. The Government has stated that it is bringing this legislation to the Parliament in order to implement the **recommendations of the Royal Commission**. Anglicare Sydney supports the implementation of those recommendations but notes that there are several important departures from those recommendations which make the draft legislation significantly harsher than envisaged by the Royal Commission. In our view, this over-reach is harmful, and is inconsistent with the representations the Government has made to the community.

e. **The great unknowns** of how the sector will be financed, and what the accompanying rules are, have not yet been provided. Accordingly, we are in the dark about the economics and the logistics of our operations under the new Act. This information will be critical to us, and we are eager to review and respond to it when it is released for consultation.

f. **Implementation** of the new Act on 1 July 2024 will be impossible for Anglicare Sydney. We are a large provider, and pride ourselves on being able to move swiftly and competently in responding to change in the sector. However, in this case we are not confident we will be able to do that. Training 5,000 staff, implementing new technology systems, designing new processes and procedures, educating many thousands of clients and their families on the supporters and representative regime and more takes time – a rushed, and likely chaotic implementation will only harm consumers and place staff at risk. Our concern is exacerbated by the mystery around the financing and regulations. As you would appreciate, these details are critical in order for us to plan for implementation.

Anglicare Sydney has worked collaboratively with a range of Australia's largest aged care providers on the Exposure Draft to jointly address the challenges and opportunities in the aged care sector. Anglicare Sydney broadly supports the submission prepared by the Aged & Community Care Providers Association (ACCPA) and endorses the co-signed letter from in-house General Counsels of leading for-profit and not-for-profit aged care providers in Australia (including Anglicare Sydney) raising concerns on the new statutory duties and compensation pathway.

Anglicare Sydney is committed to collaborating with the Commonwealth Government and the Department of Health and Aged Care to further develop the new Act and implementation timelines. Individuals, carers, workers, volunteers, and providers, together with the public, will benefit from a well implemented Act.

List of Recommendations

Objects of the new Act

Recommendation 1: That section 5(g) of the Exposure Draft be expanded so that it is consistent with Royal Commission Recommendation 3(xix).

Definitions and key concepts

Recommendation 2: That the aspirational nature of high quality care (section 19) be clarified and providers be appropriately funded to improve towards this standard.

Recommendation 3: That regulation as a residential care home (or a home or community setting) be determined based on funding. Section 9 be changed so that: (i) if a funded age care services is within the service group 'permanent residential care' then the place where that service is provided is a residential care home (and subject to Commissioner approval under section 67(1)(b)); and (ii) a place other than a residential care home is a home or community setting.

Recommendation 4: That section 8(7) be changed to allow all service groups (other than permanent residential care and residential respite care) to be delivered in any setting.

Recommendation 5: That the concept of associated provider be reviewed having regard to: (i) the broader policy objective of regulating 'shadow' (unregulated) providers, while avoiding statutory overreach and (unintended adverse) regulatory consequences. At the least, section 10(6) be changed so attributional liability arises only if a provider fails to exercise due diligence in respect of an associated provider.

Recommendation 6: That sections 10(4) (aged care worker) and 10(6) (associated provider) expressly exclude 'visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a care recipient but are not contracted by a provider'.

Aged care rights and principles

Recommendation 7: That section 20 be amended to recognise the need to balance the rights and responsibilities of all stakeholders in aged care, consistent with Royal Commission Recommendation 3(xix).

Recommendation 8: That the Statement of Principles include an enforceable statutory requirement that Commonwealth departments and agencies act in a manner compatible with the Statement of Principles.

Supporters and representatives

Recommendation 9: That subordinate legislation prescribe what is a 'decision under, or for the purposes of, this Act' for the purposes of sections 27 and 28. Provision for this subordinate legislation should be incorporated into the Act.

Recommendation 10: That statutory 'safe harbour' protections contained in section 34 of the Exposure Draft be extended to include protections for providers, responsible persons and aged care workers in respect of representative instructions.

Recommendation 11: That a clearly defined transition process be provided, including staff training materials, client-ready materials on the process of appointing supporters and representatives; and that interim appointment measures be included to ensure safe representation during the consideration period by the System Governor.

Entry to the Commonwealth aged care system

Recommendation 12: That the detailed eligibility arrangements that will be set out in the Rules be publicly released as soon as possible and that sufficient time be allowed to permit the aged care sector to properly consider and comment before the sector must apply and comply.

Recommendation 13: That assessments need to be flexible, based on circumstances and be limited to service groups and types, eliminating conditional approvals with provisions for unused funds to be returned to the Government.

Recommendation 14: That the Exposure Draft be amended to establish guaranteed assessment timeframes to provide certainty for older people and their families about access to care; and further, that sections 54 and 60(2)(c) be amended to ensure providers are properly informed about assessment.

Recommendation 15: That consultation is reopened when further information and the Rules are made available in relation to section 46(1)(c) and 46(2); and that the Exposure Draft be amended to insert guaranteed timeframes for evaluating eligibility for reassessment and determining the outcomes of reassessment on the System Governor.

Recommendation 16: That the Exposure Draft be amended to insert guaranteed timeframes required of the System Governor for classification reviews.

Recommendation 17: That the Exposure Draft be amended to include legislative provisions to ensure funding is provided and commences as soon as emergency entry is requested.

Statutory duties and compensation pathway

Recommendation 18: That the statutory duties penalties: (a) either accord with the Royal Commission's recommendations being civil penalties only (not criminal penalties) or otherwise require proof of a fault element (particularly in the case of individuals); and (b) include a requirement of prosecution and proof of failure to comply with the Aged Care Quality Standards (as applicable to provider registration categories) and no reasonable excuse.

Recommendation 19: That (a) the statutory duty in section 121 only apply to persons on the provider's governing body (as defined in section 7 of the Exposure Draft) or responsible for executive decisions (per section 11(1)(a) of the Exposure Draft), and not responsible persons; and (b) attribution liability accord with established concepts of high managerial agent or authorised person.

Recommendation 20: That the new Act expressly provides in a (new) section that (except as expressly set out in section 127 (Compensation pathway)) nothing in that Act confers a right in civil proceedings in relation to a contravention of that Act.

Recommendation 21: That 'safeguards' in the Model WHS Law be included in the new Act (including burden of proof, volunteers, removal of 'systematic pattern of conduct', legal professional privilege, limitation periods and maximum penalties). This necessitates a detailed side by side analysis be conducted as and between the Model WHS Law (and the model Heavy Vehicle National Laws (Model HVN Law) and the new Act. Where safeguards are not included then a detailed 'if not, why not?' explanation should be provided.

Recommendation 22: That the definition of aged care worker: (a) be confined to workers that are involved in the provision of aged care services; and (b) excludes volunteers. Further, sections 118 and 119 be redrafted to clearly define obligations.

Recommendation 23: That section 127 be changed to limit the compensation pathway to a provider only (and not responsible persons).

Recommendation 24: That the compensation pathway in section 127 be expressly limited to an individual receiving aged care services (and not to third parties).

Recommendation 25: That section 127 expressly provide that an individual not be able to recover the same damages twice under section 127 and general civil liability.

Recommendation 26: That the compensation pathway limitation period in section 127(2)(b) be 3 years (not 6 years).

Recommendation 27: That section 127 include other provisions and safeguards. For example: (a) the Civil Liability Act 2002 (NSW) addresses matters like contributory negligence and proportionate liability, but section 127 is silent on these matters; and (b) include a methodology as to how compensation is determined by a Court.

Fees, payments and subsidies

Recommendation 28: That there is a clear timeframe for the release of Chapter 4 and adequate time for sector-wide consultation of the crucial Chapter 4 of the Exposure Draft. It is essential that older Australians, service providers, and other key stakeholders are consulted on Chapter 4 before any legislation is introduced to Parliament.

Recommendation 29: That the role of co-contribution be clarified in the draft Chapter 4 or subordinate legislation.

Recommendation 30: That as a general principle, any additional funding arrangements support measures which facilitate innovation, research, best practice service, workforce engagement and development, and measures which meet unique needs of local regions.

Governance of the aged care system

Recommendation 31: That section 172(4) is removed to enable the Council to benefit from the significant operational and management expertise held by providers or a responsible person of a provider, consistent with Royal Commission recommendation 7.1.

Regulatory mechanisms

Recommendation 32: In Part 10 the threshold for issuance of notices be confined to where the Commissioner or System Governor (as the case may be) is satisfied that: (i) the

provider has not complied with, or is not complying with, the new Act; and (ii) that non-compliance is a serious failure.

Recommendation 33: The powers of the Commissioner and the System Governor in sections 278 to 283 (as the case may be) to issue notices to attend to answer questions or give information or documents (or both) expressly exclude matters subject to legal professional privilege.

Recommendation 34: That the power for the Commissioner to enter premises without warrant is conditional upon an immediate risk to the safety, health and wellbeing of people receiving aged care at those premises (consistent with Royal Commission recommendation 97).

Recommendation 35: That a clear timeframe is established for the release of the new critical failures powers and adequate time for sector-wide consultation on the new critical failures powers.

Information management

Recommendation 36: That section 117 be changed so that providers must exercise due diligence to ensure that personal information is protected.

Recommendation 37: That section 355(v) of the Exposure Draft be deleted so that aged care workers are not disclosure recipients, consistent with section 1317AAC of the Corporations Act 2001 (Cth) and Royal Commission Recommendation 9.

Miscellaneous

Recommendation 38: That the new Act provide that decisions made under the Act are reviewable internally and subject to both external merits review (e.g. the AAT) and administrative law judicial review (e.g. the Federal Court).

The reform timeline and readiness

Recommendation 39: That the System Governor and the Commission should develop, in partnership with the sector, a publicly available detailed sector implementation plan with timeframes and required actions for government and providers.

Recommendation 40: That the Government commit to funding and delivering a full and detailed communications campaign to older Australians, their families and advisers.

Recommendation 41: That the Government should ensure providers are sufficiently funded to implement the reforms to be included in the new Act.

1. Chapter 1 – Introduction

1.1. Objects of the new Act

The Exposure Draft provides in section 5(g) that the objects of the new Act include '*sustainable funding arrangements for the delivery of funded aged care services by a diverse, trained and appropriately skilled workforce*'. While this inclusion is helpful, it falls short of Recommendation 3(xix) of the Royal Commission, namely that '*the Australian Government will fund the aged care system at the level necessary to deliver [high quality and] safe aged care and ensure the aged care system's sustainability, resilience and endurance*'.

An aged care system that is appropriately funded to be sustainable, resilient, and enduring is key to innovative and accessible quality care for older Australians.

Recommendation 1: That section 5(g) of the Exposure Draft be expanded so that it is consistent with Royal Commission Recommendation 3(xix).

1.2. Definitions and key concepts

1.2.1. The meaning of high quality care

In reference to Question 3 of the Consultation Paper, Anglicare Sydney supports the aspirational goal of moving all providers to the provision of high quality care through ongoing continuous improvement, including through funding and regulation that promotes and enables innovation.

However, there is scope to improve the definition of high quality care (in section 19). For example, in the definition:

a. Attributes such as 'kindness' and 'compassion', necessary in the delivery of high quality care, are inherently subjective and difficult or impossible to measure.

b. 'Bilingual aged care workers and interpreters being made available if requested by the individual' is ideal and is often a part of the delivery of high quality care. However, in the context of workforce shortage, geographical challenges, and limitations on the availability of care workers with relevant language skills, this will not always be possible, despite the best intentions of providers. Accordingly, we recommend inclusion of the words 'where practicable' in section 19(c)(x).

The absence of these matters does not necessarily mean that high quality care is not being provided. We would argue that it is important to avoid an adverse inference, including by individuals and their families, that just because the statutory definition of high quality care is not met, a provider is not providing quality care.

Recommendation 2: That the aspirational nature of high quality care (section 19) is clarified and providers are appropriately funded to improve towards this standard.

1.2.2. Where funded aged care services are delivered

Section 9 describes where funded aged care can be delivered - *either in an approved residential care home or a home or community setting*. This description supports an individual's choice of the type of aged care service they receive in a place they choose. It also aligns with the Statement of Rights which supports an individual exercising choice and making decisions which effect their life.

Anglicare Sydney supports this important consumer right. However, we are concerned that sections 8 and 9 may result in unintended regulatory consequences for consumers, providers, and the Commonwealth by inappropriately limiting consumer choice and detracting from the Commonwealth policy objective to promote innovation and expand options for consumers to contribute to the cost of their aged care services.

By way of illustration, there are two scenarios to be considered.

1. **A private residence in a retirement village**

Section 9 risks capturing places that should not be regulated as a residential care home. For example, section 9(3)(b) provides for '*a place within a retirement village that has been converted*' to a '*place of residence of individuals who, by reason of sickness, have a continuing need for aged care services, including nursing services; and…is fitted, furnished and staffed for the purpose of providing those services*' to be regulated as a residential care home (pursuant to section 9 (2)).

In many retirement villages across Australia, including Anglicare Sydney's villages, individuals make modifications to their private home in a retirement village (e.g. toilet and shower modifications). These modifications are often enabled by home care funding so that the individual can age in place. Further, retirement villages commonly offer 24/7 on-call nursing (actual or virtual) services, again so that village residents can age in place (and not move to a residential care home).

However, section 9(3)(b) as drafted may mean that an individual's private home within a retirement village that has been 'converted' may be a 'residential care home' for the purposes of section 9(2). Indeed section 9(4) distinguishes between a private home within a retirement village (which may be a residential care home under section 9(2)) and private homes elsewhere (which cannot be a residential care home under section 9(2)). This then creates a regulatory disparity between individuals dependent on whether their private home is situated in a retirement village or not, namely:

- a modified private home in a retirement village of an individual who receives a funded aged care service (e.g. a Home Care Package) and other care supports may be regulated as a residential care home; and
- an identically modified private home in a place other than a retirement village of an individual who receives a funded aged care service (e.g. a Home Care Package) and other care supports will be regulated as a home or community setting (and not a residential care home).

This disparity risks being inconsistent with the objectives of promoting consumer choice and flexibility, ageing in place and a sustainable sector. It also disincentivises retirement village communities and increases government funded aged care in retirement villages.

Simply put, regulation should not be dependent on whether a private home is in a retirement village or another place. Instead, regulation should be determined based on funding – particularly if a funded age care services is within the service group 'permanent residential care' then the service should be regulated as a residential care home and subject to Commissioner approval under section 67(1)(b).

2. Cohabitation in a residential care home

Anglicare Sydney provides services to cohabiting residents who wish to move together from their home and continue to cohabit in a residential care home. Only one individual may need residential care. We want to support this consumer choice – it is important to our clients that wherever possible, couples can continue to reside and age together. This may mean that a couple cohabits in a residential care home – with one individual receiving permanent residential care services while the other receives funded home care services.

This necessitates legislation that enables flexibility so that a provider can provide both 'residential care' and home care funded aged care services in the one place (provided that that place is a residential care home). We are concerned that this may be precluded by section 8(1)(e) and request that the new Act specifically provide that both a residential care service and a home care service can be provided in the same place (being a residential care home).

Accordingly, section 8(7) should be changed to allow all service groups (other than permanent residential care and residential respite care) to be delivered in any setting.

Recommendation 3: That regulation as a residential care home (or a home or community setting) be determined based on funding. Section 9 be changed so that: (i) if a funded age care services is within the service group 'permanent residential care' then the place where that service is provided is a residential care home (and subject to Commissioner approval under section 67(1)(b)); and (ii) a place other than a residential care home is a home or community setting.

Recommendation 4: That section 8(7) be changed to allow all service groups (other than permanent residential care and residential respite care) to be delivered in any setting.

1.2.3. The concept of an associated provider

An 'associated provider' is an entity that 'engages in conduct under an arrangement with a registered provider relating to the registered provider's delivery of funded aged care services' (section 10(6)).

Anglicare Sydney supports the policy objective of regulating 'shadow' providers. That is, a provider should not be able to simply contract out of its statutory obligations by creating or utilising a shadow entity that operates as an unregulated service provider to a registered provider.

Section 10(6) appears to have broader application than section 96-4 in the (current) Aged Care Act 1997 (Cth). For example, section 96-4 applies to care provided on behalf of an approved provider, whereas section 10(6) extends beyond care to include conduct. Further, section 10(6) gives rise to statutory attributional liability including under section 88(3) (breach of conditions of registration) and potentially sections 120 and 121 (breach of statutory duties). In this context we raise two key concerns:

a. Regardless of whether a provider has exercised due diligence, section 10(6) creates attributional liability for providers by the mere conduct of an associated provider. These risks creating inequitable outcomes including potentially civil penalties under section 88(3) and criminal penalties upon a provider and responsible persons under sections 120 and 121 (as the case may be).

b. Further there is risk of regulatory distortion. To address the risk of attributional liability, providers are encouraged to insource (and not use associated providers). This may result in provider cost inefficiencies (derogating from sector sustainability) and adversely impact small and medium businesses (who provide aged care related services to providers as associated providers).

Anglicare Sydney has about 730 active arrangements with entities that may be associated providers.

Section 10(6) extends the definition of an associated provider to an entity which 'engages in conduct under an arrangement with a registered provider relating to the registered provider's delivery of funded aged care services'. Given the potentially broad scope of the term 'arrangement', if an individual (receiving aged care services) engages (and privately pays) an entity to provide services in circumstances where that entity has been recommended or facilitated by a provider, then there is risk that that entity may be an 'associated provider' of the provider. Further, in which case an employee etc of that entity will be an 'aged care worker' (pursuant to section 10(4)).

This should be contrasted with the current regulatory position where the Accountability Principles (to the (current) Aged Care Act) expressly note that 'visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a care recipient but are not contracted by the approved provider do not fall within the definition of 'staff member'.

Accordingly, the definitions of associated provider and aged care worker should each expressly exclude visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a care recipient but are not contracted by the provider.

Recommendation 5: That the concept of associated provider be reviewed having regard to: (i) the broader policy objective of regulating 'shadow' (unregulated) providers, while avoiding statutory overreach and (unintended adverse) regulatory consequences. At the least, section 10(6) be changed so attributional liability arises only if a provider fails to exercise due diligence in respect of an associated provider.

Recommendation 6: That sections 10(4) (aged care worker) and 10(6) (associated provider) expressly exclude 'visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a care recipient but are not contracted by a provider'.

1.3. Aged care rights and principles

1.3.1. Statement of Rights

Anglicare Sydney supports an individual rights-based approach to the new aged care system (underpinned by a Statement of Rights). In doing so that approach must have regard both to the individual's rights and the rights of others. This includes the rights of other individuals in aged care and the rights of aged care workers to health and safety. There are four substantive issues which need to be addressed.

1. Alignment with other laws

Consultation Paper No 2 provides that the focus of the new Act (simply put) is on what older people should expect when accessing services under the Act - other people's rights are dealt with in other legislation. However, this departs from Recommendation 3(xix) of the Royal Commission being that (emphasis added) 'people receiving aged care should respect the rights and needs of other people living and working within their environment and respect the general interests of the community in which they live…'.

The Exposure Draft and work health and safety (WHS) laws are not aligned. This means that providers are at risk of either breaching statutory duties under the new Act or under WHS laws. For example, on the one hand (pursuant to section 92 of the Exposure Draft) providers must (emphasis added) 'have in place practices to ensure delivery of funded aged care services…is not incompatible with the rights of individuals under the Statement of Rights' and 'demonstrate that...the safety, health and wellbeing and quality of life of individuals is the primary consideration...'. On the other, providers have a primary duty under the Model WHS Law to ensure (and in the case of their directors and officers exercise due diligence to ensure) the health and safety of workers. Failure to do so is, amongst other things, an offence under the Model WHS Law. This conflict is further exemplified by section 108 of the Exposure Draft which provides that a provider must comply with all applicable requirements imposed by Commonwealth, State and Territory law.

Accordingly, providers (and aged care workers) need (statutory) assurance that the Statement of Rights in the new Act does not conflict with WHS laws. While section 22(6) (an aged care system that values workers and carers) is recognised in the Exposure Draft, this objective does not appear to be included in the Statement of Rights nor sections 21 (Effect of Statement of Rights) and 92 (Rights and Principles).

2. Balancing rights with the rights of other individuals in aged care.

The Statement of Rights must be balanced by the responsibilities of individuals accessing aged care services (consistent with Royal Commission recommendation 3(xix)). These responsibilities must include not acting in a manner that is inconsistent with the lawful rights of others - this includes other individuals in aged care.

The rights of workers in aged care are paramount for ensuring the delivery of high quality care to older Australians. These rights not only safeguard the well-being and dignity of workers but also contribute directly to the quality of care provided to an ageing population. Balancing the rights of workers with other stakeholders, including the care recipient, their families, the provider, is crucial for creating a harmonious and effective aged care sector. The discrepancy in aged care

protection for workers compared to those in the disability and other allied sectors and both public and private health sectors highlights a systemic failure to prioritise the welfare and rights of workers across various domains of the care economy, particularly in aged care.

By upholding the rights of workers in aged care (consistent with Royal Commission recommendation 3(xix)), this will help in attracting and retaining staff in a struggling sector.

3. Sanctity of contract

Individuals accessing aged care also enter contracts with providers of aged care services. These contracts set out rights and obligations of both parties – the Statement of Rights must be consistent with these rights and not simply override or ignore lawfully agreed contractual rights and obligations.

4. Capacity to resource

Finally, the Statement of Rights does not appear to have sufficient regard to the finite resources of providers nor that those resources must be prioritised in a manner consistent with person-centred aged care. Conversely, section 22(9) recognises that, in the case of Commonwealth funding, there is a need to consider the availability and the needs of individuals relative to other individuals. Accordingly, a commensurate provision to section 22(9) in favour of providers should be included – for example in section 21 (Effect of Statement of Rights) and section 92 (rights and principles).

Recommendation 7: That section 20 be amended to recognise the need to balance the rights and responsibilities of all stakeholders in aged care, consistent with Royal Commission Recommendation 3(xix).

1.3.2. Statement of Principles

Anglicare Sydney supports the Statement of Principles in the Exposure Draft. However, there is no enforceable obligation on Commonwealth departments and agencies to comply with the Statement of Principles. Conversely section 92 of the Exposure Draft provides that it is a condition of registration that a provider does not act in a manner incompatible with the Statement of Rights. Particularly given the broad discretions and remedies available to the Commission and System Governor, the Statement of Principles should include an enforceable statutory requirement that Commonwealth departments and agencies act in a manner compatible with the Statement of Principles.

Recommendation 8: That the Statement of Principles include an enforceable statutory requirement that Commonwealth departments and agencies act in a manner compatible with the Statement of Principles.

1.3.3. Supporters and representatives

In reference to Questions 5-9 of the Consultation Paper, Anglicare Sydney queries the merits of the proposed supporter and representative regime. We are concerned that the proposed regime:

a. Will create an additional layer of confusion for aged care workers and providers as there is not a clear demarcation of what is (and is not) a decision 'under or for the purposes of, the Act' (Section 27(1)) and decisions pursuant to existing State and Territory substitute decision making laws. Further, the Exposure Draft contemplates multiple representatives without providing guidance for aged care workers and providers as to how conflicting instructions from multiple representatives are to be resolved. Given a supporter and representative under the new Act will only be a decision maker for matters relating to Commonwealth-funded aged care, there is a serious risk of multiple and conflicting decision-makers being involved in sensitive and time-critical matters. For example, if a resident of a residential care home needs to be transferred to a state hospital and a state-appointed guardian disagrees with a Commonwealth-appointed representative, who's decision making is to be followed? Or in the case of state-funded palliative care services being provided in a residential care home alongside Commonwealth-funded aged care? This confusion and duplication, particularly where an aged care worker may be subject to personal strict liability criminal offences, will create unnecessary stress and pressure.

   Clients and workers who participate in both NDIS and aged care will face further unnecessary complications, especially noting Action 2.11 of the recent NDIS Review. The approach and language of the nominee proposed is different from the Exposure Draft. We envisage situations where an individual who receives care from both NDIS and aged care are required to appoint nominees, representatives, and also state-based guardianship arrangements for the range of decisions relating to their care, with the potential for a different medical decision to be made by a nominee and a representative, with ensuing confusion for workers and providers.

b. The Exposure Draft does not (currently) include transition or grandfathering provisions. Accordingly, the supporters and representatives' regime will apply from commencement of the new Act on 1 July 2024. This transition will be complex. For example, the System Governor will need to undertake the considerable task of appointing all supporters and representatives, aged care recipients will need to be informed and enabled to appoint representatives and nominees, and providers will need to implement the new regime (including staff training and system changes).

c. Administration of the proposed system will require a significant number of staff at the Department of Health and Aged Care to receive, process and manage potentially tens of thousands (or more) of applications and disputes. At a time of significant budget pressures and competition for resources in the aged care system, it is unclear that the creation of this system justifies the investment of resources it will require when there is already a parallel and for the most part effective, State / Territory-based system.

Notwithstanding the comments above on the merits or otherwise of the proposed introduction of this system, our recommendations 9-11 make suggestions as to improvements to the proposed system.

Recommendation 9: That subordinate legislation prescribe what is a 'decision under, or for the purposes of, this Act' for the purposes of sections 27 and 28. Provision for this subordinate legislation should be incorporated into the Act.

There must be a defined, timely and appropriate dispute resolution procedure, coupled with a statutory 'safe harbor' immunity from suit for aged care workers and providers. Similar provisions to sections 33 and 34 which give protection to individuals, supporters and representatives should be extended to aged care workers and providers where they have acted on a reasonable basis with due diligence.

Recommendation 10: That statutory 'safe harbour' protections contained in section 34 of the Exposure Draft be extended to include protections for providers, responsible persons and aged care workers in respect of representative instructions.

Recommendation 11: That a clearly defined transition process be provided, including staff training materials, client-ready materials on the process of appointing supporters and representatives; and that interim appointment measures be included to ensure safe representation during the consideration period by the System Governor.

2. Chapter 2 – Entry to the Commonwealth aged care system

2.1. Eligibility for entry

In reference to Question 10 of the Consultation Paper, we are supportive of a simplified entry to aged care. The following comments are based on our interpretation of the Exposure Draft and draw on Anglicare Sydney's and residents' experiences of delay with the current eligibility and access arrangements. Specific details are required to make a full assessment on how this will impact individuals, including on matters such as application processes, decision timeframes, assessment tools, qualifications and competence of assessors, prioritisation, place allocation, emergency placements, fees, and subsidies.

The transitional arrangements must guarantee that all older Australians who are in the assessment and approval process for aged care services are not disadvantaged by the incoming eligibility criteria. This is particularly significant for those people current receiving either Home Care Packages or CHSP.

A proposed solution is that grandfathering arrangements be put in place so that:

a. all people currently undergoing assessment, or with an approval for certain programs and services within those programs (e.g. CHSP services) should maintain their eligibility for those services. We recommend that people waiting for service allocation should fit into the prioritisation system of the new Act, with a caveat of a maximum wait time; and

b. all people currently receiving aged care service (i.e. with approved and allocated services) retain the right to continue receiving those services.

However, all people who are currently undergoing assessment or in receipt of services should have the opportunity to elect to be re-assessed under the new eligibility arrangements if they wish to do so. The current process includes lengthy wait times between approval and assignment of home care packages. The opportunity for re-assessment will be important if peoples' needs change during this wait period.

To further ensure that older Australians accessing aged care services are not disadvantaged, and to relieve burden on the single assessment system during transition, Anglicare Sydney supports the retention of current CHSP flexibility arrangements. This will enable providers to continue to meet clients' increasing needs during the transition period.

The Consultation Paper states that 'alternative entry arrangements' will be formalised, which will help provide mechanisms for people to access aged care services in urgent or emergency circumstances. Anglicare Sydney strongly supports this inclusion and encourages that the details of these arrangements be finalised, including the mechanisms for providers to access subsidies or grants in a timeframe that reflects the urgency of the situation. The final arrangements should include timeframe commitments, not only for any reimbursable costs in such circumstances, but also for the period between registration for assessment and assessment to approval (in both emergency and non-emergency circumstances).

Anglicare Sydney is supportive of the process for delegate review post initial assessment, as we believe this will best ensure consistency of assessment, budget management and independence,

we are however cautiously concerned that the additional process of delegate review will create further delays for older Australians receiving funded aged care services.

Finally, we acknowledge that quality aged care support often requires collaboration between different providers and other parts of the broader health care system. As part of the transition to new eligibility requirements, consideration should be given to the services being accessed by individuals which are not part of the aged care system. For example, we currently work closely with community nursing programs and the Local Health District community palliative care programs to support clients who choose to die at home. With end-of-life care included in short-term aged care services, we want to ensure that older people are not excluded from receiving the best support possible care, particularly when that involves comprehensive collaboration between and access to different systems. Not all providers have the skills, competencies, or multidisciplinary staff to deliver high quality end-of-life care. Further, State and Territory health systems are not bound by, nor are required to comply with the requirements for Commonwealth funded aged care services. More thought about the interplay between aged care and other health services is highly encouraged (Ch1).

Recommendation 12: That the detailed eligibility arrangements that will be set out in the Rules be publicly released as soon as possible and that sufficient time be allowed to permit the aged care sector to properly consider and comment before the sector must apply and comply.

2.2. The needs assessment process

In reference to Question 13 of the Consultation Paper, the assessment process outlined in the Exposure Draft and Consultation Paper is well constructed.

a. Home care assessments

Anglicare Sydney does however raise concerns about the lack of guaranteed timeframes for each step of this process, noting that 'as soon as practicable' (section 45(1)) may not enable timely service commencement. Although we support the intention behind the aim for the majority of assessments to occur in the consumer's home in a face-to-face context (p.35 of the Consultation Paper), we have seen the impact of the current assessment wait times for Home Care Packages which are conducted in the home. Anglicare Sydney's frontline staff report these wait times can vary between six weeks to three months for in-home assessments, depending on the ACAT within different Local Health Districts. In contrast, assessments for CHSP (which are usually conducted via phone) are undertaken quickly and service commencement can occur in a much shorter timeframe. Defined timeframes for each phase of the process, especially for the System Governor's response and classification assessment, are deemed essential.

Anglicare Sydney appreciates the Department's acknowledgment that online assessments may be required, and we encourage that the rationale for online assessments be flexible and based on circumstances, including situations such as the urgent need for care, geographical remoteness, or when an established wait time for face-to-face has been exceeded. We recommend that in these situations, the next reassessment be completed in-home. (p.35 of the Consultation Paper).

Assessment for individual services should be removed. Assessment should be limited to service groups and service types within that group. Our experience of service provision is that clients'

needs, and choice, change too often for the current arrangements to be practicable. We anticipate that the requirement for reassessment will become a barrier to receiving timely and appropriate care (Ch2, Part 1, 36, also 47:2: ii). We acknowledge the inclusion of conditional approvals (Ch 2, p 38 of Consultation Paper No.2) but this is an unnecessary complication. Assessment should capture all reasonable needs, and these should be included in the support plan. If funds are not used, they should be returned to the Government.

Recommendation 13: That assessments need to be flexible, based on circumstances and be limited to service groups and types, eliminating conditional approvals with provisions for unused funds to be returned to the Government.

b. Residential care assessments

We submit there is need for clarity in section 54 specifically regarding notifying providers of assessment revocations and contestation by a resident or their representative. There must be opportunity for the provider to contest the specifics of the request, based on assessed needs, especially if the individual is already in residential care receiving services and waiting on the needs (re)assessment.

Section 60(2)(c) provides that 'reasons for a decision' be included in any notice. We suggest that more detail be provided in this subsection, such as information that supports the classification decision including the specific outcomes of the assessment tool.

Anglicare Sydney recommends the inclusion of timeframes in the new Act at section 61(1) to create funding certainty for providers. We suggest that the funding takes effect from the date of request for the assessment and not when the System Governor provides written notice of the classification decision.

Recommendation 14: That the Exposure Draft be amended to establish guaranteed assessment timeframes to provide certainty for older people and their families about access to care; and further, that sections 54 and 60(2)(c) be amended to ensure providers are properly informed about assessment.

2.3. Reassessment

In reference to Question 14 of the Consultation Paper, further detail (likely in the Rules) is required to comment on the adequacy of Section 46 (1)(c) and 46 (2). However, we do raise concerns about the lack of guaranteed timeframes for the decision maker. The System Governor must notify an individual within 14 days if their application for reassessment is rejected. However, there should also be guaranteed timeframes for assessing the eligibility for reassessment and for the reassessment outcomes.

The specific provision for flexibility is addressed by way of a 'reassessment on the papers.' While it is good to see that there is provision for a 'lighter touch' reassessment in the new Act, the conditions under which it can be used and the details about how it will be conducted are not provided. It is therefore difficult to comment on their adequacy.

Recommendation 15: That consultation is reopened when further information and the Rules are made available in relation to section 46(1)(c) and 46(2); and that the Exposure Draft be amended

to insert guaranteed timeframes for evaluating eligibility for reassessment and determining the outcomes of reassessment on the System Governor.

2.4. Classification review

In relation to Question 15 of the Consultation Paper, the new arrangements appear to be more onerous and increase the time required. No guarantee has been made around the timeframes from requesting a classification review to a change to the classification level. Additional detail about who can request a classification review should be included. This should include the consumer seeking or accessing care, their representative, or their nominated registered provider, with consumer consent. This should apply regardless of the service group or type the classification is related to.

Recommendation 16: That the Exposure Draft be amended to insert guaranteed timeframes required of the System Governor for classification reviews.

2.5. Emergency entry

Regarding Question 16 of the Consultation Paper, there is currently a lack of information concerning emergency entry. Anglicare Sydney recommends the inclusion of explicit guidelines in the new Act regarding funding for emergency entry. This should include detail about the provider being funded from the date of the initial eligibility request until the assessment is conducted and finalised. In the event of a denial of entry to residential care, the legislative framework should describe the funding provisions for services rendered between the time of entry and the time of denial of entry. This should acknowledge potential variations between the default rate. This is important if such provisions prevent an individual further burdening an overstretched hospital system.

Recommendation 17: That the Exposure Draft be amended to include legislative provisions to ensure funding is provided and commences as soon as emergency entry is requested.

3. Chapter 3 – Registered providers, aged care workers and digital platforms

3.1. Statutory duty and compensation

Anglicare Sydney broadly supports the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and for this duty to apply to both providers and officers (like the Model WHS Law).

However, as drafted, the proposed statutory duties and compensation pathway in the Exposure Draft risk undermining the stated policy aims of reforming aged care, including by deterring individuals from being employed or otherwise engaged (including as directors, volunteers, or both) in funded aged care services. They also risk injustice and an abrogation of common law "safeguards."

In particular, the statutory duties propose:

a. strict liability criminal offences coupled with a compensation "pathway" for vague, ill-defined, inequitable, and poorly worded obligations - which obligations materially and adversely differ from commensurate legislation (e.g. the Model WHS Law and the Model HVN Law); and

b. disproportionate criminal penalties and potential (personal) liability to compensate. For example, this includes potential penalties of 1,000 penalty units ($313,000) or 5 years imprisonment or both and a compensation pathway against responsible persons. There is little or no justification made for the provision of criminal offences.

Importantly, the proposed statutory duties:

a. do not accord with the Royal Commission's recommendation 101 – that recommendation proposed civil penalties, not criminal penalties. Instead, independent of the Royal Commission, the introduction of criminal penalties appears to emanate from ALP policy – as set out ALP Media Release "Stronger Penalties to Protect Older Australians in Aged Care" dated 3 April 2022 (ALP Media Release). However, Part 5 of Chapter 3 of the Exposure Draft now imposes only criminal (and not civil) penalties. Further, none of the offences include a "fault" element (including notably both of sections 120(6) and 121(7) which prescribe a penalty of 5 years imprisonment). This appears inconsistent with the ALP Media Release which expressly refers to criminal penalties in the case of a "deliberate breach";

b. materially (and adversely) depart from corresponding statutory duty legislative frameworks, including the Model WHS Law which law is a well understood, non-industry specific framework prescribing statutory duties. Indeed, the statutory duties framework in the Model WHS Law has been commensurately adopted in other industries (e.g. the Model HVN Law). This is not the case in the Exposure Draft; and

c. do not accord with the Royal Commission's recommendation 101 – that recommendation proposed civil penalties, not criminal penalties. Instead, independent of the Royal

Commission, the introduction of criminal penalties appears to emanate from ALP policy – as set out However, Part 5 of Chapter 3 of the Exposure Draft now imposes only criminal (and not civil) penalties. Further, none of the offences include a "fault" element (including notably both of sections 120(6) and 121(7) which prescribe a penalty of 5 years imprisonment). This appears inconsistent with the ALP Media Release "Stronger Penalties to Protect Older Australians in Aged Care" dated 3 April 2022 which expressly refers to criminal penalties in the case of a "deliberate breach".

d. are asymmetric – equivalent duties and the compensation pathway do not apply in adjacent industries (e.g. NDIS and allied sectors, public and private health). This creates regulatory distortion risking an (unintended) exodus of key talent to adjacent (and other) industries and further exacerbating aged care workforce shortages.

Further, these duties and pathway threaten to impugn not only remunerated individuals, but also the many dedicated volunteers who are critical to the ongoing viability of the aged care sector. This includes volunteers who serve as governing body members and directors on not-for-profit providers. Indeed, volunteers are key in aged care, particularly in faith-based not-for-profits, providing companionship, social interaction and activities that enhance the quality of life for older Australians. Their support extends to assisting staff, bridging connections to the community, and offering diverse skill sets for enriching the experiences of those receiving aged care. The proposed statutory duties will adversely impact volunteering in the sector.

In the circumstances, as currently drafted, the statutory duties and compensation pathway risk:

a. deterring individuals from working (including as volunteers) in aged care, including governing bodies. This too in the context where providers are already experiencing challenges to meet legislated governing body independence requirements. In the medium to long term, this will undermine sector sustainability and detract from the quality of aged care services (to the detriment of consumers). This is contrary to legislative objectives (for example, section 22(6) - an aged care system that values workers and carers) and disregards circumstances where typically aged care workers are not highly paid and have other employment options available to them. These options include adjacent sectors like public and private health and NDIS where there are no equivalent duties, criminal penalties nor compensation pathway;

b. injustice and an abrogation of common law "safeguards;"

c. providers limiting the scope and geographical reach of aged care services due to increased regulatory risk (and uncertainty); and

d. other potential consequences, including adverse impacts on the cost and availability of insurance (in a tight insurance market) and finance.

Accordingly, we recommend the proposed statutory duties and compensation pathway (as currently drafted) be carefully assessed. In this regard, we encourage you to also review the submission from provider in-house General Counsels on the Exposure Draft in the appendix

(which letter provides a detailed analysis of the implications of the prosed statutory duties and compensation pathway). Anglicare Sydney fully supports and endorses that submission.

Recommendation 18: That the statutory duties penalties: (a) either accord with the Royal Commission's recommendations being civil penalties only (not criminal penalties) or otherwise require proof of a fault element (particularly in the case of individuals); and (b) include a requirement of prosecution and proof of failure to comply with the Aged Care Quality Standards (as applicable to provider registration categories) and no reasonable excuse.

Recommendation 19: That (a) the statutory duty in section 121 only apply to persons on the provider's governing body (as defined in section 7 of the Exposure Draft) or responsible for executive decisions (per section 11(1)(a) of the Exposure Draft), and not responsible persons; and (b) attribution liability accord with established concepts of high managerial agent or authorised person.

Recommendation 20: That the new Act expressly provides in a (new) section that (except as expressly set out in section 127 (Compensation pathway)) nothing in that Act confers a right in civil proceedings in relation to a contravention of that Act.

Recommendation 21: That 'safeguards' in the Model WHS Law be included in the new Act (including burden of proof, volunteers, removal of 'systematic pattern of conduct', legal professional privilege, limitation periods and maximum penalties). This necessitates a detailed side by side analysis be conducted as and between the Model WHS Law (and the model Heavy Vehicle National Laws (Model HVN Law) and the new Act. Where safeguards are not included then a detailed 'if not, why not?' explanation should be provided.

Recommendation 22: That the definition of aged care worker: (a) be confined to workers that are involved in the provision of aged care services; and (b) excludes volunteers. Further, sections 118 and 119 be redrafted to clearly define obligations.

Recommendation 23: That section 127 be changed to limit the compensation pathway to a provider only (and not responsible persons).

Recommendation 24: That the compensation pathway in section 127 be expressly limited to an individual receiving aged care services (and not to third parties).

Recommendation 25: That section 127 expressly provide that an individual not be able to recover the same damages twice under section 127 and general civil liability.

Recommendation 26: That the compensation pathway limitation period in section 127(2)(b) be 3 years (not 6 years).

Recommendation 27: That section 127 include other provisions and safeguards. For example: (a) the Civil Liability Act 2002 (NSW) addresses matters like contributory negligence and proportionate liability, but section 127 is silent on these matters; and (b) include a methodology as to how compensation is determined by a Court.

4. Chapter 4 – Fees, payments, and subsidies

Anglicare Sydney looks forward to providing feedback on fees, payments, and subsidies when Chapter 4 is available. It is important that sector-wide consultation and adequate time for proper consideration is allowed so that implications for individuals, workers and providers are fully explored.

Anglicare Sydney is concerned that there are multiple reform processes ongoing, including the Support at Home Reforms and the pending Aged Care Taskforce Report. Without a full picture of how these reforms will fit together to form the 'architecture' of the future aged care sector, it is difficult to comment on the long-term sustainability of the aged care sector.

Recommendation 28: That there is a clear timeframe for the release of Chapter 4 and adequate time for sector-wide consultation of the crucial Chapter 4 of the Exposure Draft. It is essential that older Australians, service providers, and other key stakeholders are consulted on Chapter 4 before any legislation is introduced to Parliament.

4.1. Subsidies

4.1.1. Person-centred and provider-based subsidies

In reference to Question 22 of the Consultation Paper, until the draft of Chapter 4 is provided, Anglicare Sydney is unable to provide meaningful feedback on whether the categorisation of subsidies into person-centred and provider-based will result in genuinely person-centred care. However, we note that an explicit intention to include client contribution has not been mentioned in the consultation paper and we recommend that more details are provided when the expectation of any co-contribution is clear.

Recommendation 29: That the role of co-contribution be clarified in the draft Chapter 4 or subordinate legislation.

4.1.2. Flexibility arrangements

In relation to Question 24 of the Consultation Paper, without the specific details of the additional funding arrangements, Anglicare Sydney is unable to comment in detail. However, flexibility arrangements must be included that allow older people to choose which services they spend their budget as their needs change. Over the past year, the Department's commitment to unpacking the true cost of care has been clear, and Anglicare Sydney is deeply appreciative of the consultative approach taken in this endeavour. We strongly encourage that this work be continued, and complemented with public awareness campaigns about the value, and the cost, of quality aged care provision. We look forward to a strengthened partnership between the Department, aged care sector and consumers on this matter.

The infusion of additional funding would offer valuable opportunities to implement innovative care solutions and services, which are currently unattainable within the confines of the existing funding structure. The determination of a 'particular purpose' lacks a defined explanation, leaving uncertainty about its interpretation and criteria. Anglicare Sydney is strongly supportive of measures which facilitate innovation, research, best practice service, workforce engagement and

development, and measures which meet the unique needs of local regions. Providers should be given access to additional funds for these purposes, with pathways for long-term financial sustainability built into models of additional funding. Too often, pilot programs with excellent results are abandoned due to a lack of long-term viability or ongoing pathways for delivery.

Recommendation 30: That as a general principle, any additional funding arrangements support measures which facilitate innovation, research, best practice service, workforce engagement and development, and measures which meet unique needs of local regions.

5. Chapter 5 – Governance of the aged care system

Regarding Question 28 of the Consultation Paper, Anglicare Sydney supports a thriving aged care system with providers that are financially viable and sustainable. Accordingly, in principle, we support liquidity and capital adequacy requirements that are appropriate to the risk profile being extended to home care providers.

All aged care providers need to be able to pay their debts as and when they fall due, and particularly pay their workers on a weekly/fortnightly cycle, and all providers including home care providers need to have appropriate resources to manage their costs of operations where there are potential timing risks or lags on the income size. However, the risk profile of residential care and home care business are different, accordingly we support liquidity and capital adequacy requirements that are proportionate to the risks of the provider.

5.1. Aged Care Quality and Safety Advisory Council

The Advisory Council performs an important sector role (as laid out in section 169), and providers should continue to have a seat at the table as it enables government to receive valuable insight, feedback and discuss impacts of current and new regulatory reforms. Section 172(4) expressly rules a person not eligible for appointment 'if the person is a registered provider or a responsible person of a registered provider.' Exclusion of approved providers is inconsistent with Royal Commission Recommendation 7.1 which states that the Council should be 'drawn from all relevant aspects of the aged care system, including…approved providers.'

Recommendation 31: That section 172(4) is removed to enable the Council to benefit from the significant operational and management expertise held by providers or a responsible person of a provider, consistent with Royal Commission recommendation 7.1.

6. Chapter 6 – Regulatory mechanisms

6.1. Notices requiring action

In reference to Question 29 of the Consultation Paper, Anglicare Sydney is concerned by the low and subjective thresholds for the exercise of the Commissioner and System Governor powers (as the case may be) and a lack of transparency. With respect to the thresholds for the exercise of the Commissioner's powers:

1. The Commissioner and the System Governor has powers to issue a required action notice or compliance if there is 'information that suggests that the provider may not have complied with this Act' (Section 264). The threshold of 'suggests' is too low. The issuance of a notice is a serious matter and may (amongst other things) have a material adverse impact on a provider (including reputationally and on star rating). Accordingly, the threshold for issuance should be confined to where the Commissioner or System Governor (as the case may be) is satisfied that: (i) the provider has not complied with, or is not complying with, this Act; and (ii) that non-compliance is a serious failure.

2. The powers of the Commissioner and the System Governor in sections 278 to 283 (as the case may be) include issuing notices to attend to answer questions or give information or documents or both which matters may be subject to legal professional privilege. These powers abrogate common law rights and materially detract from a person's right to obtain legal advice (including so that they can be fully informed as to the scope of their duties). Section 269 of the Work Health and Safety Act 2011 (Cth) includes provisions to the effect that nothing in that law compels a person to give information to another person that is the subject of legal professional privilege. There is no such safeguard in the Exposure Draft. The proposed powers should not extend to matters the subject of legal professional privilege.

Recommendation 32: In Part 10 the threshold for issuance of notices be confined to where the Commissioner or System Governor (as the case may be) is satisfied that: (i) the provider has not complied with, or is not complying with, the new Act; and (ii) that non-compliance is a serious failure.

Recommendation 33: The powers of the Commissioner and the System Governor in sections 278 to 283 (as the case may be) to issue notices to attend to answer questions or give information or documents (or both) expressly exclude matters subject to legal professional privilege.

6.2. Entering a resident's home without consent or warrant

In reference to Question 30 of the Consultation Paper, the threshold for entering premises without consent or a warrant is insufficient to justify the exercise of that power. Royal Commission recommendation 97 proposed that the power to enter premises without a warrant be confined to where 'the regulator reasonably believes that there is an immediate and severe risk to the safety, health and wellbeing of people receiving aged care.' However, sections 220 and 221 do not include a requirement that entry without a warrant must be contingent upon an immediate risk to the safety, health, or wellbeing of those receiving aged care at the relevant premises. Entry onto

premises without a warrant is a serious matter and should only be undertaken where it is not practicable to obtain a warrant. It must be remembered that premises include residential care homes or private homes – both are the private places of residence for individuals.

Further, this threshold is lower than commensurate laws, for example under section 135 of the Competition and Consumer Act 2010 (Cth) which permits the ACCC to enter premises without a warrant only where the exercise of power 'is required without delay in order to protect life or public safety'.

Accordingly, authorisation to enter premises without consent or a warrant should be directly linked to the immediacy of a risk.

Recommendation 34: That the power for the Commissioner to enter premises without warrant is conditional upon an immediate risk to the safety, health and wellbeing of people receiving aged care at those premises (consistent with Royal Commission recommendation 97).

6.3. Critical failures powers

In reference to Questions 32 and 34 of the Consultation Paper, we understand that it is proposed that, Part 11 will include new critical failures powers. We welcome this consultation and look forward to providing comments as part of that consultation. It is important that adequate time is allowed for informed and appropriate consultation and recommend that this be factored into the proposed timeline for enactment and commencement of the new Act.

Recommendation 35: That a clear timeframe is established for the release of the new critical failures powers and adequate time for sector-wide consultation on the new critical failures powers.

7. Chapter 7 – Information management

7.1. Scope of protected information

Section 117(1) requires providers to 'ensure' that personal information is protected. This drafting may have material unintended consequences, including that providers risk contravening this section by:

a. factors outside of its control, such as falling victim to a cyber-attack. 'Ensuring' the protection of personal information may require providers to pay a ransom demand, which is not recommended by the Commonwealth Government; and

b. innocent errors such as accidentally sending an email to an incorrect email address.

Accordingly, the requirement to 'ensure' should be replaced with a requirement for providers to exercise due diligence including by implementing appropriate systems and procedures for the protection of personal information.

Recommendation 36: That section 117 be changed so that providers must exercise due diligence to ensure that personal information is protected.

7.2. Whistleblower protections

In relation to Questions 35 and 36 of the Consultation Paper, pursuant to section 1317AAC of the Corporations Act 2001 (Cth), eligible recipients of whistleblowing disclosures are limited to officers or a senior manager of the entity (or a related body corporate), an auditor or actuary of the entity (or a related body corporate) and a person authorised by the entity. This list of eligible recipients is limited so that whistleblower disclosures are both duly investigated in accordance with law and importantly so that statutory protections are met (e.g. as to confidentiality and protection from detriment etc).

It is proposed that under section 355 a whistleblowing disclosure can be made to (amongst others) an aged care worker (whether employed, contracted or volunteering). This proposed extension of eligible recipients to include aged care workers is inconsistent with the whistleblower regime in the Corporations Act and Royal Commission recommendation 99. An unintended consequence of extending the disclosure regime is that it creates onerous obligations on 'aged care workers' who would then be subject to significant criminal and civil penalties is whistleblower protections are inadvertently contravened. No clear policy rationale has been provided for this significant extension to the whistleblowing regime.

Recommendation 37: That section 355(v) of the Exposure Draft be deleted so that aged care workers are not disclosure recipients, consistent with section 1317AAC of the Corporations Act 2001 (Cth) and Royal Commission Recommendation 9.

8. Chapter 8 – Miscellaneous

In reference to Question 37 of the Consultation Paper, subject to customary safeguards (e.g. protection of customer information), Anglicare Sydney is supportive of an independent body to review decisions under aged care laws. Indeed, given the proposed discretions and significant new powers of the Commission, for transparency and accountability, we consider that it is essential that Commission decisions under the new Act are reviewable. This should include both internal review and both external merits review (e.g. the AAT) and administrative law judicial review (e.g. the Federal Court).

Recommendation 38: That the new Act provide that decisions made under the Act are reviewable internally and subject to both external merits review (e.g. the AAT) and administrative law judicial review (e.g. the Federal Court).

9. Chapter 9 – The reform timeline and readiness

Anglicare Sydney supports the Government's aged care reforms and is committed to timely implementation. However, we have significant concerns regarding the proposed timing for implementation of the new Act by 30 June 2024. We believe poor implementation could lead to unintended consequences for older Australians, aged care workers and service providers, jeopardising the very objectives these reforms aim to achieve. There are several issues to consider:

a. **Public and individuals and their families** – Government will need to run a significant change and communications campaign to explain to older Australians and their carers, what is changing, why, how it will impact them and what they need to do. A range of print and digital resources in multiple languages will need to be developed to ensure that the changes are consistently communicated. There will also need to be a mechanism for individuals (and even providers) to ask specific questions such as an information phone line, email or web chat supports.

b. **Workers** – Staff will need to understand what the new Act means for them, including specifically how it changes their obligations and the potential penalties they may face (section 118). Staff will also require training, for example, on the rights of individuals and how the new supporter and representative's regime operates.

c. **Providers** - the potential strain on providers expected to adapt swiftly to the changes. Without much detail pertaining to the timeline this will hinder providers' ability to comprehensively understand and implement the required adjustments. This could result in operational disruptions, increased compliance costs, and, most importantly, a compromise in the quality of adherence to the new regulations.

d. **Policies and procedures** – A range of internal policies, procedures, tools, forms, and other resources that are used by clients or workers will need to be updated to reflect the rights of individuals, the revised assessment process, the new decision-making roles. Providers will need adequate time to identify the changes required, plan, test and refine. This will come at considerable cost and require the use of third-party vendors (e.g. lawyers, clinical advisors, consultants).

e. **Systems and technology** – The new Act will require significant technology change to bring financial, clinical, and operational systems into compliance. The lead time for such changes is in the order of months at best (and likely longer if hundreds of providers are all seeking to make systems changes in parallel). The current legislative timetable does not allow time to make systems changes, which will result in either manual workarounds (increasing cost) or increased risk of non-compliance for providers.

9.1. Case Study: Aged Care Quality Standards 2019

Our understanding of the implementation effort required is informed by Anglicare Sydney's experience with other significant reform. One recent reform is the Aged Care Quality Standards 2019 which was a significant and costly process and required a 12-month period.

A significant amount of time was dedicated to planning and preparation. This included developing new resources, conducting training for staff, and communicating the changes.

Significant updates to technology, data systems, and infrastructure to meet the requirements of the new standards, including third party vendors.

Update of internal Anglicare Sydney practices, policies, and procedures to align with the new standards. This was a time intensive and costly process.

In comparison to the Aged Care Quality Standards, the new Act has significantly higher change complexity, with broader change impacts for individuals, workers, and providers. A successful implementation approach must be appropriately resourced and allow for realistic timelines. Our best estimate is at least 12 months is required, from the time the complete Act and Rules are available, to ensure a smooth transition for the aged care sector.

In order to manage a seamless sector-wide transition for individuals and their families, workers and providers, a publicly available detailed sector implementation plan with required actions for government and providers. This should be co-developed by the System Governor, the Commission, and the sector. The plan should be communicated across the sector and include information on how the changes relate to other aged care reforms to ensure reforms are synchronised and structured to adapt to a changed and changing aged care sector. The Government should also commit to a funding and delivering a communications plan to older Australians both those receiving and not receiving funded aged care services, their families and advisers, about the reforms and changes to the aged care sector and its regulation both before the new Act commences and after; and that it stand-up sufficient resources to react to concerns after implementation commences.

Recommendation 39: That the System Governor and the Commission should develop, in partnership with the sector, a publicly available detailed sector implementation plan with timeframes and required actions for government and providers.

Recommendation 40: That the Government commit to funding and delivering a full and detailed communications campaign to older Australians, their families and advisers.

Recommendation 41: That the Government should ensure providers are sufficiently funded to implement the reforms to be included in the new Act.

Closing Statement

Anglicare Sydney appreciates this opportunity to provide feedback on a critically important Act which will impact the sector for decades to come. We are available to provide further feedback or commentary if required.

[redacted]

Simon Miller
Chief Executive Officer
Anglicare Sydney

Appendix – Letter from in-house General Counsels on the Exposure Draft

29 February 2024

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Chief Executive Officer
ACCPA

Mr Mark Rigotti
Chief Executive Officer
AICD

Dear Sir/Madam

Exposure Draft of Aged Care Bill 2023 (Exposure Draft)

We write in our capacity as in-house general counsel of a mix of leading for-profit and not-for-profit aged care services providers in Australia.

The purpose of this letter is to set out our material concerns with the proposed statutory duties and compensation provisions (as currently drafted) in Part 5 of Chapter 3 (Statutory Duty and compensation) of the Exposure Draft. Many of our respective provider organisations are making separate submissions. This letter is supplementary to those submissions.

To be clear, we broadly support the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and for this duty to apply to both providers and officers (like the model Work Health and Safety Laws (Model WHS Law)).

However, as drafted, the proposed statutory duties and compensation pathway in the Exposure Draft risk undermining the stated policy aims of reforming aged care, including by deterring individuals from being employed or otherwise engaged (including as directors or volunteers or both) in funded aged care services. They also risk injustice and an abrogation of common law "safeguards".

1. Executive Summary

The statutory duties propose:

a) strict liability criminal offences coupled with a compensation "pathway" for vague, ill-defined, inequitable and poorly worded obligations - which obligations materially and adversely differ from commensurate legislation (e.g. Model WHS Law and model Heavy Vehicle National Laws (HVN Law)); and

b) disproportionate criminal penalties and potential (personal) liability to compensate. For example, this includes potential penalties of 1,000 penalty units ($313,000) or 5 years imprisonment or both and a compensation pathway against responsible persons. There is little or no justification made for the provision of criminal offences.

Importantly, the proposed statutory duties:

a) do *not* accord with the Royal Commission's recommendation 101 – that recommendation proposed civil penalties, *not* criminal penalties. Instead, independent of the Royal Commission, the introduction of criminal penalties appears to emanate from ALP policy – as set out ALP Media Release "Stronger Penalties to Protect Older Australians in Aged Care" dated 3 April 2022 (ALP Media Release). However, Part 5 of Chapter 3 of the Exposure Draft now imposes only criminal (and not civil) penalties. Further, none of the offences include a "fault" element (including notably both of sections 120(6) and 121(7) which prescribe a penalty of 5 years imprisonment). This appears inconsistent with the ALP Media Release which expressly refers to criminal penalties in the case of a "deliberate breach";

b) materially (and adversely) depart from corresponding statutory duty legislative frameworks, including the Model WHS Law which law is a well understood, non-industry specific framework prescribing statutory duties. Indeed, the statutory duties framework in the Model WHS Law has been commensurately adopted in other industries (e.g. the HVN Law). This is not the case in the Exposure Draft; and

c) are asymmetric – equivalent duties and the compensation pathway do not apply in adjacent industries (e.g. NDIS, public and private health). This creates regulatory distortion risking an (unintended) exodus of key talent to adjacent (and other) industries and further exacerbating aged care workforce shortages.

Further, these duties and pathway threaten to impugn not only remunerated individuals, but also the many dedicated volunteers who are critical to the ongoing viability of the aged care sector. This includes volunteers who serve as governing body members and directors on not-for-profit providers.

In the circumstances, as currently drafted, the statutory duties and compensation pathway risk:

a) deterring individuals from working (including as volunteers) in aged care, including governing bodies. This too in the context where providers are already experiencing challenges to meet legislated governing body independence requirements. In the medium to long term, this will undermine sector sustainability and detract from the quality of aged care services (to the detriment of consumers). This is contrary to legislative objectives (for example, section 22(6) - an aged care system that values workers and carers) and disregards circumstances where typically aged care workers are not highly paid and have other employment options available to them. These options include adjacent sectors like public and private health and NDIS where there are no equivalent duties, criminal penalties nor compensation pathway;

b) injustice and an abrogation of common law "safeguards" (as described in section 2 below);

c) providers limiting the scope and geographical reach of aged care services due to increased regulatory risk (and uncertainty); and

d) other potential consequences, including adverse impacts on the cost and availability of insurance (in a tight insurance market) and finance.

Accordingly, we recommend the proposed statutory duties and compensation pathway (as currently drafted) be carefully reviewed including having regard to the matters raised in this letter. To assist in that review, we have set out in Section 2 of this letter proposed solutions to resolve the issues raised. Please note that the matters raised in this letter are not exhaustive – we strongly urge that time is taken to carefully consider the statutory duties and compensation pathway.

We would welcome the opportunity to meet and discuss this further (and are happy to provide a markup of proposed changes to Part 5 of Chapter 3 if that assists).

2. Concerns with the statutory duties and compensation pathway:

Our concerns (together with a summary of proposed solutions) are set out in detail as follows:

a) **Part 5 of Chapter 3 does not align with the Royal Commission's recommendations:**

Recommendation 101 of the Royal Commission provided for civil penalties (not criminal penalties) to apply in the case of a provider breach of statutory duty. The proposed introduction of criminal penalties was not recommended by the Royal Commission. Indeed, it is apparent from the Royal Commission's recommendation that civil penalties are adequate and sufficient – an objective need for criminal penalties was not established. Despite this, as noted above, the Exposure Draft proposes in Part 5 of Chapter 3 only criminal (and not civil) penalties.

Further, the ALP Media Release contemplates that criminal penalties (only) apply where there is a fault element. For example, that release references (emphasis added) "introducing criminal penalties – including jail time - for dodgy aged care providers who seriously and repeatedly facilitate or cover up abuse and neglect of older Australians, and who deliberately breach the general duty of care they owe to their residents."

Indeed, that Release is consistent with the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers2 (the Guide) which provides at page 22 "*The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (i.e. recklessness).*"

In the circumstances, if criminal penalties are to apply for breach of statutory duties, then (especially in the case of individuals) those penalties should be confined to circumstances where there is a fault element (e.g. recklessness or negligence as defined in the *Commonwealth Criminal Code Act 1995 (Cth)* (**Criminal Code**)). Criminal penalties should *not* apply (at least in the case of individuals) for a failure to exercise due diligence.

Accordingly:

(i) like the Model WHS Law and HVN Law, the requirement of a fault-based element (e.g. recklessness or negligence) should be included in sections 120(6) and 121(7);

(ii) the (strict liability) criminal penalties proposed in in Part 5 of Chapter 3 (e.g. sections 120(3) and (5) and 121(4) and (6)) should be removed as they do not include a fault element; and

(iii) as part of establishing any offence under sections 120 and 121 the prosecution should also prove that there is no reasonable excuse.

Finally, Royal Commission recommendation 101 provided that (civil) penalties (on a provider) would only apply where (amongst other things) there was a failure to comply with the Aged Care Quality Standards. This important requirement (and safeguard) has *not* been included in either section 120 or section 121 of the Exposure Draft.

***Proposed solution**: The statutory duties penalties: (a) either accord with the Royal Commission's recommendations being civil penalties only (not criminal penalties) or otherwise require proof of a fault element (particularly in the case of individuals); and (b) include a requirement of prosecution proof of failure to comply with the Aged Care Quality Standards (as applicable to provider registration categories) and no reasonable excuse.*

b) Duties imposed on individuals are unjust:

The primary duty under the Model WHS Law and section 180 of the Corporations Act 2001 (Cth) (Corporations Act) (care and diligence) is confined to officers (only) (as defined in section 9 of that Act). The definition of officer is well understood. Conversely, under section 121 of the Exposure Draft, statutory duties apply to "responsible persons'' (as defined in section 11 of the Exposure Draft). That definition is not well understood and extends beyond officers to other persons including "middle management" – for example, a registered nurse in a managerial role at a residential care home is a responsible person.

However, unlike an officer, those other persons are unlikely to "make or participate in making decisions that affect the whole, or a substantial part, of the business of the corporation" (per section 9 of the Corporations Act). Consequently, the proposed statutory duty risks imposing criminal liability and a compensation pathway, even where that person is unable to exercise due diligence (pursuant to section 121(2) of the Exposure Draft). For example, section 121(2)(c) of the Exposure Draft provides that due diligence includes "to ensure that the registered provider has... appropriate resources...to manage adverse effects to health and safety of individuals accessing funded aged care services delivered by the provider".

By way of illustration, in the case of a provider with multiple residential care homes, it is unrealistic (and unjust) to require that a nurse in a managerial role in one residential care home "ensure appropriate resourc[ing]" within that home or across other residential care homes operated by that provider or both. This is contrary to other provisions in the Exposure Draft including section 22(6) - an aged care system that values workers and carers.

As a matter of completeness, we note that sections 120(7) and 121(8) of the Exposure Draft provide for the general defence of "reasonable excuse". Notably, the defendant bears the evidential burden of proof of establishing this defence. Also, the Guide provides at page 52 that "the defence of reasonable excuse should generally be avoided" including as "[t]he defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established." Accordingly, the defence of reasonable excuse cannot be used as a "workaround" for statutory overreach. Instead, these penalty provisions must be carefully drafted - the defendant should not bear the risk (and evidential burden) of having to prove their innocence by way of this defence.

Further, section 10(6) of the Exposure Draft deems conduct of an associated provider to be conduct of a provider for the purposes of the Act. This means that a provider and responsible persons may contravene their statutory duties and be subject to criminal penalties and the compensation pathway by conduct of an associated provider. This is too broad and may lead to a miscarriage of justice. This should be contrasted with the extension of attribution liability by:

(a) section 12.4 of the Criminal Code, where liability is attributed in respect (only) of a "high managerial agent: being a senior person within an organisation whose conduct could be fairly assumed to represent the body corporate's policy"; or (b) an "authorised person" being officers, employees and agents acting within their actual or apparent authority.

Proposed solution: *(a) the statutory duty in section 121 applies to persons on the provider's governing body (as defined in section 7 of the Exposure Draft) or responsible for executive decisions (per section 11(1)(a) of the Exposure Draft), and not responsible persons; and (b) attribution liability accord with established concepts of high managerial agent or authorised person.*

c) Consequences for breach of duty are indeterminate under civil law:

Sections 120(1) and 121(1) of the Exposure Draft create statutory duties on providers and responsible persons (as the case may be). It is unclear what the consequences are if a provider or responsible persons or both breach their statutory duties (in circumstances where such breach does not constitute an offence under sections 120(3) – (6) or 121(4) – (7) or both (as the case may be)).

This is illustrated by corresponding legislation, for example:

(i) section 33 of the Work Health and Safety Act 2011 (Cth) (WHS Act) provides that if a person has a health and safety duty and that person fails to comply with that duty, then that person commits a (Category 3) offence; and

(ii) section 26H of the HVN Law provides that if a person has a safety duty and that person contravenes that duty, then that person commits a (Category 3) offence.

Accordingly, does a breach of the statutory duty in sections 120(1) or 121(1) or both (as the case may be) give rise to a penalty? If so, does an individual affected (or their family members) have an action in tort for breach of statutory duty against the provider or responsible persons or both?

If it is proposed that a breach of statutory duty by responsible persons under section 121(1) "lifts the corporate veil" and exposes that person to risk of regulatory or other actions (including civil litigation), then this further reinforces our concerns described above.

If not, then the Act must expressly provide accordingly. For example, section 267(a) of the WHS Act provides that (except as expressly provided) nothing in that Act confers a right in civil proceedings in relation to a contravention of that law. There is no such provision in the Exposure Draft.

These matters need to be addressed. Otherwise, providers and responsible persons risk indeterminate liability in tort for breach of the statutory duty in sections 120(1) or 121(1). This will undermine the viability of the aged care sector.

Proposed solution*: The new Aged Care Act expressly provide in a (new) section that (except as expressly set out in section 127 (Compensation pathway)) nothing in that Act confers a right in civil proceedings in relation to a contravention of that Act.*

d) The proposed statutory duties omit important safeguards that are included in corresponding laws:

Part 2 of the WHS Law and Chapter 1A of the HVN Law contain analogous statutory duties to those proposed in the Exposure Draft. However, the Model WHS Law and HVN Law each include important safeguards that are omitted from the Exposure Draft. These omissions include:

(i) Section 18 of the WHS Act defines what is "reasonably practicable" in ensuring health and safety. Section 18(e) includes the requirement to assess *"the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."* This requirement has *not* been included in the equivalent provision in the Exposure Draft, namely section 120(2). This requirement is a key element of risk management and a risk based regulatory framework (see section 5(e) of the Exposure Draft). Providers (just like other businesses and undertakings) do *not* have unlimited resources and nor should they. In fact, provider resources are further constrained by the Government funding they receive to deliver the services. Providers must exercise diligence and judgement to allocate (scarce) resources having regard to risk. Accordingly, section 120(2) should include a provision akin to section 18(e) of the WHS Act.

(ii) Section 31 of the WHS Act prescribes a Category 1 (criminal) offence which must include the requirements of recklessness or negligence (each as defined in the Criminal Code). This approach has been taken to proscribe the very worst kind of disregard for duties imposed under that law. However, contrary to the heading *"Fault-based offence-death or serious injury or illness"* in sections 120(6) and 121(7), these requirements are *not* included in those sections. Instead, these sections simply proscribe strict criminal liability (with up to 5 years imprisonment). There is no requirement for the prosecution to prove either recklessness or negligence, nor that there was no reasonable excuse. Instead, sections 120(7) and 121(8) assume guilt (not innocence) by reversing the onus of proof so that the defendant must prove the defence of reasonable excuse.

(iii) Importantly, section 34 of the WHS Act and section 26D(2A) of the HVN Law exclude volunteers from equivalent statutory duties. As noted above, volunteers play a key role at all levels in the aged care sector. No reason is given for this material and concerning disparity between Model WHS Law and HVN Law, and the Exposure Draft. Accordingly, the proposed statutory duties must exclude volunteers who are responsible persons (and other obligations on aged care workers who are volunteers should also be excluded). Otherwise, volunteers will be deterred from the aged care sector to the significant detriment of the aged care sector.

(iv) Chapter 5 imposes offences for a serious failure. A "systematic pattern of conduct", as defined in section 18(2) of the Exposure Draft, may constitute a serious failure. Concerningly, that definition does *not* include any requirement of materiality - multiple immaterial contraventions may constitute a systematic pattern of conduct. Conversely, the WHS Act does *not* impose offences for a systematic pattern of conduct (per se) – see for example section 32 of the WHS Act (Category 2 offence). Accordingly, the concept of "systematic pattern of conduct" should be removed from Chapter 5.

(v) Section 269 of the WHS Act and section 735A of the HVN Law each contain provisions to the effect that nothing in that law compels a person to give information to another person that is the subject of legal professional privilege. There is *no* such safeguard in the Exposure Draft. On the contrary, the powers of the Commissioner in Division 4 of Part 10 of Chapter 6 include issuing notices to attend to answer questions or give information or documents or both which may be subject to legal professional privilege. These powers abrogate common law rights and materially detract from a person's right to obtain legal advice (including so that they can be fully informed as to the scope of their duties). The proposed powers must not extend to information or documents the subject of legal professional privilege.

(vi) Both the WHS Law and the HVN Law prescribe maximum time periods for the bringing of proceedings for offences (generally 2 years). Further, these laws expressly provide that the penalties are maximum penalties. No such equivalent provisions are included in the Exposure Draft.

***Proposed solution**: "Safeguards" in Model WHS Law be included in the new Act (including burden of proof, volunteers, removal of "systematic pattern of conduct", legal professional privilege, limitation periods and maximum penalties).*

This necessitates a detailed side by side analysis be conducted as and between the Model WHS Law (and HVN Law) and the new Act. Where safeguards are not included then a detailed "if not, why not?" explanation should be provided.

e) Onerous and uncertain obligations on aged care workers and responsible persons

The proposed definition of "aged care worker" in section 10(4)(a) of the Exposure Draft includes *"an individual employed or otherwise engaged (including as a volunteer) by the registered provider"*. This definition is too broad and captures (amongst others) any employee, volunteer etc. of a provider, regardless of whether that person is involved in the provision of funded aged care services or not. Many providers operate in sectors other than aged care and in doing so engage employees and other workers that are *not* in any way involved in aged care work (e.g. retirement living or non-aged care related community services). These other workers should not be regulated as aged care workers.

Further, sections 118 and 119 of the Exposure Draft create offence provisions for aged care workers and responsible persons (as the case may be) who do not comply with the Aged Care Code of Conduct. A penalty of about $78,000 is payable – an amount more than the annual wage of many aged care workers (who often work part time or on a casual basis). These sections rely upon the Aged Care Code of Conduct, which Code includes many standards of behaviour that are incapable of determining where the line falls between legality and illegality. For example, what constitutes a failure to *"act in a way that treats people with dignity and respect, and values their diversity"*? While this is a laudable value, it is ill defined, lacks clarity and should not be a matter subject to civil penalty.

***Proposed solution**: The definition of aged care worker: (a) is confined to workers that are involved in the provision of aged care services; and (b) excludes volunteers. Further, sections 118 and 119 should be redrafted to clearly define obligations.*

f) Compensation pathway:

Our concerns with section 127 of the Exposure Draft include:

(i) a compensation pathway is established against "an entity." In contrast, Consultation Paper No 2 expressly provides that an entity means a registered provider (i.e. not a responsible person). Consistent with that Consultation Paper, section 127 must expressly limit the compensation pathway to a provider only (and not responsible persons).

(ii) compensation should be expressly limited to an individual receiving aged care services (and not to third parties). This limitation is consistent with the objects of the Exposure Draft – for example section 5(b)(i) of the Exposure Draft references "uphold[ing] the rights of individuals under the Statement of Rights".

(iii) the section mitigates against restorative justice and the speedy resolution of disputes, including through alternative dispute resolution mechanisms. For example, there is no mechanism for the provider to reach an agreed final settlement with an individual in a manner which precludes a Court from subsequently making a compensation order. Consequently, a provider is at risk of having to pay compensation twice (first as part of an agreed settlement and second by way of a Court compensation order). This will result in providers being unable to reach timely settlements with individuals. An individual should not be able to recover the same damages twice under section 127 and general civil liability.

(iv) the compensation pathway limitation period in section 127(2)(b) should be 3 years (not 6 years). A 6-year period is unduly protracted, unnecessary and inconsistent with other relevant statutory limitation periods (e.g. 3 years for personal injury and compensation to relatives under the Limitation Act 1969 (NSW) and similar legislation in other States and Territories); and

(v) other provisions and safeguards should be included. For example: (a) the Civil Liability Act 2002 (NSW) addresses matters like contributory negligence and proportionate liability, but section 127 is silent on these matters; and (b) how is compensation to be determined by a Court?

***Proposed solution**: That section 127 should be changed to address these matters.*

If you wish to discuss the matters raised in this letter, please contact:

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Thank you for considering our letter. We look forward to engaging further with you on these matters.

Yours faithfully

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