Sector Support and Development Community of Practice Workgroup on Engagement on Aged Care Reforms

Submission to New Aged Care Act
Exposure Draft
Consultation Paper No. 2

'Reaching and Supporting Many'
artwork by Mayi woman Leah Cummins

We acknowledge the Traditional Custodians of the lands on which we live and work.We pay our respect to Elders past and present, and thank them for nurturing and protecting the waterways, the environment, and the ecosystems for thousands of generations. In recognising Aboriginal and Torres Strait Islander people's cultures as the longest living continuous cultures, we learn to care for country, care for culture and care for each other.

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Submission to New Aged Care Act - Exposure Draft - Consultation Paper No. 2

This submission is by the Engagement on Aged Care Reforms Workgroup of the aged care Sector Support and Development (SSD) Community of Practice (CoP). The Australian Government Department of Health and Aged Care (the Department) facilitates the CoP, comprising SSD officers, which the Commonwealth Home Support Program funds. SSD officers support aged care providers across local government, for-profit, and community not-for-profit organisations; some SSD organisations themselves also directly provide aged care services. The contributors represent organisations based in metropolitan, regional, rural, and remote locations.

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Executive Summary and Recommendations

The new Aged Care Act, as detailed by the Exposure Draft, represents the most extensive reforms to the Australian aged care system in almost 30 years. The Act aims to place the human rights of older people at the centre of the aged care system, requiring a cultural change in the aged care sector to adopt a person-centred approach to delivering quality and safe aged care.

The Workgroup on Engagement on Aged Care Reforms (Workgroup) comprises of aged care Sector Support Development (SSD) officers working in not-for-profit and commercially operated organisations across metropolitan, regional, rural, and remote Australia. The Australian Government Department of Health and Aged Care requires SSD officers to work with aged care providers, particularly those who provide Commonwealth Home Support Program (CHSP) services, to build their knowledge and capacity to transition to Australia's Aged Care Act reforms to support the sector. In other words, SSD occupy a unique position in having experience collaborating with providers to navigate the changes to the aged care system that Australian Governments have made since the Royal Commission into Aged Care's final Report and Recommendations.

Our Workgroup and the endorsing SSD organisation signatories to this submission wish to emphasise that everyone in the sector, aged care workers, leaders, and providers, are committed to delivering quality and safe care and supporting the overall reform directions. This submission makes critical recommendations that fall within the two critical sets of broad actions that must be in place to ensure the successful implementation of the new Aged Care Act's reforms:

1. The new Aged Care Act's provisions must be informed by and be responsive to the practical challenges of implementing the expectations and requirements of the new human rights/person-centred model by providers, workers, and government.
2. The Act's implementation must be supported by:

    a. Substantial, holistic, aged care sector-wide government funding, policy, and program investment. This investment would be targeted to strengthen the capability, knowledge, skills, resources, professional and career status, and remuneration status of all who work and contribute to the aged care sector at all levels across all provider service types.
    b. The Australian Government Department of Health and Aged Care and the Aged Care Quality and Safety Commission working closely with providers to support, guide, and strengthen the sector's understanding of the reforms and ability to identify and make suitable changes to transition to the new aged care system.

The 1,400 Commonwealth Home Support Program providers, of whom more than two-thirds (68%) are not-for-profit operated and significantly rely on the goodwill of volunteers, provide valued, crucial services to support older people to age well at home for as long as possible. The Australian Government Department of Health and Aged Care and the Aged Care Quality and Safety Commission must fully implement all the recommendations detailed in this submission. Doing so will ensure a sustainable aged care sector and a strengthened one that will provide high quality, safe care for our older Australians.

Chapter 1 – Introduction

Recommendation 1:

A provision that defines aged care service participants' responsibilities should be included, for example, to recognise that their rights will be supported as reasonably practicable and balanced alongside other rights.

Recommendation 2:

That Department communications to the public and older people clearly explain that the Statement of Rights and Principles are not intended to be enforceable through a court.

Recommendation 3:

That Department commits to a co-design process with First Nations people to comprehensively adopt the principles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) in the Statement of Rights.

Recommendation 4:

If First Nations stakeholders make such a recommendation, incorporate references to the right to stay connected to Island Home in the Statement of Rights.

Recommendation 5:

The definition of high-quality care should include discussion, negotiation, and collaboration of the extent to which all the elements of high-quality care, as defined by s.19, can be provided.

Recommendation 6:

The Commission publicly articulates and develops through public consultation a baseline of what good quality care looks like across the sector.

Recommendation 7:

The Department devise a comprehensive funded program of investment in the aged care sector to ensure providers and the workforce are supported to transition to the new Aged Care Act successfully. The investment would be in sector, provider and aged care workforce education, further training, skill, and capability building, including qualification advancement, professional and career development, and improved remuneration recognition.

Recommendation 8:

The Department consults providers and older people in designing and implementing the single list of funded aged care services.

Recommendation 9:

The Department:

- Provides further guidance on how supporters and representatives will operate in practice.

- Provides investment in the aged care workforce, specialising in collaborating with several stakeholders, such as social workers, counsellors and other allied health staff.

Recommendation 10:

The Department flexibly applies its supporter/representative provisions to reflect the diversity of networks and stakeholders of importance to older people and the diversity of approaches to the exercise of choice and decision-making (e.g. delegating to the collective/a group of representatives).

Recommendation 11:

Clearly define and ensure communications help inform the sector of:

- Who is authorised to be a representative or supporter of the older person.

- The interaction of the Commonwealth system with state/territory guardianship, powers of attorney, and mechanisms such as advance care directives.

Recommendation 12:

The Department should provide clarifying guidance around the role of independent advocates and whether the Act intends that they would apply to be supporters/representatives.

Recommendation 13:

- That no monetary penalties apply for supporters and representatives who breach their duties.

- Establish a banned supporter/representatives list to ensure those people who engage in elder abuse do not harm other older people.

- An approach that enables lifting such a ban, based on criteria reflecting rehabilitation, should be defined and applied.

Chapter 2 – Entry to the aged care system

Recommendation 14:

The Department:

• Publicly consults on the methodology of how it will assess needs and prioritise service allocation/places. Such consultation will ensure older people with varying cognitive functioning/disability/diverse cultural backgrounds and needs receive an appropriate allocation of services.

• Apply community/customer service standards that mandate timeframes for decisions and that measures of that success are made publicly available.

Recommendation 15:

The Department devise a comprehensive policy to address the wait times and demand for aged care places. This policy would involve:

• Consistently funding more aged care places on an ongoing basis.

• Provide parallel investment in health, social and community programs that support older people's wellbeing, social connection, and engagement.

Recommendation 16:

The Department:

• Develop emergency entry into aged care and flexible arrangements to ensure interim service delivery quickly.

• Develop and fund a 'no wrong door' approach to support ineligible Commonwealth-funded aged care applicants.

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

Recommendation 17:

The Department:

• Embark on a continuous, comprehensive communications, education and awareness-raising campaign, especially around compliance and penalty provisions, to reduce the risk that experienced workforce exit from the aged care sector.

• That the Commissioner continues to build relationships and dialogue with providers to strengthen awareness and refine its approach to compliance.

Chapter 4 – Fees, payments and subsidies

Recommendation 18:

Provisions that enable the Department to provide extra funding for a particular purpose flexibly are supported.

Chapter 5 – Managing the aged care system (governance)

Recommendation 19:

That:

- The Commissioner be permitted to advise other agencies where appropriate, such as the Inspector General of Aged Care and the Aged Care Quality and Safety Advisory Council, including state and territory health departments.
- A future review of the new Aged Care Act assesses the extent to which the Complaints Commissioner's effectiveness is affected by the fact that the Aged Care Quality & Safety Commissioner appoints them.

Recommendation 20:

Establish a Commonwealth level Office of the Advocate for Older People in Aged Care.

Recommendation 21:

- Exempt CHSP providers from being subject to prudential and financial standards.
- If such standards will apply, set entry thresholds that would activate such requirements, namely larger-sized CHSP providers (by turnover).

Chapter 6 – Regulating the aged care system

Recommendation 22:

The Commissioner consults the public and providers about how it, in practice, will use its powers in a proactive way that balances risk.

Recommendation 23:

The Department obtains and considers public feedback on its provisions about which decisions under the new Aged Care Act are reviewable.

Recommendation 24:

The Department:

- Obtain public consultation on its new critical failures powers once drafted.

- Clarify whether these powers extend to both residential and home care services.

The Commissioner:

- Consult the public and providers about how it would apply threshold tests such as 'immediate risk to health and safety,' 'no confidence in a provider, ' etc., in practice.

- Ensure that its staff who exercise critical failures powers have appropriate qualifications, training, and resources.

Recommendation 25:

The exercise of the critical failures powers to appoint external managers to be guided by those provisions related to the appointment of an administrator under the Corporations Act 2011. Such provisions should be modified to address the needs of older people in the aged care context.

Chapter 7 – Managing information

Recommendation 26:

The Department and Australian Government adopt the Human Rights Law Centre's recommendations to strengthen its whistleblower protection provisions.

Chapter 8 – Miscellaneous

Recommendation 27:

- Define which independent review bodies would be able to be accessed.

- Develop provisions that ensure that older people can access the independent review body to review a decision cost-effectively and on time.

- Ensure low-cost, timely facilitation via the Commissioner to function as conciliator of concerns between a provider and older person in their care.

- A legislative requirement that the System Operator and Commissioner follow model litigant principles in these review processes. This reduces the risk of bad faith misuse of administrative and legal processes, further compounding the distress associated with an older person's and provider's concerns.

- If the Department decides to use a non-court (i.e. not a judge appointed under Chapter 3 of the Constitution) body to play a role in the review, that provisions require the inclusion of suitably qualified and credentialed aged care consumers and provider representatives to be members in such review bodies. Due weight must be given to lived, operational and sector/industry experience when appointing such members.

Chapter 9 – The timeline for the new Act

Recommendation 28:

Noting that the Act is planned to commence from 1 July 2024, the Department and Commissioner are recommended to apply a phased approach to applying key provisions, notably concerning enforcement and operational features.

Recommendation 29:

The review of the operation and effectiveness of the Act occurs every three years rather than the singular review in five years that currently is planned (Consultation Paper, page 6).

Introduction

The Engagement on Aged Care Reforms Workgroup (Workgroup) of the aged care Sector Support and Development (SSD) Community of Practice (CoP) thank the Australian Government Department of Health and Aged Care (the Department) for the opportunity to make this submission to the Exposure Draft of the new Aged Care Act. Our submission comes after reviewing the plain English and full Consultation Paper No. 2 (the Consultation Paper) and the Exposure Draft.

The Workgroup aims to bring together the members of the SSD CoP to analyse, interpret, and share aged care reform information and resources to support the 1400 Commonwealth Home Support Programme (CHSP) service providers in transitioning through the aged care reform process. The Australian Government Department of Health and Aged Care (the Department) facilitates the CoP.

SSD officers, funded by the CHSP, support aged care providers. SSD officers come from local government, for-profit, and community-not-for-profit organisations, some of whom provide aged care services directly.

Our Workgroup, the authors of this submission, represents SSD officers from organisations based across metropolitan cities, regional, rural and remote areas. Aged care clients who receive care from providers in these areas include older people from culturally and linguistically diverse backgrounds. Please note that other endorsing SSD organisations are responsible for supporting the aged care sector across similar areas.

Our submission refers to the Exposure Draft Chapters and the questions raised by the Consultation Paper. We have only replicated those questions for which we have a response. Sections of the Exposure Draft herein will use the format s.# (e.g. s.20, s.24(5) etc.)

Chapter 1 - Introduction

1. Are the updated objects, Statement of Rights and Statement of Principles clear? Do they meet their aims? If not, what changes do we need to make?

Overall, the Exposure Draft's objects, Statement of Rights (s.20) and Statement of Principles (s.22) are clear and give effect to the Royal Commission's recommendations.

S.20 states that the System Operator and the Commissioner are to have regard to the Statement of Rights when engaging with providers who provide services to older people. These provisions will support the realisation of older people's rights.

We note that s.21(2), detailing the Statement of Rights, requires that providers who deliver services:

> "must not act in a way that is incompatible with the rights specified in section 20, taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals."

We support this critical qualifier, acknowledging that balancing competing or conflicting rights may be required. This recognises the practical challenges that providers have when delivering quality services. For example, Work Health and Safety rules may constrain the extent to which an older person's preferences or choices can be given effect. The principle that, in practice, rights may be balanced or limited against other rights needs to be strengthened.

Recommendation 1:
A provision that defines aged care service participants' responsibilities should be included, for example, to recognise that rights will be supported as reasonably practicable and balanced alongside other rights.

While the Statement of Rights and Principles are appropriately elevated to be in the new Aged Care Act, we note that s.21(3) states that "Nothing in this Division [being Division 1 – our insertions] creates rights or duties that are enforceable by proceedings in a court or tribunal". A similar provision applies to the Statement of Principles (s.23(2)).

Recommendation 2:
That Department communications to the public and older people clearly explain that the Statement of Rights and Principles are not intended to be enforceable through a court.

This is an opportunity to inform the public of the alternative ways that providers and the Aged Care Quality and Safety Commission can respond to concerns and complaints to resolve issues that would preclude the need for court enforcement. This would help appropriately set expectations and reduce misunderstanding.

Recommendation 3:
That Department commits to a co-design process with First Nations people to comprehensively adopt the principles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) in the Statement of Rights.

A human rights-based approach to the new Act, based on internationally agreed human rights conventions, should also reflect the principles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which Australia gave formal support to on 3 April 2009.

The Aged Care Royal Commission's Final Report states the aged care system must reflect the fact that for many Aboriginal and Torres Strait Islander people, health is grounded in connection to Country, culture, family and community. Each of these elements is capable of affecting the social, emotional and physical wellbeing of older Aboriginal and Torres Strait Islander people and, in turn, determining their health outcomes. (Volume 3a, page 239)

Incorporating the principles of the UNDRIP into the Statement of Rights (s. 20), would be a step closer to improving culturally respectful and safe, high quality, trauma-informed, needs-based and flexible aged care services regardless of where a person lives.

2. Some First Nations stakeholders would also like to add a right to stay connected to Island Home in the Statement of Rights. This would be in addition to 'Country.' Do you agree? We would like to get feedback from First Nations people on whether we should include Island Home in the rights and other parts of the new Act.

Noting that our submission supports the Department prioritising feedback from First Nations stakeholders to this question, we support including Island Home if this has been a suggestion made in previous consultations by those stakeholders.

Recommendation 4:
If First Nations stakeholders make such a recommendation, incorporate references to the right to stay connected to Island Home in the Statement of Rights.

3. Do you think the updated definition of high-quality care will encourage providers to do better? Does the definition match your idea for aged care in the future?

The Exposure Draft refers to Aged Care Quality Standards (Quality Standards) which have been in place in the aged care sector. However, some CHSP providers may be subject to them for the first time from when the Act commences (1 July 2024), which will be a significant change. Additionally, the Exposure Draft introduces a concept of high-quality care, defined by Section 19. While this updated definition of high-quality care has significantly improved from previous iterations, the following considerations will strengthen it.

Recommendation 5:
The definition of high quality care should include discussion, negotiation, and collaboration of the extent to which all the elements of high-quality care, as defined by s.19, can be provided.

Noting that supporting choice and control (section 5(c)) is one Object of the Act that frames the aims of the aged care system, we suggest the definition of high quality care, therefore, includes wording that more explicitly states that discussion, negotiation and collaboration between older people and providers forms a part of the process. As part of operations and business models, providers develop practices that sometimes require a baseline consistency. While providers undertake their best endeavours to be meaningfully responsive to the preferences and needs of older people, the current definition implies that providers will meet all stated needs in their entirety in all circumstances. This creates a structural expectation gap that cannot be realistically resolved, even over time.

Recommendation 6:
The Commission publicly articulates and develops through public consultation a baseline of what good quality care looks like across the sector.

This proactive and responsive approach would reduce the risks of providers operating on a 'several steps distance removed' trial and error basis, which, despite providers' best, good faith efforts, may end up being assessed by an audit as non-compliant.

More broadly, while our submission understands the s.19 high-quality care definition intends to encourage best practice and innovation, this provision must be accompanied by direct government investment. Moreover, this investment and programmatic support should apply to the sector to support its transition to the new Aged Care Act.

Recommendation 7:
The Department devise a comprehensive funded program of investment in the aged care sector to ensure providers and the workforce are supported to transition to the new Aged Care Act successfully. The investment would be in sector, provider and aged care workforce education, further training, skill, and capability building, including qualification advancement, professional and career development, and improved remuneration recognition.

4. Do you think a single list of services will make it clearer which services the funded aged care system provides?

Our submission supports this idea in principle. However, it is difficult to provide further endorsement as there is no defined list we can assess.

With that in mind, the risk of a service list is in creating a retail model (transactional), which could inhibit innovation, that is, the development of new products/services. Implementation of the service list must reflect the needs of older people and providers

to be effective. The form of this list will also include the ability to filter according to service type or category, by state/geographical region, etc., for ease of use.

Recommendation 8:
The Department consults providers and older people in designing and implementing the single list of funded aged care services.

5. Are the proposed roles of supporters and representatives clear? Please tell us why or why not.

While the roles of supporters and representatives appear clear, there should be more guidance in practice about how these roles will operate. For example, how would this be facilitated in families with several family members who may have combinations of supporters and representatives who would like to support the older person in fulfilling their choices?

While there are challenges, recognising several parties the older person endorses to have input in the latter's wishes can serve a protective function. One in two people who perpetrate elder abuse are family, so there needs to be a clause that gives providers powers, especially when safety risks arise. From facilitating collaboration to mediating conflict and identifying risk, counsellors, social workers, and other allied health staff can play a key role, requiring workforce investment from government and providers. Please see the response to Question 6 for further suggestions.

Recommendation 9:
The Department:

- **Provides further guidance on how supporters and representatives will operate in practice.**
- **Provides investment in the aged care workforce, specialising in collaborating with several stakeholders, such as social workers, counsellors and other allied health staff.**

6. Do you think it's okay that an older person can only have either representatives or supporters? Are there times when an older person, or their families and support networks, would want a representative and a supporter?

In addition to the response to Question 5, while an either/or proposition to an older person having representatives/supporters may be more straightforward, limiting older people to choose between a representative or a supporter seems counter-productive. For example, an older person may need a representative to make decisions but want another family member (who may live closer) to be a supporter.

The Act should permit older people to have both representatives and supporters. This greater flexibility will enable the participation and support of those networks (immediate family and/or friends and/or others) of the older person to ensure that collectively they can facilitate the older person's wishes. While having more participants will be more challenging, there could be opportunities to strengthen social bonds between the older

person and their representatives/supporters while empowering the older person to exercise their choice. Furthermore, enabling the older person to have representatives and supporters is more inclusive of specific groups of people who want support from their "chosen family", such as the LGBTQI+ community whose traditional family relationships have broken down. Aboriginal and Torres Strait Islander people use kinship, not family, culturally and linguistically collectivist cultures, so some of these terms will need flexibility in how they are interpreted or applied.

Recommendation 10:
The Department flexibly applies its supporter/representative provisions to reflect the diversity of networks and stakeholders of importance to older people and the diversity of approaches to the exercise of choice and decision-making (e.g. delegating to the collective/a group of representatives).

7. Providers will need to interact with supporters and representatives about a range of decisions that people using their aged care services can make. What support will providers need to move to these new arrangements?

Providers will need clear guidance on how the Commonwealth system intersects with State/Territory guardianship and powers of attorney. There is at least recognition of this in the Exposure Draft with a requirement that the System Governor effectively automatically approve appointing a guardian or power of attorney as a representative. Nonetheless, it is unclear how providers will know who has been authorised by the Commonwealth as a representative or supporter and their relationship concerning advance care directives.

Recommendation 11:
Clearly define and ensure communications help inform the sector of:
- **Who is authorised to be a representative or supporter of the older person.**
- **The interaction between the Commonwealth system with state/territory guardianship, powers of attorney, and mechanisms such as advance care directives.**

Similarly, while advocates are identified to have a role in the Statement of Rights (s20(10)) and s144(e) concerning complaints functions of the Commissioner, further clarification is required.

Recommendation 12:
The Department should provide clarifying guidance around the role of independent advocates and whether the intention is for advocates to apply to be appointed as supporters/representatives.

As referred to above in response to Question 3, to enable providers to best work with supporters and representatives, government must investment in education, capability building and training of providers and the aged care workforce (Recommendation 6), including for workers for whom their skills involve facilitating relationships with

representatives/supporters (such as social workers and counsellors) (Recommendation 8).

8. What sort of penalty should apply to supporters and representatives who don't carry out their duties, if any?

The only penalty currently available under the Exposure Draft focuses on the ability to suspend or revoke a supporter/representative's status, which is appropriate. To have any more stringent penalties, such as monetary penalties, will deter people from acting in these roles and diminish older people's ability to exercise and delegate their wishes and decision-making in a more structured way.

The power to remove supporters/representatives from their roles where they breach their duty should also consider extending this removal to be an effective ban that applies to future opportunities for these same people to be supporters/representatives of other older people. The ban could apply over a time that reflects the severity of the conduct that led to this situation. Additionally, providing a process or structure of education and permitting the person to demonstrate insight/understanding of the impact of their previous conduct and obligations should also be considered.

Recommendation 13:

- **No monetary penalties apply for supporters and representatives who breach their duties.**
- **A banned supporter/representatives list should be created to ensure those people who engage in elder abuse do not harm other older people.**
- **An approach that enables lifting such a ban, based on criteria reflecting rehabilitation, should be defined and applied.**

9. Representatives must always try to help people make their own decisions. But sometimes, the older person might not want to decide, even if they can. Should an older person be able to choose to have a representative if they can still make their own decisions? Please tell us why or why not.

Provided there is genuine informed consent, an older person should be able to nominate a representative to support the future anticipated wishes of the older person. Making choices is laudable, including the ability to delegate that function. Ideally, the older person and the representative/s would discuss the scope to which the latter will make decisions on behalf of the older person. We recognise that depending on the specific situation and if there is contestability or conflict, the use of more formalised modes of delegation of decision-making, such as via powers of attorney, may need to be applied. That said, there are cultures where choice/control principles are incongruent. Some Aboriginal and Torres Strait Islander communities live within a collective culture, and it would be natural for an elder to defer their wishes to someone else. The new Act needs to be flexible to allow for these cultural nuances.

Chapter 2 – Entry to the aged care system

13. Is there anything else you would like to see specified in the legislation regarding the needs assessment process?

Recommendation 14:
The Department:

- **Publicly consults on the methodology of how it will assess needs and prioritise service allocation/places. Such consultation will ensure older people with varying cognitive functioning/disability/diverse cultural backgrounds and needs receive an appropriate allocation of services.**
- **Apply community/customer service standards that mandate timeframes for decisions and that measures of that success are publicly available.**

We note that the current needs assessment process does not include community or customer service standards, namely, commitments that decisions be made within a specific timeframe and that mandated transparent reporting occurs. An aged care system that rightly requires providers to be responsive to older people's needs should also extend to the government's roles.

Recognising that the Exposure Draft details the overall operational architecture of the aged care system, wait times to access aged care packages are a continual issue. A broader aged care and ageing policy and program investment must be devised to drive down the demand for aged care support. One practical example would be to encourage social prescribing.

Recommendation 15:
The Department devise a comprehensive policy to address the wait times and demand for aged care places. This policy would involve:

- **Consistently funding a more aged care places on an ongoing basis.**
- **Provide parallel investment in health, social and community programs that support older people's wellbeing, social connection, and engagement.**

14. Are you comfortable with the proposal to maintain flexibility to vary services that a person can use under the Commonwealth Home Support Programme (CHSP) when the Act is introduced? Note: these changes won't affect Home Care Packages.

This flexibility is helpful and enables providers to provide appropriate services to a person when their needs and preferences change.

More broadly, while Support at Home commences in 2025 (and CHSP providers are to transition to that no earlier than 1 July 2027), the new Aged Care Act will nonetheless place requirements and obligations upon CHSP providers that will apply for the first time from 1 July 2024. To ensure the smooth transition of providers to the new Aged

Care Act and continued quality aged care, our submission recommends the Department provide corresponding increased funding investment to support CHSP providers' education, awareness raising and capability to transition to the aged care system changes. Please see Recommendations 6 and 16.

15. Is it clear in the new Act that a person can have their classification reviewed and changed if needed?

Yes.

16. We will develop alternative ways to enter the aged care system in the future. Do you have any feedback about emergency entry to aged care? Is there anything you would like us to address when we develop the alternative entry arrangements for the new Act?

It should be possible for older people to access support at home urgently and then have their needs and eligibility for ongoing services assessed later. For example, a family carer might become ill, making it critical to provide meals and transport to the older person quickly. Flexible arrangements to permit access to services such as Meals on Wheels should be permitted before an assessment establishes eligibility for ongoing services.

Recommendation 16:
The Department:

- **Develop emergency entry into aged care and flexible arrangements to ensure interim service delivery quickly.**
- **Develop and fund a 'no wrong door' approach to support ineligible Commonwealth-funded aged care applicants.**

While the currently drafted age thresholds are clear, the Department must develop 'no wrong door' protocols to make appropriate referrals and link to potential alternative service providers rather than have the older person 'start from scratch.' We look forward to the Department seeking public consultation feedback on its approach to emergencies, alternative arrangements, and cases of ineligibility.

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

17. Do you think the draft statutory duties on registered providers and responsible persons meet the aims of the policy?

The draft statutory duties appear to meet the aims of the policy, and we note that they are based on similar offence provisions under the *Work Health and Safety Act 2011.* Significantly, we note that contextual matters and threshold requirements apply when determining liability, such as where a provider's breach of their registration involves a significant failure or a systemic pattern of conduct (s.88). Similarly, we note that the Consultation Paper states (page 58):

> The new statutory duty provides that registered providers must ensure, as far as is reasonably practicable, that their conduct while delivering funded aged care services to older people does not cause adverse effects on the health and safety of those people. Subsection 120(2) outlines what is considered reasonably practicable for the purposes of the duty. That is, what can be done in the circumstances, and whether it is reasonable in those circumstances to do all that is possible, taking into account and weighing up all relevant matters …
>
> A serious failure involves conduct that:
> • exposes an individual to whom the registered provider owes a duty to a risk of death or serious injury or illness, and
> • involves a significant failure or is part of a systemic pattern of conduct (see section 18 for example).

Despite these defined parameters to assess whether there is a breach of statutory duty and to apply penalties, we nonetheless have received the following feedback from providers, which reflect a critical need for the Department to ensure its communications, education and awareness-raising activities clearly explain the circumstances in which liability would apply:

- Many older people using aged care services have several complex health care conditions. Any of these can result in older people sustaining injuries (e.g. falls) and death. The extent to which appropriate recognition by regulators of those realities will occur is unclear when determining whether statutory duties have been breached.

- From the Act’s 1 July 2024 commencement, many obligations and statutory duties will apply to CHSP providers for the first time. We are concerned about the Act applying civil and criminal penalties to responsible persons. The foreshadowing of a penalty regime already impacts board members and key personnel's attraction and retention. This trend will worsen if the Exposure Draft Act's provisions on statutory duties become a reality.

- The scale of proposed civil penalties for organisations appears excessive considering the limited capacity of small services to pay such fines. More than

two-thirds (68%) of CHSP providers are not-for-profit providers. Many providers, particularly small, not-for-profit organisations, are primarily staffed and managed by volunteers.

- The application of criminal penalties to organisations is excessive and not consistent with related areas of health care or disability services. Overall, the penalty regime will risk worse care being delivered as it will severely disincentivise people from reporting incidents and applying a continuous improvement approach. In health care, the approach is to encourage no-fault reporting, and the Exposure Draft or the Commission has not articulated that approach.
- The Aged Care Royal Commission's Final Report (Volume 3b, page 533) expressed a preference for the use of civil penalties and accessorial liability. It stated that its vision of the new aged care system would not include new criminal offences, as existing laws would apply to conduct that caused harm to an older person.

Should the Act retain penalties as a potential accountability mechanism, it is equally vital that the Department and the Aged Care Safety and Quality Commission (Commission) work with providers to ensure suitable education, awareness, guidance, and training so that organisations, responsible persons, and workers, are appropriately equipped to adhere to these duties. The Commissioner should continue and expand its engagement with providers and apply best practice principles when raising concerns and investigating and addressing issues of non compliance in a proportionate manner.

Recommendation 17:
The Department:

- **Embark on a continuous, comprehensive communications, education and awareness-raising campaign, especially around compliance and penalty provisions, to reduce the risk that experienced workforce exit from the aged care sector.**
- **The Commissioner continues to build relationships and dialogue with providers to strengthen awareness and refine its approach to compliance.**

Inadequate government support to build the aged care sector's capacity and provide appropriate resources to meet these obligations and statutory duties risk setting up such providers, workers, and volunteers to fail and may provoke many to withdraw from providing valued services to older people altogether. Please see Recommendation 6.

Chapter 4 – Fees, payments and subsidies

21. What do you think about the structure proposed in Chapter 4?

It is difficult to provide informed comment about how the approach will apply in practice as it relates to home care services because:

- The Support at Home arrangements and funding that mainly apply to CHSP providers are yet to be determined; the latter aimed to apply no earlier than 1 July 2027.

- The fees, payments, and subsidies are yet to be detailed.

22. Do you think having ‘person-centred’ and ‘provider-based’ types of subsidies reflects the person-centred approach of the new Act?

It is necessary to articulate how the government intends to support providers in providing Commonwealth-funded aged care services to fulfil the objectives and purposes of the new Aged Care Act. The two-pronged approach is appropriate as:

1. Funding providers via the ‘provider-based’ subsidies and defining the manner and type of services that would attract such funding directly enables the delivery of person-centred aged care in a person-centred way.
2. The person-centred subsidy gives effect to an older person’s choice and control in accessing aged care.

Our submission looks forward to being consulted about further detail on how other factors impact an older person's ability to access aged care (such as geographic location, including the availability of providers, such as in the case of thin markets) are factored in through these proposed subsidies. Please see also the response to Question 24.

24. Do you agree with registered providers getting access to extra Government funding that they can use for a particular purpose? This would be rather than using it to deliver specific aged care services—for example, a one-off subsidy payment for extra equipment in a pandemic.

Providers' ability to access extra government funding for a particular purpose is essential. The COVID pandemic experience demonstrates that solely relying on a payment-to-individuals mechanism like Home Care Packages was inappropriate in an emergency. Government must be able to provide funding through grants to all types of providers when necessary.

Recommendation 18:

Provisions that enable the Department to provide extra funding for a particular purpose flexibly are supported.

Chapter 5 – Managing the aged care system (governance)

25. Do you think the role of the Commissioner should include other activities?

Where complaints give rise to system issues that require reform, the Commissioner's activities should also include advising other agencies where appropriate, such as the Inspector General of Aged Care and the Aged Care Quality and Safety Advisory Council, including state and territory health departments. Similarly, while the current intention is for the Department of Health and Aged Care to perform the role of the System Governor, nonetheless, the legislation should enable the Commissioner to advise the Department in their own right if, in future, the System Governor's role is delegated elsewhere.

Recommendation 19:
That:

- **The Commissioner be permitted to advise other agencies where appropriate, such as the Inspector General of Aged Care and the Aged Care Quality and Safety Advisory Council, including state and territory health departments.**
- **A future review of the new Aged Care Act assesses the extent to which the Complaints Commissioner's effectiveness is affected by the fact that the Aged Care Quality & Safety Commissioner appoints them.**

26. Is it clear how the roles of the System Governor and Commissioner are different? But also, how they fit together, as roles that oversee and manage the aged care system?

We commend the Department's clear articulation of the roles of each governance participant in overseeing the system, including that they must have regard to the Statement of Principles in their operations. With that in mind, please see our response to Question 27 for further recommendations for improvement.

27. Do you think the arrangements for the Complaints Commissioner clearly show what their role is?

Yes, it is clear, although please refer to our response in Question 25, which includes Recommendation 18 about reviewing the structure of the Complaints Commissioner being directly appointed by the Aged Care Quality and Safety Commissioner.

The Exposure Draft defines the roles of the Aged Care Quality and Safety Commissioner, the Complaints Commissioner and the Aged Care Quality and Safety Advisory Council. Beyond the Act, several community-based organisations advocate for older people receiving care.

While that is the case, we recommend including a Commonwealth level Office of the Advocate for Older People in Aged Care. This can be modelled after the Office of the Advocate for Children and Young People. While potentially having functions similar to the Advisory Council, this Office would work much more explicitly from an older person-centred perspective and provide aged care system-level advocacy on behalf of older people.

Recommendation 20:
Establish a Commonwealth level Office of the Advocate for Older People in Aged Care.

While we support the overall aim of the reforms detailed in the Exposure Draft to support a culture change to the aged care system to be more human rights-based and person-centred, policy and regulatory change must be accompanied by substantial resource and financial investment by the government.

Similarly, while having processes to resolve complaints, such as via the Complaints Commissioner, is laudable and necessary, supporting providers and the aged care workforce to continue providing quality and safe care and meaningfully responding to concerns that may arise is equally essential. A more holistic approach to reform that provides more direct investment and resources for the sector to adapt to these reforms would raise the quality and safety of services delivered and improve older people's care experiences while strengthening their relationship and confidence with providers. For example, the Statement of Rights' (s21 (2)(a)(i) reference to assessments being trauma-informed is laudable. However, the Department has an equally important role in supporting the aged care workforce in obtaining the appropriate training to practice in a trauma-informed way. If there is no corresponding government investment, the practical operation of the new Aged Care Act, for example, when it comes to affirming older people's right to complain, risks being rhetorical. We hope that the Commission provides sustained support in the coming months by sharing research and innovation to inspire continuous development, for example, the variety of ways in which providers can obtain feedback from older people in a way that is perceived to be more informal and less confrontational. Please refer to Recommendations 6 and 16.

28. Do you think requirements for providers to make sure they maintain stable and secure finances should also apply to the home services sector? For example, to protect ongoing and consistent care and check that finances are sustainable in that sector?

We note that those providers that operate as specific entities, such as being registered as a constitutional corporation under the Corporations Act 2001 (Cth), would already be subject to existing financial obligations such as maintaining solvency. While there is a case for the government to monitor the overall financial sustainability of the home care sector, that can be achieved through financial reporting measures already in place. It is unclear whether the benefits outweigh the administrative burdens of mandating prudential and financial standards, particularly for smaller CHSP providers.

If the new Aged Care Act will apply prudential and financial standards, we recommend that the requirements to maintain stable and secure finance apply to certain sized providers (in terms of operating revenue). The varying ways such providers would demonstrate financial sustainability should be proportionately defined.

Recommendation 21:

- **Exempt CHSP providers from being subject to prudential and financial standards.**
- **If such standards apply, set entry thresholds that would activate such requirements, namely larger CHSP providers (by turnover).**

Chapter 6 – Regulating the aged care system

29. Do you think the Commissioner's added powers will make sure they can regulate the sector in a proactive way that balances risk?

As currently drafted, the Exposure Draft details the powers and the (legal) circumstances of their use, which includes consideration of risk; for example, s276(c)(i) states that the Commissioner may give an adverse action warning notice if they are aware "that, as a result of the non-compliance, there is an immediate and severe risk to the safety, health or wellbeing of an individual to whom the provider is delivering funded aged care services."

We acknowledge that ordinarily, how an agency uses its powers (the Commissioner, in this case) would be governed by internal policies. These should be publicly available such as in the form of guidances.

Recommendation 22:
The Commissioner consults the public and providers about how it, in practice, will use its powers in a proactive way that balances risk.

Additionally, we note that the Act has yet to include provisions determining which decisions are reviewable. While we note that not all powers exercised under the proposed Act would constitute reviewable decisions, it would be helpful to invite public consultation feedback once the Department has formed its approach.

Recommendation 23:

The Department obtains and considers public feedback on its provisions about which decisions under the new Aged Care Act are reviewable.

32. Does the new Act explain the System Governor's role in managing the integrity of the aged care program clearly enough? Is there anything you would like us to include in the new framework to make sure we make sure aged care funding is used correctly?

Yes, it is clear.

33. What are the pros and cons of the proposed new critical failures powers? Are these powers needed to make sure the Commissioner can protect older people and keep residential care homes if the provider gets into difficulties?

We note that provisions currently need to be drafted for the critical failures power as they are being developed and will be subject to future public consultation. We urge that these details become available for public consultation as soon as possible.

The theoretical benefits of this power are to authorise government to intervene where there is an immediate risk to the health and safety of individuals accessing residential aged care services or the provider becoming insolvent, and the Commissioner does not have confidence that the registered provider can address the situation. While our submission supports the Royal Commission recommendations that informed this provision, these powers must be exercised judiciously because they are exceptionally invasive and coercive. Similarly, the scope of whether these powers would apply to residential and home care services needs to be clarified.

The Department must detail how these powers will occur and seek sector and public input. Similarly, the sector should be consulted and educated about the Commissioner's investigation, assessment and decision-making process, and critically, what could constitute as meeting the threshold tests of 'immediate risk to the health and safety of individuals' or of a provider becoming insolvent; including, the range of circumstances that could lead the Commissioner to determine that it has no confidence in a provider to address the situation.

Furthermore, it is incumbent upon the Commissioner to ensure its representatives exercising the critical failure powers have appropriate training and resources to respond to such situations.

Recommendation 24:
The Department:

- **Obtain public consultation on its new critical failures powers once drafted.**
- **Clarify whether these powers extend to both residential and home care services.**

The Commissioner:

- **Consult the public and providers about how it would apply threshold tests such as 'immediate risk to health and safety,' 'no confidence in a provider, ' etc., in practice.**
- **Ensure that its staff who exercise critical failure powers have appropriate qualifications, training, and resources.**

34. Are the reasons listed for using the critical failures powers fair? Or are there others we could consider?

In addition to our response to Question 33, the Department's challenge is articulating and informing the public about its approach to using these powers. While the Commissioner is the appropriate body to be authorised to address the immediate risk to the health and safety of individuals, how it can do so may not necessarily be through appointing an external manager, which is what the Consultation paper (page 72) that describes the likely action these powers will allow. Seeking intervention through another regulatory agency that is appropriately trained (such as a hospital or mental health service, accompanied by the Commissioner and other agencies) may be more appropriate.

That said, appointing an external manager to respond can be appropriate if a provider becomes insolvent, provided that the circumstances are limited and clearly defined. The Department may consider using similar provisions for the appointment of an administrator under the Corporations Act 2001 (the Corporations Act).

Recommendation 25:
The exercise of the critical failures powers to appoint external managers to be guided by those provisions related to the appointment of an administrator under the Corporations Act 2011. Such provisions should be modified to address the needs of older people in the aged care context.

Chapter 7 – Managing information

35. Do you agree with the scope of protected information under the new Act? What information do you think should be protected under the new Act?

Our submission supports these provisions.

36. What challenges could there be with the whistleblower framework? How do you think we could solve these challenges?

While these provisions are supported, we note the public reporting about the limitations in practice around the enforceability of whistleblower protections. The Human Rights Law Centre has made recommendations to strengthen whistleblower protection provisions. The Guardian's reporting on these recommendations refers to:

> "including by introducing a reverse onus on employers to prevent detrimental acts against a whistleblower, something which already exists in federal corporate whistleblowing protections. The report also recommends that whistleblowing laws be enforced by dedicated regulatory bodies and calls for whistleblower protection authorities to be established in each jurisdiction to advise and protect individuals."

Recommendation 26:
The Department and Australian Government adopt the Human Rights Law Centre's recommendations to strengthen its whistleblower protection provisions.

The Exposure Draft outlines that disclosures do not need to be made in 'good faith,' removing additional barriers for prospective whistleblowers. The whistleblower needs to have 'reasonable grounds' to make a disclosure. 'Reasonable grounds' focus on whether an issue warrants further assessment and investigation, which would support the overall aims of the Act. Importantly, we understand that the Consultation Paper (page 87) states the protections for whistleblowers only extend to those who meet the 'reasonable grounds' requirement, which means that appropriate penalties can still apply to those who lodge vexatious complaints.

Chapter 8 – Miscellaneous

38. Do you have any concerns about the process of asking for an independent review body to review a decision under the current aged care laws? Would you like any concerns addressed in the new Act?

Our submission notes that the details of Chapter 8 – Miscellaneous - Part 2 – Review of Decisions are not drafted. Similarly, our submission recognises that according to the Australian Law Reform Commission:

> "not every administrative decision is subject to judicial review. Administrative action that does not affect an individual's liberties, vested rights or legitimate expectations is not subject to judicial review. Similarly, policy decisions of government are not subject to judicial review."

Recommendation 26:

- **Define which independent review bodies can be accessed.**
- **Develop provisions that ensure that older people can access the independent review body to review a decision cost-effectively and on time.**
- **Ensure low-cost, timely facilitation via the Commissioner to function as conciliator of concerns between a provider and older person in their care.**
- **A legislative requirement that the System Operator and Commissioner follow model litigant principles in these review processes. This reduces the risk of bad faith misuse of administrative and legal processes, further compounding the distress associated with an older person's and provider's concerns.**
- **If the Department decides to use a non-court (i.e. not a judge appointed under Chapter 3 of the Constitution) body to play a role in the review, that provisions require the inclusion of suitably qualified and credentialed aged care consumers and provider representatives to be members in such review bodies. Due weight must be given to lived, operational and sector/industry experience when appointing such members.**

39. Are there any decisions that the System Governor and the Commissioner should only assign to staff of senior levels?

Any delegation needs to come with the responsibility of completion. While this requirement may be achieved easily in some situations, such as by a call centre operator deciding on a client's eligibility, this requirement should be tied to the exercise by delegates of higher powers, such as provider approval and grant allocations. There needs to be greater transparency in the exercise of delegations. Please refer to Recommendation 13 and the response to Question 13 regarding using Customer/Community Service Standards and public-mandated reporting on meeting these standards. Requiring timely completion of delegated decision-making should equally apply to any entities for whom the Department appoints/subcontracts to

perform such functions externally, such as the single assessment workforce, which the Consultation Paper foreshadowed (page 34).

Chapter 9 – The timeline for the new Act

44. Are there any particular reform initiatives that you consider must be prioritised for commencement? Alternatively, are there any initiatives that you think would benefit from delayed commencement?

Recommendation 28:
Noting that the Act is planned to commence from 1 July 2024, the Department and Commissioner are recommended to apply a phased approach to applying key provisions, notably concerning enforcement and operational features.

While we note that the Department's position is that 1 July 2024 is the commencement date for all aspects of the new Aged Care Act, in practice, there should be a staged approach that involves:

- Having the new Statement of Rights and the Statement of Principles operate from the Act's commencement date will provide that new framework to support older people.
- Phasing in tranches of those requirements and obligations on providers. In particular, providers should have more time to adapt to the new Aged Care Quality Standards and new Registration requirements. While we note that the Department aims from March/April 2024 to commence its deeming process for providers, not all providers will likely be successfully registered and assigned their appropriate categories by then. The Department and Commission should appropriately coordinate and calibrate their regulatory/enforcement actions over this time.

As the new Aged Care Act represents the most extensive reforms to the aged care sector in over 20 years, a five year time horizon for a review is too long to identify areas for improvement.

Recommendation 29:
The review of the operation and effectiveness of the Act occurs every three years rather than the singular review in five years that currently is planned (Consultation Paper, page 6).

We encourage the Department to proactively commit to a three-yearly, ongoing review rather than risk having Parliamentary orders create a requirement (see, as an example, page 1 of Private Health Insurance Report 2022-23 (accc.gov.au)).

45. What will you need to do to get ready for the new aged care system?

The CHSP Sector, Support and Development program plays a critical role in building the capacity of the aged care sector and providers to successfully build awareness of and ability to transition to the new Aged Care Act requirements.

More broadly, we urge the government to better recognise and support the fact that providers require considerable effort to prepare for and implement the changes required by the new Act. For example, every provider's policy and operational documents will need to be updated with new references to the new Act and to incorporate new expectations, such as how to make their service trauma aware. This education, awareness and upskilling in the sector require time and resources to implement, and the Department and the Australian Government must provide a corresponding investment towards this next phase. Recommendation 6 calls for additional government investment to ensure that the sector can adopt the reforms to strengthen the delivery of aged care rather than detract from it. Recommendation 16 urges the Commission to apply a communications campaign to raise awareness and resolve concerns regarding the compliance and the specific circumstances that would result in penalties. Similarly, Recommendation 26 calls for a phased approach to applying the new Act in practice to allow more time for providers to transition.

46. Is there anything that will affect you getting ready for the new aged care system?

Workforce shortages and limited resources, felt acutely by the 68% of CHSP providers that are not-for-profit operated, place practical constraints on the level of readiness for the new aged care system and the pace of that transition. As mentioned in the response to Question 45, critical Recommendations are Recommendation 6, which urges the Australian Government to invest in the sector's transition more broadly; Recommendation 16, concerning comprehensive communication about the duties and penalty regime, and Recommendation 26, calling for a staged approach to applying the Act.

47. Do you have any concerns about the sector being ready to move to the new aged care system from 1 July 2024?

A phased approach is a more practical way for government to ensure that the sector can successfully transition to the changes. Doing so upfront benefits not only the sector but also government administration. Respectfully, we note that the government has already incurred delays in progressing the reforms and, for example, appropriately responded by announcing an extension to the timeframes for CHSP to be incorporated in Support at Home (until at least mid-2027). Recently, the Single Assessment System tenderers will not be appointed until at least September 2024. More time and investment towards transition will help providers, management and staff, and the Department and Commission update and refine processes so that they are correctly implemented.