

Submission to the Department of Health and Ageing on the proposed new Aged Care Act

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Made by:

Research Analytics



Research Analytics – [REDACTED] – email –

[REDACTED] Contact number – [REDACTED] – website – www.mycdc.com.au



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Our Perspective

About Us

This submission is prepared by Mark Sheldon-Stemm. Thank you to the Commission for providing this opportunity to make our submission.

Research Analytics is headed by Principal Mark Sheldon-Stemm. Mark brings over 25 years CEO/CFO experience in health aged care services in metro, rural, regional and remote settings. Since 2015 he has worked in the development of new aged care systems with supporting business & financial systems, including MyCDC for both community and residential Aged Care. Mark is also a Senior Australian and is determined to make the aged care system one of excellence. Rather than talk about how it should be done, he does it.

In 2018, Mark was commissioned by the Department of Health and the Minister for Aged Care to undertake analysis and provide a report on how Consumer Directed Care will work in Residential Aged Care. He had conducted workshops on Consumer Directed Care (MyCDC), with over 4,500 staff trained in this area; and in helping organisations meet the Aged Care Standards.

Research Analytics has developed a sophisticated benchmarking database over the past 25 years on the operation of residential care covering both care and accommodation.

Research Analytics consults to over 75 residential and home care providers around Australia covering all locations and types of services (in Metropolitan, Rural, Remote, Regional, Indigenous and Special Needs Groups). All of these are successfully operated from both a care and financial perspective.

In terms of credentials, knowledge, and experience to make the comments Mark is a Fellow of the Institute of Public Accountants and has the following Qualifications:

- Master of Management (Strategic Foresight) – 2009
- Graduate Diploma of Agricultural Economics – 2000
- Bachelor of Social Science – 1990 - Majors – Psychology & Sociology
- Diploma in Commercial Data Processing 1982
- Commerce (Accounting Procedures) Certificate 1980

And Experience:

- CFO – American Flange (multinational company)
- CFO (Financial Controller) – United Milk Tasmania:
- Finance Director – Agricultural Developments of Tasmania (and associated companies):
- CFO – Mt. St Vincent's Aged Care;
- CEO – Tandara and Grenoch Aged Care organisations:
- President of Aged and Community Service – Tasmania:
- Chair and Co-Founder of Suicide Prevention program- CORES:
- CFO (Company Secretary/Business Manager) – CRC Forestry Ltd:
- General Manager – CEO Kalyna Care:
- CEO CapeCare:
- Consultant in Aged Care:
- CEO Riverview Residence Collie:

Preface

Due to the nature of the changes to the aged care act, it is important any submission is able to provide a perspective from all stakeholders.

The Aged Care system in Australia is fundamentally a Commonwealth Government responsibility. While the actual services are outsourced to the private sector (made up of for profit, not for profit organisations and State governments), the Commonwealth Government has full control of the Aged Care system. This is from the allocation of places to funding to regulating to underwriting the accommodation deposits to managing the outcomes for consumers and monitoring the performance of the aged care providers.

The proposed act is a movement to a “user rights” based approach and is designed to empower people accessing care and services to receive the best quality care possible.

As an outsourced program the Government does not have direct control over the care and services delivered and therefore relies on a regulatory framework to monitor the services to ensure people are receiving the best quality care possible.

Whilst the act offers a positive outcome for people accessing care and services, there are many consequences (some unintended) that will arise due to the act being implemented in its current draft form. The responses provided here are based on the proposed act and the consequences that are likely to arise from its implementation.

Executive Summary of Submission:

These consequences of the act (in its current form) include the following:

- 1 Registered Nurses – The failure to recognise Enrolled Nurses will eventually eliminate these positions from aged care without being able to replace them with registered nurses.
- 2 Reporting – The level of reporting requirements is not reduced by the act but rather increased.
- 3 Culture – The definition of High-Quality Care - Involvement of some cultural members but not other cultures. The act is therefore discriminative to these other cultures.
- 4 Digital Platforms – The definition of a digital platform is not clear and the form of regulation in some cases will not apply to some services.
- 5 Financial – The requirement for providers to remain financially viable is outside of the control of aged care providers as they are “price takers” and have their “costs dictated”. This means they have no ability to control their financial viability and rely totally on government funding.
- 6 Sexuality – The requirement for the word “appropriate” to be added before the words “sexual relationships”. The wording in the proposed standard 7.1.6 should also be amended to add the word “appropriate” before the word sexual in the phares “engage in sexual activity”.
- 7 Worker Selection – This requires greater clarification in the way that the duty of care is matched with choice.

- 8 Development of a “Careless” class in the elderly – The ability for action to be taken against a provider who fails in their duty of care seems reasonable, however this is likely to lead to some people never receiving any form of care.
- 9 What is Missing from the Act – The act fails to clearly define and require aged care providers to outline their – Model of Care. A series of policies and procedures and the standards do not constitute a Model of Care which is the way providers deliver services from the moment providers make first contact with a person through the stages of care and services.

Addressing these Points in Detail:

Registered Nurses – Refer Chapter 3 - Part 4 – Division 2 - section 116

This section should recognise the role of Enrolled Nurses as Nurses and they should be included as part of the 24-hour coverage required as well as the minutes per day per resident in residential aged care.

Likely Unintended Consequence: Enrolled Nurses will not be available in aged care without the ability to replace them with Registered Nurses leading to poor outcomes for people receiving care and services.

Recommendation: This part of the act should be changed to include – Nurses – Registered and Enrolled Nurses.

Reporting – Refer Chapter 3 - Part 4 - Division 2 – Section 109

This section needs to clarify the reporting requirements to reduce the amount of duplication by providers. Currently providers are asked to report the same information to different agencies. The system is currently a “report many times” and in many cases the information is never used.

Likely Unintended Consequence: The additional cost for providers to maintain reporting of the same material to different agencies reduces the funds available for care and services.

Recommendation: The act should clarify the reporting required by aged care providers and there should be one single agency where information is reported and only once.

Culture – Chapter 1 – Part 2 - Division 2 – Section 19

The way the current definition of High-Quality Care is framed references one type of culture.

Recommendation: This is discriminatory, and the act should be amended to include all cultures to receive High Quality Care.

Digital Platforms – Chapter 3 – Part 6 – Section 128-130

The definition of a digital platform is unclear and sets a wide net as to what a digital platform is. This may also go beyond the ability to control digital platforms where services are used for non-government funded services.

Likely Unintended Consequence: Some digital platforms are likely to structure themselves to avoid provisions of the act.

Recommendation: If the intention is to ensure all care and services provided to older people are of a high quality by these digital platforms then a clearer definition is required as to what services would fall under this section of the act.

Financial – Chapter 5 – Part 3 - Division 6 – Section 163-165

The financial requirements, in terms of a provider remaining viable, is outside of their control considering they are price takers, and their costs are determined by the Government in residential care with the same system to apply in Home Care in the future. The Act needs to state the responsibility of the government to fund services to provide high quality care. Under the objectives of the act, it states – (g) provide for sustainable funding arrangements for the delivery of funded aged care services by a diverse, trained and appropriately skilled workforce; The Act fails to outline how this will be achieved and places responsibility on each provider rather than the government to fund the services.

Recommendation: The act should reflect the role of the Government in funding services based on the requirements for staffing levels, cost of staff and the general operations.

The act should also recognise the different costs structures between the classes of aged care providers. These classes being – Metropolitan, Regional, Rural and Remote. Providers located in these different classes should be funded based on the costs of services that relates to location.

Sexuality – Part 3 - Division 1 – Section 16 & Division 1

The rights of the person to engage in sexual activity is not challenged, however given the condition of some people the activity should be appropriate to the circumstances, and take into account their condition and other aspects.

Whilst the act includes the freedom of expression that is part of everyone's right there are situations where people living in care may not be able to discern what is appropriate in relation to this activity. In some cases, people living with dementia, may not be able to fully consent or have full awareness to any sexual activity and yet may engage in it. Given Division 3, Section 127 allows for compensation in the case of serious injury or illness then the provider may cause this to happen by allowing what could be inappropriate sexual activity.

Likely Unintended Consequence: Providers will need to monitor any activity of this nature, so as to not be subject to claims of compensation where the activity is not appropriate. In doing so they will be in breach of the act and proposed standards.

Recommendation: The word “appropriate” be inserted before the words “sexual activity” in the act and the proposed aged care standards.

Worker Selection – Part 3 – Division 1

Worker Selection and the rights of people to choose versus the duty of care. The act fails to clearly define how this will be regulated and what is acceptable. The rights outlined in the act is effectively a “Motherhood” statement and the act clashes with the Industrial Relations laws.

Likely Unintended Consequence: Acquiring staff in aged care will become more difficult with the current shortage of good, qualified staff being further reduced in trying to match staff across all people requiring care and services in a 24/7 operation. This is more difficult in a residential care setting as opposed to home care.

Recommendation: The act needs to clarify how worker selection is to work in practice so all parties can agree on who provides the care and services to the person, and how these will not clash with the Industrial Relations laws under the Fair Work Act.

Development of a “Careless” class in the elderly – Section 127 – Division 3 & Section 120 – Part 5

The ability for action to be taken against a provider who fails in their duty of care seems reasonable. However, this is likely to lead to some people never receiving any form of care.

Division 3, Section 127 allows for compensation in the case of serious injury or illness. As a result, providers will make a risk assessment before accepting anybody for care and services. If this assessment indicates that providing care and services are likely to be difficult and there is a possibility that some action may be taken against the provider (even though the provider may not have caused any serious injury or illness), then that person may not receive care.

While the percentage of people who fit this profile may be small this will still lead to a “careless” class of people who should receive care but are unable to access it.

The other effective of this will be the likely increase in indemnity insurance as insurers will assess the risk of having actions taken against a provider. The provider will need to demonstrate they have processes in place that will reduce the risk of any claims to limit increases in insurance premiums.

Likely Unintended Consequence:

- 1 Some people will not receive care and services.**
- 2 Viability of an aged care service will be reduced applying further pressure on the ability for financial viability in aged care.**

Recommendation: The proposed act includes actions taken in the Federal court for a period of up to 6 years. The recommendation is that this time be limited to 1 year and that a formal process of mediation be applied before any actions is taken so the parties can come to a resolution. Any further action is decided within the Administrative Appeals Tribunal (or similar body) rather than a court. In this case the Department of Health and Ageing would be the party acting on behalf of those seeking compensation and this would occur only after the mediation process has failed.

What is Missing from the Act

The act fails to clearly define and require aged care providers to outline their – Model of Care. A series of policies and procedures and the standards do not constitute a Model of Care, which is the manner in which providers deliver services from the moment they make contact with a person through the stages of care and services.

Currently the regulatory system is ineffectual, as it is a piece meal approach, where standards are tied to policies and procedures rather than actual practices of care and services. As a result, the audits and assessment of services does not relate to the way people are treated in the care setting.

Under the definition of High-Quality Care providers should be required to develop a manual of operations which defines how they conduct their services from the moment they first contact the person through to providing services. The model of care would then support the regulator to understand how services are provided and the way the provider is able to show all standards are met.

Actual Consequence: The ability to apply regulatory compliance will fail to pick up areas where a provider does not perform the service in accordance with best practice. Policies and Procedures have been found to fail in being applied to the way a person receives care and services.

Recommendation: The definition of High-Quality Care should include the requirement for a provider to develop a manual outlining their model of care which can then be matched against the actual practices they employ in care and services and then linked back to their policies and procedures.

This will significantly improve the regulatory framework and ensure best practice can be monitored.

ATTACHMENTS

(SECTIONS OF THE ACT RELATING TO THE ABOVE POINTS)

Research Analytics – [REDACTED] – email –

[REDACTED] Contact number – [REDACTED] – website – www.mycdc.com.au



EXPOSURE DRAFT

Section 115

1 **115 Cooperation with other persons**

2 (1) A registered provider must cooperate with any person who is
3 performing functions, or exercising powers, under this Act.

4 Note: The expression *this Act* (see section 7) includes:

- 5 (a) legislative instruments made under this Act; and
6 (b) the Regulatory Powers Act as it applies in relation to this Act.

7 (2) A registered provider must cooperate with, and provide all
8 reasonable facilities and assistance necessary to, any person who is
9 undertaking activities mentioned in paragraph 131A(1)(c) of the
10 *National Health Reform Act 2011* for the purposes of the Pricing
11 Authority performing the function mentioned in
12 paragraph 131A(1)(a) of that Act.

13 (3) Without limiting subsection (1) or (2), cooperating with a person
14 includes providing access to any approved residential care home of
15 the registered provider.

16 **116 Registered nurses**

17 (1) A registered provider must ensure that at least one registered nurse
18 is on site, and on duty, at all times at an approved residential care
19 home of the registered provider.

20 (2) Subsection (1) does not apply if:

21 (a) the System Governor grants the registered provider an
22 exemption in accordance with any rules made for the
23 purposes of subsection (3); or

24 (b) the registered provider is delivering funded aged care
25 services at the approved residential care home under a
26 specialised aged care program that is prescribed by the rules.

27 (3) The rules may make provision for, or in relation to, the granting of
28 an exemption to the requirement in subsection (1).

29 (4) Without limiting subsection (3), rules made for the purposes of that
30 subsection must:

EXPOSURE DRAFT

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

Chapter 3

Obligations of registered providers etc and conditions on registration of registered

providers **Part 4**

Registered provider, responsible person and aged care worker obligations **Division 2**

Section 117

- 1 (a) provide for the circumstances in which an exemption from
2 subsection (1) may be granted (on application or otherwise)
3 to a registered provider in relation to an approved residential
4 care home; and
- 5 (b) provide that before granting such an exemption, the System
6 Governor must be satisfied that the provider has taken
7 reasonable steps to ensure that the clinical care needs of the
8 individuals residing in the approved residential care home
9 will be met during the period for which the exemption is in
10 force; and
- 11 (c) provide that such an exemption that is granted to a registered
12 provider in relation to an approved residential care home
13 must not be in force for more than 12 months; and
- 14 (d) provide that more than one such exemption may be granted
15 to a registered provider in relation to an approved residential
16 care home; and
- 17 (e) provide for the conditions that may apply to such an
18 exemption that is granted to a registered provider in relation
19 to an approved residential care home.
- 20 (5) If an exemption from subsection (1) is granted to a registered
21 provider in relation to an approved residential care home, the
22 System Governor must make publicly available information about
23 the exemption, including:
- 24 (a) the name of the registered provider and the approved
25 residential care home; and
- 26 (b) the period for which the exemption is in force; and
- 27 (c) any conditions that apply to the exemption; and
- 28 (d) any other information of a kind prescribed by the rules.

EXPOSURE DRAFT

Division 2—Registered provider, responsible person and aged care worker obligations

2

3 108 Compliance with laws

4 A registered provider must comply with all applicable
5 requirements imposed by a law of the Commonwealth or a law of a
6 State or Territory in which the provider operates as a registered
7 provider.

8 109 Reporting

9 (1) A registered provider must:

- 10 (a) if the rules prescribe that a report must be given to a person
11 referred to in subsection (2)—give to that person the
12 information prescribed by the rules in accordance with any
13 requirements prescribed by the rules; and
14 (b) report to the Commissioner reportable incidents in
15 accordance with any requirements prescribed by the rules.

16 (2) The persons are the following:

- 17 (a) the Commissioner;
18 (b) the Complaints Commissioner;
19 (c) the Inspector-General of Aged Care;
20 (d) the System Governor;
21 (e) the Pricing Authority.

12 (3) Without limiting subsection (1), the rules may prescribe
13 requirements about reporting information relating to the
following:

- 14 (a) complaints made to a registered provider;
15 (b) the workforce, and governance, of a registered provider;
16 (c) compliance by a registered provider with requirements
17 relating to nursing services;
18 (d) locations at which funded aged care services are delivered
by
19 a registered provider;

EXPOSURE DRAFT

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

Chapter 3

Obligations of registered providers etc and conditions on registration of registered

providers **Part 4**

Registered provider, responsible person and aged care worker obligations **Division 2**

Section 110

- 1 (e) specified groups of individuals to whom a registered provider
2 is delivering funded aged care services;
- 3 (f) how specified funded aged care services are delivered;
- 4 (g) specified financial and prudential matters.
- 5 (4) Without limiting subsection (1), the rules may prescribe
6 requirements in relation to reporting periods and the timeframes
7 within which the information must be given in relation to those
8 reporting periods.
- 9 (5) An entity contravenes this subsection if:
- 10 (a) the entity is a registered provider; and
- 11 (b) the entity fails to comply with subsection (1).
- 12 Civil penalty: 250 penalty units.

Section 19 – Definition of high quality care.

- 16 c) (viii) implementing inclusive policies and procedures, in
17 partnership with Aboriginal or Torres Strait Islander
18 persons, family and community to ensure that culturally
19 safe, culturally appropriate and accessible care is
20 delivered to those persons at all times, which
21 incorporates flexibility and recognises the unique
experience of those persons;
- 22 (ix) adapting policy, practices and environments to ensure
23 that services are culturally appropriate for the diverse
24 life experiences of individuals, including by engaging
25 workers with lived experience of diversity in the
26 provider’s workforce and governing body;

EXPOSURE DRAFT

Part 6—Aged care digital platform operators

2

3 **128 Meaning of *aged care digital platform***

4 (1) An *aged care digital platform* means an online enabled
5 application, website or system operated to facilitate the delivery of
6 services in the aged care system (whether funded aged care
7 services or not), where:

8 (a) the operator of the application, website or system acts as an
9 intermediary for individuals seeking to access those services
10 who interact with entities providing the services via the
11 application, website or system; and

12 (b) the operator of the application, website or system requires,
13 and processes, payments referable to that intermediary
14 function.

15 (2) An *aged care digital platform* also means an online enabled
16 application, website or system that is prescribed by the rules.

17 (3) An *aged care digital platform* does not include an online
18 application, website or system prescribed by the rules.

19 (4) For the purposes of subsection (2) or (3), the rules may:

20 (a) prescribe an online application, website or system by name or
21 by inclusion in a specified class or specified classes; or

22 (b) prescribe an online application, website or system in respect
23 of all services in the aged care system, or in respect of
24 specified services in the aged care system.

25 **129 Duty of operators of aged care digital platforms**

26 (1) An operator of an aged care digital platform contravenes this
27 subsection if:

28 (a) an entity represents via the platform that the entity can
29 deliver a service in the aged care system; and

30 (b) the operator does not check and display on the platform:

31 (i) whether the entity is a registered provider or not; and

EXPOSURE DRAFT

Chapter 3 Registered providers, aged care workers and aged care digital platform operators

Part 6 Aged care digital platform operators

Section 130

- 1 (ii) if the entity is a registered provider—the registration
2 categories in which the entity is registered.
- 3 (2) An operator of an aged care digital platform contravenes this
4 subsection if:
- 5 (a) a person represents via the platform that the person can
6 perform work involved in the delivery of a service in the
7 aged care system; and
- 8 (b) the operator does not check and display on the platform:
9 (i) whether the person is an aged care worker of a
10 registered provider or not; and
11 (ii) if the person is an aged care worker of a registered
12 provider—details of the registered provider and whether
13 the registered provider is satisfied the provider has met
14 the requirements under section 91 in relation to the
15 person.
- 16 (3) An entity or person is liable to a civil penalty if the entity or person
17 contravenes subsection (1) or (2).
- 18 Civil penalty: 500 penalty units.

19 130 Other obligations of certain operators of aged care digital 20 platforms

- 4 (1) An entity that is a constitutional corporation and the operator of an
5 aged care digital platform must:
- 6 (a) notify the Commissioner, in accordance with any
7 requirements prescribed by the rules, that the entity operates
8 the platform; and
- 9 (b) implement a complaints management system and manage
10 complaints in accordance with that system and any other
11 requirements prescribed by the rules; and
- 12 (c) implement an incident management system and manage
13 incidents in accordance with that system and any other
14 requirements prescribed by the rules; and
- 15 (d) display on the platform a summary and explanation of the
16 complaints management system referred to in paragraph (b)
-

EXPOSURE DRAFT

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

Chapter 3

Aged care digital platform operators **Part 6**

Section 130

- 1 and the incident management system referred to in
2 paragraph (c); and
3 (e) report to the Commissioner, the System Governor, the
4 Complaints Commissioner or the Inspector-General of Aged
5 Care, any information prescribed by the rules to be reported
6 to that person; and
7 (f) display on the platform, in a way that is prominent to
8 individuals using the platform to access funded aged care
9 services, the Statement of Rights.

10 Note: Registered providers, as a condition of their registration, have
11 obligations in relation to reporting, incident management and
12 complaints management: see sections 109, 95 and 96.

13 (2) An entity is liable to a civil penalty if the entity contravenes
14 subsection (1).

15 Civil penalty: 250 penalty units.

EXPOSURE DRAFT

Division 6—Financial and Prudential Standards

2 163 Commissioner may make Financial and Prudential Standards

3 (1) The Commissioner may, by legislative instrument, make standards
4 in relation to financial and prudential matters.

5 Note 1: These standards are the *Financial and Prudential Standards*: see
6 section 7.

7 Note 2: It is a condition of registration that a registered provider must comply
8 with the Financial and Prudential Standards: see section 98. If a
9 registered provider breaches a condition of registration, the provider
10 may be liable to a civil penalty: see subsection 88(3).

1 (2) The standards may only deal with the following:

2 (a) requirements in relation to the liquidity and capital adequacy
3 of registered providers that:

4 (i) are providing funded aged care services in an approved
5 residential care home; and

6 (ii) are not government entities;

7 (b) requirements in relation to the keeping of financial records
8 relating to the delivery of funded aged care services,
9 including records about refundable deposits, accommodation
10 bonds, fees and payments;

11 (c) requirements in relation to governance systems and strategies
12 that registered providers must have in place to ensure that
13 they remain:

14 (i) financially viable and sustainable; and

15 (ii) able to comply with the other applicable requirements in
16 the standards;

17 (d) requirements in relation to the disclosure and reporting, by
18 registered providers, of information that may assist the
19 Commissioner to:

20 (i) monitor the financial viability and sustainability of
21 registered providers; and

22 (ii) monitor the compliance of registered providers with the
23 other applicable requirements in the standards; and

EXPOSURE DRAFT

- 1 (iii) quantify prudential and financial risk relating to
2 registered providers;
3 (e) requirements in relation to any other prudential matter
4 prescribed by the rules.
- 5 (3) Without limiting subsection (1), the standards may specify
6 different requirements for different kinds of registered providers.
- 7 Note: For example, the standards might specify different requirements for
8 registered providers in different registration categories.
- 9 (4) Without limiting paragraph (2)(e), rules prescribing a prudential
10 matter for the purposes of that paragraph may also prescribe that
11 any standards made under subsection (1) dealing with that
12 prudential matter only apply to registered providers in a specified
13 registration category.
- 14 (5) Subsections (3) and (4) of this section do not limit
15 subsection 33(3A) of the *Acts Interpretation Act 1901*.

16 **164 Having regard to principles, and consultation, in making**
17 **standards**

- 18 (1) In making standards under subsection 163(1), the Commissioner
19 must have regard to the Statement of Principles and the following
20 principles:
21 (a) for a registered provider to deliver ongoing quality and safe
22 care, the registered provider must remain financially viable
23 and sustainable;
24 (b) safeguarding of the refundable deposits, accommodation
25 bonds and entry contributions of individuals that are held by
26 registered providers is helped by registered providers:
27 (i) remaining financially viable and sustainable; and
28 (ii) having responsible management.
- 29 (2) The Commissioner must consult the System Governor before
30 making standards under subsection 163(1).

EXPOSURE DRAFT

Chapter 5 Governance of the aged care system
Part 3 Aged Care Quality and Safety Commission
Division 6 Financial and Prudential Standards

Section 165

1 165 Effect of Financial and Prudential Standards

2 Standards made under subsection 163(1) that are inconsistent with
3 the rules have no effect to the extent of the inconsistency, but the
4 standards are taken to be consistent with the rules to the extent that
5 the standards are capable of operating concurrently with the rules.

142 Safeguarding functions

- 15 The *safeguarding functions* of the Commissioner are the
16 following:
- 17 (a) to uphold the rights under the Statement of Rights, and
18 protect and enhance the safety, health, wellbeing and quality
19 of life, of individuals accessing funded aged care services,
20 including through encouraging the delivery of culturally safe,
21 culturally appropriate, trauma aware and healing informed
22 funded aged care services;
- 23 (b) to protect continuity of care through:
- 24 (i) monitoring the financial viability and sustainability of
25 registered providers; and
- 26 (ii) monitoring the compliance of registered providers with
27 their financial and prudential obligations under section
28 98 and taking proactive steps to prevent non-compliance
29 with those obligations; and
- 30 (iii) taking proactive steps to mitigate prudential and
31 financial risks;
- 32 (c) to promote:
- 33 (i) continuous improvement for registered providers and
34 aged care workers of registered providers; and

EXPOSURE DRAFT

Chapter 5 Governance of the aged care system

Part 3 Aged Care Quality and Safety Commission

Division 2 Establishment and functions of the Commissioner

Section 143

- 1 (ii) the delivery of high quality care by registered providers;
2 and
3 (iii) the confidence and trust of individuals in the delivery of
4 funded aged care services;
5 (d) to ensure registered providers and operators of aged care
6 digital platforms comply with this Act, using the regulatory
7 mechanisms available to the Commissioner under Chapter 6;
8 (e) to ensure aged care workers and responsible persons of
9 registered providers comply with their obligations under the
10 Aged Care Code of Conduct, using the regulatory
11 mechanisms available to the Commissioner under Chapter 6;
12 (f) to support registered providers to develop and implement
13 effective incident management systems;
14 (g) to build the capability of registered providers to prevent and
15 manage reportable incidents;
16 (h) to oversee the notification and management of reportable
17 incidents and respond where appropriate;
18 (i) to collect, correlate, analyse and disseminate information
19 relating to reportable incidents to identify trends or systemic
20 issues;
21 (j) if the Commissioner considers it appropriate to do so, to seek
22 and consider clinical advice relevant to functions of the
23 Commissioner;
24 (k) if the Commissioner considers it appropriate to do so, to seek
25 and consider any professional advice (including financial
26 advice) relevant to functions of the Commissioner.

EXPOSURE DRAFT

264 Grounds for giving required action notices

- 18 For the purposes of sections 262 and 263, the grounds are as
19 follows:
- 20 (a) the provider has not complied, or is not complying, with this
21 Act;
 - 22 (b) there is information that suggests that the provider may not
23 have complied, or may not be complying, with this Act;
 - 24 (c) it is likely that the provider will fail to comply with this Act
25 and that the failure will give rise to:
 - 26 (i) a risk to the safety, health or wellbeing of an individual
27 to whom the provider is delivering funded aged care
28 services; or
 - 29 (ii) a prudential risk;

EXPOSURE DRAFT

Regulatory mechanisms **Chapter 6**
Notices requiring action **Part 10**
Required action notices **Division 1**

Section 265

- 1 (d) the provider is, or is about to become, unable to meet its
- 2 liabilities;
- 3 (e) there is, or there might be, a material risk to the security of
- 4 the provider's assets;
- 5 (f) there is, or there might be a material deterioration in the
- 6 provider's financial condition;
- 7 (g) the provider is conducting its affairs in an improper or
- 8 financially unsound way;
- 9 (h) the provider is conducting its affairs in a way that may cause
- 10 or promote instability in the Commonwealth aged care
- 11 system;
- 12 (i) the notice would address a matter affecting the interests of an
- 13 individual to whom the provider is delivering, or might in the
- 14 future deliver, funded aged care services.

EXPOSURE DRAFT

15 Meaning of reportable incident

29 (1) A **reportable incident** is any of the following incidents that have
30 occurred, are alleged to have occurred, or are suspected of having
31 occurred, in connection with the delivery of funded aged care
32 services to an individual by a registered provider:

33 (a) unreasonable use of force against the individual;

Introduction **Chapter 1**

Definitions and key concepts **Part 2**

Key concepts **Division 2**

Section 16

1 (b) unlawful sexual contact, or inappropriate sexual conduct,
2 inflicted on the individual;

3 (c) psychological or emotional abuse of the individual;

4 (d) unexpected death of the individual;

5 (e) stealing from, or financial coercion of, the individual by an
6 aged care worker of the provider;

7 (f) neglect of the individual;

8 (g) use of a restrictive practice in relation to the individual (other
9 than in circumstances prescribed by the rules);

10 (h) unexplained absence of the individual in the course of the
11 delivery of funded aged care services to the individual.

Part 3—Aged care rights and principles

2 Division 1—Aged care rights

3 20 Statement of Rights

4 *Independence, autonomy, empowerment and freedom of choice*

5 (1) An individual has a right to:

6 (a) exercise choice and make decisions that affect the
7 individual's life, including in relation to the following:

8 (i) the funded aged care services the individual has been
9 approved to access;

10 (ii) how, when and by whom those services are delivered to
11 the individual;

12 (iii) the individual's financial affairs and personal
13 possessions; and

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- 14 (b) be supported (if necessary) to make those decisions, and have
15 those decisions respected; and
16 (c) take personal risks, including in pursuit of the individual's
17 quality of life, social participation and intimate and sexual
18 relationships.

19 *Equitable access*

- 20 (2) An individual has a right to equitable access to:
21 (a) have the individual's need for funded aged care services
22 assessed, or reassessed, in a manner which is:
23 (i) culturally safe, culturally appropriate, trauma-aware and
24 healing-informed; and
25 (ii) accessible and suitable for individuals living with
26 dementia or other cognitive impairment; and
27 (b) palliative care and end-of-life care when required.

28 *Quality and safe funded aged care services*

- 29 (3) An individual has a right to:

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Chapter 1 Introduction

Part 3 Aged care rights and principles

Division 1 Aged care rights

Section 20

- 1 (a) be treated with dignity and respect; and
2 (b) safe, fair, equitable and non-discriminatory treatment; and
3 (c) have the individual's identity, culture, spirituality and
4 diversity valued and supported; and
5 (d) funded aged care services being delivered to the individual:
6 (i) in a way that is culturally safe, culturally appropriate,
7 trauma-aware and healing-informed; and
8 (ii) in an accessible manner; and
9 (iii) by aged care workers of registered providers who have
10 appropriate qualifications, skills and experience.
- 11 (4) An individual has a right to:
12 (a) be free from all forms of violence, degrading or inhumane
13 treatment, exploitation, neglect, coercion, abuse or sexual
14 misconduct; and

New Standards

7.1.6	Older people can maintain relationships of choice free from judgement, including intimate relationships, and engage in sexual activity.
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Part 3—Aged care rights and principles

2 Division 1—Aged care rights

3 20 Statement of Rights

4 *Independence, autonomy, empowerment and freedom of choice*

- 5 (1) An individual has a right to:
- 6 (a) exercise choice and make decisions that affect the
7 individual's life, including in relation to the following:
- 8 (i) the funded aged care services the individual has been
9 approved to access;
- 10 (ii) how, when and by whom those services are delivered to
11 the individual;
- 12 (iii) the individual's financial affairs and personal
13 possessions; and
- 14 (b) be supported (if necessary) to make those decisions, and have
15 those decisions respected; and
- 16 (c) take personal risks, including in pursuit of the individual's
17 quality of life, social participation and intimate and sexual
18 relationships.

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Chapter 3 Registered providers, aged care workers and aged care digital platform operators

Part 5 Statutory duty and compensation

Division 1 Provider and responsible person duties

Section 120

1 **Part 5—Statutory duty and compensation**

2 **Division 1—Provider and responsible person duties**

3 **120 Registered provider duty**

4 (1) A registered provider must ensure, so far as is reasonably
5 practicable, that the conduct of the provider does not cause adverse
6 effects to the health and safety of individuals to whom the provider
7 is delivering funded aged care services while the provider is
8 delivering those services.

9 (2) In this Act, *reasonably practicable*, in relation to a duty imposed
10 under this Part, means that which is, or was at a particular time,
11 reasonably able to be done, taking into account and weighing up all
12 relevant matters including:

- 13 (a) the likelihood of the adverse effect concerned occurring; and
- 14 (b) the likely degree of harm from the adverse effect; and
- 15 (c) what the person concerned knows, or ought reasonably to
16 know, about ways of preventing the adverse effect; and
- 17 (d) the availability and suitability of ways to prevent the adverse
18 effect; and
- 19 (e) the rights of individuals under the Statement of Rights.

20 Note: Under the Statement of Rights, an individual has a right to exercise
21 choice and make decisions that affect the individual's life, including
22 taking personal risks.

23 *Strict liability offence—serious failures*

- 24 (3) A registered provider commits an offence of strict liability if:
- 25 (a) the provider has a duty under subsection (1); and
 - 26 (b) the provider engages in conduct that does not comply with
27 the duty; and
 - 28 (c) the conduct amounts to a serious failure by the provider to
29 comply with the duty.

30 Penalty:

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

Chapter 3

Statutory duty and compensation Part 5

Provider and responsible person duties Division 1

Section 120

- 1 (a) in the case of an offence committed by a registered provider
2 that is an individual—150 penalty units; or
3 (b) in the case of an offence committed by a registered provider
4 other than an individual—1000 penalty units.
- 5 (4) Conduct of a registered provider amounts to a *serious failure* to
6 comply with the duty in subsection (1) if:
7 (a) the conduct exposes an individual to whom the duty is owed
8 a risk of death or serious injury or illness; and
9 (b) the conduct:
10 (i) involves a significant failure; or
11 (ii) is part of a systematic pattern of conduct.

12 *Strict liability offence—death or serious injury or illness*

- 13 (5) A registered provider commits an offence of strict liability if:
14 (a) the provider has a duty under subsection (1); and
15 (b) the provider engages in conduct; and
16 (c) the conduct amounts to a serious failure by the provider to
17 comply with the duty; and
18 (d) the conduct results in the death of, or serious injury to, or
19 illness of, an individual to whom the duty is owed.

20 Penalty:

- 21 (a) in the case of an offence committed by a registered provider
22 that is an individual—500 penalty units; or
23 (b) in the case of an offence committed by a registered provider
24 other than an individual—4,800 penalty units.

25 *Fault-based offence—death or serious injury or illness*

- 26 (6) A registered provider commits an offence if:
27 (a) the provider has a duty under subsection (1); and
28 (b) the provider engages in conduct; and
29 (c) the conduct amounts to a serious failure by the provider to
30 comply with the duty; and

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Chapter 3 Registered providers, aged care workers and aged care digital platform operators

Part 5 Statutory duty and compensation

Division 1 Provider and responsible person duties

Section 121

1 (d) the conduct results in the death of, or serious injury to, or
2 illness of, an individual to whom the duty is owed.

3 Penalty:

4 (a) in the case of an offence committed by a registered provider
5 that is an individual—1000 penalty units or 5 years
6 imprisonment or both; or

7 (b) in the case of an offence committed by a registered provider
8 other than an individual—9,500 penalty units.

9 *General defence of reasonable excuse*

10 (7) Subsection (3), (5) or (6) does not apply if the registered provider
11 has a reasonable excuse.

12 Note: A defendant bears an evidential burden in relation to the matter in
13 subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

14 **121 Responsible person duty**

15 (1) A responsible person of a registered provider must exercise due
16 diligence to ensure that the provider complies with the provider's
17 duty under section 120.

18 (2) In this section, *due diligence* includes taking reasonable steps:

19 (a) to acquire and maintain knowledge of requirements applying
20 to registered providers under this Act; and

21 (b) to gain an understanding of the nature of the funded aged
22 care services the registered provider delivers and the
23 potential adverse effects that can result to individuals when
24 delivering those services; and

25 (c) to ensure that the registered provider has available for use,
26 and uses, appropriate resources and processes to manage
27 adverse effects to health and safety of individuals accessing
28 funded aged care services delivered by the provider; and

29 (d) to ensure that the registered provider has appropriate
30 processes for receiving and considering information
31 regarding incidents and risks and responding in a timely way
32 to that information; and

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

Chapter 3

Statutory duty and compensation Part 5

Provider and responsible person duties Division 1

Section 121

1 (e) to ensure that the registered provider has, and implements,
2 processes for complying with any duty or requirement of the
3 registered provider under this Act.

4 (3) A responsible person of a registered provider may be convicted or
5 found guilty of an offence under this Act relating to a duty under
6 this section whether or not the registered provider has been
7 convicted or found guilty of an offence under section 120.

8 *Strict liability offence—serious failures*

9 (4) A responsible person of a registered provider commits an offence
10 of strict liability if:

- 11 (a) the person has a duty under subsection (1); and
12 (b) the person engages in conduct that does not comply with the
13 duty; and
14 (c) the conduct amounts to a serious failure by the responsible
15 person to comply with the duty.

16 Penalty: 150 penalty units.

17 (5) Conduct of a responsible person of a registered provider amounts
18 to a **serious failure** to comply with the duty in subsection (1) if:

- 19 (a) the conduct exposes an individual to whom the duty is owed
20 a risk of death or serious injury or illness; and
21 (b) the conduct:
22 (i) involves a significant failure; or
23 (ii) is part of a systematic pattern of conduct.

24 *Strict liability offence—death or serious injury or illness*

25 (6) A responsible person of a registered provider commits an offence
26 of strict liability if:

- 27 (a) the person has a duty under subsection (1); and
28 (b) the person engages in conduct; and
29 (c) the conduct amounts to a serious failure by the responsible
30 person to comply with the duty; and

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Chapter 3 Registered providers, aged care workers and aged care digital platform operators

Part 5 Statutory duty and compensation

Division 1 Provider and responsible person duties

Section 121

1 (d) the conduct results in the death of, or serious injury to, or
2 illness of, an individual to whom the duty in section 120 is
3 owed by the registered provider.

4 Penalty: 500 penalty units.

5 *Fault-based offence—death or serious injury or illness*

6 (7) A responsible person of a registered provider commits an offence
7 if:

8 (a) the person has a duty under subsection (1); and

9 (b) the person engages in conduct; and

10 (c) the conduct amounts to a serious failure by the responsible
11 person to comply with the duty.

12 (d) the conduct results in the death of, or serious injury to, or
13 illness of, an individual to whom the duty in section 120 is
14 owed by the registered provider.

15 Penalty: 1000 penalty units or 5 years imprisonment or both.

16 *General defence of reasonable excuse*

17 (8) Subsection (4), (6) or (7) does not apply if the responsible person
18 has a reasonable excuse.

19 Note: A defendant bears an evidential burden in relation to the matter in
20 subsection (8) (see subsection 13.3(3) of the *Criminal Code*).

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Chapter 3 Registered providers, aged care workers and aged care digital platform operators

Part 5 Statutory duty and compensation

Division 3 Compensation pathway

Section 127

1 **Division 3—Compensation pathway**

2 **127 Compensation orders**

- 3 (1) The Federal Court or the Federal Circuit and Family Court of
4 Australia (Division 2) may order an entity to compensate an
5 individual for serious injury or illness if:
6 (a) the entity is found guilty of an offence against this Part; and
7 (b) the serious injury or illness resulted from the commission of
8 the offence.
- 9 (2) The court may make the order only if:
10 (a) either:
11 (i) the Commissioner applies for an order under this section
12 with the consent of the individual; or
13 (ii) the individual applies for an order under this section;
14 and
15 (b) the application is made within 6 years of the day the cause of
16 action that relates to the commission of the offence accrued.
- 17 (3) If the court makes the order, the amount of compensation specified
18 in the order that is to be paid to the individual may be recovered as
19 a debt due to the individual.