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Department of Health and Aged Care
- New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601

By email: AgedCareLegislativeReform@health.gov.au

Dear Sir/Madam

Exposure draft of the New Aged Care Act

We appreciate the opportunity to make a submission to the Department of Health and Aged Care (**Department**) in relation to the exposure draft of the *Aged Care Bill 2023* (**New Act**). Thomson Geer is a national law firm with a group of partners practising in the health and aged care space.

We help our clients in relation to all aspects of their aged care operations, including regulatory compliance. We want our clients and the broader aged care sector to be supported by effective regulation to provide care for older Australians which is safe, effective and of the highest possible standard which the community and public expect to be delivered to older Australians. To that end, we broadly support the considered recommendations made by the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) that were directed towards assisting aged care providers achieve these objectives.

Our detailed submissions are included in the Annexure to this letter. In addition to those submissions, we make the following submissions on matters of principle:

1 Timeframe

The proposed 1 July 2024 implementation date is unrealistic. The New Act will require organisational change for both the System Governor/Aged Care Quality and Safety Commission (**ACQSC**) and for providers. Long term success will be better served by allowing time to prepare and plan for transition to mitigate against any disruption to the delivery of aged care services.

Currently, ~75% of aged care services are being delivered to individuals under home care arrangements (whether that is under the Commonwealth Home Support Programme (**CHSP**), the Short-Term Restorative Care (**STRC**) Programme, Home Care Packages (**HCP**), etc.). The changes in relation to home care arrangements under the new Support at Home program are being delivered in two stages from 1 July 2025 (for STRC and HCP) and 1 July 2027 (for CHSP).

The Department has indicated that this staged approach is being implemented in order to:

- minimise disruption and ensure continuity of care for older people; and
- give providers time to change their business systems and adjust to new payment arrangements.

However, a similar transitional approach is not being afforded to the Department/ACQSC and residential aged care providers, despite the higher level of risk associated with the delivery of those services.

While we understand some of the changes under the New Act are required to be in place to allow for the Support at Home transition from 1 July 2025 (e.g. the Single Assessment System), as we outline below, there is still a considerable amount of work to be done by all stakeholders in relation to the New Act.

If the implementation date of the New Act cannot be extended due to the Support at Home implementation, the objects of the reform agenda are more likely to be achieved if a transitional phase to the introduction of the New Act was set to allow all stakeholders in the system (particularly in respect of the delivery of permanent residential care) to become accustomed to the legislative changes and allow for changes to systems, policies and procedures to minimise disruption to the delivery of care to older Australians.

During this transitional phase the operation of the New Act could be modified for a finite period. We suggest a finite transition period of not less than 6 months from the commencement date.

2 Missing information

Our submission is limited inherently by the fact that much of the New Act is missing. Key areas such as fees and payments, the Rules, registration categories and reviewable decisions are required to be able to consider the New Act as a whole and assess areas of conflict, gaps or other problems. The New Act also introduces many new definitions that are either associated with new concepts or amend current concepts to align with structural changes to the system proposed by the New Act. All of this needs to be considered together.

The New Act is currently structured in a way that sets out the rights of individuals and the responsibilities of providers. The key connection between those rights and responsibilities will be the terms of the contract that is entered into between the parties and the proposed Rules. The New Act does not include any provisions dealing with the agreement between the individual and the provider. Without having that detail, neither we nor the sector as a whole will be able to adequately assess system changes required to be made to implement the New Act.

It has also been proposed by the Department that subordinate legislation accompanying the New Act will be presented after the New Act has already been tabled in Parliament. The provisions of the New Act cannot be considered in isolation without considering the impact of the operative provisions that are proposed to be included in the Rules. There will inherently be a number of matters and issues that need to be considered in this subordinate legislation which are essential and will directly impact how certain provisions in the New Act will operate.

Any revised implementation timeframe or transitional phase should allow for appropriate consideration of the missing information in the context of what has already been made available in the consultation process to date.

3 Issues not addressed

The New Act presents an opportunity to address a number of key issues which arise in frontline service delivery, and which we are often called on to assist clients to navigate. At present, the New Act does not address these matters.

As referred to above, the New Act and consultation papers published by the Department (**Consultation Paper**) include no detail about the form of contract between an individual and their care provider and the means for that contract to come to an end. One of the matters we are most frequently called to advise on is how to end an agreement with a consumer where the consumer or their family has abused or threatened staff members or other residents.

Other aspects which should, in our view, also be addressed are:

(a) Safety – providers are sometimes put in the difficult position of having to choose whether to comply with aged care laws or WHS laws. This arises often directly as a result of resident or family member behaviour which puts staff members at risk. We note that the Department has decided in Consultation Paper No. 2 not to include any responsibilities on an individual receiving services. This fails to recognise that providers in residential care frequently have to deal with behaviours from individuals and family members which put their staff and other care recipients at risk. These behaviours are not related to care, but rather are often bullying and harassment type behaviours which sometimes required intervention of the court (e.g. protection orders).

(b) Security of tenure – the current security of tenure provisions do not address the current reality of aged care operations. Some of the practical issues which we see arising frequently are respite residents who refuse to leave at the end of their agreement, residents who smoke who enter a clearly non-smoking facility, residents whose care needs cannot be met but who refuse to have a medical assessment as part of the security of tenure process, behavioural impacts caused by violent or threatening family members, which currently do not provide any grounds to terminate the resident agreement. Clearly the provisions are critical to ensure safety of consumers, however the current formulation does not reflect the current operating environment. Greater flexibility is needed and the risk/principles based approach in the New Act could be used to inform an improved framework in this area.

(c) Dignity of risk – the Quality Standards have brought about a positive change in supporting individuals to live the life they choose. Consideration should be given to support and protect providers in circumstances where an individual chooses to take a risk (after that risk having been appropriately discussed etc).

(d) Fees – there are a number of aspects relating to fees in the current Act which should be addressed in the New Act. While the fees and payments elements of the New Act are not available, we suggest that the following items be addressed in the New Act:

(i) Clear articulation of the process for obtaining consent to increase fees in home care.

(ii) A more commercial approach to restitution in circumstances where a refundable accommodation deposit has been charged for an amount higher than the IHACPA approval.

(iii) Greater flexibility in relation to the use of refundable accommodation deposits.

4 Royal Commission

In a number of instances, the New Act deviates materially from the recommendations of the Royal Commission. The most material instances relates to the imposition of criminal penalties on responsible persons who have breached the statutory duty.

The Royal Commission did not make a recommendation that criminal penalties should apply and, in fact, the Royal Commission's position was that civil penalties were appropriate.

While we appreciate that governments are free to make their own decisions in relation to Royal Commission findings, the departures are significant and should be the subject of more detailed review and explanation as to why a different approach has been taken and whether the consequence is warranted.

5 Consequences

We are concerned that there are significant unintended consequences which will result from the New Act, in particular from the definition of responsible persons and the statutory duties. The significant personal (and possibly criminal) liability for responsible persons will put the aged care sector at a material disadvantage relative to other sectors. A registered nurse or volunteer board director would not choose to work in aged care when in an adjacent industry (such as public or private healthcare or NDIS) those same personal liabilities do not exist. Even if those persons were prepared to continue

in this situation, it is possible that the organisation will not be able to procure insurance to cover these liabilities.

This is just one of the obvious consequences of the proposed reforms and we consider that fuller analysis of downstream consequences should be undertaken before the New Act is finalised.

We have also been provided with a copy of the submission made by the general counsel of 15 approved providers dated 29 February 2024. We support the comments and recommendations made in that submission.

We would welcome the opportunity to discuss our submission with the Department. Please contact any of our partners Julie McStay, Lucinda Smith or Nikolas Miljkovic to discuss.

Yours sincerely
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Annexure

Topic	Issue	Discussion	Solution/next step
Refine definition of associated provider	**Associated Provider definition too broad**	The associated provider definition is designed to ensure that a registered provider is responsible for actions their subcontractors. On the current formulation, the definition will include hundreds of service providers to a registered provider including hairdressers, physiotherapists, cleaners, caterers, general practitioners etc. Some of this group of service providers are engaged by the individual and not the provider and yet would be captured in the current formulation of the definition. Providers do not control these relationships and it seems unlikely it was intended to extend liability and responsibility for their actions to the provider This seems to be an unintended consequence and when combined with the statutory duties will make aged care operations practically very difficult. The relevant Royal Commission was principally concerned with risk management practices to ensure care continuity in circumstances of default by contractors.	The definition needs to better reflect the policy objective in relation to liability for subcontractors by including qualitative factors and/or a materiality threshold. Relevantly, Section 96-4 of the Aged Care Act currently provides that an approved provider should only be responsible for care provided on behalf of the provider under a contract or arrangement.
Refine definitions of responsible person	**Contractors and volunteers**	The definition does not include the equivalent reference in the current definition of key personnel that the definition includes a person where they are employed or not.	Make clear that a responsible person does not have to be an employee.
		The definition as drafted would include volunteers. Please see our submission below about volunteers and the statutory duty.	
	Statutory duty scope	Please see our submission below about the level of responsible person to which the statutory duty should attach.	
Amend statutory	**Statutory duty not subject to**	The Royal Commission recommended that	Include a breach of the Quality Standards in

Topic	Issue	Discussion	Solution/next step
duties	**appropriate qualifications**	penalties for the breach of duty would include a breach of the aged care Quality Standards as a requirement. This has not been included. Section 121(3) provides that a responsible person can be guilty of an offence in circumstances where the registered provider was not found guilty of an offence under s120.	the formulation of the statutory duty. Amend s121(3) such that a responsible person cannot be liable in circumstances where the offence has not been made out against the provider.
	Statutory duty – fault based offence (both provider and responsible persons)	Sections 120(6) and 121(7) are titled "fault based offence", yet no fault based element is included.	Include a fault based element, drawing appropriately on other analogous laws. For example a requirement of recklessness/wilful disregard.
	Statutory duty of responsible persons too broad	The definition of responsible person includes individuals who would not be in a position to exercise the due diligence required in relation to this offence. It is not appropriate that individuals who are not in a position to control or influence policies, resources and systems are subject to this duty. Attaching the duty to a nurse manager of an approved residential care home will have a material detrimental impact on the already challenging workforce availability issues.	The statutory duty should only apply to persons who are members of a governing body or who meet limb 1(a) of the definition (executive decision makers)
	Statutory duty of responsible persons – reasonable excuse	The defence of reasonable excuses is not sufficiently defined and the defendant should not bear the onus of proof.	Amend the formulation of the defence so that it is clear.
	Statutory duty of responsible persons – due diligence	Section 121(1) requires a responsible person to exercise due diligence to "ensure that" the registered provider complies with the statutory duty. A responsible person can use due diligence but cannot guarantee that the due diligence steps undertaken result in compliance by the registered provider.	Amend the formulation of the section to remove "ensure that"
	Statutory duty of responsible	The Royal Commission did not recommend	Remove criminal liability for the fault based

Topic	Issue	Discussion	Solution/next step
	persons – criminal liability	criminal penalties for responsible persons where the statutory duty has been breached. Rather the Royal Commission recommended civil penalties. Imposing criminal penalties is disproportionate to the equivalent roles in adjacent industries (eg healthcare and NDIS) and will have a material negative impact on the availability of suitable governing persons	offence.
	Statutory duty - volunteers	The definition of responsible persons includes a person who is a volunteer. This means a volunteer board member of a community based not for profit will be exposed to the same level of personal liability as a person who is being paid for completing the same role. This is inconsistent with other equivalent provisions in WHS laws.	Exclude volunteers from the statutory duties.
	Who can bring a claim	Section 127 does not make it clear who can obtain an order. The compensation pathway should only be available to an individual who has received funded aged care services under the Act. Subsection 1 does not make this clear and leaves open the possibility that a third party could bring a claim.	Amend s127(1) so that the party claiming can only be the individual who obtained the relevant funded aged care service.
	Other claims	Section 127 leaves open the possibility that an individual could bring claims in relation to breaches of other sections of the Act. This section should be the only pathway to compensation orders.	Amend the New Act to make clear that the only pathway is s127 and that nothing else in the New Act considers a right in civil proceedings for a contravention of the New Act.
	Person responsible for paying compensation not clear	The compensation pathway in s127 is against an "entity". An entity means a number of different types of organisation listed in s7 (definitions), including an individual. The right to seek compensation should be against the registered provider. The statutory duty in s120 attaches to the	Amend s127 to refer to "registered provider".

Topic	Issue	Discussion	Solution/next step
		registered provider. Section 127 should be expressed in the same terms given that breach of the duty is one of the limbs to establishing compensation under this section. An individual should not be able to bring a claim against an individual responsible person.	
	Possible double compensation	An individual may seek compensation through direct discussion with a registered provider, reach a settlement and then seek further compensation under this section. A claimant should not be able to recover compensation under s127 where they have already received compensation in a preceding civil liability claim	Amend s127 to prevent double dipping.
	Limitation period	The limitation period is inconsistent with the limitation periods which currently apply in relation to similar claims, being 3 years. For example personal injury, which is 3 years under the *Limitation Act 1969 (NSW)*.	Amend s127(2)(b) to replace 6 years with 3 years.
	Other laws	The Bill does not provide for any other usual mechanisms relating to claims of this type – for example contributory negligence. These frameworks are well established in existing state civil liability acts.	Incorporate appropriate references to existing laws in relation to management of these kinds of claims.
Statement of Rights	**Clarity regarding consequences for breaching the Statement of Rights**	The Statement of Rights is one of the central pieces of the reform. As such it is critical that there is a clear articulation of how the Statement of Rights interacts with other provisions in the legislation. The definition of reasonably practicable (relevant to the statutory duty) then refers to the Statement of Rights. How the Statement of Rights feeds in to possible compliance action of breach of a statutory duty requires further consideration. For example, a provider may have considered the	Review how the Statement of Rights interplays with compliance and other actions in the New Act so that it is considered appropriately without unplanned consequences.

Topic	Issue	Discussion	Solution/next step
		rights the individual has under the Statement of Rights but for resource availability reasons or the safety of other consumers, been unable to fully comply.	
Reasonableness test for high quality care	The definition of high quality care in the new act is not limited to an obligation to provide high quality care "only so far as is reasonable" as was recommended by the Royal Commission.	The concept of high quality care exists under the current Act but there is no clear statement that imposes an obligation to provide high quality care. The Royal Commission recommended a statutory duty be imposed on providers to deliver High Quality Care. There is no statutory duty to deliver high quality care proposed in the New Act but whether the provider has delivered high quality care is a factor to be taken into account in assessing the provider's compliance with the New Act – For example see sections 22(13) and 23. As currently drafted, the obligation to deliver High Quality Care is not limited by any objective standard and is not consistent with the recommendations of the Royal Commission. The Royal Commission recommend that the obligation to deliver high quality care be limited to an obligation to deliver that care "only so far as is reasonable". The definition in its current form speaks in absolutes. Without a proviso that states the obligation is limited to an obligation to provide high quality care "only so far as is reasonable"; unachievable objects are imposed and unachievable expectations are set with consumers. For example; in its current form in order to deliver "high quality care" the provider must "put the individual first." The provider cannot always put the individual first. If this was an absolute	The definition of high quality care is amended to align with the recommendations of the Royal Commission and be limited to an obligation to deliver high quality care "so far as is reasonable". As envisaged by the Royal Commission, matters to be taken into account to determine reasonableness should be listed e.g. • Wishes of individual • Foreseeable risks to any person including the individual • Matters within control of provider • Matters within limits of funding

Topic	Issue	Discussion	Solution/next step
		requirement the obligation would be to deliver every service that a consumer might desire without regard for available funding or the safety and well-being of other residents and staff. This seem unlikely to have been the intent of the inclusion of the concept of high quality care.	
Whistleblower arrangements	**Existing whistleblower frameworks that may be implemented**	We understand and can see that the core of this new regime has been borrowed from and aligns to an extent with the whistleblower regime in place under the NDIS. However, the proposed framework in the New Act has been significantly broadened from the NDIS regime and, in some instances, has removed material provisions that would assist in dealing with and maintaining the integrity of whistleblower disclosures. In our view, it would be more appropriate for the Department to implement and draw upon an existing whistleblower framework which the majority of providers are already subject to. For example, there are whistleblower frameworks in place under the Corporations Act, the Taxation Administration Act and the NDIS Act, all of which may have been drawn upon to bring the aged care system in line with other industries and frameworks to allow for consistencies at the federal level both in terms of administration of the framework as well as understanding for all stakeholders involved. Given the alignment in a number of ways between the aged care and disability sectors (particularly in terms of the level of care and services delivered and the vulnerability of individuals involved), in our view, it would be suitable for the Department to draw more closely upon the NDIS whistleblower framework, rather than seeking to implement a	Rather than implementing a new whistleblower framework with different disclosure grounds and avenues, align the obligations and protections more closely with existing whistleblower regimes (primarily under the NDIS).

Topic	Issue	Discussion	Solution/next step
		new framework which, as currently drafted, goes over and above recommendations arising from the Royal Commission. Doing so would allow all relevant government bodies and delegates to administer and implement a framework which is already in force and effect and to draw upon experiences and learnings from that existing framework. For some providers (depending on their size and structure), an altogether new whistleblower framework may require compliance with at least four different whistleblower regimes (being those under the Corporations Act, the Taxation Administration Act, the NDIS Act and this New Act).	

	Individuals to whom disclosures may be made	Given the nature of the services being provided in the aged care system, the whistleblower arrangements as currently drafted effectively allow for:
		• anyone to make a disclosure in relation to any "entity" (which includes individuals); and
		• disclosures to be made to a broad range of individuals, including people who are:
		  • not involved in aged care and do not understand the regulatory framework in which funded aged care services are delivered (e.g. police officers); and
		  • not suitable to receive disclosures (e.g. an aged care worker, who could simply be a volunteer or an employed cleaner/maintenance person/caterer who, by way of example, may not have English as
			We recommend that the individuals to whom disclosures can be made are limited to those people involved in the aged care system and, as such, remove reference to disclosures being made to "police officers" (at section 355(a)(vi)).
			
			We would also recommend amending reference to "aged care worker of a registered provider" (at section 355(a)(v) to persons nominated by the provider to receive whistleblower disclosures. In doing so, you may consider requiring that that nominee's details are published in some way (e.g. on the provider's website or on My Aged Care).

Topic	Issue	Discussion	Solution/next step
		their first language to properly understand the disclosure or their associated obligations). By allowing for disclosures to be made to these types of people, it undermines the efficacy of the whistleblower framework as those types of people may not be able to properly administer the relevant obligations relating to such disclosures. For example, allowing for disclosures to be made to any aged care worker of a provider would require extensive education and training on their obligations in receiving a whistleblower disclosure, which may be far removed from their ordinary employment duties and obligations.	
	Removal of 'in good faith' requirement	The New Act has removed the requirement that whistleblower disclosures are to be made on a good faith basis. While that change aligns with the Corporations Act whistleblower regime, it is not aligned with the NDIS whistleblower regime which, as outlined above, is the sector most closely associated with aged care. The only requirement specified is that the whistleblower must have 'reasonable grounds'. Allowing for disclosures to be made without a 'good faith' requirement removes any appropriate balance in the system and could give rise to vexatious claims against providers even by individuals who are in no way associated with that provider. On a daily basis, providers already deal with numerous and extensive complaints from dissatisfied family members, even in circumstances where the care recipient themselves may be satisfied and/or provider has been fully compliant with their legislative and contractual obligations.	We recommend re-implementing the requirement that whistleblower disclosures must be made in good faith.

Topic	Issue	Discussion	Solution/next step
		Allowing for an anonymous whistleblower disclosure framework with no suitable balance or protection against vexatious complainants: • may see the whistleblower provisions used as an alternative complaint mechanism where residents (or their representatives, friends or family members) are perhaps not satisfied with the outcome of a complaint through the regular avenues or vindictive due to something that has occurred in relation to their loved one; and • will require providers to address and investigate all such disclosures arising, regardless of the nature of the disclosure and whether or not it has been made in good faith.	
Critical failures powers	**The New Act proposes to introduce new "Critical failures powers".** **There is some commentary in the consultation papers that gives a very broad brush indication of the proposed scope of the powers but the relevant provisions to be included in the New Act are missing.**	It appears intended that the critical failure powers will be the most serious compliance tool available to the Commission that will be exercised in the most serious of circumstances and will involve (potentially) the most serious consequence for providers. It is currently proposed there be a further period of consultation focussed on the critical failures powers at some point in the future ie after the New Act is passed. The consultation paper asks for input on matters such as the advantages and disadvantages of the proposed new critical failures powers, whether the powers are necessary and whether the conditions identified to trigger the critical failures powers are reasonable. Providers cannot comment on those matters	Any revised implementation timeframe or transitional phase of the New Act should allow for appropriate consideration of the proposed scope of the critical failures powers to be included in the New Act.

Topic	Issue	Discussion	Solution/next step
		without seeing the draft provisions. Given the gravity of the powers contemplated, providers should have the opportunity consider the impact of the powers in the context of the Act as a whole including in the context of other penalties and consequences that are proposed in the New Act to enable an assessment of areas of conflict and gaps but also to enable a reasonable assessment of the totality of compliance tools available to regulators and whether or not those tools are reasonable or otherwise unfair and/or disproportionate to risk.	
System governor and Commission roles	**There is a lack of clarity in the division of regulatory powers as between the Systems Governor and the Commission.**	The New Act gives rights in relation to regulatory activity over some areas back to the Secretary of the Department (Systems Governor). While this is apparently intended to be limited to only matters related to the "administration of the Act" the effect of the drafting (e.g. S132(1)(h) is far broader than that and there are many areas where there will be cross over and potential confusion as to whether a matter is the subject of regulation by one or both of the Systems Governor and the Commission. For example; unless there is some clarity introduced into the Act, both the Systems Governor and the Commission have broad powers to issue Required Actions Notices and compliance notices which are likely to be frequently used powers.	The regulatory powers of the System Governor be recast by an amendment to S132(1)(h) to include a statement that its powers do not extend to any matters in respect of which the Commission has specific regulatory powers allocated under Chapter 5 Part 3.
	Detail on the review rights of decisions made by the Systems Governor and the Commission are missing from the New Act.	Particularly given the issues raised above related to potential for cross over and confusion between the regulatory powers of the Systems Governor and the Commission, the absence of the review rights provisions is problematic. This is a key area where providers must be able to consider the New Act as a whole and assess	Any revised implementation timeframe or transitional phase of the New Act should allow for appropriate consideration of the proposed system of rights of review to be included in the New Act.

Topic	Issue	Discussion	Solution/next step
		areas of conflict, gaps or other problems.	
Interaction with State/Territory laws	**Attorney and guardianship laws**	The State and Territory attorney and guardianship laws are currently play an important and vital role in the ability to effectively deliver aged care services, particularly for those individuals who have lost capacity. The proposed new provisions relating to representatives in the New Act do not in any way recognise the existing State and Territory appointments and the interplay between an appointed representative under the New Act and attorneys/guardians. The only reference to existing appointments in the New Act relates to existing guardians/attorneys having; • no authority or power to make any decisions on behalf of an individual in relation to matters concerning the delivery of funded aged care services (if they have not been separately appointed as a representative); and • the ability to apply to be appointed by the System Governor as a representative (and the System Governor being required to accept that application and appointment). The Department will need to consider a number of issues in addressing the interplay and interaction between the State/Territory frameworks and the proposed new framework, including: • the existing duties of an individual's state or territory guardian being in direct conflict with duties as a representative under the New Act (particularly in States such as NSW and WA where 'best interests' substitute decision-making models are still	Given the issues presented and which do not seem to have been considered in the current drafting, we suggest: • further clarification is provided by the Department as to how the New Act will address the type of scenarios outlined in these submissions; • a clear and robust education and guidance framework is developed to accompany these changes outlining the differences and interaction between the proposed model and the State/Territory models. It should not fall on providers to provide this education and guidance; • remove the ability for appointed attorneys to be automatically eligible to be appointed as representatives (noting their decision-making power is currently limited to financial affairs), unless they have also been appointed as an individual's guardian; and rather than requiring currently appointed guardians to make an application/request to be appointed as a representative (which the System Governor must accept and approve), a State/Territory appointed guardian should automatically be recognised as a representative under the New Act unless they choose to opt out (rather than requiring a positive step to be taken to be appointed as a representative).

Topic	Issue	Discussion	Solution/next step
		in effect, which may not always align with an individual's will and preferences); • whether a person appointed as a representative due to their existing appointment as an attorney/guardian will have their appointment revoked by the System Governor in circumstances where an individual's state-based appointment has been revoked; • whether a person appointed as a guardian under State and Territory law should be presumed to be appropriate to be appointed as a representative under the New Act (again, referring to the direct conflict between making decisions in an individual's best interests and their will and preferences); • whether a guardian will continue to have decision making power in relation to aged care decisions (as they do now) to allow for a period of time during which the System Governor can make representative appointments (particularly where an individual lacks capacity); • whether the Department has considered how an appointed guardian/attorney will be made aware of: • the change in their authority and decision making power on their power to make decisions under, or for the purposes of the New Act on behalf of an individual (noting that the current drafting does not require any notification to be	

Topic	Issue	Discussion	Solution/next step
		made to appointed guardians/attorneys); or • the requirement for that appointed guardian/attorney to take a positive step to apply to be appointed as a representative to continue to be able to make any related decisions; • whether any specific protections will be afforded to providers where: • they are the subject of claims from appointed guardians or attorneys where the provider has complied with directions received from a representative; and • a representative has made a decision relating to an aged care matter, but which an appointed attorney does not agree with and as such, does not agree to pay funds to the provider associated with that decision; and • as currently drafted, the New Act requires that where an appointed attorney (being an individual appointed to make decisions relating to financial affairs) makes an application to be appointed as a representative, the System Governor must appoint that individual as a representative, despite the fact that their existing power at the State/Territory level as an attorney does not allow for that person to make care related decisions. It is clear from the above that there is significant	

Topic	Issue	Discussion	Solution/next step
		potential for confusion between the various frameworks and amongst appointees, which will create not only an administrative burden for providers, but may also give rise to various legal claims and disputes involving the provider which will take away significant time and resources for a provider in managing those affairs (particularly given the lack of any education or guidance being provided to the public on this subject matter).	
	Privacy laws	Chapter 7 of the New Act deals with information management systems and processes, particularly around the use, recording and disclosure of information in the performance of duties and functions in the aged care system. However, as currently drafted, there is no clear mechanism to deal with the interaction and interplay between privacy obligations as drafted in Chapter 7 with existing privacy legislation. This is not just limited to the *Privacy Act 1988* (Cth) (**Privacy Act**), but also other state-based pieces of privacy legislation such as the *Health Records and Information Privacy Act 2002* (NSW) (**HRIP Act**). While we understand that the Australian Constitution specifies that Commonwealth law prevails to the extent of any inconsistency with State/Territory law, it is not clear whether the information management provisions and the concept of 'protected information' in the New Act are intended to 'cover the field' and address all information management obligations in the aged care system. The manner in which the provisions have been drafted gives 'protected information' a broad definition that it could be interpreted to 'cover the field' to the exclusion of all State/Territory laws,	We recommend that clear guidance is provided to providers to confirm the position and interplay between the New Act and other existing State/Territory legislation. This may be done in the form of: • further materials being developed and published by the Department to ensure providers and individuals involved in the system understand their obligations relating to information management; and/or • additional 'notes' included in the legislation to make clear, for example, whether or not authorisations under the New Act will have effect for the purposes of State/Territory legislation (or if that carve out is only limited to the Privacy Act).

Topic	Issue	Discussion	Solution/next step
		particularly noting section 322(3) which encompasses any information: • obtained or generated for the purposes of the New Act; or • derived from information obtained or generated for the purposes of the New Act. By way of example, at what point is 'health information' under the HRIP Act not obtained or generated (or derived) for the purposes of the New Act where it relates to an individual's ongoing health, care, support and palliative needs delivered by a provider? We can see that attempts have been made to refer back to the Privacy Act through a series of 'notes' in Chapter 7. For example, Note 2 at section 323(3) of the New Act mentions that where the recording, use or disclosure of protected information is authorised under the New Act, those authorisations will also have effect for the purposes of the Privacy Act. However, it is not clear whether the Department's intention is that compliance with information management provisions in the New Act will also have effect for the purposes of other State/Territory privacy legislation.	
Drafting issue – person/entity	**Drafting issues related to definitional matters create confusion and a lack of clarity surrounding who might be captured by a penalty provision.**	Penalties may be imposed under the New Act on any one of a number of persons or categories of persons. Some categories are defined (e.g. Entity) some categories are not (e.g. person). Penalties can be imposed on an "Entity" and an 'Entity" is defined as an:	There should be a reconsideration of the penalty provisions to provide clarity with respect to the class of persons against whom a penalty can be imposed.

Topic	Issue	Discussion	Solution/next step
		• Individual • Body corporate • Body politic • Partnership • Other unincorporated association Penalties can be imposed on a person. There is no definition of a person. A person could conceivably include all of the categories listed in the definition of "Entity".	
Penalties – clarity on civil/criminal	**There is inconsistency in the penalty provisions**	The New Act expresses penalties in different and inconstant ways, including: • Specific references to civil penalty • No reference to whether the penalty is civil or criminal • Specific references to penalty units or imprisonment, without specifying that the provisions is a criminal penalty provision Further some penalty provisions do not make it clear that the penalty is a maximum.	Each penalty provision should clearly state: • whether it is civil or criminal; and • where the penalty is up to/maximum
Supporters and representatives	**Interaction with State/Territory laws**	We refer to our discussion outlined above.	We refer to our proposed solutions/next steps outlined above.
	Location of provisions within New Act	The supporter and representative provisions are spread out in the New Act at: • Part 4 of Chapter 1; and • Part 4 of Chapter 8.	All provisions relating to supporters and representatives should be dealt with in the same Part/Chapter of the New Act to ensure clarity as to the obligations and requirements associated with those matters.

Topic	Issue	Discussion	Solution/next step
	Supporters *or* representatives	The Department has amended the provisions since the initial draft of the New Act to specify that individuals may only appoint supporters ***or*** representatives. The New Act goes so far as to prohibit the appointment of a representative where a supporter has already been appointed. This gives rise to issues where an individual may have already appointed someone as their 'supporter', but their appointed guardian subsequently applies to be appointed as the individual's representative, noting that: • the System Governor 'must' approve that appointment under section 376(4) of the New Act and would therefore be required to cancel the supporter's appointment; and • the consent of the individual is not required for the appointment of a person as a representative (unlike a supporter which does require consent). The second Consultation Paper suggests this has been done to take into account divergent family and support networks but, in our view, it achieves the opposite outcome. For example, a divergent support network may include multiple people who wish to be kept up to date and provided information in relation to the individual's care (i.e. multiple supporters), but only one individual to be appointed as a representative to make decisions on behalf of the individual. Allowing individuals to appoint both supporters and representatives will: • address some of the issues we have outlined above;	Individuals should be able to appoint both supporters ***and*** representatives.

Topic	Issue	Discussion	Solution/next step
		• more broadly address the different types of support networks of individuals; and • align with the NDIS framework which allows for both plan nominees and correspondence nominees to be appointed (being the equivalent of representatives and supporters in the New Act).	
	Interaction with other substitute/supportive decision makers	In addition to the interaction and interplay with State/Territory legislation, there will need to be consideration as to how representatives under the New Act will interact with an individual's other appointed decision-makers and, in particular, the point at which a decision is no longer related to or for the purposes of the New Act. For example, an individual receiving funded aged care services may have a broad range of appointed decision makers including attorneys, guardians, NDIS nominees, Centrelink nominees and now representatives under the New Act. Under that scenario, an appointed attorney has control over the financial affairs of the individual, but that attorney's power may be fettered by the Centrelink nominee who has control over how Centrelink payments are to be made (e.g. that nominee may notify Centrelink to make payments directly to the provider). It is not clear from the provisions of the New Act or any of the guidance material issued to date whether it is being proposed that an appointed representative will assume those powers in their role of making decisions related to or for the purposes of the New Act and, if so, how providers will be protected both financially and legally where they have complied with a representative's decision, but then exposed to claims or failures to	The Department needs to connect the proposed representative framework to other legislative frameworks, including, but not limited to, the NDIS, Centrelink and State/Territory frameworks. Until that is done and, in the interim, it may be appropriate to clearly define the types of decisions that a representative will be able to make, given the current drafting is ambiguous due to how broadly it may be interpreted. For example, it would be appropriate to clearly specify whether or not representatives have the ability to make decisions in relation to financial affairs.

Topic	Issue	Discussion	Solution/next step
		pay from those other appointed individuals under other frameworks. It is important to note that the Disability Royal Commission Research Report *'Diversity, dignity, equity and best practice: a framework for supported decision-making'* included as one of its recommendations (number 4) that: *"The interrelationships of supported decision-making with other formal systems and informal spheres of life means that supported decision-making cannot stand alone and must be embedded in and connected to existing systems with different institutional and legislative frameworks."* It is clear in the current circumstances that the proposed representative framework has not been embedded or connected in any way to these existing systems and, without any defined limit to a representative's decision making power, there will be confusion and disputes arising in relation to a large number of decisions that are made in the aged care system.	
	Request for appointment of supporters and representatives by provider	Sections 374(2) and 376(2) provide that an appointment of a supporter or representative may be made on the request of a 'person' (including the individual) or 'body' and, in the case of representatives, 'on the initiative of the System Governor'. In the current guardian State-based framework, providers have the ability to bring applications to the relevant Guardianship Tribunals to have a guardian appointed for an individual in certain circumstances. In our view, the position under sections 374(2) and	Sections 374(2) and 376(2) should be amended to allow for a registered provider to make requests for appointment of a supporter or representative, particularly in circumstances where an individual has lost capacity and no other person has made such a request.

Topic	Issue	Discussion	Solution/next step
		376(2) does not adequately support circumstances where an individual has lost capacity and may not have a broad support network or 'person' who may be able to make the required request for appointment under those sections. The provider would be the most suitable entity to make a request in those types of situations.	
	Emergency provisions	It is not clear in the current draft of the New Act what the position is for a provider for a period where there is no person validly appointed as a representative for an individual and an aged care related decision needs to be made.	The Department should allow for: • a transitional period where a provider can take instructions from a guardian validly appointed at State/Territory level (i.e. as is currently being done) until a representative has been formally appointed by the System Governor; and/or • a framework/mechanism for providers to be released from any claims or liability where instructions are taken from a person other than an appointed representative in emergency situations.
	Penalties and compensation pathways	There are a number of statutory duties imposed on supporters and representatives, but there is no: • clear statement as to the obligations of supporters and representatives (e.g. recording of information associated with decisions made); or • any real enforcement action or penalties involved with a failure of a nominee to comply with those duties if they can show they have acted reasonably and in good faith. Otherwise, the only action that can	We recommend that: • positive obligations on supporters/ representatives are implemented to make clear how an appointed nominee will be assessed in the performance of their duties; • penalties are incorporated and applied in circumstances where a nominee has breached their statutory duties, particularly where they have not acted reasonably/in good faith;

Topic	Issue	Discussion	Solution/next step
		be taken against them is to simply have them removed from their nominee role. However, in our view, there should some form of penalty associated with a nominee's blatant disregard or failure to comply with their statutory duties. The only penalties currently set out in the New Act only deal with elder abuse type scenarios where a nominee dishonestly uses their position to obtain a benefit or cause detriment. Further, at the State/Territory level, individuals may seek compensation through the relevant Tribunals where their appointed guardian/attorney has misused their power or otherwise breached their fiduciary duties. As currently drafted, an appointed nominee under the New Act may clearly breach their duties and simply be removed from their position without penalty, with the individual left with no clear path for compensation. In our view, that does not support the policy of protecting older Australians.	and • clear compensation pathways are introduced to allow for a specific mechanism for individuals to seek compensation against nominees who have breached their duties.
	Enduring appointments	This issue relates to the authority of a person appointed by the individual after they have lost decision-making capacity. Under common law principles, if an appointment of an attorney/guardian is made by an individual, and that individual subsequently loses capacity, then the appointment would ordinarily automatically be revoked. This issue is addressed in State/Territory jurisdictions through enduring powers of attorney and enduring guardianship appointments. However, as currently drafted, there is no equivalent concept included to make clear that an appointment of a supporter or representative is made on an enduring basis, or whether the	The New Act should clearly set out whether or not supporter/representative appointments are made on an enduring basis and are intended to continue after an individual has lost decision-making capacity.

Topic	Issue	Discussion	Solution/next step
		individual may choose to either make general or enduring appointments in the same manner as the State/Territory models.	