

Exposure draft of the new Aged Care Act

Submission

29 February 2024



About ACCPA

The Aged & Community Care Providers Association (ACCPA) is the national industry association for aged care providers offering retirement living, seniors housing, residential care, home care, community care and related services.

ACCPA exists to unite aged care providers under a shared vision to enhance the wellbeing of older Australians through a high performing, trusted and sustainable aged care sector. We support our members to provide high quality care and services while amplifying their views and opinions through an authoritative and comprehensive voice to the government, community and media.

Our sector serves to make better lives for older Australians, and so do we.

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1. Executive summary

ACCPA welcomes the opportunity to provide input regarding the exposure draft of the new Aged Care Act which was the first recommendation of the Royal Commission into Aged Care Quality and Safety. We note the exposure draft aims to address 33 recommendations (in part, or in full) of the Royal Commission.

We support the Royal Commission's vision of a new, person-centred aged care system that delivers better outcomes for older people and continues to improve over time.

However, ACCPA has a number of critical concerns regarding the exposure draft, which will need to be addressed before the legislation can be progressed. Details regarding our areas of concern are included in both this submission and supporting appendices.

It needs to be recognised that there is a critical shortage of people working in aged care, from personal care workers, to nurses, to administration staff, to directors on governing bodies of providers. This is the case in all parts of Australia, but particularly in regional, rural and remote areas. This is in the context of broader workforce shortages across adjacent sectors, including health and disability – resulting in a highly mobile workforce.

We consider it crucial that the new Aged Care Act does not worsen this situation, through imposition of penalties and regulatory burdens which are out of step with similar sectors, or even those managing greater risk than aged care. Unfortunately, ACCPA has already heard of examples across Australia of directors either resigning from governing bodies or withdrawing their applications to sit on a governing body due to the proposed legislation. We are also receiving feedback that aged care workers are concerned and unwilling to take on a role that would see them fall within the proposed definition of responsible persons or be subject to excessive civil penalties that do not apply in similar sectors. These examples are particularly concerning given that the proposed penalties in the exposure draft have not yet come into force.

New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, Rules, guidance and education materials). There should be a staged approach to implementation, given the multiple reforms being introduced in a sector already under strain and having gone through significant and ongoing reforms since the Royal Commission. Implementation of these reforms needs to be done right, not rushed.

Our other key concerns include: the proposed statutory duties and associated penalties on registered providers and responsible persons; how some of the key concepts will operate and be implemented in practice (for example, we are concerned the exposure draft deems actions of associated providers to be actions of registered providers); and the imbalance between the rights of care recipients and the rights of other people (including other care recipients and aged care workers). We also recommend the proposed supporters and representatives provisions not be included in the Aged Care Act until further legislative alignment is undertaken (requiring consultation with the states and territories) to ensure the process will work effectively and does not create a clash with state and territory legislation – resulting in confusion and poorer outcomes for care recipients and their families.

In relation to regulation, we would like to see an enabling and improvement focussed environment established in the Aged Care Act (operationalised by the Department of Health and Aged Care and the Aged Care Quality and Safety Commission), rather than an environment that increases risk aversion, thereby reducing or eliminating innovation. A partnership approach between registered providers and the Department and the

Commission is desirable and represents best practice in other sectors such as health. Critically, this more open environment should incorporate ways for registered providers to openly discuss problems with regulators with a focus on improvement rather than simply punishment.

2. List of recommendations

2.1 Introduction

Recommendation 1: The feedback and proposed amendments to the legislation made throughout Appendix 1 be adopted.

Recommendation 2: The proposed legislative amendments in Appendices 2 and 3 be adopted.

2.2 Reform timeline and readiness support

Recommendation 3: New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, Rules, guidance and education materials). A staged approach to implementation should be adopted.

Recommendation 4: The Government should provide dedicated funding to registered providers to assist with transition and implementation.

2.3 Obligations, duties, penalties, and compensation

Recommendation 5: Duties on registered providers and responsible persons should be aligned with work health and safety requirements.

Recommendation 6: The new Aged Care Act should not duplicate other laws by requiring a registered provider to comply with applicable requirements imposed by a law of the Commonwealth or a law of a state or territory.

Recommendation 7: Where a registered nurse is not available to be on site and on duty at all times at an approved residential care home, registered providers should not be penalised in circumstances beyond their control.

Recommendation 8: There should not be excessive penalties imposed on responsible persons and aged care workers for breaches of the Code of Conduct, which can be addressed via existing processes and mechanisms.

Recommendation 9: All penalties should be a ‘maximum of’ to allow decisions to be made flexibly about the degree and severity of the offence and therefore the penalty.

Recommendation 10: Identified penalties should be civil penalties rather than criminal penalties.

Recommendation 11: The new Aged Care Act should not include a compensation pathway as compensation pathways already exist.

2.4 Rights and responsibilities

Recommendation 12: Section 21 of the exposure draft should be amended in accordance with Appendix 2, to reflect reasonableness and ensure the rights of all individuals in the aged care sector (including care recipients, as well as aged care workers and the community) are respected and protected.

2.5 Definitions and key concepts

Recommendation 13: The definition of governing body and responsible persons should be amended to bring them into line with established corporate governance laws and practice.

Recommendation 14: The requirements in relation to associated providers should be changed to be consistent with the requirements in the *Aged Care Act 1997*, as they are currently excessively broad.

Recommendation 15: The impact of provisions included in the exposure draft on volunteers, including duties and penalties, should be reconsidered.

Recommendation 16: An aspirational definition of high quality care should not be included in the new Aged Care Act.

Recommendation 17: Identified technical issues in relation to ageing in place and the ability of retirement village operators to deliver funded aged care services should be addressed.

2.6 Powers and functions of the Aged Care Quality and Safety Commissioner, Complaints Commissioner and System Governor

Recommendation 18: The Complaints Commissioner should be independent and not report directly to the Aged Care Quality and Safety Commissioner. The Complaints Commissioner should not be able to make determinations on providers' compliance.

Recommendation 19: The Aged Care Quality and Safety Commissioner should not make Financial and Prudential Standards, as this conflicts with their role as a regulator.

Recommendation 20: The provisions of the exposure draft regarding the Required Action notices, Compliance notices and Adverse Action Warning notices should be amended, in accordance with Appendix 1, to ensure transparency, procedural fairness and effective review rights.

Recommendation 21: There should be reasonable timeframes within which the Aged Care Quality and Safety Commissioner and System Governor must make decisions by and communicate those decisions by.

2.7 Supporters and representatives

Recommendation 22: The supporters and representatives provisions should not be included in the new Aged Care Act until further work is done (including consultation with the states and territories) to ensure the process will work effectively and does not clash with state and territory legislation resulting in poorer outcomes and confusion for care recipients and their families.

2.8 Whistleblower protections

Recommendation 23: Registered providers, responsible persons and aged care workers should be removed from the list of people to whom a disclosure qualifying for protection can be made. Instead, registered providers should be able to identify specific person/s who are authorised to receive a qualifying disclosure.

Recommendation 24: A requirement that disclosures must be made in good faith should be included.

2.9 Other issues

Recommendation 25: The existing restrictive practices regime should continue, until discussions with the states and territories are completed and relevant laws amended.

Recommendation 26: The Department of Health and Aged Care should consult the insurance sector on the implications of the new Aged Care Act on the ability of registered providers to obtain insurance and the potential cost of such insurance (in the short and long-term) and if found to risk making providers uninsurable, or are cost prohibitive, then to amend or remove any related proposed legislation to avoid unintended closures.

Recommendation 27: The regulation and accreditation of registered providers and disability providers should be harmonised.

3. Introduction

Recommendation 1: The feedback and proposed amendments to the legislation made throughout Appendix 1 be adopted.

Recommendation 2: The proposed legislative amendments in Appendices 2 and 3 be adopted.

The passage and implementation of the new Aged Care Act will mark the beginning of a new phase of significant reform for the aged care sector – impacting registered providers, care recipients, and all other stakeholders.

It is important this ‘once in a generation’ reform is done right, that it is well-designed and genuinely informed by consultation feedback – and importantly, not rushed.

We also note that the exposure draft is incomplete – with Chapter 4 on fees, payments and subsidies missing, along with multiple sections that are ‘to be drafted’. The subordinate legislation (Rules) is also not available for consultation, yet is referenced many times throughout the exposure draft. It is difficult to assess the impact of the reforms, without the full picture available. Sufficient time must therefore be made for consultation on both the missing sections and the Rules, ensuring the sector has the opportunity to provide a comprehensive suite of feedback before it is introduced to Parliament.

Based on the information available to date, ACCPA has prepared the following:

- Submission (this document): focuses on priority issues, with corresponding recommendations.
- Appendix 1: Feedback and recommended legislative changes corresponding to various provisions of the exposure draft.
- Appendices 2 and 3: Proposals for legislative change to:
 - Section 21 – Statement of Rights (Appendix 2).
 - Part 5, Chapter 3 – Statutory duty and compensation (Appendix 3).

In addition to the feedback and recommendations made in this submission, all content in the Appendices should be considered and adopted.

4. Reform timeline and readiness support

Recommendation 3: New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, Rules, guidance and education materials). A staged approach to implementation should be adopted.

Recommendation 4: The Government should provide dedicated funding to registered providers to assist with transition and implementation.

ACCPA has previously called for sufficient detail and lead time to allow providers to prepare for and implement the reforms that the introduction of the new Aged Care Act will bring.

A start date of 1 July 2024 for the new requirements applying to providers is not feasible. ACCPA members have consistently raised concerns that without all necessary detail – e.g.

the ‘to be drafted’ sections of the exposure draft, the Rules, and guidance and education materials – they cannot comprehensively plan for implementation. When details are limited, or not yet finalised, there is a risk that any planned changes to policies, procedures and training may be futile if, in the end, different changes are made. Indeed, small changes in the wording of legislation can have significant implications for implementation.

An example raised by ACCPA members where significant changes were made with insufficient lead time was the home care pricing transparency reforms that commenced on 1 January 2023. These reforms were implemented with official advice (addressing the nature of changes required) issued to the sector in late November 2022. Members reported significant disruption, as they had begun discussing proposed changes with care recipients in preparing them for the 1 January 2023 changes and then had to go back to these care recipients. This is because more changes were required which had not previously been identified by the government. These changes required more transition time than was allowed for in the legislation.

New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, Rules, guidance and education materials). It is imperative to the experience of consumers, that support for provider readiness is prioritised. Sufficient time to plan and prepare for the reforms will ensure reform is able to be implemented well with optimal outcomes for care recipients.

There is no question that implementation of new registered provider requirements will require a substantial change management process, with considerations such as financial impact, extent of workforce education and training required, recruitment of appropriately skilled personnel, IT readiness, updates required for internal policies and procedures, and most importantly care recipient and representative communications.

Providers have different capacities within their organisations to implement reforms. For example, some smaller or regional, rural and remote providers may only have one person leading this process, or the staff responsible may perform a combination of roles requiring diverse skills including provision of direct care to older people which should also be prioritised. We have heard that the increased cost, obligations and compliance burden expected to result from the reforms will impact all providers and, in particular, smaller and regional, rural and remote providers. Therefore, the cumulative impact of all of the reforms must be considered, and a staged approach to implementation should be adopted.

ACCPA members have said that minor legislative changes might take 3 months to implement whereas more substantial changes (equivalent to new quality standards or governance reforms (independent Boards and advisory bodies)) might take up to 12 months or even longer to fully implement.

Some examples and considerations raised by our members for transition and staging include:

- Advice that it takes approximately three months to properly receive, review, and approve new policy as it cycles through the different management and approval levels, including the governing body, before it can be converted into action.
- The Strengthened Quality Standards requiring the development and implementation of staff and care recipient learning, alignment of internal policies, gap analyses and addressing gaps, which takes 6 to 12 months.
- Adopting changes to ICT is a particular pressure point, due to the length of time needed for third party vendors to consider, plan, implement, and test changes – taking 12+ months. Digital maturity and financial capacity to invest in ICT across the sector also varies significantly.

Given the large scale of reforms to be implemented, ACCPA recommends that the Government provide dedicated funding to registered providers to assist with transition and implementation. Financial sustainability is critical to the capacity of registered providers to implement the reforms to be introduced through the new Aged Care Act.

5. Obligations, duties, penalties, and compensation

Recommendation 5: Duties on registered providers and responsible persons should be aligned with work health and safety requirements.

Recommendation 6: The new Aged Care Act should not duplicate other laws by requiring a registered provider to comply with applicable requirements imposed by a law of the Commonwealth or a law of a state or territory.

Recommendation 7: Where a registered nurse is not available to be on site and on duty at all times at an approved residential care home, registered providers should not be penalised in circumstances beyond their control.

Recommendation 8: There should not be excessive penalties imposed on responsible persons and aged care workers for breaches of the Code of Conduct, which can be addressed via existing processes and mechanisms.

Recommendation 9: All penalties should be a ‘maximum of’ to allow decisions to be made flexibly about the degree and severity of the offence and therefore the penalty.

Recommendation 10: Identified penalties should be civil penalties rather than criminal penalties.

Recommendation 11: The new Aged Care Act should not include a compensation pathway as compensation pathways already exist.

ACCPA considers that some of the proposed duties and associated penalties are unreasonable and/or excessive compared to those that apply in other similar sectors or circumstances.

It needs to be recognised that there is a critical shortage of people working in aged care, from personal care workers, to nurses, to administration staff, to directors on governing bodies of providers. This is the case in all parts of Australia, but particularly in regional, rural and remote areas. This is in the context of broader workforce shortages across adjacent sectors, including health and disability – resulting in a highly mobile workforce.

We consider it crucial that the new Aged Care Act does not worsen this situation, through imposition of penalties and regulatory burdens which are out of step with similar sectors, or even those managing greater risk than aged care. Unfortunately, ACCPA has already heard of examples across Australia of directors either resigning from governing bodies or withdrawing their applications to sit on a governing body due to the proposed legislation. We are also receiving feedback that aged care workers are concerned and unwilling to take on a role that would see them fall within the proposed definition of responsible persons or be subject to excessive civil penalties that would not apply in similar sectors. These examples are particularly concerning given that the proposed penalties in the exposure draft have not yet come into force.

All penalties throughout the new Aged Care Act should be preceded by the word ‘maximum’ to allow decisions to be made flexibly about the degree and severity of the offence and therefore the penalty. The penalties should also be no higher than those in adjacent sectors (e.g. NDIS) or to equivalent provisions in the current legislation. In addition, we have identified penalties that should be civil penalties rather than criminal penalties, to better align

with comparable sectors. We are also concerned about the inclusion of strict liability offences in the exposure draft, as this removes the requirement on the prosecution to prove fault and therefore removes one of the fundamental protections in criminal law.

We have identified provisions of concern with recommended changes in Appendix 1 to this submission. However, in this part of our submission we raise the following issues of particular concern.

5.1 Requirement to comply with other laws

Proposed section 108 requires a registered provider to comply with all applicable requirements imposed by a law of the Commonwealth or a law of a state or territory. That a registered provider should comply with relevant laws is self-evident and therefore this proposed section is unnecessary.

We are also concerned that the inclusion of this section could result in onerous and excessive regulatory burden under the new Aged Care Act for registered providers in relation to any non-compliance with these other laws, as well as the potential for providers to face double jeopardy by way of penalty under the Commonwealth, state or territory law and the new Aged Care Act (as a result of breaching a condition).

5.2 Registered nurses

Proposed section 116 – Registered nurses, needs to be rewritten, as there are circumstances beyond the control of a registered provider, where a registered nurse is not available to be on site and on duty at all times at an approved residential care home. It is unreasonable for registered providers to be held to account in legislation for requirements they cannot reasonably meet, given the known and systemic workforce shortages in aged care. Paragraph 116(2)(b) of the exposure draft does not provide sufficient flexibility to deal with these circumstances in a timely way.

Broad assurances from the current regulator that they will take a reasonable approach will not allay fears regarding the application of this legislative requirement, nor can they bind the behaviour of a future regulator.

5.3 Code of Conduct penalties

We recommend penalties for breaches of the Aged Care Code of Conduct should not be included in the new Aged Care Act and proposed sections 118 and 119 should be deleted. Aged care workers and responsible persons are already subject to consequences if they do not meet, for example, relevant professional standards as well as the possibility of banning orders under the Aged Care Act. A penalty of, currently, \$78,250 is completely unreasonable for what might be a minor breach of the Aged Care Code of Conduct, particularly for aged care workers whose annual salaries would be similar to or less than the proposed penalty. In addition, some elements of the Code are open to interpretation, resulting in uncertainty for the workforce.

5.4 Registered provider and responsible persons duties and penalties

Proposed sections 120 and 121 impose duties and associated penalties on registered providers and responsible persons. We have significant concerns with these sections and in Appendix 3 propose drafting changes to address these concerns.

We are particularly concerned about the inclusion of criminal penalties and strict liability offences. Indeed, strict liability offences should not be employed lightly – and, as stated in [*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*](#) (at page 22), “The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject

people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (i.e. recklessness).”

We also note that while the Royal Commission recommended civil penalties for certain breaches of statutory duty, it did not recommend any criminal penalties (recommendation 101).

In addition, we recommend changes to align with work health and safety laws by including an assessment of risk, risk mitigation and associated costs, into the list of relevant matters when considering what was reasonably able to have been done by a registered provider in relation to a duty (paragraph 18(e) of the *Work Health and Safety Act 2011*). Consideration should also be given to actions or omissions of care recipients when determining whether a registered provider has breached a duty, which is also consistent with work health and safety laws.

Consistent with the Royal Commission’s recommendation 101, we also propose that a serious failure be confined to a failure to comply with one or more of the Aged Care Quality Standards.

In relation to the responsible person duty, we recommend the duty does not apply to people in middle management positions who do not have oversight of the day-to-day operations of a registered provider and are not in positions to ensure registered providers comply with the duty under proposed section 120. The current broad use of the term ‘responsible person’ in the draft is far outside the accepted definition utilised in established corporations and charities legislation and adopted in similar sectors.

We also recommend the removal of proposed subsection 121(3) to be consistent with our proposed change from criminal penalties to civil penalties. It also makes no sense for a responsible person to be convicted or found guilty of an offence of not exercising due diligence to ensure the registered provider complies with the provider’s duty under section 120, if the provider has not been convicted or found guilty of an offence under section 120.

Consistent with the Royal Commission’s recommendation 101 and our recommendation for section 120, we also propose that a serious failure in relation to a responsible person be confined to a failure to comply with one or more of the Aged Care Quality Standards.

As noted above, we also recommend penalties be a ‘maximum of’ so decisions can be made flexibly about the degree and severity of the offence and therefore the penalty.

5.5 Compensation

The exposure draft includes proposed section 127 which sets out circumstances where compensation orders can be made. Section 127 is unnecessary and should not be included in the new Aged Care Act as there are other compensation pathways available for care recipients. We also think it is not appropriate for the Commissioner to apply for a compensation order on behalf of an individual, as the ability to do so conflicts with the Commissioner’s role as the regulator of registered providers.

6. Rights and responsibilities

Recommendation 12: Section 21 of the exposure draft should be amended in accordance with Appendix 2, to reflect reasonableness and ensure the rights of all individuals in the aged care sector (including care recipients, as well as aged care workers and the community) are respected and protected.

ACCPA supports a rights-based approach for the new Aged Care Act. However, there must be a balanced and reasonable approach to implementation, particularly in relation to the Statement of Rights. To this end, ACCPA proposes the phrase ‘so far as is reasonably practicable’ be inserted into subsections 21(1) and 21(2), to account for circumstances not within the control of a registered provider. In Appendix 1, ACCPA has also provided feedback on individual rights, including the right for individuals to stay connected with pets (paragraph 20(12)(a)), which ACCPA recommends be removed due to the potential risks to the health and safety of other residents and staff. The option to stay connected with a pet would not be precluded by such a change and allows flexibility for both care recipients and registered providers to determine the most appropriate circumstances and approach.

We note the Royal Commission into Aged Care Quality and Safety recommended the new Aged Care Act should specify that “people receiving aged care should respect the rights and needs of other people living and working within their environment, and respect the general interests of the community in which they live; the rights and freedoms of people receiving aged care should be only limited by the need to respect the rights of other members of their community” (recommendation 3 xviii).

As recognised by the Royal Commission, there must be balance between rights (of care recipients, as well as aged care workers, other care recipients and the community) and responsibilities, most importantly in relation to work health and safety obligations. ACCPA notes section 21 of the exposure draft states that “registered providers delivering funded aged care services to individuals must not act in a way that is incompatible with the [Statement of Rights], 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 recommend the legislation be further strengthened to achieve the necessary balance and have therefore proposed legislative amendments to section 21 in Appendix 2.

Guidance and education materials should also be prepared by the Department of Health and Aged Care and the Aged Care Quality and Safety Commission that includes practical advice for registered providers on operationalising rights, including how to manage competing rights.

The notion that rights come with responsibilities is not new – in the preamble to the International Covenant on Economic, Social and Cultural Rights (one of the international conventions the new Aged Care Act will rely on) it is acknowledged that individuals have duties to other individuals and to their community. We also note that prior to the introduction of the current Charter of Rights, the *User Rights Principles 2014* contained rights, as well as responsibilities, for care recipients provided with residential care, home care, and short-term restorative care.

The legislative amendments we propose in Appendix 2 provide a list of care recipient responsibilities, including for care recipients to respect the rights of:

- other people, including other individuals receiving funded aged care services, aged care workers, responsible persons, volunteers, and visitors; and

- aged care workers and responsible persons to work in a safe environment free from exploitation, abuse, discrimination or harassment.

7. Definitions and key concepts

Recommendation 13: The definition of governing body and responsible persons should be amended to bring them into line with established corporate governance laws and practice.

Recommendation 14: The requirements in relation to associated providers should be changed to be consistent with the requirements in the *Aged Care Act 1997*, as they are currently excessively broad.

Recommendation 15: The impact of provisions included in the exposure draft on volunteers, including duties and penalties, should be reconsidered.

Recommendation 16: An aspirational definition of high quality care should not be included in the new Aged Care Act.

Recommendation 17: Identified technical issues in relation to ageing in place and the ability of retirement village operators to deliver funded aged care services should be addressed.

ACCPA has identified areas of concern and has recommended changes in Appendix 1 to this submission. In this part of our submission, we highlight issues of particular concern.

7.1 Governing body and responsible persons

We recommend changes to the proposed definitions of governing body and responsible persons.

In relation to ‘governing body’, our proposed changes clarify who the governing body is for registered providers of a body corporate incorporated, or taken to be incorporated, under the *Corporations Act 2001*, as well as for registered providers incorporated under an Act of a state or territory, or a registered provider that is a partnership, and for any other type of registered provider.

For responsible persons, we propose changes that bring the definition into line with corporate governance laws and practice, make it easier to understand and make it consistent with the *Corporations Act 2001*. These changes ensure individual liability provisions are not inappropriately imposed on people in middle management positions, who do not have oversight of the day-to-day operations of a registered provider. The definition should also appropriately reflect that many registered providers will operate a number of facilities or outlets with centralised functions in head office and decentralised functions in the service areas.

We have also proposed changes to other related sections of the exposure draft, e.g. proposed section 100 (Membership of governing bodies) to limit the circumstances in which a registered provider is required to have a majority of independent non-executive members.

7.2 Associated provider

Proposed subsection 10(6) is too broad in that it deems actions of associated providers to be actions of the registered provider, in relation to an arrangement with the registered provider relating to the registered provider’s delivery of funded aged care services. Broad ranging imposition of accessorial liability, such as this, has the very real likelihood of unintended

consequences and disproportionate outcomes. Instead, a registered provider should have oversight of and undertake due diligence in relation to the actions of an associated provider.

Proposed paragraph 10(4)(b) is also too broad as it deems an individual employed or otherwise engaged (including a volunteer) by an associated provider of a registered provider to be an aged care worker of the registered provider.

ACCPA has heard from members their concerns about how these provisions would work in relation to a number of scenarios. These include, for example, a plumber who attends a residential care home to deal with an emergency situation; or visiting medical practitioners, pharmacists and other allied health professionals who have been requested by, or on behalf of, a care recipient but are not contracted by the registered provider.

Instead of these provisions, ACCPA recommends that the new Aged Care Act include the equivalent of section 96-4 of the *Aged Care Act 1997*, which provides that a “reference in this Act to an approved provider providing care includes a reference to the provision of that care by another person, on the approved provider’s behalf, under a contract or arrangement entered into between the approved provider and the other person”.

7.3 Volunteers

The exposure draft (proposed subsection 10(4)) proposes to include volunteers in the definition of aged care worker, which will subject volunteers to personal legal risks and additional duties. This is onerous and likely to lead to the loss of volunteerism which would have a negative impact on the aged care sector and the care and support care recipients receive. The impact on volunteers should be reconsidered as a priority when amending the exposure draft.

7.4 High quality care

Page 20 of [A new Aged Care Act: exposure draft – Consultation paper no. 2](#) states “...the proposed wording in the Exposure Draft aims to raise the bar for high quality care. It seeks to clarify that high quality is about excellence, that is, the delivery of care at a level above the quality and safety funded aged care required under the new Act”.

An aspirational definition of ‘high quality care’ (proposed section 19) should not be included in the new Aged Care Act, because it is aspirational and providers, as stated in the consultation document, will expressly not be funded to deliver to the proposed definition.

Also, registered providers won’t always be able to implement the elements included in the proposed aspirational definition of high quality care. For example, supporting care recipients to remain connected with animals and pets if requested by a care recipient (subparagraph 19(c)(vii)) is problematic particularly in residential care or where it may be contrary to the rights of others including other residents and aged care workers (e.g. due to allergies or fear). Also, bilingual aged care workers and interpreters (subparagraph 19(c)(x)) may not be available in all circumstances in all areas (e.g. in rural and remote) when requested by a care recipient.

As currently proposed, both registered providers and care recipients are likely to be confused about the level of care they can reasonably be expected to provide and to receive.

7.5 Ageing in place

ACCPA welcomes the flexibility the exposure draft allows for residential aged care to be delivered in a retirement village. This will support the sector to meet demand for aged care services as Australia’s ageing population increases over coming decades. It is also important for the new Aged Care Act to facilitate innovation in ageing in place and not limit the places nor circumstances in which residential aged care can be provided (subject to being in an approved registered care home and delivered by registered providers).

However, we are concerned that, as currently drafted, the exposure draft (paragraph 8(7)(a)) might prevent the delivery of more than one service group in the one setting. The new Aged Care Act should allow for enhanced consumer outcomes, delivered flexibly as per need. For example, the current wording may prevent a couple living together where one has approval for home care and the other has approval for permanent residential care (the couple could live in an approved residential care home or in a place that is an approved residential care home in a retirement village). This unintended consequence needs to be addressed in the revised draft.

We also recommend that there be greater clarity and confirmation of intent in relation to the following issues.

- The new Aged Care Act should allow for one, or more than one, residential care places in a residential care home (including a retirement village), with the flexibility for these places to change to accommodate individuals ageing in place.
- Retirement village operators who want to become a registered provider of home care or home support, but not a provider of residential care, should be allowed to do so. There is concern the wording in the proposed section 9 may not allow this.
- Places within a retirement village specifically designed for residential care or newly built should not be excluded by the use of the word ‘converted’ in paragraph 9(3)(b).
- The reference to private home in paragraph 9(4)(a) needs to be clarified. Is it intended to include a private home in a place other than a retirement village or also a private home within a retirement village?
- Guidance is needed on how the compliance obligations on a retirement village operator with residential care places would work so they would only apply in relation to those residents receiving funded residential care services.
- We note that arrangements for means testing, and accommodation supplements, will need to be worked through to accommodate circumstances where an individual wants to stay in their retirement living unit and the retirement village operator converts the unit to a residential care place.

8. Powers and functions of the Aged Care Quality and Safety Commissioner, Complaints Commissioner and System Governor

Recommendation 18: The Complaints Commissioner should be independent and not report directly to the Aged Care Quality and Safety Commissioner. The Complaints Commissioner should not be able to make determinations on providers’ compliance.

Recommendation 19: The Aged Care Quality and Safety Commissioner should not make Financial and Prudential Standards, as this conflicts with their role as a regulator.

Recommendation 20: The provisions of the exposure draft regarding the Required Action notices, Compliance notices and Adverse Action Warning notices should be amended, in accordance with Appendix 1, to ensure transparency, procedural fairness and effective review rights.

Recommendation 21: There should be reasonable timeframes within which the Aged Care Quality and Safety Commissioner and System Governor must make decisions by and communicate those decisions by.

ACCPA is of the view that in some areas the powers and functions of the Aged Care Quality and Safety Commissioner, in particular, need to be sensibly limited. There are also conflicts of interest associated with some of the functions that the Commissioner has been prescribed. In particular:

- The Aged Care Quality and Safety Commission’s complaints functions should sit with an independent Complaints Commissioner who does not report directly to the Aged Care Quality and Safety Commissioner. We understand this may not necessarily require the creation of a separate agency. The Complaints Commissioner’s focus should be on conflict resolution processes that build relationships between parties (using alternative dispute resolution or similar approaches) so they should not be conflicted with regulatory compliance powers. To this end, the Complaints Commissioner should not be able to make determinations as to a registered provider’s compliance with the Act, as this would be duplicative of the Aged Care Quality and Safety Commissioner’s role.
- The Aged Care Quality and Safety Commissioner should not make Financial and Prudential Standards, as there is a conflict of interest in having the Aged Care Quality and Safety Commissioner both making and regulating standards. It is generally good practice to have separation between the standard setter and the regulator.

With regard to the powers of the System Governor and the Aged Care Quality and Safety Commissioner, ACCPA is concerned that the processes related to powers to issue Required Action notices, Compliance notices and Adverse Action Warning notices, lack transparency, procedural fairness and effective review rights. We therefore recommended changes to the relevant provisions in Chapter 6 of the exposure draft (see Appendix 1). These include:

- Procedural fairness provisions, namely pathways for review of decisions and that the Aged Care Quality and Safety Commissioner and System Governor should adhere to prescribed timeframes for making and communicating decisions in response to written responses received from registered providers.
- Proposed requirements for registered providers to be given comprehensive details of a matter in relation to which a notice is given.

In addition, ACCPA is concerned about some of the timeframes (or lack thereof) within which the Aged Care Quality and Safety Commissioner and System Governor are required to make decisions by and communicate those decisions. There are limited provisions to this effect, and some that do exist are unnecessarily long. For example, section 60 of the exposure draft allows the System Governor 28 days after a classification decision is made to give notice to the individual – this should be changed to 7 days. There is no prescribed time period in the exposure draft for the completion of needs assessments and reassessments. A requirement should be added that these must occur within a period described by the Rules regardless of location (and this should be a reasonable period of time, e.g. 14 days).

9. Supporters and representatives

Recommendation 22: The supporters and representatives provisions should not be included in the new Aged Care Act until further work is done (including consultation with the states and territories) to ensure the process will work effectively and does not clash with state and territory legislation resulting in poorer outcomes and confusion for care recipients and their families.

ACCPA supports the need for arrangements to be put in place to simplify and make clear who can represent a care recipient in relation to their funded aged care services, the circumstances in which a representative can act, as well as their duties and responsibilities.

It is essential that registered providers know in a timely manner who a care recipient's representative is and when there are any changes. It is also important that registered providers have a pathway to the timely appointment of a representative when a care recipient's circumstances change from not needing a representative to needing a representative or where the appointed representative is considered to be not acting in the best interests of the care recipient.

However, in relation to the proposed arrangements for supporters and representatives included in the exposure draft, ACCPA has received a large amount of feedback from members and others saying there is a high risk of unintended consequences without further consultation.

Issues raised include:

- interaction with state and territory requirements;
- interaction when care recipients move between aged care and other care systems, such as the medical system;
- how registered providers are expected to manage disagreements between multiple supporters or multiple representatives;
- how registered providers are meant to know when someone is communicating the will of the care recipient;
- what happens if there is a delay in advice from the Department of Health and Aged Care;
- transitional arrangements for care recipients with representative arrangements already in place; and
- the structure the Department will be putting in place to administer the new arrangements.

In addition to these issues, consideration should be given to each care recipient having only one representative (and no supporters) or, if there is more than one representative, establishing a clear hierarchy of decision making which is workable for providers.

10. Whistleblower protections

Recommendation 23: Registered providers, responsible persons and aged care workers should be removed from the list of people to whom a disclosure qualifying for protection can be made. Instead, registered providers should be able to identify specific person/s who are authorised to receive a qualifying disclosure.

Recommendation 24: A requirement that disclosures must be made in good faith should be included.

Registered providers, responsible persons and aged care workers should be removed from the list (under paragraph 355(a)) of people to whom a disclosure qualifying for protection can be made and replaced with an authorised person of a registered provider. It is unreasonable for any aged care worker (including a volunteer) to be able to receive a disclosure qualifying for protection. Not all aged care workers will have the requisite skills and English language literacy required to receive disclosures. Instead, registered providers should be allowed to identify specific person/s who are authorised to receive a qualifying disclosure.

Consistent with disclosures made under the *National Disability Insurance Scheme Act 2018*, a requirement that disclosures must be made in 'good faith' should also be introduced as a measure to curb vexatious complaints. In addition, it should be made clear that a qualifying

disclosure does not include a vexatious complaint made by a worker facing disciplinary action.

11. Other issues

Recommendation 25: The existing restrictive practices regime should continue, until discussions with the states and territories are completed and relevant laws amended.

Recommendation 26: The Department of Health and Aged Care should consult the insurance sector on the implications of the new Aged Care Act on the ability of registered providers to obtain insurance and the potential cost of such insurance (in the short and long-term) and if found to risk making providers uninsurable, or are cost prohibitive, then to amend or remove any related proposed legislation to avoid unintended closures.

Recommendation 27: The regulation and accreditation of registered providers and disability providers should be harmonised.

11.1 Restrictive practice

Page 19 of [A new Aged Care Act: exposure draft – Consultation paper no. 2](#) states that “[R]estrictive practice requirements will mirror the current legislation with the exception of a hierarchy for a restrictive practices substitute decision-maker and the associated immunity provision” and “the Government continues to work with states and territories on establishing clear arrangements for appointing a restrictive practices substitute decision-maker under state and territory consent and guardianship laws”.

Until the discussions with the states and territories are completed and relevant laws amended, ACCPA believes the existing restrictive practices regime should continue. In particular, the hierarchy for a restrictive practices substitute decision-maker and the associated immunity provision.

11.2 Insurance

ACCPA has heard concerns from members that the exposure draft if legislated, as proposed, could lead to increases in insurance for registered providers and/or insurance not being able to be obtained.

ACCPA has had initial discussions with stakeholders in the insurance sector and there are complex factors involved in analysing such concerns, including at an individual provider level and at a sector-wide level, for both costs and insurability of the sector.

The passage of time may also be important as to whether any impacts might be felt in the short-term and/or longer term regarding potential insurances costs. This would also depend on a range of operational and risk factors for specific aged care providers.

We therefore believe it is incumbent on the Department of Health and Aged Care to engage the insurance sector to consider the implications of the new Aged Care Act on the ability of registered providers to obtain insurance, and the potential cost of such insurance (in the short and long term). Any components of the legislation which risk making providers uninsurable, or are cost prohibitive, must then be amended, or removed to, avoid providers being forced to close.

11.3 Harmonisation

While not directly relevant to the exposure draft, ACCPA supports arrangements being put in place either in primary legislation, subordinate legislation, or in practices and procedures implemented by the Department of Health and Aged Care and the Aged Care Quality and

Safety Commission to harmonise the regulation and accreditation of registered providers and disability providers. For example, the extent to which audits under the NDIS should be acceptable for aged care and vice versa.

Such an approach should have significant benefits for all participants in both sectors, including the relevant departments and regulators.

12. Contact

If you have any questions or would like to discuss, please contact us at policy@accpa.asn.au.

Appendix 1: ACCPA feedback on provisions of the exposure draft of the new Aged Care Act

The tables below include ACCPA’s feedback on provisions of the exposure draft of the new Aged Care Act. This Appendix should be read in conjunction with ACCPA’s submission on the exposure draft and the proposed amendments in Appendices 2-3.

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Chapter 1: Introduction

Section/s of exposure draft	ACCPA feedback
Section 5 – Objects of this Act	<p>In ACCPA's 2023 submission on the proposed foundation elements of the new Aged Care Act, we said the Objects needed to be simple and achievable, and that aged care providers must be adequately funded to deliver the outcomes sought.</p> <p>The Objects of the current <i>Aged Care Act 1997</i> include subsection 2-1(2) which says: "In construing the objects, due regard must be had to: (a) the limited resources available to support services and programs under this Act; and (b) the need to consider equity and merit in accessing those resources." Such provisions should be included in the new Aged Care Act to account for the challenges and realities of the aged care system, including (for example) that the new Aged Care Act does not provide right of access – only right of assessment. Whilst rationing of health and aged care services has been a strategy adopted by successive governments to limit health and aged care costs, it would be misleading to not explicitly acknowledge this.</p> <p>In addition, another Object should be added to recognise the importance of education, training and support for registered providers, responsible persons, and aged care workers.</p> <p>Subparagraph (b)(i) – the word 'uphold' should be replaced with 'support' to be more consistent with proposed section 21.</p> <p>Subparagraph (b)(iii) "...put older people first..." – while it is important that older people be at the centre of the aged care system, providers have an obligation to maintain a safe working environment meaning there are circumstances where older people's needs may require alternative options that mean their preferences need to be adapted (e.g. residents wanting to smoke, or have a pet when other residents are allergic to the pet). This wording should be removed or amended.</p>
Section 7 – Definitions, 'carer'	<p>Paragraph (a) – add 'with care needs' after 'older individual'.</p> <p>Paragraph (b) – add 'responsible persons' to paragraph (b) to be consistent with subparagraph (b)(i).</p> <p>Insert the following, consistent with the <i>Carer Recognition Act 2010</i>:</p> <p style="padding-left: 40px;">(c) To avoid doubt, an individual is not a 'carer' merely because he or she: (i) is the spouse, de facto partner, parent, child or other relative of an individual, or is the guardian of an individual; or (ii) lives with an individual who requires care.</p>
Section 7 – Definitions, 'governing body'	<p>Recommend changing the definition to be consistent with the <i>Corporations Act</i> to:</p> <p>(a) if the registered provider is a body corporate incorporated, or taken to be incorporated, under the <i>Corporations Act 2001</i>, the directors as defined by section 9AC of the <i>Corporations Act 2001</i>;</p>

Section/s of exposure draft	ACCPA feedback
	<p>(b) if the registered provider is a body incorporated under an Act of a State or Territory, the person or group of persons exercising the same or similar functions as the directors of a body corporate (see (a)) including but not limited to:</p> <ul style="list-style-type: none"> (i) in the case of an incorporated association, the committee of management; (ii) in the case of the incorporation of trustees, the trustees of the Property Trust; <p>(c) if the entity is a partnership—a partner in the partnership;</p> <p>(d) otherwise - the person or the group of persons responsible for the role and / or functions similar to that undertaken by director(s) referred to in (a) above.</p>
<p>Section 7 – Definitions, insert a new definition of Officer, which will be relevant for the definition of responsible persons and associated provisions</p>	<p>Officer of a registered provider means:</p> <p>(a) if the registered provider is a body corporate incorporated, or taken to be incorporated, under the <i>Corporations Act 2001</i>, the officers as defined by section 9AD of the <i>Corporations Act 2001</i> but does not include a member of the governing body; or</p> <p>(b) otherwise - the person or the group of persons responsible for the role and / or functions similar to that undertaken by the officer referred to in (a) above but does not include a member of the governing body.</p>
<p>Section 7 – Definitions, 'serious injury or illness'</p>	<p>Introductory words – recommend replacing “requiring the individual to have” with ‘in respect of which the individual received’ to reflect the fact that the individual did in fact receive the treatment.</p> <p>Paragraph (a) – should be removed as it is too wide and could include hospital admissions with no other 'treatment' for the injury or illness; our preference is to have a list of specific injury or illness.</p> <p>Paragraph (b) (which will become new paragraph (a)) – should be changed to read ‘immediate medical treatment by or under the supervision of a medical practitioner for:’</p>
<p>Section 7 – Definitions, 'setting'</p>	<p>Recommend replacing with a new definition of aged care setting to read ‘aged care setting means an approved residential care home and a home or community setting’. The use of 'setting' is too general and would include a place in which funded aged care services should not be delivered i.e. a residential care home that has not been approved under the Aged Care Act.</p>
<p>Section 8 – Aged care service list and funded aged care services</p>	<p>Paragraphs 8(6)(a) and (b) – recommend linking this to 'care needs' as follows: ‘(a) services for persons with care needs who are experiencing sickness; (b) services incidental or conducive to the care for persons with care needs who are experiencing sickness.’</p> <p>Subsection 8(7) should be amended to make it clear that care recipients can receive home care/support services in a residential care home (including in a part of a retirement village). For example, a couple where one person has been assessed as needing</p>

Section/s of exposure draft	ACCPA feedback
	residential care and the other person has been assessed for home care services and they wish to live together in a residential care home.
Section 9 – Where funded aged care services are delivered	<p>Subsection 9(2) – recommend making it clear that this refers only to places approved under paragraph 67(1)(b) as follows:</p> <p style="padding-left: 40px;">‘A residential care home means a place approved under paragraph 67(1)(b) that:…’</p> <p>Paragraph 9(2)(a) – recommend linking to care needs and funded aged care services as follows: ‘is the place of residence of persons with care needs who are experiencing sickness, who have a continuing need for funded aged care services, including nursing services’.</p> <p>Also see section 7.5 of the main part of ACCPA’s submission where we identify technical issues in relation to proposed section 9 and ageing in place and the ability of retirement village operators to deliver funded aged care services.</p>
Section 10 – Who delivers funded aged care services	<p>Subsection 10(1) – should include responsible persons who are aged care workers but not members of the governing body.</p> <p>Subsection 10(3) – it is unclear what the purpose of this subsection is. We recommend it either be clarified or removed.</p> <p>Subsection 10(4) – proposed definition of aged care worker includes volunteers, which suggests the new Aged Care Act will subject volunteers to personal legal risks and additional duties. This is unreasonable and likely to lead to the loss of volunteerism which will have a negative impact on the aged care sector and the care and support care recipients receive. Recommend either that volunteers are excluded from the definition of aged care worker or consideration is given to limiting the impact on volunteers of personal legal risks and additional duties to be imposed by the new Aged Care Act, noting other criminal and legal avenues already exist.</p> <p>Paragraph 10(4)(a) – definition needs to be narrowed to reflect only individuals employed by a registered provider and who provide or have responsibility for supporting services to people funded through the Commonwealth’s aged care program (our reading of the drafted definition is that all staff of a registered provider including those working in services that are not funded aged care services would be included in this definition and would therefore, inappropriately, need to comply with aged care obligations).</p> <p>Paragraph 10(4)(b) – should be deleted as it is not appropriate for individuals employed or otherwise engaged (including as a volunteer) by other entities to be deemed to be aged care workers of a registered provider.</p> <p>Subsection 10(5) is noted but there are responsible persons as defined in section 11 who are also aged care workers. It is confusing to have one definition of responsible person which</p>

Section/s of exposure draft	ACCPA feedback
	<p>includes both aged care workers of the registered provider and members of the governing body of a registered provider.</p> <p>Subsection 10(6) – see section 7.2 of ACCPA’s submission where we recommend this subsection be replaced with the equivalent of section 96-4 of the <i>Aged Care Act 1997</i>, which provides that a “reference in this Act to an approved provider providing care includes a reference to the provision of that care by another person, on the approved provider’s behalf, under a contract or arrangement entered into between the approved provider and the other person”.</p>
<p>Section 11 – Meaning of responsible person</p>	<p>It is confusing to have one definition which includes aged care workers of the registered provider and members of the governing body of a registered provider. Consider having two definitions.</p> <p>In addition, consider adopting a definition in line with the <i>Corporations Act</i> as follows:</p> <p>(1) Each of the following is a responsible person of a registered provider:</p> <p>(a) any member of the governing body of the registered provider; or</p> <p>(b) any officer [see proposed new definition to be included in section 7] of the registered provider; or</p> <p>(c) any member of the most senior level of executive of management responsible for the day-to-day operations of the registered provider; or</p> <p>(d) any person who is a registered nurse and who has responsibility for overall management of the nursing services delivered by the registered provider in aged care settings.</p> <p>(2) Each of the following is a management person of a registered provider:</p> <p>(a) any person who has responsibility for the day-to-day management of the nursing services delivered at an approved residential care home or from an outlet delivering funded aged care services in a home and community setting, and who is a registered nurse; and</p> <p>(b) any person who has responsibility for the day-to-day management of the funded aged care services delivered at an approved residential care home or from an outlet delivering funded aged care services in a home and community setting.</p> <p>(3) To avoid doubt, a management person is not a responsible person if there is at least one person within each category in paragraphs 11(1)(c) and (d) and subsection 11(2).</p>
<p>Section 16 – Restrictive practice in relation to an individual</p>	<p>Subsection 16(1) – it should be made clear that the reference to rights in subsection 16(1) is not a reference to the Statement of Rights in section 20.</p>
<p>Section 17 – Restrictive practice requirements</p>	<p>Section 17 – until consultations with the states and territories are completed and implemented, the new Aged Care Act should include</p>

Section/s of exposure draft	ACCPA feedback
	<p>the existing hierarchy for a restrictive practices substitute decision-maker and the associated immunity provision.</p> <p>Paragraph 17(1)(a) – should be amended so that consideration of the impact of the use of a restrictive practice on an individual also takes into account the likely impact on other persons of not using the practice.</p>
<p>Section 19 – Meaning of high quality care</p>	<p>Section 19 should be deleted.</p> <p>An aspirational definition of high quality care should not be included in the new Aged Care Act, because it is aspirational, and providers will not be funded to deliver to the proposed definition.</p> <p>This means both registered providers and care recipients are likely to be confused about the level of care they can reasonably be expected to provide and to receive.</p>
<p>Section 20 – Statement of Rights</p>	<p>Much of the feedback made in ACCPA's 2023 submission on the proposed foundation elements of the new Aged Care Act, with respect to the Statement of Rights still applies – including rights being worded in absolute terms and acknowledging that rights may not be able to be guaranteed at all times, even when reasonable steps are taken. It is important that the rights included in the Statement of Rights are able to be implemented by registered providers. For example, in relation to subsection 20(8), what is intended when access to interpreters and communication aids is not available (as this cannot be guaranteed in every location at all times)? And how does this apply in thin markets? There may also be practical limitations on how, when and by whom services can be delivered to an individual (subparagraph 20(1)(a)(ii)). Additionally, access to palliative and end-of-life care encompasses responsibilities of state and territory governments (paragraph 20(2)(b)).</p> <p>In terms of implementing the rights, a balanced and reasonable approach should be adopted. For example, while an individual should have a right to exercise choice and make decisions about their financial affairs (subparagraph 20(1)(a)(iii)), they also have an obligation to pay fees on time. A reasonable approach should also be adopted when considering how registered providers can support the right to opportunities and assistance to stay connected with the individual's family members or friends, and community (paragraphs 20(12)(a) and 20(12)(b)). A good example of balance already evident in the Statement of Rights is the concept of 'safe' visitation in paragraph 20(12)(a) – this reference should be retained.</p> <p>An additional point under paragraph 20(2)(a) should be added to include 'timely assessment'.</p> <p>Paragraph 20(3)(d)(ii) – the wording "in accessible manner" has the potential to cause confusion as access and accessibility can have different meanings in the aged care context.</p>

Section/s of exposure draft	ACCPA feedback
	<p>Subsection 20(6) – “... including the costs of those services” – does this only relate to registered providers or does it also encompass the full cost of aged care services being funded by the taxpayer?</p> <p>ACCPA members have expressed concern about the right for individuals to stay connected with pets (paragraph 20(12)(a)). The reference to pets should be removed from this paragraph due to potential risks: what happens if a worker is allergic (and particularly in thin markets where there is less flexibility in rostering)? What happens if other care recipients are allergic to the pet, or the pet is aggressive or damages property? It is also unclear who is expected to be responsible for caring for the pet as well as for the costs associated with the pet. The option to stay connected with a pet would not be precluded by such a change and allows flexibility for both care recipients and registered providers to determine the most appropriate circumstances and approach. The Aged Care Act cannot realistically account for every unique scenario.</p>
<p>Section 21 – Effect of Statement of Rights</p>	<p>Care recipient responsibilities should be included in the new Aged Care Act. The rights of care recipients must be balanced with the rights of others including aged care workers, other care recipients and the community – importantly in relation to work health and safety obligations.</p> <p>The Statement of Rights also needs to reflect what is reasonably practicable and achievable by registered providers, particularly as there will be circumstances outside their control.</p> <p>To acknowledge the obligations of registered providers to comply with work health and safety laws, ACCPA recommends new paragraphs 21(1)(b) and 21(2)(b) be added as follows: ‘the primary duty of a person conducting a business or undertaking under Work Health and Safety laws.’</p> <p>There should be further limitations on the operation of the Statement of Rights. The following (<i>in red italics</i>) should be added to the end of subsection 21(3): “Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal <i>or in respect of which a registered provider can be held to have contravened or usurps, abrogates or replaces any provisions of the contract, agreement or arrangement between registered providers and individuals for the delivery of funded aged care services</i>”.</p> <p>Based on what was previously included in the <i>User Rights Principles 2014</i>, care recipient responsibilities should be included as a new subsection 21(4):</p> <p>(4) An individual must, when receiving funded aged care services:</p> <ul style="list-style-type: none"> (a) take reasonable care for their own safety, health and wellbeing; (b) take reasonable care that their acts or omissions do not adversely affect the safety, health and wellbeing of other persons; (c) accept responsibility for their actions and choices even

Section/s of exposure draft	ACCPA feedback
	<p>though some actions and choices may involve an element of risk;</p> <ul style="list-style-type: none"> (d) give enough information to enable the registered provider to deliver the funded aged care services; (e) tell the registered provider and their staff about any problems with the funded aged care services; (f) comply, so far as they are reasonably able, with any reasonable instruction that is given by the registered provider to allow the provider to comply with this Act; (g) co-operate with any reasonable policy or procedure of the registered provider relating to safety, health and wellbeing that has been notified to the individual; (h) respect the rights of: <ul style="list-style-type: none"> (i) other people including other individuals receiving funded aged care services, aged care workers, responsible persons, volunteers, and visitors; (ii) aged care workers and responsible persons to work in a safe environment free from exploitation, abuse, discrimination or harassment; (i) pay any fees as specified in their agreement with the registered provider by the due date and to negotiate an alternative arrangement with the registered provider if any changes occur in their financial circumstances. <p>See also Appendix 2 for proposed amendments to this section in context.</p>
Section 22 – Statement of Principles	<p>Paragraph 22(1) – the following text (<i>in red italics</i>) should be inserted: The safety, health, wellbeing and quality of life of individuals is the primary consideration in the <i>operation of the aged care system by the Commonwealth and the</i> delivery of funded aged care services.</p> <p>Paragraph 22(2)(a) “puts older people first” – while it is important that older people be at the centre of the aged care system, providers have an obligation to maintain a safe working environment, meaning there are circumstances where older people's needs may require alternative options that mean their preferences need to be adapted (e.g. residents smoking). This wording should be removed or amended.</p> <p>Paragraph 22(3)(e) should be amended as follows (insertions in <i>red italics</i>, deletions struck through): “be aware of, and exercise, <i>have</i> their rights under the Statement of Rights <i>supported</i> when accessing, or seeking to access, funded aged care services.”</p> <p>In the ‘note’ after subsection 22(4), paragraph (m) should include the word “regional” before “rural, remote...”.</p> <p>Subsection 22(5) – “... and connections with individuals in the community ...” – this wording is unclear in the context of the other text in this subsection and the paragraphs below it.</p> <p>Paragraph 22(6)(b) should also include responsible persons who are aged care workers but not members of the governing body.</p>

Section/s of exposure draft	ACCPA feedback
	<p>Subparagraph 22(6)(b)(i) and paragraph 22(13)(d) – the term “high quality care” should be replaced with “quality care” as registered providers are not funded to deliver high quality care and it is not relevant for all registered providers.</p> <p>The Statement of Principles should also be amended to reflect the value and experience of registered providers:</p> <ul style="list-style-type: none"> • An additional paragraph should be added to subsection 22(6) which ‘recognises the important role of providers of quality aged care services’. • An additional paragraph should be added to subsection 22(13): which would indicate that regulation of the Commonwealth aged care system ‘is undertaken in collaboration with registered providers, responsible persons, and aged care workers’.
Section 23 – Effect of Statement of Principles	<p>ACCPA understands that the Statement of Principles is designed to guide the decisions, actions and behaviours of government agencies operating under the new Aged Care Act. However, given that the System Governor and Commissioner et al must have regard to the principles when performing functions or exercising powers under the new Aged Care Act, the principles may inform or influence decisions made about providers. ACCPA has previously expressed concern (in ACCPA’s 2023 submission on the proposed foundation elements of the new Aged Care Act) that the Principles should not be used as another tool to measure providers’ compliance (or influence the Commission’s decision-making in relation to compliance action). This is particularly the case if providers are found to have acted inconsistently with the Principles, while the Government and regulators are not held to account for a failure to comply with this Division (subsection 23(3)). Subsection 23(3) should be removed.</p> <p>ACCPA also recommends inserting the following after “... court or tribunal” in subsection 23(2): “or in respect of which a registered provider can be held to have contravened”. If the Statement of Principles are to apply in any way to providers (even indirectly), this must be made clear.</p>
Part 4 – Supporters and representatives	Part 4 should not be included in the new Aged Care Act as further detailed consultations are needed including with state and territory governments. See section 9 of ACCPA’s submission.

Chapter 2: Entry to the Commonwealth aged care system

Section/s of exposure draft	ACCPA feedback
Division 3 – Aged care needs assessments and reassessments	Add a requirement that an aged care needs assessment and reassessment must occur within the period prescribed by the rules, irrespective of location.
Section 46 – Aged care needs reassessment	The current security of tenure provisions rely upon assessments of long-term needs current as at the date of an issue. Aged Care Assessment Teams have refused to undertake these reassessments, effectively preventing approved providers seeking to rely upon the security of tenure provisions. While this may be dealt with elsewhere, this section should be amended to provide explicit recognition of the function to reassess needs in response to a request where there is a security of tenure process underway.
Section 49 – Restrictions on approvals of service types or services in certain service groups	This section expands upon the definitions of care needs, sickness etc. The new Aged Care Act would benefit from having a comprehensive definition of the characteristics that qualify an individual for aged care services in the various settings in Chapter 1, Division 1 or 2 rather than scattered throughout the new Aged Care Act.
Section 60 – Notice of decision	Subsection 60(1) – 28 days should be changed to 7 days (as 28 days is too long a time for someone waiting for notice of a decision).
Section 64 – Changing classifications	Subsection 64(4) should make clear what the impact on providers is, if the changed decision reduces the amount of funding available to a provider.

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

Section/s of exposure draft	ACCPA feedback
Chapter 3	Also refer to Appendix 3 which includes tracked proposed drafting changes to Part 5 (statutory duty and compensation) of Chapter 3.
Section 68 – Registration requirements	<p>Paragraph 68(1)(a) – will registered providers with one ABN be able to register separately to deliver different types of funded aged care services (e.g. home care and residential care) if they want to?</p> <p>Subparagraph 68(3)(b)(i) – this terminology is vague and disconnected to the audit assessments. Recommend it be replaced with: ‘the audit referred to in subparagraph (2)(e)(i) found the entity will be able to comply with the Aged Care Quality Standards that apply to the provider registration category’.</p>
Section 70 – Notices of possible refusal	<p>Subsection 70(1) – this appears to exclude a notice when it is proposed to reject some but not all the categories / homes. Recommend it be clarified that a decision not to register or approve any of the categories or homes triggers a notice requirement for procedural fairness.</p> <p>Subsection 70(3) – there is no time prescribed for the Commissioner to make a decision. Recommend that a reasonable period be set after which the decision maker is taken not to have made the decision set out in the notice. E.g. 14 days.</p>
Section 73 – Notice of refusal decisions	Subsection 73(2) – for procedural fairness, recommend replace 14 days with 7 days, as 14 days is too long a time for someone waiting for notice of a decision.
Section 74 – Registration period	Subsection 74(2) – recommend that there be criteria specified in the new Aged Care Act to be taken into account for determining a longer or shorter period; and that a procedural fairness pathway be provided with respect to decisions about the period, at a minimum if it is shorter than 3 years, such as notice of possible decision and opportunity to respond.
Section 75 – Deemed registration	Subsection 75(3) – the deeming provision is not wide enough having regard to the circumstances in which it might be used. For example, not all reasons for deemed registration relate to an emergency.
Section 76 – Variation of registration on Commissioner’s own initiative	Section 76 – should include a framework which sets out the circumstances in which the Commissioner may vary the registration of a registered provider. As currently written, there are no boundaries as to when the Commissioner could make a decision to vary the registration of a registered provider which could have significant business implications for the owners and workers of registered providers. We note that a framework is set out in subsection 83(1) for suspension of registration and in subsection 84(1) for revocation of registration.

Section/s of exposure draft	ACCPA feedback
Section 78 – Notice of possible variation of registration	<p>Subsection 78(1) – should be amended so that the Commissioner is required to notify, in writing, the registered provider if the Commissioner decides to vary the registration of a registered provider regardless of the impact it has on the provider. Procedural fairness requires that registered providers be informed.</p> <p>Subsection 78(3) – should be amended for procedural fairness, so that the Commissioner is taken not to have made the decision set out in the notice if the decision-maker does not decide within 14 days of receiving submissions from the registered provider.</p>
Section 79 – Notice of possible refusal to vary registration	<p>Subsection 79(3) – should be amended for procedural fairness, so that the Commissioner is taken not to have made the decision set out in the notice if the decision maker does not decide within 14 days of receiving submissions from the registered provider.</p>
Section 80 – Notice of decision to vary	<p>Subsection 80(1) – should be amended for procedural fairness, to require the Commissioner to give notice of a decision to vary and update the Provider Register within 7 days (instead of 14 days) after making the decision.</p>
Section 81 – Notice of decision not to vary	<p>Subsection 81(1) – should be amended for procedural fairness, to require the Commissioner to give notice of a decision not to vary within 7 days (instead of 14 days) after making the decision.</p>
Section 83 – Suspension of registration	<p>Paragraph 83(1)(a) – 'proposing to contravene' should be removed as this refers to a future state of affairs that has not occurred and which may not occur.</p> <p>Paragraph 83(4)(c) – should be removed given the seriousness of the penalty compared to the vagueness of the concept of 'public trust'. This is often measured against the media's interest, and this is not an appropriate indicator.</p> <p>Subsection 83(6) – this is a relevant criteria for the decision under subsection 83(1) and should be included in subsection 83(4).</p>
Section 84 – Revocation of registration	<p>Paragraph 84(1)(a) – 'proposing to contravene' should be removed as this refers to a future state of affairs that has not occurred and which may not occur.</p> <p>Paragraph 84(2)(c) – should be removed given the seriousness of the penalty compared to the vagueness of the concept of 'public trust'. This is often measured against the media's interest, and this is not an appropriate indicator.</p> <p>Subsection 84(4) – this is a relevant criterion for the decision under subsection 84(1) and should be included in subsection 84(2).</p>
Section 85 – Notice of possible suspension or revocation	<p>Subsection 85(2) – should be amended for procedural fairness, so that the Commissioner is taken not to have made the decision set out in the notice if the decision maker does not decide within 14 days of receiving submissions from the registered provider.</p>

Section/s of exposure draft	ACCPA feedback
Section 86 – Notice of decision	<p>Subsection 86(1) – should be amended for procedural fairness, to require the Commissioner to notify an entity within 7 days of a decision to suspend or revoke the registration of an entity.</p> <p>Paragraph 86(2)(c) – the reconsideration pathway will often contain timelines that make it futile for a registered provider to apply, or which blocks access to the AAT / Federal Court for appropriate relief. Recommend consideration be given to how the pathway can be modified to ensure registered providers are given meaningful access to procedural fairness in a manner commensurate with the seriousness of the decision.</p>
Section 88 – Conditions of registration	<p>This is a new and significant penalty. The penalty should be a 'maximum' to allow decisions to be made flexibly about the degree and severity of the offence and therefore the penalty.</p>
Section 90 – Compliance with Aged Care Code of Conduct	<p>This section should be amended so that registered providers, responsible persons, and aged care workers are only required to comply with the Code of Conduct as far as is reasonably practicable. This is important as elements of the Code are open to interpretation and the currently proposed consequences of breaching the Code.</p>
Section 92 – Rights and principles	<p>Subsection 92(1) – demonstrated understanding of the rights of individuals under the Statement of Rights must not be interpreted as an obligation to show it in practice and accordingly this paragraph should be amended as:</p> <ol style="list-style-type: none"> 1) It is a condition of registration that a registered provider that is registered in a provider registration category prescribed by the rules must demonstrate that the provider understands: <ul style="list-style-type: none"> (a) the rights of individuals under the Statement of Rights; and (b) the delivery of funded aged care services by the registered provider is not incompatible with the rights of individuals under the Statement of Rights. <p>Subsection 92(2) – should be deleted as it reflects a proposed Principle (subsection 22(1)) that is applicable to the regulators and accordingly should not be a condition of registration for certain registered providers prescribed by the Rules.</p>
Section 99 – Continuous improvement	<p>Subsection 99(1) – should be deleted as registered providers will not be funded for the delivery of high quality care, as defined. Failure to meet this requirement could unreasonably lead to a registered provider being non-compliant and subject to penalties.</p> <p>Subsection 99(2) would then become subsection 99(1) requiring certain registered providers to have a continuous improvement plan.</p>

Section/s of exposure draft	ACCPA feedback
Section 100 – Membership of governing bodies	<p>How is it intended that section 100 applies to registered providers (other than companies), including sole traders, partnerships, and trusts?</p> <p>Also, consideration should be given to increasing the threshold for an exemption from the requirement to have a majority of independent non-executive members, for registered providers that put in place a governing advisory body that complies with Rules to be prescribed.</p>
Section 101 – Advisory body requirements	Subparagraph 101(1)(a)(iii) – delete ‘at any time’ and replace with ‘within a reasonable time frame’.
Section 107 – Ceasing the provision of funded aged care services	Paragraph 107(b) – the security of tenure provisions in the new Aged Care Act have not yet been released for consultation. Currently these provisions are cumbersome and impractical for providers.
Section 108 – Compliance with laws	<p>The section should be removed as it is self-evident that registered providers must comply with relevant Commonwealth and state and territory laws.</p> <p>Also, this section could result in onerous and excessive regulatory burden under the new Aged Care Act for registered providers in relation to any non-compliance of these other laws, as well as the potential for providers to face double jeopardy by way of penalty under the Commonwealth, state or territory law and the new Aged Care Act (as a result of breaching a condition).</p>
Section 109 – Reporting	Subsection 109(5) – insert the word ‘maximum’ in front of the penalty.
Section 110 – Change in circumstances	Subsection 110(5) – insert the word ‘maximum’ in front of the penalty.
Section 111 – Responsible persons of a registered provider must notify of change of circumstances relating to suitability	<p>Paragraph 111(1)(a) – add ‘or management persons’ after ‘responsible persons’ to accommodate the proposed new definition of responsible persons.</p> <p>Subsection 111(3) – change to a civil penalty and insert the word ‘maximum’ in front of the penalty. Also remove the words ‘commits an offence of strict liability’ and replace with ‘contravenes this subsection’.</p>
Section 112 – Determination relating to suitability of responsible persons of a registered provider	<p>Subsection 112(1) – add the following new sentence at the end ‘For the purposes of this section, responsible persons include management persons.’ This is to accommodate the proposed new definition of responsible persons.</p> <p>Subparagraph 112(5)(b) – should be amended as an individual subject to a possible negative suitability determination should have at least 14 days to respond, rather than an arbitrary shorter period.</p> <p>Subsection 112(6) – for procedural fairness, add at the end of the section ‘and make a decision within 14 days of receiving the</p>

Section/s of exposure draft	ACCPA feedback
	submissions failing which the decision-maker is taken not to have made the decision set out in the notice’.
Section 113 – Offence relating to failure to take action as required by determination	Change this section to a civil penalty and insert the word ‘maximum’ in front of the penalty.
Section 114 – Offence relating to failure to comply with responsibility to consider suitability matters relating to responsible persons	Subsection 114(2) – change to a civil penalty and insert the word ‘maximum’ in front of the penalty.
Section 116 – Registered nurses	<p>Section 116 – needs to be rewritten as there are circumstances beyond the control of a registered provider, where a registered nurse is not available to be on site and on duty at all times at an approved residential care home. It is unreasonable for registered providers to be held to account in legislation for requirements they cannot reasonably meet, given the known and systemic workforce shortages in aged care. Paragraph 116(2)(b) of the exposure draft does not provide sufficient flexibility to deal with these circumstances in a timely way.</p> <p>Broad assurances from the current regulator that they will take a reasonable approach will not allay fears regarding the application of this legislative requirement, nor can they bind the behaviour of a future regulator.</p>
Section 117 – Protection of personal information	<p>Subsection 117(1) – ‘ensure’ should be removed and replaced with a requirement to take reasonable steps/exercise due diligence to protect personal information. A registered provider (like any other organisation) cannot ensure the protection of personal information. For example, all organisations (including the Commonwealth) are at risk of cyber-attacks.</p> <p>The following should be added to paragraph 117(1)(b):</p> <ul style="list-style-type: none"> (v) for the purpose of obtaining legal advice; or (vi) for the purpose of obtaining membership support or advice from a national industry association for registered providers.
Section 118 – Aged care workers of registered providers must comply with Aged Care Code of Conduct	Section 118 should be deleted. Aged care workers are already subject to consequences if they do not meet, for example, relevant professional standards as well as the possibility of being subject to a banning order. A possible penalty of currently \$78,250 is unreasonable for what might be a minor breach of the Aged Care Code of Conduct, particularly for aged care workers whose annual salaries would be similar to or less than the proposed penalty. In addition, some elements of the Code are open to interpretation.

Section/s of exposure draft	ACCPA feedback
Section 119 – Responsible persons of registered providers must comply with Aged Care Code of Conduct	<p>Section 119 should be deleted. Responsible persons are already subject to consequences if they do not meet, for example, relevant professional standards as well as the possibility of being subject to a banning order. A possible penalty of currently \$78,250 is unreasonable for what might be a minor breach of the Aged Care Code of Conduct, particularly for responsible persons whose annual salaries would be less or no more than the proposed penalty. In addition, some elements of the Code are open to interpretation.</p>
Section 120 – Registered provider duty	<p>Section 5.4 of ACCPA’s submission outlines concerns we have with section 120 and includes recommended solutions.</p> <p>All penalties should be civil rather than criminal penalties. In addition, penalties should be a ‘maximum’ to ensure scope for flexibility in imposing penalties, so these are commensurate with the degree and severity of an offence.</p> <p>Subsection 120(1) – the Department and the Commission need to provide clear guidance on how subsection 120(1) would apply in another pandemic situation.</p> <p>In Appendix 3, we have included other suggested changes to section 120.</p> <p>These include aligning with work health and safety laws to:</p> <ul style="list-style-type: none"> • Include an assessment of risk, risk mitigation and associated costs, as relevant matters when considering what was reasonably able to have been done by a registered provider. • Have regard to whether the individual has taken reasonable care for their own health and safety, not adversely affected the health and safety of other persons and complied (as far as possible) with reasonable instructions of the registered provider. <p>Consistent with the Royal Commission’s recommendation 101, we also propose that a serious failure be confined to a failure to comply with one or more of the Aged Care Quality Standards.</p>
Section 121 – Responsible person duty	<p>Section 5.4 of ACCPA’s submission outlines concerns we have with section 121 and includes recommended solutions.</p> <p>All penalties should be civil rather than criminal penalties. In addition, penalties should be a ‘maximum’ to ensure scope for flexibility in imposing penalties, so these are commensurate with the degree and severity of the offence.</p> <p>To be consistent with work health and safety laws, subsection 121(1) should be amended so that these duties only apply to members of governing bodies, officers of registered providers and the most senior level of executive management responsible for the day to day operations of the registered provider.</p> <p>Subsection 121(2) should be amended to add the words in <i>red italics</i>, so it would read ‘In this section, due diligence includes taking reasonable steps <i>within the scope of a person’s role</i>’.</p>

Section/s of exposure draft	ACCPA feedback
	<p>Paragraph 121(2)(a) is unreasonable. No one person has the capacity to acquire and maintain knowledge of requirements applying to registered providers under the Act. Recommend replacing with 'to acquire and maintain a reasonable understanding of requirements applying ...'.</p> <p>In Appendix 3, we have included other recommended changes to section 121, including to be consistent with the Royal Commission's recommendation 101. We propose that a serious failure in relation to a responsible person be confined to a failure to comply with one or more of the Aged Care Quality Standards.</p>
Section 125 – Other duties not affected	<p>Add a new subsection 125(1) which says: 'A contravention of this Part nor any act or omission that constitutes a contravention of this Part has any consequence under any law other than this Act'. This is similar to section 53-2 of the <i>Aged Care Act 1997</i>.</p> <p>Add a new subsection 125(3) similar to section 267 of the <i>Work Health and Safety Act 2011</i> as follows:</p> <p style="padding-left: 40px;">'This Part does not confer a right of action in civil proceedings in relation to a contravention of a provision in this Act.'</p>
Section 127 – Compensation orders	<p>Section 127 is unnecessary and should not be included in the new Aged Care Act as there are other compensation pathways available for individuals to pursue compensation. It is not appropriate for the Commissioner to apply for a compensation order on behalf of an individual as the ability to do so conflicts with the Commissioner's role as the regulator of registered providers. Also, compensation orders should not apply to responsible persons or aged care workers.</p>
Part 6 – Aged care digital platform operators	<p>Concern has been raised about the ability of aged care digital platforms to also promote services that are not funded aged care services and the possible resulting confusion for care recipients. It will be important that information on aged care digital platforms clearly identifies services delivered by registered providers and those that are not.</p>

Chapter 5: Governance of the aged care system

Section/s of exposure draft	ACCPA feedback
Section 132 – Functions of the System Governor	<p>An additional function should be added requiring the System Governor to consult with registered providers, responsible persons, and aged care workers as being integral to a well-functioning aged care system.</p> <p>Paragraph 132(1)(c) – ‘high quality care’ should be replaced with ‘quality care’ as providers are not funded to deliver high quality care.</p> <p>In relation to monitoring and encouraging the training and development of aged care workers (paragraph 132(1)(e)) – how will this work in practice, given the number of aged care workers there are in the sector? Further, will only compulsory training be monitored, or all training?</p>
Section 141 – Functions of the Commissioner	<p>Paragraphs 141(1)(c) should be removed – the complaints functions should sit with an independent Complaints Commissioner.</p> <p>In relation to the function to reconsider and review decisions relating to the Commission’s functions (paragraph 141(1)(f)), registered providers should have an avenue to ask for a review of Commission decisions without fear of reprisal.</p> <p>Subsection 141(4) – the following should be added: ‘take reasonable steps to provide opportunities for registered providers, responsible persons, and aged care workers of funded aged care services to engage with the Commissioner’.</p>
Section 142 – Safeguarding functions	<p>The term ‘uphold’ in paragraph 142(a) is inconsistent with section 21 which requires registered providers to not act in a way that is incompatible with the Statement of Rights. An alternative word such as ‘support’ should be used.</p> <p>Paragraph 142(c)(i) should include responsible persons who are not members of the governing body of a registered provider.</p> <p>Paragraph 142(c)(ii) – ‘high quality care’ should be replaced with ‘quality care’ as providers are not funded to deliver high quality care.</p> <p>Paragraphs 142(d) and 142(e) – the word ‘ensure’ should not be used here. The Commissioner cannot guarantee that registered providers et al. comply with the Act and obligations under the Code of Conduct.</p>
Section 143 – Engagement and education functions	<p>A further function should be added as follows: ‘to engage with registered providers, responsible persons, and aged care workers of funded aged care services, to learn about their experiences of providing care, for the purposes of continuous improvement of the aged care system’. The Commission should engage proactively with registered providers, responsible persons, and aged care workers who should also have scope to engage with the Commission proactively and positively.</p>

Section/s of exposure draft	ACCPA feedback
	<p>Paragraph 143(d)(i) – ‘and operationalisation of those Rights’ should be added after ‘the rights of individuals under the Statement of Rights’. The Commissioner should not simply educate about the Statement of Rights, but also how these should be put into practice.</p> <p>On education of registered providers, responsible persons, and aged care workers more broadly, clarity is needed on training e.g. what is desirable and what is compulsory – noting that training requirements should be flexible based on the training needs for each service (as informed by care recipient needs). Up-to-date and comprehensive training materials for providers, especially on operationalisation of requirements under the new Aged Care Act (e.g. the Statement of Rights) will be important.</p>
<p>Section 144 – Complaints functions</p>	<p>Aligned to the feedback above on section 141, this section should be removed, with the functions given to an independent Complaints Commissioner.</p> <p>The Complaints Commissioner should put in place conciliation, mediation, alternative dispute resolution, or similar where the focus is on resolving (to the extent the Aged Care Act allows) complaints more quickly and bringing the parties together to improve the relationship.</p> <p>It is also important that the complaint-handling process is streamlined and transparent. Processes need to be tight in relation to vexatious and repeat complainants.</p> <p>There should also be a requirement to first determine if a complaint is within the scope of an individual’s current funded aged care service that is being provided. This would help reduce complaints in home and community care about items/services that are not permitted to be funded under the package as the complaint would not be accepted, appropriately reducing administrative burden.</p> <p>Additionally, consistent with our feedback on section 142, ACCPA recommends replacing ‘uphold’ in paragraph 144(a) with ‘support’ – as uphold is inconsistent with section 21 which requires registered providers to not act in a way that is incompatible with the Statement of Rights.</p>
<p>Section 163 – Commissioner may make Financial and Prudential Standards</p>	<p>This section should be removed. The Commissioner should not make Financial and Prudential Standards. There is a conflict of interest in having the Commissioner both making and regulating standards.</p> <p>Before similar standards are introduced for registered providers that are not providing services in an approved residential care home, the Department would need to undertake consultations with those registered providers and adapt standards to account for the differing operating environments (e.g. not holding refundable accommodation deposits of care recipients).</p>
<p>Section 164 – Having regard to principles, and</p>	<p>Aligned to our feedback on section 163, this section should be removed.</p>

Section/s of exposure draft	ACCPA feedback
consultation, in making standards	Also, what is meant by ‘financially viable and sustainable’ (paragraph 164(1)(a)) given the challenges currently faced by the sector? How would the Commissioner respond where providers potentially put their financial situation at risk to meet another Government requirement e.g. hiring agency staff to meet the 24/7 registered nurse requirement?
Section 165 – Effect of Financial and Prudential Standards	Aligned to our feedback on section 163, this section should be removed.
Section 182 – Appointment of Complaints Commissioner	To prevent a conflict of interest with the Aged Care Quality and Safety Commissioner’s other functions, the Complaints Commissioner should be independent and therefore not report directly to the Aged Care Quality and Safety Commissioner. The Complaints Commissioner should not be able to make determinations as to providers’ compliance with the Act as this would be duplicative of the Aged Care Quality and Safety Commissioner’s role.

Chapter 6: Regulatory mechanisms

Section/s of exposure draft	ACCPA feedback
Section 191 – Use of force in executing monitoring warrants	This section should be removed as it is not included in the Regulatory Powers Act.
Section 206 – Use of force in executing investigation warrants	This section should be removed as it is not included in the Regulatory Powers Act.
Section 219 – Responsibility to provide facilities and assistance	Insert the word ‘maximum’ in front of the penalty.
Section 220 – Monitoring authorisations	In relation to entry to a residential care home without a warrant or consent, it is important this power is not exercised lightly, including because registered providers also need to be able to manage infection control risk.
Section 221 – Investigation authorisations	In relation to entry to a residential care home without a warrant or consent, it is important this power is not exercised lightly, including because registered providers also need to be able to manage infection control risk.
Section 226 – Person with knowledge of a computer or a computer system to assist access etc.	Insert the word ‘maximum’ in front of the penalty.
Part 10, Division 1 – Required action notices, Division 2 – Compliance notices, Division 3 – Adverse action warning notices	<p>The powers to give Required Action notices, Compliance notices and Adverse Action Warning notices, lack transparency, procedural fairness and effective review rights.</p> <p>We recommend:</p> <ol style="list-style-type: none"> 1. The Commissioner or System Governor should: <ol style="list-style-type: none"> 1.1 consider any written response made by a registered provider in accordance with the notice. 1.2 make a further decision in respect of the notice, within a specified time frame (e.g. 7 days) of receiving any written response from a provider, that either confirms, varies or revokes the original decision. 1.3 within a specified time frame (e.g. 7 days) after making the further decision, give the registered provider a written notice that sets out the further decision, the reasons for the decision and that the provider must, within a specified period, take specified action. 2. The Commissioner or System Governor should be taken to have revoked the original decision set out in the notice if what is set out in 1.2 or 1.3 above is not complied with.

Section/s of exposure draft	ACCPA feedback
	<ol style="list-style-type: none"> 3. The periods set out in paragraphs 265(d), 271(d), 277(1)(d) and 277(1)(e) should not commence before notice of the decision is provided in 1.3 above. 4. If the registered provider seeks internal review of the further decision or the grounds upon which it is based, the Commissioner or System Governor should ensure that a decision on reconsideration is made prior to the expiration of the period specified in 1.3 above. 5. A registered provider may apply to the Administrative Appeals Tribunal for a stay of the operation of the notice if the registered provider has applied for internal review until a decision on reconsideration is made. 6. The Commissioner or System Governor may after the further decision is made, by written notice given to a registered provider, vary or revoke a notice, if at the time of the variation or revocation, the Commissioner or System Governor considers that the variation or revocation is appropriate and the effect of the variation or revocation is not adverse to the registered provider.
<p>Section 264 – Grounds for giving required action notices</p>	<p>The current standards to trigger a Required Action Notice are too low.</p> <p>The words “it is likely that the provider will fail to comply with this Act” should be removed from paragraph 264(c), and the remainder should be merged with paragraph 264(a) (with some further changes) to read: “the provider has not complied, or is not complying, with this Act and the non-compliance gives rise to”.</p> <p>Paragraph 264(b) should be removed.</p> <p>Subparagraph 264(c)(i) – add ‘serious’ before ‘risk’.</p> <p>Subparagraph 264(c)(ii) – add ‘significant failure with respect to’ before ‘prudential risk’.</p> <p>Paragraph 264(e) – add ‘serious’ before ‘risk’ and remove ‘or there might be’.</p> <p>Paragraph 264(f) – add ‘serious’ before ‘deterioration’ and remove ‘or there might be’.</p> <p>Paragraph 264(g) – add ‘that is a significant failure’ after ‘unsound way’.</p> <p>Paragraphs 264(h) should be removed – it is unclear what this would mean and when it would apply.</p> <p>Paragraph 264(i) should be removed – it is not linked to any breach of rights, duties, obligations, contract etc.</p>
<p>Section 265 – Contents of required action notices</p>	<p>Paragraph 265(b) – replace the word ‘brief’ with ‘comprehensive’ and add ‘and the reasons for the decision to give the notice and the required action’ after ‘notice is given’. There should be transparency and detailed reasons for the exercise of this power.</p>

Section/s of exposure draft	ACCPA feedback
Section 266 – Commissioner may vary or revoke required action notices	This section should be removed if procedural fairness provisions are adopted in accordance with what we have proposed above.
Section 267 – System Governor may vary or revoke required action notices	This section should be removed if procedural fairness provisions are adopted in accordance with what we have proposed above.
Section 268 – Penalty for contravening required action notices	Insert the word ‘maximum’ in front of the penalty.
Section 269 – Commissioner may give compliance notices relating to Commissioner’s functions	Subparagraph 269(a)(ii) – should be removed consistent with the proposed amendments to paragraph 264(b). Paragraph 269(b) – remove ‘or possible non-compliance’.
Section 270 – System Governor may give compliance notices relating to System Governor’s functions	Subparagraph 270(a)(ii) – should be removed consistent with the proposed amendments to paragraph 264(b). Paragraph 270(b) – remove ‘or possible non-compliance’.
Section 271 – Contents of compliance notices— general	Paragraph 271(b) – replace the word ‘brief’ with ‘comprehensive’ and add ‘and the reasons for the decision to give the notice and the required action’ after ‘non-compliance’. There should be transparency and detailed reasons for the exercise of this power. Paragraphs 271(b) and 271(c) – consequential to the proposed amendments to sections 269 and 270, remove ‘or possible non-compliance’.
Section 272 – Contents of compliance notices— additional content for notices given by Commissioner in relation to significant failures or systemic patterns of conduct	Section 272 should be amended as follows (insertions in <i>red italics</i> , deletions struck through): “a compliance notice given to the provider by the Commissioner in relation to the non-compliance must also set out that the Commissioner is so satisfied and <i>brief comprehensive</i> reasons <i>about why</i> that the Commissioner is so satisfied.”
Section 273 – Commissioner may vary or revoke compliance notices	This section should be removed if procedural fairness provisions are adopted in accordance with what we have proposed above.
Section 274 – System Governor may vary or revoke compliance notices	This section should be removed if procedural fairness provisions are adopted in accordance with what we have proposed above.

Section/s of exposure draft	ACCPA feedback
Section 275 – Penalty for contravening compliance notices	Insert the word ‘maximum’ in front of the penalty.
Section 277 – Contents of adverse action warning notice	Paragraph 277(1)(b) – replace the word ‘brief’ with ‘comprehensive’ and add ‘and the reasons for the decision to give the notice and the required action’ after ‘non-compliance’. There should be transparency and detailed reasons for the exercise of this power.
Section 280 – Offence for failure to comply with notice	Insert the word ‘maximum’ in front of the penalty.
Section 281 – Attending before authorised officer to answer questions – making oath or affirmation	Insert the word ‘maximum’ in front of the penalty.
Section 284 – Strict liability offence for failure to comply with notice	This section should be removed. It is unreasonable for a strict liability offence, with a criminal penalty, to be imposed for failure to give information or produce documents to the Commissioner or System Governor.
Section 285 – Privilege against self-incrimination not abrogated	This should also include preservation of the right to silence in response to questions.
Section 286 – Banning orders on current and former registered providers	<p>Recommend removing this section – banning orders are better suited to be given against people, rather than providers.</p> <p>Continuity of care is a vital consideration – what will happen to care recipients if a banning order is made against the registered provider of their care? The Commission should exhaust all options before a banning order is issued to prevent care recipients from being displaced. Care recipients will be put at risk if there are no alternative registered providers available in the timeframe required.</p> <p>If this section is retained, the following text (in <i>red italics</i>) should be added to paragraphs 286(3)(b) and 286(3)(c) to ensure banning orders are made only in extreme circumstances:</p> <p>(b) the Commissioner reasonably believes that the entity has contravened, is contravening, or is likely to contravene this Act <i>in a manner that has, is or is likely to pose a severe risk to the safety, health or wellbeing of an individual accessing funded aged care services</i>; or</p> <p>(c) the Commissioner reasonably believes that the entity has been involved in, or is likely to become involved in, a contravention of this Act by another entity <i>in a manner that has, is or is likely to pose a severe risk to the safety, health or wellbeing of an individual accessing funded aged care services</i>; or</p>
Section 287 – Banning orders on individuals as	Aligned to the above, the following should be added to the end of the sentence in subparagraph 287(2)(d)(i): <i>“in a manner that has, is</i>

Section/s of exposure draft	ACCPA feedback
aged care workers and responsible persons	<i>or is likely to pose a severe risk to the safety, health or wellbeing of an individual accessing funded aged care services"</i>
Section 289 – Contraventions of banning orders	Insert the word 'maximum' in front of the penalties.
Section 291 – Notice of decision about banning order	A person or entity potentially subject to a banning order should be given access to all the information used by a delegate in making their decision to issue a banning order.
Section 294 – Varying or revoking banning order on application	Paragraph 294(4)(b) should be amended as entities that receive a notice of intention from the Commissioner proposing not to vary or revoke a banning order or condition or proposing to specify one or more new conditions, should have at least 14 days to respond, rather than any shorter period.
Section 298 – Terms of reference for assurance activities	The word 'may' should be replaced with 'must' – terms of reference for assurance activities should not be optional.
Section 299 – Reports by System Governor on assurance activities	If the System Governor prepares a report under subsection 299(3), it should not be optional for the System Governor to give a copy of the report to a registered provider to which the activity relates. The word 'may' in subsection 299(4) should be replaced with 'must'.
Section 301 – Registered providers must provide facilities and assistance for assurance activities	Insert the word 'maximum' in front of the penalty.
Section 306 – Recovery of amounts from financial institutions	Insert the word 'maximum' in front of the penalty.
Section 317 – Civil penalty provisions for false or misleading information	Insert the word 'maximum' in front of the penalty.
Section 318 – Civil penalty provision for false or misleading documents	Insert the word 'maximum' in front of the penalty.

Chapter 7: Information management

Section/s of exposure draft	ACCPA feedback
Section 323 – Basic limits on recording, use and disclosure of protected information	Insert the word ‘maximum’ in front of the penalties.
Section 333 – Recording, use or disclosure to avert or report serious threat to individual seeking or accessing funded aged care	This should also include the safety of other people involved in aged care, including aged care workers.
Section 334 – Recording, use or disclosure for provision of services to an individual	<p>It should be made explicit that registered providers passing protected information relating to an individual seeking to access, or accessing, funded aged care services onto ACCPA for the purpose of seeking advice or assistance is permissible. The following paragraph should be added to section 334:</p> <p>‘(f) for the purpose of obtaining membership support or advice from a national industry association, or equivalent, for registered aged care providers’.</p>
Section 355 – Disclosures qualifying for protection	<p>Subparagraphs 355(a)(iii), 355(a)(iv) and 355(a)(v) should be removed and replaced with an authorised person of a registered provider. It is unreasonable for any aged care worker (including a volunteer) to be able to receive a disclosure qualifying for protection. For example, part-time workers with English as a second language may not be aware that a qualifying disclosure is being made to them.</p> <p>A requirement that disclosures must be made in ‘good faith’ should also be introduced as a measure to curb vexatious complaints. This is consistent with disclosures made under the <i>National Disability Insurance Scheme Act 2018</i> (paragraph 73ZA(2)(d)). In addition, it should be made clear that a qualifying disclosure does not include a vexatious complaint made by a worker facing disciplinary action.</p> <p>Paragraph 355(c) – the new Aged Care Act should clarify whether it is intended that complaints made about a registered provider’s services could potentially also be considered a qualifying disclosure and, if so, the impact on the whistleblower arrangements.</p>
Section 357 – Confidentiality of identity of disclosers	<p>It is unclear how this section works if, for example, a disclosure is made to an aged care worker who escalates the issue to a responsible person. It should be made clear that internal communications for the purposes of recording and responding to the disclosure is permissible.</p> <p>ACCPA has previously recommended (in ACCPA’s 2023 submission on the proposed foundation elements of the new Aged Care Act) that the Department of Health and Aged Care and/or the Aged Care Quality and Safety Commission publish resources and</p>

Section/s of exposure draft	ACCPA feedback
	<p>templates for providers to use ahead of the start date of any legislative change with respect to the whistleblower framework, and the above point should be clarified in such resources.</p> <p>Insert the word 'maximum' in front of the penalty.</p>
Section 358 – Victimization prohibited	Insert the word 'maximum' in front of the penalties.
Section 360 – Registered providers' obligations in relation to disclosers	<p>Paragraph 360(1)(a) should also include responsible persons.</p> <p>The list in subsection 360(2) should also include the System Governor and other relevant people working for the registered provider.</p>

Chapter 8: Miscellaneous

Section/s of exposure draft	ACCPA feedback
Part 4 – Appointment of supporters and representatives	Part 4, Chapter 8 should be deleted as per our feedback on Part 4 of Chapter 1.
Part 7 – Use of computer programs to make decisions	Part 7 should include transparency requirements, requiring the System Governor and the Commissioner to publish details of the computer program and any algorithm(s) used to make decisions.
Section 405 – False or misleading information or documents in applications and requests	Insert the word 'maximum' in front of the penalty.
Section 411 – Annual report on the operation of the Act	Subsection 411(2) should include metrics on the performance of the System Governor in carrying out the System Governor's functions under the new Aged Care Act.

Appendix 2: ACCPA proposed amendments to section 21

21 Effect of Statement of Rights

- (1) An individual is entitled to the rights specified in section 20 when accessing, or seeking to access, funded aged care services so far as is reasonably practicable, taking into account:
 - (a) that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals;
 - (b) the primary duty of a person conducting a business or undertaking under Work Health and Safety laws.
- (2) It is the intention of the Parliament that registered providers delivering funded aged care services to individuals must not act in a way that is incompatible with the rights specified in section 20, so far as is reasonably practicable, taking into account:
 - (a) that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals;-
 - (b) the primary duty of a person conducting a business or undertaking under Work Health and Safety laws.
- (3) Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal or in respect of which a registered provider can be held to have contravened or usurps, abrogates or replaces any provisions of the contract, agreement or arrangement between registered providers and individuals for the delivery of funded aged care services.
- (4) An individual must, when receiving funded aged care services:
 - (a) take reasonable care for their own safety, health and wellbeing;
 - (b) take reasonable care that their acts or omissions do not adversely affect the safety, health and wellbeing of other persons;
 - (c) accept responsibility for their actions and choices even though some actions and choices may involve an element of risk;
 - (d) give enough information to enable the registered provider to deliver the funded aged care services;
 - (e) tell the registered provider and their staff about any problems with the funded aged care services;
 - (f) comply, so far as they are reasonably able, with any reasonable instruction that is given by the registered provider to allow the provider to comply with this Act;
 - (g) co-operate with any reasonable policy or procedure of the registered provider relating to safety, health and wellbeing that has been notified to the individual;
 - (h) respect the rights of:
 - (i) other people including other individuals receiving funded aged care services, aged care workers, responsible persons, volunteers, and visitors;
 - (ii) aged care workers and responsible persons to work in a safe environment free from exploitation, abuse, discrimination or harassment;
 - (i) pay any fees as specified in their agreement with the registered provider by the due date and to negotiate an alternative arrangement with the registered provider if any changes occur in their financial circumstances.

Appendix 3: ACCPA proposed amendments to Part 5, Chapter 3

Part 5—Statutory duty and compensation

Division 1—Provider and responsible person duties

120 Registered provider duty

- (1) A registered provider must ensure, so far as is reasonably practicable, that the conduct of the provider does not cause ~~adverse~~harm effects to the health and safety of individuals to whom the provider is delivering funded aged care services while the provider is delivering those services.
- (2) In this Act, *reasonably practicable*, in relation to a duty imposed under this Part, means that which is, or was at a particular time, reasonably able to be done, taking into account and weighing up all relevant matters including:
 - (a) the likelihood of the ~~adverse effect~~harm concerned occurring; and
 - (b) the likely degree of harm from the ~~adverse effect~~conduct; and
 - (c) what the person concerned knows, or ought reasonably to know, about ways of preventing the ~~adverse effect~~harm; and
 - (d) the availability and suitability of ways to prevent the ~~adverse~~harm effect; and
 - (e) after assessing the extent of the risk of harm and the available ways of eliminating or minimising the risk of harm, the cost associated with available ways of eliminating or minimising the risk of harm, including whether the cost is grossly disproportionate to the risk; and
 - (fe) the rights of individuals under the Statement of Rights.

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

- (3) In determining whether the registered provider has contravened s 120(1), regard must be had to whether the individual has:
 - (a) taken reasonable care for their own health and safety; and
 - (b) taken reasonable care that their acts or omissions do not adversely affect the health and safety of other persons; and
 - (c) complied, so far as the individual is reasonably able, with any reasonable instruction that is given by the registered provider to allow the registered provider to comply with this Act; and
 - (d) co-operated with any reasonable policy or procedure of the registered provider relating to health or safety that has been notified to the individual.

~~Strict liability offence—serious failures~~

(34) A registered provider ~~commits an offence of strict liability~~contravenes this subsection if:

- (a) the provider has a duty under subsection (1); and
- (b) the provider, without a reasonable excuse, engages in conduct that does not comply with the duty; and
- (c) the conduct amounts to a serious failure by the provider to comply with the duty.

Maximum Civil Penalty:

- (a) in the case of ~~an offence committed~~contravention by a registered provider that is an individual—150 penalty units; or
- (b) in the case of ~~an offence committed~~a contravention by a registered provider other than an individual—1000 penalty units.

(45) Conduct of a registered provider amounts to a *serious failure* to comply with the duty in subsection (1) if:

- (a) the conduct exposes an individual to whom the duty is owed a risk of death or serious injury or illness; and
- (b) the conduct:

- (i) involves a significant failure, being conduct that is a significant departure from the conduct that could reasonably be expected from a registered provider, having regard to the requirements registered providers are subject to under this Act, and is a failure to comply with one or more of the Aged Care Quality Standards; or
- (ii) is part of a systematic pattern of conduct, being conduct that involves the registered provider knowingly failing to comply with one or more of the Aged Care Quality Standards on a repeated basis having regard to:

(A) the number of times (the *relevant contraventions*) the registered provider's conduct has not complied with a provision of this Act;

(B) the period over which the relevant contraventions occurred;

(C) the number of individuals affected by the relevant contraventions;

(D) the registered provider's response, or failure to respond, to any complaints about the relevant contraventions.

~~Strict liability offence—death or serious injury or illness~~

(56) A registered provider ~~commits an offence of strict liability~~contravenes this subsection if:

- (a) the provider has a duty under subsection (1); and
- (b) the provider, without a reasonable excuse, engages in conduct that does not comply with the duty; and
- (c) the conduct amounts to a serious failure by the provider to comply with the duty; and
- (d) the conduct results in the death of, or serious injury to, or illness of, an individual to whom the duty is owed.

Maximum Civil Penalty:

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

Fault based offence—death or serious injury or illness

- (67) A registered provider ~~commits an offence~~ contravenes this subsection if:
- (a) the provider has a duty under subsection (1); and
 - (b) the provider, without a reasonable excuse, intentionally engages in conduct that does not comply with the duty; and
 - (c) the conduct amounts to a serious failure by the provider to comply with the duty; and
 - (d) the conduct results in the death of, or serious injury to, or illness of, an individual to whom the duty is owed.

Maximum Civil Penalty:

- (a) in the case of ~~an offence committed~~ a contravention by a registered provider that is an individual—1000 penalty units ~~or 5 years imprisonment or both~~; or
- (b) in the case of ~~an offence committed~~ a contravention by a registered provider other than an individual—9,500 penalty units.

General defence of reasonable excuse

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

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

121 Responsible person duty

- (1) The following A-responsible persons of a registered provider must exercise due diligence to ensure that the provider complies with the provider's duty under section 120:
 - (a) any member of the governing body of the registered provider; or
 - (b) any officer of the registered provider; or
 - (c) any member of the most senior level of executive of management responsible for the day -to-day operations of the registered provider.
- (2) In this section, *due diligence* includes taking reasonable steps within the scope of a person's role:
 - (a) to acquire and maintain knowledge of a reasonable understanding of requirements applying to registered providers under this Act; and
 - (b) to gain an understanding of the nature of the funded aged care services the registered provider delivers and the potential adverse effects/harm that can result to individuals when delivering those services; and
 - (c) to ensure that the registered provider has available for use, and uses, appropriate resources and processes to manage adverse effects/harm to health and safety of individuals accessing funded aged care services delivered by the provider; and

- (d) to ensure that the registered provider has appropriate processes for receiving and considering information regarding incidents and risks and responding in a timely way to that information; and
- (e) to ensure that the registered provider has, and implements, processes for complying with any duty or requirement of the registered provider under this Act.

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

~~*Strict liability offence—serious failures*~~

~~(34) A responsible person of a registered provider commits an offence of strict liability contravenes this subsection if:~~

- (a) the person has a duty under subsection (1); and
- (b) the person, without reasonable excuse, engages in conduct that does not comply with the duty; and
- (c) the conduct amounts to a serious failure by the responsible person to comply with the duty.

Maximum Civil Penalty: 150 penalty units.

~~(45) Conduct of a responsible person of a registered provider amounts to a *serious failure* to comply with the duty in subsection (1) if:~~

- (a) the conduct exposes an individual to whom the duty is owed a risk of death or serious injury or illness; and
- (b) the conduct:
 - (i) involves a significant failure being conduct that is a significant departure from the conduct that could reasonably be expected from a responsible person, having regard to the requirements responsible persons are subject to under this Act, and is a failure to comply with one or more of the Aged Care Quality Standards; or
 - (ii) is part of a systematic pattern of conduct, being conduct that involves the responsible person knowingly failing to comply with one or more of the Aged Care Quality Standards on a repeated basis having regard to:
 - (A) the number of times (the *relevant contraventions*) the responsible person's conduct has not complied with a provision of this Act;
 - (B) the period over which the relevant contraventions occurred;
 - (C) the number of individuals affected by the relevant contraventions;
 - (D) the responsible person's response, or failure to respond, to any complaints about the relevant contraventions.

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

~~(56) A responsible person of a registered provider commits an offence of strict liability contravenes this subsection if:~~

- (a) the person has a duty under subsection (1); and
- (b) the person, without a reasonable excuse, engages in conduct, that does not comply with the duty; and
- (c) the conduct amounts to a serious failure by the responsible person to comply with the duty; and

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

Maximum Civil Penalty: 500 penalty units.

~~Fault-based offence—death or serious injury or illness~~

- (~~7~~6) A responsible person of a registered provider ~~commits an offence~~contravenes this subsection if:
 - (a) the person has a duty under subsection (1); and
 - (b) the person, without reasonable excuse, intentionally engages in conduct that does not comply with the duty; and
 - (c) the conduct amounts to a serious failure by the responsible person to comply with the duty.
 - (d) the conduct results in the death of, or serious injury to, or illness of, an individual to whom the duty in section 120 is owed by the registered provider.

Maximum Civil Penalty: 1000 penalty units ~~or 5 years imprisonment or both~~.

~~General defence of reasonable excuse~~

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

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

Division 2—Other provisions that apply to duties

122 Duties not transferrable

A duty cannot be transferred to another entity.

123 Entity may have more than 1 duty

An entity can have more than 1 duty by virtue of being in more than 1 class of duty holder.

124 More than 1 entity can have a duty

- (1) More than 1 entity can concurrently have the same duty.
- (2) Each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty.
- (3) If more than 1 entity has a duty for the same matter, each entity:
 - (a) retains responsibility for the entity's duty in relation to the matter; and
 - (b) must discharge the entity's duty to the extent to which the entity has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

125 Other duties not affected

- (1) A contravention of this Part nor any act or omission that constitute a contravention of this Part has any consequence under any law other than this Act.
- (2) This Part does not affect any duty imposed by, or under, any other law of the Commonwealth, or of a State or Territory, or under the common law.
- ~~(4)~~(3) This Part does not confer a right of action in civil proceedings in relation to a contravention of a provision in this Act.

126 Concurrent operation of State and Territory laws

This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.

Division 3—Compensation pathway

127 Compensation orders

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