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**Submission to Department of Health and Aged Care: A New Aged Care Act: Exposure
Draft Consultation Paper No: 2**

I am grateful for the opportunity to make this submission about the exposure Draft Aged Care Bill in Australia. I am a Professor of Law with a background and expertise in negligence and compensation law and in the adequacy of compensation for injuries suffered by vulnerable people in Australia. I am a co-author of a leading Australian Tort textbook¹ and I have previously written on the lack of compensation for injuries suffered by older people in aged care.² **I have made previous submissions in response to** previous Aged Care Consultation Papers released by the Department.³ **I reiterate all the points I made in those submissions** as they continue to be relevant to this consultation. In this submission, I comment particularly on the matters discussed in Chapter 3 Part 5 (Consultation Questions Chapter 3: 17 and 18) of the consultation paper in relation to the proposed statutory duty and compensation.

¹ Luntz, Burns et al, *Torts: Cases, Legislation and Commentary*, 9th ed Lexis Nexis, 2021.

²Eg <https://blogs.griffith.edu.au/law-futures-centre/2021/06/01/the-forgotten-injured-recovery-for-injuries-in-aged-care/#:~:text=Despite%20high%20rates%20of%20injury%2C%20Australians%20in%20aged.and%20by%20the%20National%20Disability%20Insurance%20Scheme%20%28NDIS%29..>

³ <https://research-repository.griffith.edu.au/handle/10072/427353>; <https://research-repository.griffith.edu.au/handle/10072/427354>.

High Levels of Abuse, Neglect and Injury in Aged Care

As my previous submissions have made clear, the extent of neglect and abuse in aged care as revealed in the Royal Commission into Aged Care Quality and Safety ('Aged Care Royal Commission') was 'deeply concerning', 'inexcusably high' and demonstrated an unacceptable level of neglect and injury to older people in the aged care system.⁴ The Aged Care Royal Commission documented the range of injuries and death to people in aged care that resulted from neglect and abuse. Despite the findings and recommendations of the Aged Care Royal Commission in 2021, abuse and neglect resulting in injury and death of older people in residential aged care has continued. The most recent sector performance report of the public regulator, the Aged Care Quality and Safety Commission ('Aged Care Commission'), for the quarter July-September 2023 shows the mandatory reporting of 13, 797 serious 'reportable incidents' including unreasonable use of force; neglect; psychological or emotional abuse; unlawful or inappropriate sexual conduct; unexplained absence and death.⁵ 623 of those reports concerned unlawful or inappropriate sexual contact. These figures are very unlikely to represent the total extent of injury and harm in aged care.

Lack of Existing Compensation for Injury in Aged Care: The Forgotten Injured

Given the extent of injury (and death) in aged care through neglect and abuse, it might be expected that would be many successful actions for compensation and/or a compensation scheme which responded to injuries suffered in aged care. Despite the theoretical availability of actions in tort and other areas of law, there is little evidence of successful litigation in Australia. There have been a limited number of actions in Australia against aged care providers seeking injury compensation. No statutory compensation scheme exists despite the existence of injury compensation schemes in many other categories of injury, including for Australians harmed in other institutional contexts. The lack of litigation to date suggests that there are significant practical as well as legal barriers inhibiting civil action by people injured in aged care. Barriers may include that the injured person has cognitive issues; lack of financial resources to fund litigation; lack of advocacy and legal assistance; fear of retribution for people who still reside at premises owned by the aged care provider; ill health and restricted life span; the impact of

⁴ Royal Commission into Aged Care Quality and Safety (Final Report, 26 February 2021) <https://www.royalcommission.gov.au/aged-care/final-report>.

⁵ Aged Care Quality and Safety Commission, Sector Performance Report: Quarter 1 July- September 2023, (Report) < <https://www.agedcarequality.gov.au/media/97909>> ('Sector Performance Report').

trauma and stress and delay in litigation; a well-founded fear of being disbelieved; a culture of discrimination; and likely low amounts of damages if settled or successful. Any new compensation provisions in the draft Aged Care Bill should be aimed at making it easier for injured people to obtain compensation and to overcome the barriers and impediments discussed above.

My Submissions

My **overall submission** in response to the draft compensation provisions and other provisions in the draft Aged Care Bill is that **I do not believe the provisions that are currently proposed will result in much if any improved compensation for people injured in aged care.** In my view, if the legislation is introduced it will result in compensation pathways which will exist only in theory and almost never provide any compensation to injured people in practice.

I suggest the following amendments to the Draft Bill:

1. Clause 21(3) and 23 (3) should be amended to allow a private action to be brought by an injured individual when an injury results from a breach of the Statement of Rights or the Statement of Principles.
2. The relevant provisions concerning the proposed statutory duties should be amended to ensure that:
 - Provisions concerning an action for compensation by an injured person for breach of the statutory duties are separate to and disentangled from the penalty provisions.
 - Injured people should be able bring an action for breach of the statutory duty independent of any regulatory action by the regulator and without the need for the regulator first to have successfully prosecuted a provider for a penalty.
 - The action by an injured person for compensation should not require breach to be shown at any higher level than that the reasonable practicable steps required by the duty have not been taken. An injured person should not have to also show matters such as ‘significant failure’, that there was ‘a systematic pattern of conduct’ or that ‘serious injury or illness’ resulted. While these matters may be relevant to whether criminal penalties should be available to the regulator, they create unnecessary,

unfair, unprincipled and burdensome hurdles to civil compensation for vulnerable injured people.

Statement of Rights and Principles

The draft Aged Care Bill provides for both a Statement of Rights⁶ of people in Aged Care and a Statement of Principles⁷ to guide the provision and regulation of aged care. These both provide for safety, health and well-being of people in aged care and freedom from harm, abuse and neglect.⁸ These are welcome and important provisions. However, breach of those Rights or Principles cannot (as proposed) be remedied through proceedings by any harmed individual.⁹ Injured people have no means (other than an indirect right such as to make a complaint) to achieve any remedy when they are injured as a result of even serious breaches of their Rights or of the Principles. The provisions will explicitly not give rise to the possibility of a breach of statutory duty action. As is often the case in discussions about rights-based provisions in legislation, what is the purpose of an individual being given rights if the wronged individual has no rights of enforcement or redress when a right is breached?

Clause 21(3) and 23 (3) should be amended to allow a private action to be brought by an injured individual when the injury results from a breach of the Statement of Rights or the Statement of Principles.

A New Duty of Care and Compensation Pathways

The statutory duty¹⁰ proposed in the draft legislation departs substantially from that proposed by the Aged Care Royal Commission. For example, the proposed duty will not be to provide 'high quality care.' It will only require providers to 'ensure so far as is reasonably practicable'¹¹

⁶, Clause 20

⁷ Clause 22.

⁸ Clause 20 (4) for example provides that an individual has a right 'to be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion abuse or sexual misconduct' and to have 'quality and safe funded aged care services.'

⁹ Clause 21 (3) and Clause 23 (2).

¹⁰ Clause 120. Clause 121 requires a 'responsible person' of a registered provider to 'exercise due diligence to ensure a provider complies with the duty, and Clause 122 provides the duty cannot be transferred to another entity.

¹¹ Clause 120 (2) provides that reasonably practicable means what was at a particular time able to be done taking into account the likelihood of the adverse effect, the likely degree of harm, what the person concerned knew or ought to have reasonably known about preventing the adverse effect, and the rights of the individual harmed under the Statement of Rights in the legislation.

that the conduct of the provider does not cause adverse effects' to an individual's health and safety.¹²

Despite the content of the proposed statutory duty being expressed as one of reasonable practicability (ie similar to common law duty of reasonable care and to WHS duties), confusingly breach is not expressed as a failure to achieve reasonable practicability. This seems to defeat the purpose of including this standard in the duty itself. Instead only 'serious failures'¹³ which expose an individual to the risk of death or result in serious injury or illness or result in death or injury¹⁴ and which involve conduct which is a 'significant failure'¹⁵ or 'part of a systematic pattern of conduct' will be a breach of the duty which is subject to penalty.¹⁶

Serious injury or illness is defined in the draft Aged Care Bill as requiring immediate treatment as inpatient in hospital; or immediate treatment for amputation, serious head injury serious eye injury, serious burns, separation of skin from tissue such as degloving or scalping, spinal injury, loss of bodily function, or serious lacerations; or 'medical treatment within 48 hours of exposure to a substance'.¹⁷

The draft Aged Care Bill does provide for a compensation order to be sought for breach of the statutory duty by the regulator or by an individual who has been harmed. However, compensation can only be ordered where 'an entity has been found guilty of an offence' and there has been serious injury or illness as a result of the offence.¹⁸ There is a provision for a duty of aged care digital platform providers, but the duty does not relate to the need to prevent harm to any individual person through the action of a care provider sourced through the platform. Rather it relates to the need for platform providers to abide by regulatory requirements such as checking and displaying whether a person on the platform is a registered provider and having complaints and incident management systems.¹⁹

The proposed statutory duty provisions for providers are far weaker than those recommended by the Aged Care Royal Commission. Unfortunately, if the proposed statutory duties in the

¹² Ibid.

¹³ Clause 120 (4).

¹⁴ Ibid.

¹⁵ Clause 18 defines this as involving significant departures from conduct expected from conduct reasonably expected of providers.

¹⁶ Clause 18 provides that systematic patterns of conduct require regard to be had to the number of times of contraventions by the provider of the legislation, the time period of contraventions, number of individuals affected by contraventions and provider's response to contraventions.

¹⁷ Clause 7.

¹⁸ Clause 127.

¹⁹ Clause 130.

draft Aged Care Bill are adopted, they are very unlikely to result in any significantly improved compensation for people injured in aged care. They will not overcome the barriers to a successful action discussed above and present very significant new barriers to compensation. There is no additional proposed pathway of redress for historic harms suffered by people in aged care, or of redress by Government. The proposed statutory duty sets a very high standard for breach which involves only 'serious failures' and death or serious injury or illness. Many of the injuries and harms suffered in aged care would not meet the proposed definition. For example, serious psychiatric injury following sexual assault or from continuous verbal abuse, malnutrition resulting in significant weight loss and organ failure, loss of teeth, and wounds and broken bones treated at the aged care residence would not appear to meet the proposed definition. Breach of the proposed statutory duty will be far more difficult to show than breaches of current tort law (which is already failing). The proposed provisions inappropriately attribute a criminal standard of breach, to both criminal and civil actions. The need to also show significant failures or systemic failures before there is a breach by a provider are far above what might be considered as breach of duty in negligence law.

In addition, an injured person could only receive compensation for breach of the proposed statutory duty, where the regulator has already successfully prosecuted a person for a civil or criminal penalty. This relies on the regulator to take compliance action proactively at the highest level of penalty as a precursor to compensation. At present, the regulator has been heavily criticised for failing to take active compliance action and there is little evidence of serious penalties being sought even when very serious injury or death have resulted from failures by providers. While there is some possibility under the draft Aged Care Bill that compensation could be offered to an injured person by a provider through a 'restorative approach' to complaint resolution,²⁰ or through an enforceable undertaking by a provider,²¹ this puts the discretion onto a provider and the regulator whether to offer/require compensation and the quantum of compensation.

The draft Aged Care Bill provides no option of a completely independent action by an individual injured in aged care based on breach of their rights under the legislation or based on contravention by a provider or aged care worker of their legislative obligations which have caused injury. Yet in other areas, the legislation provides express rights of compensation for

²⁰ Clause 183 (2) (e).

²¹ Clause 246 and 251.

providers for harm that would be considered nowhere near as serious as the bodily harm often suffered by people in aged care. For example, s227 provides express rights for a provider to seek compensation from the Commonwealth for damage to electronic equipment and allows for proceeding by a provider to obtain 'reasonable compensation'. There are no 'higher' standards or requirements for providers before they can obtain compensation. As currently proposed, it would be easier for a provider to obtain compensation under the proposed legislation if a computer was damaged during an investigation, than for a resident who was raped while in residential aged care due to failures by a provider to protect them.

The relevant statutory provisions should be amended to ensure that:

1. Provisions concerning an action for compensation by an injured person for breach of the statutory duty should be separate to and disentangled from the penalty provisions.
2. Injured people should be able bring an action for breach of the statutory duty independent of any regulatory action by the regulator and without the need for the regulator first to successfully prosecute a provider for a penalty.
3. The action by an injured person for compensation should not require breach to be shown at any higher level than that the reasonably practicable steps required by the duty have not been taken. An injured person should not have to also show matters such as 'significant failure', that there was 'a systematic pattern of conduct' or that 'serious injury or illness' resulted (as defined in the narrow way under the legislation). While these matters may be relevant to whether criminal penalties should be available to the regulator, they create unnecessary, unfair, unprincipled and burdensome hurdles to compensation for vulnerable injured people.

I am happy to provide further comments on the draft legislation if that would assist the Department.

Yours sincerely

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Professor Kylie Burns