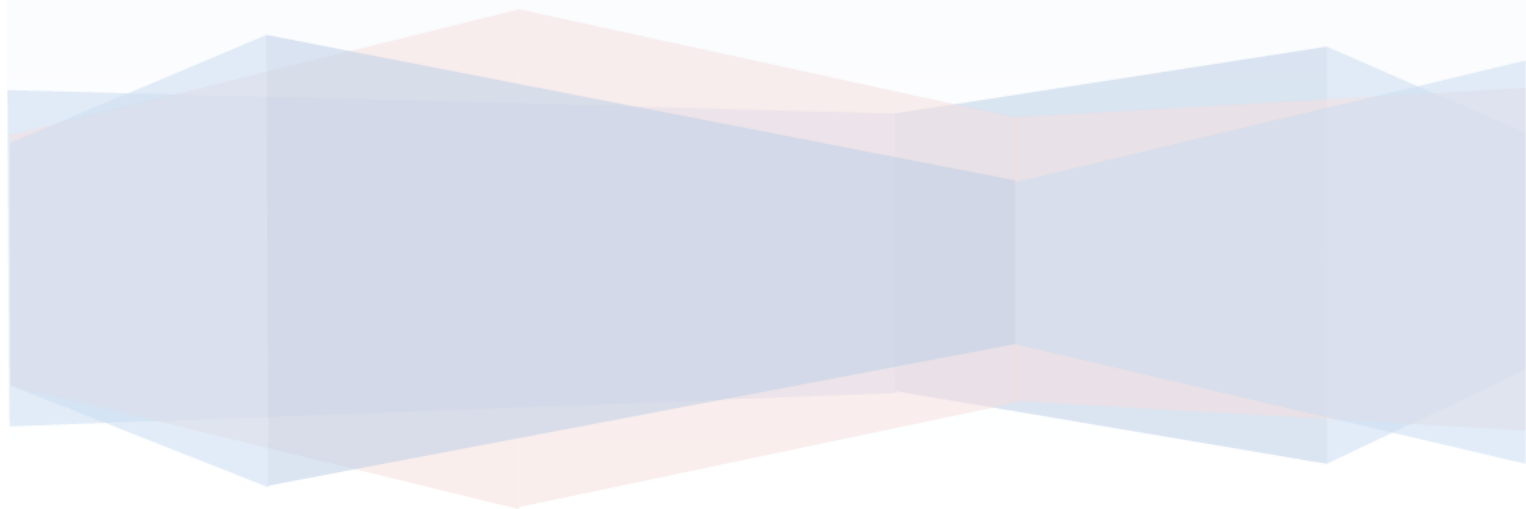


Submission

Aged Care Bill 2024 (Cth)

Remedies in the Aged Care Bill 2024 (Cth)

Ms Charlotte Steer, March 2024



Introduction

I welcome the opportunity to make a submission on the exposure draft of the Aged Care Bill 2024 ('the Bill').

This submission addresses the proposed remedies in Chapter 3, Part 5 of the Bill (Ch 3 *Registered providers, aged care workers and aged care digital platform operators*, Part 5 *Statutory duty and compensation*) ss 120-127.

This submission is made in my personal capacity and is not intended to express the views of any organisation with which I am currently, or have been previously, associated.

I have practiced as a lawyer and tribunal member in NSW for over 30 years, specialising in housing law, consumer protection, administrative law, the role of tribunals in access to justice, and, more recently, elder law. As a result, this submission draws on many years of practical experience assisting people to resolve their disputes.

I have designed and taught two undergraduate law subjects at University of New South Wales directly relevant to the rights of recipients of aged care services. *Housing Law* compares the legal rights of residents in all forms of shared housing, including aged care; and *Older People and the Law* considers the rights and remedies for older persons domestically and internationally in the light of the proposed United Nations Convention on the Rights of Older People. My commentary on the proposed remedies in the Bill is informed by my knowledge of the much wider range of remedies available to residents in other forms of shared housing.

This submission is a follow-up to my submission on Program Design to the Royal Commission into Aged Care Quality and Safety in January 2020, acknowledging the work of the National Association of Legal Centres' National Older Persons Legal Services Network, and their submission to the Parliament of Australia Standing Committee on Health, Aged Care and Sport, Inquiry into Quality of Care in Residential Aged Care Facilities in Australia, March 2018.

The submission also draws on my chapter, 'Aged Care, Housing Rights, and the Right to Housing' in Batagol, Becky et al, *Australian Feminist Legislation Project* (Routledge, forthcoming). The chapter proposes that breaches of the Charter of Aged Care Rights should be adjudicated at the NSW Civil and Administrative Tribunal ('NCAT'), using the same statutory device that brings breaches of the federal Australian Consumer Law within the jurisdiction of the NSW tribunal. The chapter includes a fully-drafted Bill for a proposed *Aged Care Rights Act 2025* (NSW).

The particular focus of this submission is the inadequacy of the proposed legal remedies in the Bill for harms to residents in residential aged care services and the need for increased statutory protections.

The submission calls for the enactment of a user-friendly pathway to comprehensive remedies for persons who are harmed by the conduct of providers of aged care services.

I would welcome the opportunity to discuss this submission in more detail.


03 March 2024

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Executive Summary

The Aged Care Bill 2024 ('the Bill') should be amended to allow additional court and tribunal remedies for individuals affected by harmful conduct of aged care providers.

The Bill includes a Statement of Rights,¹ and a Statement of Principles,² but specifically excludes any remedies through courts or tribunals for failure to comply with the rights or principles.³ The Bill includes provisions for a Code of Conduct⁴ and Quality Standards,⁵ neither of which are directly enforceable through courts or tribunals.

The Bill permits legal remedies by individuals for breaches of the legislation only in narrowly defined circumstances. The Federal Court⁶ may order compensation, but only when the conduct of an aged care provider causes serious injury or illness, or the risk of death, serious injury, or illness,⁷ and only when an offence based on that harm has been proven.⁸ Only the individual concerned or the Commissioner (with the consent of the individual), may make the application.⁹

These limited remedies reflect a conceptualisation of residents in aged care as patients in hospitals, or recipients of charity, who do not deserve to have access to the full range of remedies available to others for comparable harms. This is a form of ageism. The Bill should be based on a reconceptualisation of individuals living in aged care, or receiving aged care services, as autonomous bearers of human rights, entitled to access to justice for breaches of their human rights.

The remedies available to individuals harmed by breaches of the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards should be congruent with equivalent legislation in Australia concerning the rights of people living in collective housing with shared rights. The Bill should include the equivalents of remedies available to individuals living in other forms of shared housing, such as retirement villages, boarding houses, caravan parks or strata apartments. Residents in each of these forms of housing have specific statutory remedies through State-based tribunals.¹⁰

Additionally, those who are affected by the harm done to an individual, such as family members who have witnessed the conduct or its aftermath, should be entitled to make applications on their own behalf. Representative proceedings should be permitted.

Remedies should include not only orders for compensation, but also orders related to future conduct, and policies, apologies, retractions, enforceable undertakings, and declarations that contract provisions are varied, void or unenforceable.

The restriction on rights to access legal remedies through courts and tribunals is a breach of the human rights of individuals accessing aged care. The right of access to justice for enforcement of breaches is an essential attribute of any human right.¹¹ The Bill should be amended to include a detailed pathway for access to justice through an extensive range of remedies in the federal courts and tribunals, modelled on existing federal provisions such as the *Australian Human Rights Commission Act 1986* (Cth).¹²

¹ Aged Care Bill 2023 (Cth) s 20 Aged Care Statement of Rights ('the Statement of Rights').

² Aged Care Bill 2023 (Cth) s 22 Aged Care Principles ('the Principles').

³ Aged Care Bill 2023 (Cth) ss 21, 23.

⁴ Aged Care Bill 2023 (Cth) s 13 Aged Care Code of Conduct ('the Code of Conduct').

⁵ Aged Care Bill 2023 (Cth) s 14 Aged Care Quality Standards ('the Quality Standards').

⁶ or the Federal Court and Family Court (Division 2): Aged Care Bill 2023 (Cth) s 120.

⁷ Aged Care Bill 2023 (Cth) ss 120, 121.

⁸ Aged Care Bill 2023 (Cth) s 127.

⁹ Aged Care Bill 2023 (Cth) s 127(2)(a).

¹⁰ The NSW Civil and Administrative Tribunal ('NCAT') has jurisdiction under the *Residential Tenancies Act 2010* (NSW), *Retirement Villages Act 1999* (NSW), *Strata Schemes Management Act 2015* (NSW), *Boarding Houses Act 2012* (NSW), *Residential (Land Lease) Communities Act 2013* (NSW).

¹¹ Office of the High Commissioner for Human Rights, 'Access to justice for the right to housing', *UN Human Rights, Office of the High Commissioner* (Webpage, n.d.); <<https://www.ohchr.org/EN/Issues/Housing/Pages/AccessToJustice.aspx>>; Anita Mackay, Laura Grenfell and Julie Debeljak, 'A New Aged Care Act for Australia? Examining the Royal Commission's Proposal for Human Rights Inclusive Legislation' (2023) 46(3) UNSW Law Journal 836, 838.

¹² *Australian Human Rights Commission Act 1986* (Cth) s 6PO(4).

1. Are the objects of the Act appropriate?

The objects of the Act require amendment to include rights of access to justice for individuals harmed by the conduct of aged care providers.

Section 5 states the objects of the Act, including:

(e) provide a robust and risk-based regulatory framework for the delivery of funded aged care services, including accessible complaint mechanisms for individuals accessing those services, that will promote public confidence and trust in the Commonwealth aged care system; and

(f) provide and support education and advocacy arrangements that can assist individuals accessing funded aged care services to understand their rights, make decisions and provide feedback on the delivery of their services without reprisal.

The available remedies should not be limited to complaint mechanisms under a regulatory framework. Instead, a full range of remedies in courts and tribunal should be available.

Support, education and advocacy arrangements should not be limited to assisting individuals to understand their rights and provide feedback, but should include assistance in accessing legal remedies through courts and tribunals.

The Bill relies on outdated forms of regulatory paternalism through licensing sanctions and complaints mechanisms that deny individuals full autonomy over the actions to be taken in response to breaches of their rights under the Bill. This is a form of insidious ageism and reflects the history of aged care as a charity for which older, infirm people should be grateful, or as a medicalised institution where residents have less than the rights of hospital patients.

The limited statutory rights of access to justice in the Bill are in stark contrast to the rights of individuals who live outside aged care. The Aged Care Bill, and its predecessor,¹³ govern the rights of individuals whose home is in an aged care facility, or who receive aged care services at home. Yet the rights of these individuals to home and housing are less than the rights of residents in all other forms of housing in Australia, each of which is governed by legislation providing enforceable rights through courts or tribunals. The rights of individuals who live in rented accommodation, boarding houses, caravan parks, strata schemes and retirement villages are provided in State or territory legislation which is enforceable by the individual or group of residents concerned, usually through a State Civil and Administrative Tribunal.¹⁴

The right to housing has been defined to include the right to adequate enforcement mechanisms.¹⁵ The Special Rapporteur on Housing (2014-2017) had a specific focus on “how international human rights norms on the right to housing can be transformed into domestic law and policy”.¹⁶ The current focus is on access to justice, particularly for persons who “have no effective access to hearings before courts, tribunals or other bodies, when the unacceptable circumstances in which they are forced to live will be

¹³ *Aged Care Act 1997* (Cth).

¹⁴ For example, in NSW, residents in each of these types of accommodation may make applications for enforceable orders from NCAT under the respective Acts eg residents in retirement villages under the *Retirement Villages Act*(1999 (NSW).

¹⁵ Office of the High Commissioner for Human Rights, ‘Access to justice for the right to housing’, *UN Human Rights, Office of the High Commissioner* (Webpage, n.d.) <<https://www.ohchr.org/EN/Issues/Housing/Pages/AccessToJustice.aspx>>.

¹⁶ Office of the High Commissioner for Human Rights, ‘Access to justice for the right to housing: Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context’, *UN Human Rights, Office of the High Commissioner* (Webpage, n.d.) <<https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>>.

considered as human rights violations requiring effective remedies”.¹⁷ These international imperatives can be given domestic force in the Bill.

The objects of the Bill should be amended to include access to hearings before courts or tribunals with effective remedies for violations of the rights specified in the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards. The objects of the Act are more likely to be achieved if there are mechanisms for enforcement of rights as an additional measure to encourage compliance, due to the deterrent and educative effect of the risk of additional legal consequences.

Recommendation 1: The Objects

Section 5 (e) should be amended as follows (amendments in bold italics):

(e) provide a robust and risk-based regulatory framework for the delivery of funded aged care services, including accessible complaint mechanisms **and legal remedies** for individuals accessing those services, that will promote public confidence and trust in the Commonwealth aged care system; and

(f) provide and support education and advocacy arrangements that can assist individuals accessing funded aged care services to understand **and enforce** their rights, make decisions and provide feedback on the delivery of their services without reprisal.

2. The Simplified Outline

The Simplified Outline should be amended to summarise the proposed changes to the enforcement mechanisms in the Bill.

Section 6 provides a simplified outline which includes:

The objects of the Act, the Statement of Rights and the Statement of Principles underpin the system and are aimed at ensuring quality and safe care for individuals

...

Criminal penalties and civil penalties apply for failures to meet requirements under the Act and compensation can be sought in cases of serious failures by registered providers.

The Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards should be directly enforceable through a broadened range of court or tribunal remedies available to care recipients and those directly affected by breaches of the care recipient’s rights.

The available remedies should be broader than compensation, and should be for any breach of the obligations in the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards.

This proposal respects the consultation and expertise involved in specifying the content of the obligations in the Bill and makes no proposals to alter the content of the obligations, only to broaden the mechanisms for their enforcement.

¹⁷Office of the High Commissioner for Human Rights, ‘Access to justice for the right to housing: The report to the 40th session of the UN Human Rights Council in March 2019 of the Special Rapporteur on the right to adequate housing, Leilani Farha, is devoted to the critical issue of ensuring access to justice for the right to housing’, *UN Human Rights, Office of the High Commissioner* (Webpage, n.d.) <<https://www.ohchr.org/EN/Issues/Housing/Pages/AccessToJustice.aspx>>.

Recommendation 2: The Simplified Outline

Section 6 should be amended as follows (amendments in bold italics):

The objects of the Act, the Statement of Rights, and the Statement of Principles, **and the Aged Care Code of Conduct, and the Aged Care Quality Standards**, underpin the system and are aimed at ensuring quality and safe care for individuals

...

Criminal penalties and civil penalties apply for failures to meet requirements under the Act and compensation can be sought **by individuals affected by the failures, or by the Commissioner (with the consent of the individual)**, in cases of serious failures by registered providers. **Additional remedies are available through courts and tribunals as specified in Chapter 3, Part 5.**

3. The Code of Conduct should be enforceable

The Bill should be amended to include remedies for breaches of the Code of Conduct.

Section 13 of the Bill states that rules of conduct may be prescribed. The current Code of Conduct outlines eight elements of expected behaviour, including respect for freedom of expression and self-determination; respecting individual dignity and privacy; and providing safe and competent care with integrity, honesty and transparency which is free from all forms of violence, discrimination, exploitation, neglect, abuse, and sexual misconduct.

All unlawful breaches of these obligations should be remediable, not merely those offences causing or risking death, serious injury or illness, as required under ss 120 and 121 of the Bill.

Recommendation 3: The Code of Conduct

Section 13 should be amended to include (amendments in bold italics):

(3) Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.

4. The Quality Standards should be enforceable

The Bill should be amended to include remedies for breaches of the Quality Standards.

Section 14 of the Bill states that standards may be prescribed. The Quality Standards are likely to include important rights such as being treated with dignity; respecting identity, culture and diversity; providing services within an environment of cultural safety; and respecting the right to make informed choices.

All unlawful breaches of these obligations should be remediable, not merely those offences causing or risking death, serious injury or illness, as required under ss 120 and 121 of the Bill.

Recommendation 4: The Quality Standards

Section 14 should be amended to include (amendments in bold italics):

(3) Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.

5. The Statement of Rights should be enforceable

The Bill should be amended to remove the prohibition on court and tribunal remedies in s 21(3), which provides:

(3) Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal.

The Statement of Rights includes human rights such as independence, autonomy, empowerment and freedom of choice; to be treated with dignity and respect; to receive safe, fair, equitable and non-discriminatory treatment; to be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct; to have personal privacy and information protected; to communicate in the individual's preferred language or method of communication; and to be supported by an advocate. These are fundamental human rights and should be enforceable through more than an administrative complaints mechanism.

In particular, the Statement of Rights includes the right to "exercise choice and make decisions that affect the individual's life". However, s 21 of the Bill precludes individuals from accessing remedies for violations of their rights through courts or tribunals, thus denying them the full range of choices available to other individuals in the community.

This restriction on the right of access to justice is not congruent with current conceptions of individuals receiving aged care services as autonomous bearers of the full range of human rights.

Recommendation 5: The Statement of Rights

Section 21(3) should be amended as follows (amendments in bold italics):

(3) Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.

6. The Statement of Principles should be enforceable

The Bill should be amended to remove the prohibition on court and tribunal remedies in s 23(2), and to include a failure to comply with the Statement of Principles as a ground for review or challenge of any decision. Section 23 states:

...

(2) Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal.

(3) A failure to comply with this Division does not affect the validity of any decision, and is not a ground for the review or challenge of any decision.

The Statement of Principles provides for a “person-centred aged care system” where the “safety, health, wellbeing and quality of life of individuals is the primary consideration” and the individual’s physical, mental, cognitive and communication capabilities should be maintained or improved to the extent possible. The Commonwealth aged care system is to be transparent and promote innovation, continuous improvement and contemporary evidence-based best practice in a way that is responsive and proportionate to risk, with a focus on prevention and timely action.

Individuals harmed by breaches of these obligations should have access to the same range of civil, criminal and administrative law remedies as the general community. Removing their rights to access courts and tribunals for breaches of these obligations is an unwarranted and discriminatory denial of their human right of access to justice.

Recommendation 6: The Statement of Principles

Section 23 should be amended as follows (amendments in bold italics):

...

(2) ***Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles*** are enforceable by proceedings in a court or tribunal ***as specified in Chapter 3, Part 5.***

(3) A failure to comply with this Division ***may*** affect the validity of any decision, and ***is*** a ground for the review or challenge of any decision.

7. The Compensation Pathway should be broadened

The Bill should be amended to include a pathway for broader remedies for individuals who have been harmed by a breach of the obligations in the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards.

The compensation pathway in Chapter 3, Part 5, Division 3 is too limited and is not congruent with remedies available to individuals in other forms of shared housing.

The Simplified Outline of Chapter 3 should be amended to include reference to the broader compensation pathway. The broader compensation pathway should cover a wider range of applicants and remedies.

Section 65 states:

...

A registered provider must comply with key obligations, including conditions on their registration, when delivering funded aged care services. Civil penalties or offences generally apply for failure to meet these obligations. Statutory duties also apply to registered providers (and responsible persons of providers) with individuals able to seek compensation in cases resulting in serious illness or injury.

...

Separate obligations are also placed on responsible persons and aged care workers of registered providers, including to comply with the Aged Care Code of Conduct.

Recommendation 7: Ch 3 Simplified Outline

Section 65 should include an additional paragraph stating (amendments in bold italics):

Breaches of rights or duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.

8. What should the Compensation pathway include?

The Bill should be amended to include broader avenues for remedies through courts and tribunals.

The Bill permits legal remedies through the courts only in narrowly-defined circumstances. The Federal Court¹⁸ may order compensation, but only when the conduct of an aged care provider causes serious injury or illness, or the risk of death, serious injury, or illness¹⁹, and only when an offence based on that harm has been proven.²⁰ Only the individual concerned,²¹ or the Commissioner (with the consent of the individual),²² may make the application.

The remedial provisions in Part 5 of the Bill fail to live up to the objects of the Bill, which include providing a forward-looking aged care system that is designed to uphold the rights of individuals under the Statement of Rights; and assist individuals accessing funded aged care services to live active, self-determined and meaningful lives; and ensure individuals accessing funded aged care services are free from mistreatment, neglect and harm from poor quality or unsafe care.²³

The Bill should be amended to broaden the kinds of harms for which remedies are available. The breaches of rights for which there is no statutory court or tribunal remedy in the Bill include the right to remain connected to a pet,²⁴ to be supported to communicate,²⁵ and to be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct.²⁶ These breaches of the legislation will only be remediable through the federal courts if they result in serious injury or illness. Claims for distress, anxiety, inconvenience, embarrassment, affront, humiliation, or minor injury or illness will not be remediable under the Bill.

Federal and State legislation from related areas could be used as a basis for reforms to the Bill that would better promote the autonomy and dignity of individuals receiving aged care services. The basis for claims should be broadened; the remedies should be more extensive; standing to make applications should be widened; consideration should be given to the suitability of State or Commonwealth courts or tribunals; and compulsory mediation should be considered.

¹⁸ or the Federal Court and Family Court (Division 2): Aged Care Bill 2023 (Cth) s 120.

¹⁹ Aged Care Bill 2023 (Cth) ss 120,121.

²⁰ Aged Care Bill 2023 (Cth) s 127.

²¹ Aged Care Bill 2023 (Cth) s 127(2)(a)(ii).

²² Aged Care Bill 2023 (Cth) s 127(2)(a)(i).

²³ Aged Care Bill 20204 (Cth) s 5(b).

²⁴ connection to pets is included in definition of 'high quality care' in s 19(c)(vii) and included in the Statement of Principles s 22(6)(b)(i).

²⁵ Statement of Principles s 20(8).

²⁶ Statement of Principles s 20(4)(a).

What grounds for applications?

The Bill should be amended to permit applications to the federal courts for breaches of the Statement of Rights, the Statement of Principles, and also the Code of Conduct and the Quality Standards.

What remedies?

Remedies should include more than monetary compensation.

The federal courts already have power in anti-discrimination matters to order remedies in the form of declarations of right; that conduct not be repeated or continued; that an act or course of conduct be performed to redress harm; and that contracts or agreements be varied or terminated to address loss or damage.²⁷

Under state legislation, courts have the power to order apologies, or retractions; to implement programs or policies to address harm; to declare contracts or agreements void whole or in part, ab initio or from a certain date; and to extend orders to conduct that affects others.²⁸ Courts may also be given the power to make enforceable undertakings.

The High Court of Australia has recently confirmed that claims for non-economic loss are available for breaches of residential tenancy legislation. On the same basis, breaches of aged care requirements can be seen as breaches of contractual obligations to provide pleasure and enjoyment, entitling claims for disappointment and distress.²⁹ Damages in this area are notoriously low, so the deterrent effect will be more educational than financial. Limiting claims to a tribunal and not permitting legal representation except in exceptional circumstances is another measure that limits the financial exposure of aged care providers. Aged care providers who are compliant with the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards, and who have robust complaints mechanisms with access to aged care advocates and mediation, are unlikely to be the subject of substantial claims.

A technical legal issue which may need to be addressed in the legislation is the effect of any equivalents of the *Civil Liability Act 2002* (NSW). A specific section would need to be included stating that the court or tribunal may order compensation for emotional distress and other effects not amounting to personal injury, such as disappointment, distress, inconvenience, anxiety, embarrassment, humiliation, damage to reputation and other like claims, and that these types of claims are not to be considered as claims for personal injury and are therefore not excluded by the *Civil Liability Act 2002* (NSW) or any equivalent.

An additional area to clarify will be the method for balancing competing rights. For example, the conduct of an inveterate “wanderer” in an aged care facility may require balancing the wanderer’s rights to freedom of movement versus another resident’s right to privacy. One method that could be adopted is the High Court’s current test of proportionality.³⁰

The Aged Care Bill should include a broader range of orders so that the federal courts may craft orders responsive to the identified objects of the Bill, to address past harms, and to reduce the risk of harm for the future.

Who may apply?

The rules for standing in the Bill should respect and promote the rights of individuals to live in community, and promote their interconnectedness. The Bill should recognise that harm to an individual may cause harm to others. The Bill should be amended to permit claims by groups of affected

²⁷ Australian Human Rights Commission Act 1986 (Cth) s 46PO(4).

²⁸ Anti-Discrimination Act 1977 (NSW) s 108 (2).

²⁹ *Baltic Shipping Co v Dillon* (1993) 16 CLR 344 and see the minority judgment of Gordon and Edelman JJ in *Young v Chief Executive Officer (Housing)* [2023] HCA 31

³⁰ For example, *McCloy v New South Wales* (2015) 257 CLR 178. Draft legislation adapting the proportionality test for use in tribunals adjudicating aged care disputes can be found in Charlotte Steer, Ch 15 ‘Aged Care, housing rights and the right to housing’ in Batagol, Becky et al, *Australian Feminist Legislation Project* (Routledge, forthcoming).

individuals, and by those who have experienced vicarious trauma as the result of harm to another. Statutory provisions could be modelled on existing legislation permitting groups of affected individuals to make applications.³¹

Which courts or tribunals?

Consideration should also be given to whether the federal courts are the best place to adjudicate the kinds of harms experienced by individuals receiving aged care.

The Australian Human Rights Commission's dispute resolution processes would seem to be amply suited to this role and consideration should be given to including aged care disputes in their remit.³²

It may be more appropriate for state and territory tribunals to deal with these disputes because of their expertise in housing law, their statutory mandates for just, quick and cheap dispute resolution, the capacity to inquire in any way they see fit and not be bound by the strict rules of evidence, and the provision of tribunal conciliation services prior to adjudication.

State tribunals currently adjudicate federal disputes under the Australian Consumer Law through statutory provisions deeming the federal law to be State law,³³ and a similar mechanism could be used to create enforceable State and territory remedies for breaches of the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards. Model legislation to create State-based tribunal remedies for breaches of the Charter of Aged Care Rights under the current *Aged Care Act 1997* (Cth) could be used as a guide.³⁴

Should mediation be required?

Although NCAT provides conciliation as well as adjudication, some applications require separate, independent mediation as a precondition for an application to NCAT. Consideration should be given to the merits of such a scheme in relation to aged care disputes. Mediations might be conducted through a body external to the tribunal or court (in NSW, some strata scheme applications require attempts at mediation through the Department of Fair Trading³⁵). The Bill should include provisions requiring accredited mediators to be experts in elder mediation.³⁶

Recommendation 8: The Compensation Pathway

Chapter 3 Part 5 should include a new Division 4 providing a pathway for broader remedies for harms to individuals and others affected by breaches of the obligations under the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

³¹ For example, Residential (Land Lease) Communities Act (NSW) s 71.

³² Australian Human Rights Commission 'Information for people making complaints' (<<https://humanrights.gov.au/complaints/information-people-making-complaints>>).

³³ See for example, *Fair Trading Act 1987* (NSW) s 28.

³⁴ Charlotte Steer, Ch 15 'Aged Care, housing rights and the right to housing' in Batagol, Becky et al, *Australian Feminist Legislation Project* (Routledge, forthcoming).

³⁵ For example, Strata Schemes Management Act 2015 (NSW) s 131.

³⁶ Dale Bagshaw, Ch 13 'Elder mediation: an emerging field of practice' in Moscati, Maria, Michael Palmer and Marian Roberts (eds) *Comparative Dispute Resolution* (Edward Elgar Publishing, 2020) 202.

9. Standard Aged Care Agreements

The Bill should include a separate chapter setting out a requirement for a standard-form contract for residents in aged care facilities, with mandatory terms, as is done in NSW for residential tenancies.³⁷

The mandatory terms should include a term stating that compliance with the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards is a term of the contract, and remedies for breach are available as recommended above.

There should be no immunities. Provisions such as s 21(3) and s 23(2) of the Aged Care Bill should be removed.

There should be a requirement on the aged care provider to disclose to any resident or prospective resident any orders made by the relevant court or tribunal relating to breaches of the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards.

There should be a requirement for written reasons for any orders made by the relevant court or tribunal relating to breaches of the Statement of Rights, the Statement of Principles, the Code of Conduct or the Quality Standards, and for publication of the orders and reasons with the identifying details of the resident or recipient redacted, but the identity of the aged care provider publicly available. The relevant court or tribunal should have a discretion to decide that the orders and reasons should not be publicly available.

Provisions that should be included, modelled on NSW residential tenancies legislation, include:

- Standard aged care agreements³⁸
- Mandatory terms³⁹
- Prohibited terms⁴⁰
- Additional terms should be permitted only if they are not inconsistent with the legislation.⁴¹
- Unlawfully contracting out of the mandatory provisions should be prohibited⁴² and penalised with civil penalties.⁴³
- Remedies under the *Contracts Review Act 1980* (NSW) and equivalent legislation should be preserved.⁴⁴

Provisions that should be included, modelled on NSW retirement villages legislation, include:

- Penalties for misrepresentations⁴⁵
- Requirements for a general inquiry document and a disclosure statement⁴⁶
- There should be consideration of the financial and other information that should be available to residents and prospective residents⁴⁷
- Regulation of any waiting list fee⁴⁸ or holding deposit⁴⁹

³⁷ Residential Tenancies Act 2010 (NSW) s 15.

³⁸ Residential Tenancies Act 2010 (NSW) s 15.

³⁹ Residential Tenancies Act 2010 (NSW) s 15(5).

³⁹ Residential Tenancies Act 2010 (NSW) s 15(5).

⁴⁰ Residential Tenancies Act 2010 (NSW) ss 15(3), 19.

⁴¹ Residential Tenancies Act 2010 (NSW) s 15(4), 21.

⁴² Residential Tenancies Act 2010 (NSW) s 219.

⁴³ Residential Tenancies Act 2010 (NSW) s 22.

⁴⁴ Residential Tenancies Act 2010 (NSW) s 220.

⁴⁵ Retirement Villages Act 1999 (NSW) s 17.

⁴⁶ Retirement Villages Act 1999 (NSW) s 18.

⁴⁷ Retirement Villages Act 1999 (NSW) s 20.

⁴⁸ Retirement Villages Act 1999 (NSW) s 21.

⁴⁹ Retirement Villages Act 1999 (NSW) s 22.

- There should be no restrictions on the aged care recipient receiving independent legal advice.⁵⁰
- There should be an examination period⁵¹ and a cooling off period⁵². However, the cooling off period should not be waived if the resident commences occupation, instead there should be a right for a specified short period after moving in when the contract may be terminated by the aged care recipient for no reason, with limited financial consequences.

Recommendation 9: Standard Aged Care Agreements

The Aged Care Bill should include provisions requiring a standard aged care agreement and including a mandatory term requiring compliance with obligations under the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

10. Conclusion

The Bill should be amended to include a user-friendly pathway for comprehensive remedies for harms to individuals caused by the conduct of aged care providers and staff in breach of the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

The recommendations do not change the content of the obligations in the Bill and are not an attempt to introduce new remedies untested in Australian law. The recommendations are realistic proposals that are appropriate for this once-in-a-generation opportunity to reflect the changes in the community's perception of the roles and responsibilities in aged care.

The recommendations reject statutory provisions that are based on models of paternalism, charity and ageism. The proposed statutory provisions respect the dignity and autonomy of individuals receiving aged care. Breaches of the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards are considered in terms of breaches of human rights and, in particular, breaches of the right to housing, and the associated right to access justice, amounting to a failure to ensure an adequate standard of living.

The recommended provisions would ensure that users of the legislation have clarity about the rights and remedies available under the legislation. This will assist providers, regulators, staff, care recipients, carers, families, friends, and providers of medical, allied health and other services to easily understand the rights and remedies in aged care.

The existing patchwork of remedies through contract law, tort law, anti-discrimination law and consumer protection law leaves significant gaps in protection. These gaps in protection and the lack of transparency about the available remedies act as barriers to access to justice. The lack of remedies conceals the extent of harm and leaves individuals without access to justice.

The Bill should be amended to provide remedies equivalent to those available to individuals living in other forms of shared housing. Recipients of aged care deserve recognition that their rights in aged care are rights to housing, and that they are autonomous bearers of human rights, with the right to self-determination, including access to justice for breaches of their housing rights.

Recommendation 10: Comprehensive Remedies

⁵⁰ Retirement Villages Act 1999 (NSW) s 28.

⁵¹ Retirement Villages Act 1999 (NSW) s 27.

⁵² Retirement Villages Act 1999 (NSW) s 32.

The Bill should be amended to include a user-friendly pathway for comprehensive remedies for harms to individuals caused by the conduct of aged care providers and staff in breach of the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

[REDACTED]

03 March 2024

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Recommendations

1. The Objects
2. The Simplified Outline
3. The Code of Conduct
4. The Quality Standards
5. The Statement of Rights
6. The Statement of Principles
7. Ch3 Simplified Outline
8. The Compensation Pathway
9. Standard Aged Care Agreements
10. Comprehensive Remedies

Recommendation 1: The Objects

Section 5 (e) should be amended as follows (amendments in bold italics):

(e) provide a robust and risk-based regulatory framework for the delivery of funded aged care services, including accessible complaint mechanisms **and legal remedies** for individuals accessing those services, that will promote public confidence and trust in the Commonwealth aged care system; and

(f) provide and support education and advocacy arrangements that can assist individuals accessing funded aged care services to understand **and enforce** their rights, make decisions and provide feedback on the delivery of their services without reprisal.

Recommendation 2: The Simplified Outline

Section 6 should be amended as follows (amendments in bold italics):

The objects of the Act, the Statement of Rights, and the Statement of Principles, **and the Aged Care Code of Conduct, and the Aged Care Quality Standards**, underpin the system and are aimed at ensuring quality and safe care for individuals

...

Criminal penalties and civil penalties apply for failures to meet requirements under the Act and compensation can be sought **by individuals affected by the failures, or by the Commissioner (with the consent of the individual)**, in cases of serious failures by registered providers. **Additional remedies are available through courts and tribunals as specified in Chapter 3, Part 5.**

Recommendation 3: The Code of Conduct

Section 13 should be amended to include (amendments in bold italics):

(3) *Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.*

Recommendation 4: The Quality Standards

Section 14 should be amended to include (amendments in bold italics):

(3) *Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.*

Recommendation 5: The Statement of Rights

Section 21(3) should be amended as follows (amendments in bold italics):

(3) *Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.*

Recommendation 6: The Statement of Principles

Section 23 should be amended as follows (amendments in bold italics):

...

(2) *Rights and duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.*

(3) A failure to comply with this Division *may* affect the validity of any decision, and *is* a ground for the review or challenge of any decision.

Recommendation 7: Ch 3 Simplified Outline

Section 65 should include an additional paragraph stating (amendments in bold italics):

Breaches of rights or duties in the Aged Care Code of Conduct, the Aged Care Quality Standards, the Statement of Rights, and the Statement of Principles are enforceable by proceedings in a court or tribunal as specified in Chapter 3, Part 5.

Recommendation 8: The Compensation Pathway

Chapter 3 Part 5 should include a new Division 4 providing a pathway for broader remedies for harms to individuals and others affected by breaches of the obligations under the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

Recommendation 9: Standard Aged Care Agreements

The Aged Care Bill should include provisions requiring a standard aged care agreement and including a mandatory term requiring compliance with obligations under the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.

Recommendation 10: Comprehensive Remedies

The Bill should be amended to include a user-friendly pathway for comprehensive remedies for harms to individuals caused by the conduct of aged care providers and staff in breach of the Statement of Rights, the Statement of Principles, the Code of Conduct and the Quality Standards.