Estia Health

Response to the Exposure Draft of the Aged Care Act 2023 (Exposure Draft)

Prepared by
Estia Health

6 March 2024

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To whom it may concern,

Exposure Draft of Aged Care Act 2023 (Exposure Draft)

Thank you for the opportunity to provide feedback on behalf of Estia Health for the Exposure Draft for the *Aged Care Act 2023* (**New Act**).

Estia Health has a long history of engaging constructively on the design and implementation of aged care legislation, including through the Royal Commission into Aged Care Quality and Safety (**Royal Commission**).

As part of responding to the consultation process for the Royal Commission, Estia Health made recommendations on issues as diverse as worker registration, the de-regulation of places, transparency of information, supported decision-making, training standards and funding/financing models. This has continued through submissions in more recent times to the Senate Enquiry and the Independent Health and Aged Care Pricing Authority.

We support the intent of the New Act and particularly its focus on the safety, health and well-being of older people.

Detail – In assessing the impact of the proposed changes, we observe that an all-encompassing view on the design, operation and impact of the New Act and other changes is difficult given there are significant elements that are yet to be finalised, most notably the Rules, Fees and Payments, Financial and Prudential Standards and transitional arrangements. There are a multitude of sections (c50) where the operationalisation of the legislation will be set out in Rules yet to be published.

Timing – The planned commencement date of 1 July 2024 is concerning. While noting the desire of consumer groups for the existing timeframe to be retained, the degree to which the legislation is incomplete and the short period for consideration of transition risks and implementation of the changes by providers is particularly noteworthy. This concern has a number of components if the planned July 2024 implementation date is retained, including:

a) The timeframe in which to review the yet-to-be-published parts of the Bill is inadequate;

b) The timeframe in which to consult on the yet to be published Rules is inadequate;

c) Other areas which have a direct impact on operations are yet to be published. By way of example, the Aged Care Quality and Safety Commission released (6 February 2024) an extensive consultation regarding the new Aged Care Quality Standards and accompanying proposed documents that are a significant change in the way the Commission interacts with registered providers regarding audits and re-registration. The consultation closes 6 weeks before the proposed commencement date;

d) The proposed changes create a significant training requirement for aged care workers. The Aged Care Quality and Safety Commissioner has been clear that she is required to regulate according to the rules in place at the time. The potential consequences of failing to meet requirements, despite best endeavours, are obvious; and

e) Quite simply, the implementation of the New Act will have real and significant immediate impacts on providers (with a short notice period) with a substantial change management and education program required. This is equally true for the Aged Care Quality and Safety Commission and the System Governor, who, amongst many things, is proposed to become the arbiter for a new program of Supporters and Representatives which will interplay with existing state-based systems (as one example). In saying this, we note the admonition in David Tune's report where he noted the extent to which the rollout of new activities had influenced the Commission's capability.

Given the substantial change requirements for providers and Government entities, it is imperative that the required regulatory impact statement is full and detailed and can withstand scrutiny. We note the recent conclusions of the Australian National Audit Office (**ANAO**) in their report titled 'Design and Early Implementation of Residential Aged Care Reforms'.

The Bill proposes a 5-year review. That is too long for a Bill such as this. It is imperative that there is an enhanced and structured periodic review mechanism during and over the first five years, not solely at the 5-year anniversary. The primary purpose of this review would be to assess whether the Act is meeting the Objects and that in doing so it has not placed unreasonable requirements and costs on stakeholders. The latter is particularly important in the sector where resources should be focused on delivering care. We expect the ongoing review will evaluate how effectively the New Act has been implemented across the sector, including an assessment of any unreasonable operational challenges or barriers faced by providers.

Our response to the consultation focuses on those issues we see as material, rather than commentary on every item. This also reflects our overall support for the New Act.

Each issue we have commented on is summarised in a table which outlines the topic, our concern and a proposed solution or consideration.

In relation to the matter of statutory duties, given the complexity of the issue, we have separately collaborated with other leading aged care providers to develop a detailed joint submission setting out our material concerns with the proposed statutory duties and compensation provisions (as currently drafted) in Part 5 of Chapter 3 of the Exposure Draft. A copy of the joint submission is attached at **Appendix 1**.

We are committed to collaborating with the Department of Health and Aged Care and other stakeholders to ensure the New Act meets the future needs of Australia's ageing population. We believe that addressing these concerns and incorporating our recommendations will significantly enhance the effectiveness and impact of the new legislation. We would welcome the opportunity to engage face-to-face on the matters we have raised in our submission and to have the opportunity to future contributions as the legislative process progresses.

Yours sincerely,

[redacted]

Sean Bilton
Chief Executive Officer
Estia Health

Enc. Joint submission on statutory duties

TOPIC: SUPPORTERS AND REPRESENTATIVES (Chapter 1, Part 4)

CONCERN - The System Governor can appoint "supporters" and "representatives" of people "accessing, or seeking to access, funded aged care services" (clauses 374, 376).

(a) The proposed federal appointment process for supporters and representatives is unlikely to align with state and territory guardianship/administration laws potentially creating confusion and conflicting duties for decision-makers; and (b) there is insufficient clarity about the practical operationalisation of the nominee system.

Estia Health supports Dr. John Chesterman's views in his article 'More work needed on aged care bill' - Australian Ageing Agenda[1] on the complexities introduced by the Act regarding nominees. Our concerns mirror his, focusing on potential conflicts with state laws, and issues around autonomy, privacy, and the practicality of implementing the Act's provisions. We note there is a lack of clarity in relation to the following matters:

- There is a need for transparency and checks in the nominee appointment process to prevent abuse and address potential conflicts of interest;
- There are practical and legal issues in monitoring nominees' actions, ensuring their accountability, and addressing potential disputes or conflicts;
- It is unclear how the actions of representatives, which would be an offence under s35, will be detected or to whom suspicions can be reported;
- There is considerable uncertainty about the interaction of the Bill with existing state and territory guardianship/administration laws and related decision-making laws and practices, for example, even in cases where a state tribunal has appointed a guardian, the Bill requires the System Governor to consult the care recipients' views before confirming their tribunal-appointed guardian as a representative. However, it is unclear how the System Governor would address situations where an individual is dissatisfied with their assigned guardian (a not infrequent occurrence); and
- S30 of the Bill sets out a 'wills and preferences test' and, whilst this is laudable and aligns the Bill with Australia's international human rights obligations to adopt a 'substituted judgment' approach, it creates conflict with state laws (i.e. in NSW, the 'welfare and interest' approach must be taken by substitute decision-makers).

PROPOSAL

There is a need for clear guidelines, safeguards against abuse, role clarity, and mechanisms for dispute resolution to ensure that the system supports the well-being and rights of individuals in aged care, while preventing potential conflicts and abuses of power.

- The nominee appointment process must be aligned as far as possible with guardianship/decision-making laws across states and territories to prevent inconsistencies in regulation. Such inconsistency creates an untenable situation for aged care workers and (potential) substitute decision-makers.
- The consent frameworks need to be strengthened to ensure explicit consent mechanisms are in place for appointing representatives, with clear assessments of the capacity of the resident to consent.
- Laws should be established for handling personal and health information by supporters and representatives, aligned with the *Privacy Act 1988* (Cth) and relevant state and territory privacy laws.
- Precise roles, limits of authority, accountability and ethical guidelines should be clearly defined for supporters and representatives and robust safeguards should be implemented against the abuse of power.
- Comprehensive training and support should be provided to supporters and representatives to enable them to fulfil their roles effectively and ethically.
- A clearly defined dispute resolution mechanism should be established in the event of conflicts (between the resident/family members/substitute decision-makers or providers) regarding the appointment, actions or accountability of nominees. This mechanism should be clearly defined, easily accessible, and designed to ensure fair, impartial, and timely resolution of conflicts which uphold the best interests of the care recipient.
- Aged care employees will require extensive training, clear guidance, and robust support to fully comprehend and effectively navigate the new system of representatives and supporters.

[1] Chesterman, J. (2024, January 22). More work needed on aged care bill. *Australian Ageing Agenda*. Retrieved from https://www.australianageingagenda.com.au/executive/more-work-needed-on-aged-care-bill/"

TOPIC: PROVIDER RE-REGISTRATION (Chapter 2, Part 3, Division 3)

CONCERN 1 - Triennial registration is an unnecessary administrative requirement and cost to both the Commonwealth and registered providers within the framework of the (to be) extended and extensive statutory monitoring functions of the Aged Care Quality and Safety Commissioner.

The current arrangements demonstrate that the regulator and system governor have the capability to identify the potential for failure and actual failure. If these cannot be identified through the program of ongoing monitoring and oversight, one can only conclude the Government has concerns about the effectiveness of the ACQSC program of monitoring.

CONCERN 2 - Triennial registration which includes an audit (s68 (2) (e) (i)) against the Aged Care Quality Standards (Consultation Paper No 2, page 46) and a 'deep dive' into the suitability of an entity to remain a registered provider creates cost and an administrative burden for the Aged Care Quality and Safety Commission and a cost administrative burden for registered providers.

The plan to link quality audits with the reregistration decision is flawed because it is inoperable. Many registered residential care home providers have more than twenty (20) homes and increasingly many have more than eighty (80). In a practical sense, the time lag between audits and the application for reregistration may be long.

PROPOSAL CONCERNS 1 & 2

The planned reregistration scheme should not proceed.

CONCERN 3 - The requirements that qualify a provider to be reregistered will be set out in the Rules (s68 (3) (a) (ii)).

The decision whether to reregister a provider has serious ramifications for all stakeholders and is arguably one of the most important made by the Commissioner. The requirements to be considered by the Commissioner should be set out in the Act and thereby subject to Parliamentary debate. The disallowance provisions are inadequate for a matter of this importance.

We also note that the 'Rules' approach creates a situation where the Minister may change the rules such that a provider that has been registered may not be eligible for reregistration due to a change in the Rules.

PROPOSAL - CONCERN 3

The considerations regarding the reregistration of a provider should be set out in the Act and subject to Parliamentary debate rather than in the Rules (s68(3)(a)(ii)).

The Act should provide that where the requirements are changed, those providers registered under the 'old regime' remain subject to the regime under which they were last registered.

CONCERN 4 - The notion of the need for a triennial deep dive brings into question the confidence stakeholders can have in the regime of reporting, publishing and performance monitoring which includes on-site audits by the ACQSC staff.

Consultation Paper No. 2 does not provide insight into the evidence the Government considered in proposing this inclusion in the monitoring regime.

TOPIC: DUTY OF RESPONSIBLE PERSON (Chapter 3, Part 5, Division 1)

CONCERN – The responsibilities of a responsible person to exercise due diligence to ensure that the registered provider complies with the provider's duty under section 120 (s121) (1)) pays no regard (directly) to the role and function of the responsible person within the registered provider entity.

Despite the requirement for due diligence and the defence of reasonable excuse, a duty such as '*to ensure that the registered provider has, and implements, processes for complying with any duty or requirement of the registered provider under this Act*'. (s121 (2) (e) is unreasonable and will create concern, particularly for those responsible persons whose roles are providing direct care, such as a care home manager. Among the raft of duties and requirements of a registered provider are many that are tangential to the day-to-day management and care of residents.

Notably, the Bill draws no distinction between those responsible persons of limited influence and those such as members of the governing body and senior executives.

Such a set of responsibilities has the potential to dissuade people from taking on these roles where the responsibility set out in the Act seems onerous. The establishment of sub section (4) and (6) as strict liability offences creates a further complexity despite the general defense of reasonable excuse set out in s121(8).

PROPOSAL

The Bill be amended to more accurately reflect the varying levels of responsibility and influence held by different responsible persons within a registered provider's organisational structure. The amendment should aim to:

- Clearly delineate the compliance obligations in relation to the operational capacity and hierarchical level of the responsible person within the provider entity;
- Introduce a tiered framework of responsibility, ensuring that the extent of 'due diligence' and compliance oversight required is commensurate with the individual's role, authority and capacity to affect organisational change; and
- Provide clearer guidance on the expectations for each category of responsible persons, thereby facilitating a more equitable and realistic allocation of responsibilities.

Such amendments would not only align the legal framework with the practical realities of aged care but would also ensure that the essential roles within aged care providers are filled by professionals who are not dissuaded by the fear of disproportionate legal burdens.

TOPIC: STATUTORY DUTIES (Chapter 3, Part 5)

CONCERN

We broadly support the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and that this duty applies to both providers and officers (like the model Work Health and Safety Laws (**Model WHS Law**)).

However, as drafted the proposed statutory duties and compensation pathway in the Exposure Draft risk undermining the stated policy aims of reforming aged care, including by deterring individuals from being employed or otherwise engaged (including as directors or volunteers) in funded aged care services. They also risk injustice and an abrogation of common law "safeguards".

Given the complexity and significance of these issues, we have engaged in collaboration with other leading aged care providers to develop a comprehensive joint submission setting out our material concerns with the proposed statutory duties and compensation provisions (as currently drafted) in Part 5 of Chapter 3 of the Exposure Draft.

This collaborative effort represents a deep dive into the issues at hand, offering a panoramic view from the sector's standpoint on the repercussions of the introduced penalties. Furthermore, it proposes avenues for progress, reflecting our collective dedication to fostering a constructive dialogue and finding common ground in navigating the regulatory complexities introduced by the new legislation.

A copy of the joint submission is attached at **Appendix 1**.

TOPIC: FINANCIAL AND PRUDENTIAL STANDARDS (Chapter 3, Part 5, Division 6)

CONCERN - The Aged Care Quality and Safety Commissioner will have the power to introduce Financial and Prudential Standards and then enforce compliance. (s163)

It is inappropriate that the same person has statutory responsibility for designing and introducing Rules and enforcing compliance with the Rules.

The consolidation of these powers—both the formulation of regulatory standards and the oversight of compliance—within the office of a single entity raises significant concerns regarding checks and balances in regulatory oversight. The fundamental principle of separation of powers within governance structures is designed to prevent the concentration of authority, ensuring that the entity drafting regulations is distinct from the one enforcing them. This separation is crucial to maintaining an objective and balanced regulatory environment, promoting fairness, and preventing conflicts of interest.

PROPOSAL

The responsibility for the creation and introduction of Financial and Prudential Standards be reallocated to the Minister responsible for aged care. Such an approach would enhance the integrity of the regulatory process, ensuring that standards are developed with a broad perspective on the aged care sector's needs and challenges, and enforced with impartiality and a focus on quality and safety outcomes.

TOPIC: WORKER SCREENING (Chapter 5, Part 3, Division 7)

CONCERN - (a) The current overlapping requirements for worker screening across aged care and NDIS is unnecessarily burdensome and costly; and
(b) Consultation Paper No. 2 is silent on any timeframe for regulatory alignment and simplification due to its intersection with the state-based NDIS systems.

Consultation Paper No. 2 (page 51) references the proposed approach to worker screening requirements, including alignment with the current NDIS program which varies by state.

Since the introduction of NDIS worker screening requirements into aged care when caring for an NDIS resident (in addition to aged care criminal history checks), there has been a material burden and cost to providers due to the complexity and variance in different systems (aged care vs NDIS, federal vs state, state by state variances). This has resulted in the need to invest in systems and resources to ensure ongoing compliance, including the cost of funding materially higher worker screening costs in the NDIS environment.

PROPOSAL

Worker screening is prioritised as a material issue to be addressed in the short term. Efforts to streamline and harmonise the screening processes between aged care and the NDIS should be expedited to reduce the administrative and financial burdens on providers.

We recommend the establishment of a Memorandum of Understanding (**MOU**) executed between the Federal and State Governments. This MOU should articulate a shared commitment to resolve the worker screening issues, outlining a clear timetable and concrete steps towards regulatory alignment and simplification.

TOPIC: AGED CARE QUALITY AND SAFETY ADVISORY COUNCIL (Chapter 5, Part 4)

CONCERN 1 – The functions of the Council include

s169 ***(a) to monitor the performance of the Commissioner's functions, and***

S169 ***(e) to identify systemic performance issues within the Commission and to make referrals to the Minister if appropriate*****.**

There is no obligation on the Commissioner to provide information and documents sought by the Council to inform their monitoring. Nor does it oblige the Commissioner to respond to the Council in writing.

The requirements of governing bodies to consider and respond to advice from the advisory bodies are instructive.

The absence of obligations to provide information and respond to communications from the Council creates the potential to limit the effectiveness of the Council.

PROPOSAL – CONCERN 1

The Bill places an obligation on the Aged Care Quality and Safety Commissioner to:

a.) Provide any documents or information requested by the Council; and

b.) Respond to any reports to the Commissioner regarding the Council's assessment of the Commission's performance.

CONCERN 2 - A person is not eligible for appointment to the Advisory Council if the person is a registered provider or a responsible person of a registered provider (s172 (4)).

Consequently, s172(4) precludes a person from (not representing), the stakeholder group that demonstrably has the most (daily) engagement with the Commission.

The prohibition on people who are a responsible person of a registered provider means that the Council will not include members with contemporary experience and knowledge of aged care service delivery or contemporary knowledge and understanding of the Commission's relationship with registered providers.

Whilst the list of eligible people includes a person with '*substantial experience or knowledge in delivery of funded aged care services to individuals*', the fast-moving pace of the sector means that 'outsiders looking in' are simply observers and those with prior experience become the providers of historical knowledge.

PROPOSAL – CONCERN 2

a.) The prohibition on appointment of a person who is a responsible person of a registered provider should be removed; and

b.) The list should include 'a person who has significant and senior experience as a responsible person of a registered provider.'

TOPIC: COMPLAINTS COMMISSIONER (Chapter 5, Part 5)

CONCERN 1 - The Complaints Commissioner is not an independent statutory office holder.

The Bill proposes that the Complaints Commissioner will be an ACQSC employee appointed by the Aged Care Quality and Safety Commissioner to assist the Commissioner in the performance of the Commissioner's complaints functions (s182). The Complaints Commissioner will act under delegation from the Aged Care Quality and Safety Commissioner.

While the Complaints Commissioner cannot be directed on a particular decision, they may receive guidelines from the Aged Care Quality and Safety Commissioner and be directed regarding their modus operandi.

PROPOSAL – CONCERN 1

The Complaint Commissioner is appointed by and reports to the Minister as recommended by the Royal Commissioners.

This proposition:

a.) ensures that the Complaints Commissioner has a statutory responsibility and is accountable to the Parliament; and

b.) removes any perception that the Complaints Commissioner is influenced by the Aged Care Quality and Safety Commissioner's view of the 'providers compliance posture' (Aged Care Quality and Safety Commission Regulatory Strategy, February 2020) that may influence the finding regarding the complaint.

CONCERN 2 - The Bill does provide details on the responsibilities and authority of the Complaints Commissioner.

While the Bill sets out the functions of the Aged Care Quality and Safety Commissioner regarding complaints, the role of the Complaints Commissioner appointed by the Aged Care Quality and Safety Commissioner has no functions nor powers in his/her own right.

PROPOSAL – CONCERN 2

a.) The Act should establish the Complaints Commissioner as a statutory office holder and establish the functions (including the power to compel information in the Complaints Commissioner's own right), reporting arrangements and modus operandi in the Act rather than the Rules as a delegate of the Aged Care Quality and Safety Commissioner.

b.) In the event Governments persist with the arrangement whereby the Complaints Commissioner is appointed by the Aged Care Quality and Safety Commission, the Act should set out the functions, reporting arrangements and modus operandi.

CONCERN 3 - the Bill provides that the manner in which complaints will be dealt with by the Aged Care Quality and Safety Commissioner will be set out in the Rules.

The management of complaints regarding registered providers and aged care workers is significant with the potential for serious outcomes. The handling of complaints against registered providers and aged care workers is a matter of critical importance, bearing significant implications for the welfare and rights of older Australians receiving care. Given the potential regulatory outcomes (such as a banning order) from complaints, it is paramount that the framework governing this process is robust, transparent and subject to the highest level of scrutiny.

PROPOSAL - CONCERN 3

We support the proposition put forward by COTA and OPAN (Key Issues Paper; National organisations working with older people and carers, January 2024) that the new features of the Complaints Framework must be explicitly included in the Act itself rather than being relegated to the Rules. This inclusion would ensure that any changes or updates to the framework undergo thorough parliamentary review and approval, thereby affording it the stability and rigour required. The current provision, which allows for the framework to be defined within subordinate legislation, presents a risk of insufficient oversight and the potential for alterations at the discretion of the responsible minister. Such a scenario could undermine the framework's effectiveness and the confidence of older Australians and their families in the complaints resolution process.

TOPIC: CRITICAL FAILURE POWERS (Chapter 6, Part 11)

OVERARCHING CONCERN – no detail has been provided

CONCERN 1 – The Aged Care Quality and Safety Commissioner will have '*power to appoint an external manager to a registered provider in limited circumstances…*'. (Consultation paper No 2, page 79). This has the effect of transferring the responsibility for the operation of the entity and management of the assets to a person not appointed by the owners of the assets.

The reference to 'appoint an external manager to a registered provider' suggests the 'manager' will be the most senior executive reporting to the governing body and thereby only acting on the authority of the governing body.

On another look, it may mean the external manager will displace the governing body.

CONCERN 2 - The role and responsibilities of a person appointed by the Aged Care Quality and Safety Commissioner have not been articulated.

We note the section has not been drafted. We conclude that '*limited circumstances*' have not been defined and nor has '*any potential interactions with other laws, including the Corporations Act 2001*' been explored.

The effect of this section is to authorise a public servant to indirectly assume control of a constitutional corporation that is subject to laws such as the *Corporations Act 2001* and the *Australian Charities and Not-for-profits Commission Act 2012*.

Triggers – We also note that while Consultation Paper No. 2 references Recommendation 103 of the Royal Commissioners as an authority regarding '*an **immediate risk** to the health and safety of individuals accessing residential aged care services*' (Consultation Paper No. 2, page 78), the Royal Commissioners actually set a higher standard by reference to '*an **immediate and severe risk** to the safety, health and wellbeing of one or more people receiving care*'. Clearly immediate and severe risk is a different test to severe risk.

PROPOSAL – CONCERNS 1&2

Overview

a.) The triggers for the appointment of an external manager must be clearly defined; and

b.) The statutory duties, role and responsibilities of an external manager appointed by the Aged Care Quality and Safety Commissioner must be clearly established.

Preference 1

Abolish this section. The Aged Care Quailty and Safety Commissioner will utilise existing powers related to the suitability of 'responsible persons' to address issues of incompetence within aged care management.

Preference 2

If the section is to remain then we propose that the power to appoint an external manager should be vested in a court, ensuring judicial oversight and adherence to due process, thereby safeguarding the rights of registered providers and their governing bodies.

TOPIC: PROTECTED INFORMATION (Chapter 7, Part 2)

CONCERN – the definition of protected information as '*information whose disclosure could reasonably be expected to prejudice the financial interests of an entity*' (s322 (2) (b) (i) is vague.

Whilst the broad-ranging protections in the current Act are not necessary, a definition which is vague creates uncertainty. An analysis of the Bill reveals public reporting of provider performance is extensive and goes a long way to responding to the concerns regarding transparency expressed by the Royal Commission.

Provider information held by Government entities may include information such as registered intellectual property or information (often described as 'commercial in confidence') which if disclosed becomes competitor intelligence or (say) about negotiations (including pricing) with DHAC regarding the acquisition of an aged care home in a thin market.

Furthermore, registered providers often enter into contracts bound by confidentiality agreements. Whilst the disclosure of such information to government agencies should be permissible, the counterparties in these contracts do not typically expect such information to be made widely available.

PROPOSAL

The Bill should provide clarity around the term 'prejudice the financial interests' and further define 'financial interests' for the purpose of the Act. The Bill should explicitly acknowledge that registered providers operate in a competitive commercial environment. This acknowledgement should inform the framework for protected information, ensuring that the legislation accommodates the need to safeguard commercially sensitive information without compromising the overarching goals of transparency and accountability in aged care.

TOPIC: WHISTLEBLOWING (Chapter 7, Part 5)

CONCERN

a.) the broadening of the criteria allowing 'anyone' to make a disclosure;

b.) the broadening of the categories of individuals that are deemed able to receive a disclosure;

c.) the removal of the 'good faith' requirement; and

d.) the intersection with the *Treasury Laws Amendment (Enhancing Whistleblower Protections Act) 2019 Cth*[2] (**Treasury Act**).

We advocate for a balanced approach that preserves the spirit of whistleblowing as a tool for transparency and protection, without inadvertently creating avenues for misuse.

Broadening of Whistleblower disclosers and recipients: The Bill expands whistleblower eligibility to 'any person'. This inclusivity, along with the diverse group eligible to receive disclosures (such as the ACQSC, System Governor, Department officials, registered providers, aged care workers, volunteers and various personnel including police officers), adds complexity and potential challenges (such as maintaining confidentiality and anonymity) and may result in some disclosures being unaddressed or inappropriately handled.

Training and Awareness: Extending the scope of potential recipients of whistleblower disclosures to ALL aged care workers, to include not only employees and volunteers of the registered provider but also individuals engaged by associated providers and independent contractors, poses untenable administrative and operational complexities. Ensuring that such a diverse and broad group is comprehensively trained and aware of how to handle whistleblowing disclosures appropriately, respecting confidentiality and procedural correctness (and understanding the very specific legal requirements of dealing with a whistleblowing disclosure) would require substantial resources and time. The current draft does not fully address the mechanisms for such training or the standards required.

Intersection with existing legislation: From 1 January 2020, under the Treasury Act, public companies and large proprietary companies[3] must already have a whistleblower policy which complies with ASIC's Regulatory Guide 270[4] for entities on the contents of whistleblowing policies and handling whistleblowing disclosures. Accordingly, many providers will be required to navigate a complex interplay between the sector-specific whistleblowing requirements and the broader Treasury Act legislation, ensuring that internal policies and procedures satisfy both sets of requirements. There may be challenges in determining which legislation takes precedence in certain situations or how to apply the different standards and protections. To give an example of the practical differences, under the Treasury Act, to qualify for protection under the Treasury Act, the whistleblower must be an 'eligible discloser[5]' and must have made a disclosure to an 'eligible recipient[6]' The categories of who can make and receive a disclosure is significantly narrower than under the Bill. The Treasury Act also contains specific carveouts for personal work-related grievances[7] and the Bill has no such exemptions.

Lack of Good faith requirement: Without the 'good faith' requirement, there is an increased risk of disclosures being made for reasons unrelated to genuine concerns about wrongdoing or non-compliance. This opens the door to malicious or frivolous disclosures.

Complaints vs disclosures: The Bill does not differentiate between routine grievances and genuine whistleblowing complaints. Investigating and resolving whistleblowing disclosures is heavily resource intensive often involving legal expertise, dedicated personnel to conduct interviews and gather evidence, and secure data management systems to protect confidentiality. If the system becomes flooded with routine complaints misclassified as whistleblowing complaints, not only does it create significant resourcing challenges but it risks becoming less responsive and effective and diminishes the protective intent of whistleblower legislation.

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[2] Which received Royal Assent on 12 March 2019

[3] A proprietary company is a large proprietary company for a financial year if it has at least two of the following characteristics:
(a) the consolidated revenue for the financial year of the company and any entities it controls is $50 million or more;
(b) the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $25 million or more; and
(c) the company, and any entities it controls, has 100 or more employees at the end of the financial year.

[4] Regulatory Guide RG 270 Whistleblower policies (asic.gov.au)

[5] See s1317AAA of the Corporations Act.

[6] If an entity is a body corporate, an eligible recipient includes: (a) an officer or senior manager of the entity or related body corporate; (b) the internal or external auditor (including a member of an audit team conducting an audit) or actuary of the entity or related body corporate; and (c) a person authorised by the entity to receive disclosures that may qualify for protection. Disclosures can also be made to a legal practitioner, ASIC, APRA or another Commonwealth body prescribed by regulation or if it is an 'emergency disclosure' or 'public interest disclosure'.

[7] See Section 1317AADA(2) of the Corporations Act

TOPIC: WHISTLEBLOWING (Chapter 7, Part 5)

PROPOSAL

Disclosures: Limiting disclosures to 'responsible persons' and those employees registered with AHPRA ensures that concerns are actioned by those with the appropriate decision-making capacity and confidentiality obligations.

Introduction of 'Good Faith' Requirement: a 'good faith' requirement should be introduced to ensure that disclosures are made with honest intent. This will help in maintaining the integrity of the whistleblowing process and deter malicious or unfounded disclosures, sometimes based on employee grievances.

Integration with Existing Legislation: Clear guidance on how the New Act whistleblowing provisions interact with other legislation, including any superseding elements or requirements, should be articulated to avoid compliance ambiguities.

Complaints vs whistleblowing disclosures: The Rules should draw a clear distinction between a routine complaint and a whistleblower disclosure. Discrete channels and criteria for whistleblower disclosures should be established to ensure they are recognised and addressed with the requisite seriousness and confidentiality.

Implementation Support and Resources: Implementation support and resources should be made available to providers. This could include templates for internal policies, training materials, and best practice guidelines for managing whistleblowing disclosures, for example, the ACQSC could issue an aged care version of the ASIC Report 758 on '*Good practices for handling whistleblower disclosures*'[8] as a guide.

Feedback Mechanism for Early Implementation: Establishing a feedback mechanism to capture insights and challenges encountered by providers in the early stages of implementing the new whistleblowing provisions could inform ongoing adjustments and improvements.

[8] Australian Securities & Investments Commission (ASIC), "Report 758: Good practices for handling whistleblowing disclosures", March 2, 2023. Accessed 11 February 2024. https://download.asic.gov.au/media/wsjegua5/rep758-published-2-march-2023.pdf .

TOPIC: REVIEWABLE DECISIONS (Chapter 8, Part 1)

CONCERN – (a) The list of reviewable decisions is not included in the Exposure Draft, and (b) the criteria to include a decision as reviewable is not clear (Chapter 8, Part 1).

Consultation Paper No. 2 (page 90) references the reviewable decisions relating to new policy and proffers that '*There will be an expanded number of reviewable decisions throughout the new Act*'.

Over time the amendments to the *Aged Care Act 1997* have created a raft of decisions by the regulator and DHAC that are not reviewable. The New Act will create a new decision regime.

The significance of this is that increasingly decisions/recommendations and the outcomes of non-reviewable decisions have become public information either directly or indirectly such as the impact of the finding of unmet Standards in the Aged Care Quality Standards leading to an ACQSC decision that influences an aged care home's Star Rating.

We anticipate that the comprehensive re-registration arrangements will be a 'deep dive' into the registered provider and previous decisions by the regulator and system governor will influence the outcome.

PROPOSAL

All decisions/recommendations that may be published, inform the publication of a consolidated report such as Star Ratings or influence a further decision by the regulator or System Governor should be reviewable.

TOPIC: SECURITY OF TENURE

CONCERN – The current regime provides very little flexibility for providers to seek the removal of an older person who is (a) the perpetrator of significant abuse towards other residents and staff, or (b) refuses to pay legitimate fees and charges despite having the means to do so.

The submission by national organisations working with older people and carers (**Consumer Groups**[9]) to Consultation Paper No. 2 outlines the first issue under Item 22 (page 27), stating:

"The current aged care act provides for security of tenure where, once an aged care provider accepts a person as a resident or client, there are limited grounds for them to cease services. The current law for residential aged care services associates those provisions to the specific room/bed that the person is accepted into. This means that if there are egregious examples of abuse, including sexual abuse, the aged care provider has limited options to relocate residents into a solution that protects victims of abuse."

There are also circumstances where care recipients simply refuse to pay the fees and charges associated with residential aged care, despite having the means to do so.

PROPOSAL

Estia Health supports the proposal of the Consumer Groups, namely:

"A new provision should be included that allows a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative housing solution before suspending the security of tenure of any individual accessing aged care services."

[9] Aged Care Act Exposure Draft Key Issues Paper Jan 2024_FINAL," at https://media.opan.org.au/uploads/2024/01/Aged-Care-Act-Exposure-Draft-Key-Issues-Paper_Jan-2024_FINAL.pdf`.

Appendix 1

Joint submission on statutory duties and compensation provisions

29 February 2024

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Email: AgedCareLegislativeReform@health.gov.au

Copies to:
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Chief Executive Officer
ACCPA

Mr Mark Rigotti
Chief Executive Officer
AICD

Dear Sir/Madam

Exposure Draft of Aged Care Bill 2023 (Exposure Draft)

We write in our capacity as in-house general counsel of a mix of leading for-profit and not-for-profit aged care services providers in Australia.

The purpose of this letter is to set out our material concerns with the proposed statutory duties and compensation provisions (as currently drafted) in Part 5 of Chapter 3 (Statutory Duty and compensation) of the Exposure Draft. Many of our respective provider organisations are making separate submissions. This letter is supplementary to those submissions.

To be clear, we broadly support the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and for this duty to apply to both providers and officers (like the model Work Health and Safety Laws (**Model WHS Law**)).

However, as drafted, the proposed statutory duties and compensation pathway in the Exposure Draft risk undermining the stated policy aims of reforming aged care, including by deterring individuals from being employed or otherwise engaged (including as directors or volunteers or both) in funded aged care services. They also risk injustice and an abrogation of common law "safeguards".

1. Executive Summary

The statutory duties propose:

a) strict liability criminal offences coupled with a compensation "pathway" for vague, ill-defined, inequitable and poorly worded obligations - which obligations materially and adversely differ from commensurate legislation (e.g. Model WHS Law and model Heavy Vehicle National Laws (**HVN Law**)); and

b) disproportionate criminal penalties and potential (personal) liability to compensate. For example, this includes potential penalties of 1,000 penalty units ($313,000) or 5 years imprisonment or both and a compensation pathway against responsible persons. There is little or no justification made for the provision of criminal offences.

Importantly, the proposed statutory duties:

a) do *not* accord with the Royal Commission's recommendation 101 – that recommendation proposed civil penalties, *not* criminal penalties. Instead, independent of the Royal Commission, the introduction of criminal penalties appears to emanate from ALP policy – as set out ALP Media Release "Stronger Penalties to Protect

Older Australians in Aged Care" dated 3 April 2022[1] (**ALP Media Release**). However, Part 5 of Chapter 3 of the Exposure Draft now imposes *only* criminal (and *not* civil) penalties. Further, none of the offences include a "fault" element (including notably both of sections 120(6) and 121(7) which prescribe a penalty of 5 years imprisonment). This appears inconsistent with the ALP Media Release which expressly refers to criminal penalties in the case of a "*deliberate* breach";

b) materially (and adversely) depart from corresponding statutory duty legislative frameworks, including the Model WHS Law which law is a well understood, non-industry specific framework prescribing statutory duties. Indeed, the statutory duties framework in the Model WHS Law has been commensurately adopted in other industries (e.g. the HVN Law). This is *not* the case in the Exposure Draft; and

c) are asymmetric – equivalent duties and the compensation pathway do *not* apply in adjacent industries (e.g. NDIS, public and private health). This creates regulatory distortion risking an (unintended) exodus of key talent to adjacent (and other) industries and further exacerbating aged care workforce shortages.

Further, these duties and pathway threaten to impugn not only remunerated individuals, but also the many dedicated volunteers who are critical to the ongoing viability of the aged care sector. This includes volunteers who serve as governing body members and directors on not-for-profit providers.

In the circumstances, as currently drafted, the statutory duties and compensation pathway risk:

a) deterring individuals from working (including as volunteers) in aged care, including governing bodies. This too in the context where providers are already experiencing challenges to meet legislated governing body independence requirements. In the medium to long term, this will undermine sector sustainability and detract from the quality of aged care services (to the detriment of consumers). This is contrary to legislative objectives (for example, section 22(6) - an aged care system that values workers and carers) and disregards circumstances where typically aged care workers are *not* highly paid and have other employment options available to them. These options include adjacent sectors like public and private health and NDIS where there are *no* equivalent duties, criminal penalties nor compensation pathway;

b) injustice and an abrogation of common law "safeguards" (as described in section 2 below);

c) providers limiting the scope and geographical reach of aged care services due to increased regulatory risk (and uncertainty); and

d) other potential consequences, including adverse impacts on the cost and availability of insurance (in a tight insurance market) and finance.

Accordingly, we recommend the proposed statutory duties and compensation pathway (as currently drafted) be carefully reviewed including having regard to the matters raised in this letter. To assist in that review, we have set out in Section 2 of this letter proposed solutions to resolve the issues raised. Please note that the matters raised in this letter are not exhaustive – we strongly urge that time is taken to carefully consider the statutory duties and compensation pathway.

We would welcome the opportunity to meet and discuss this further (and are happy to provide a markup of proposed changes to Part 5 of Chapter 3 if that assists).

2. Concerns with the statutory duties and compensation pathway:

Our concerns (together with a summary of proposed solutions) are set out in detail as follows:

a) Part 5 of Chapter 3 does *not* align with the Royal Commission's recommendations:

Recommendation 101 of the Royal Commission provided for civil penalties (*not* criminal penalties) to apply in the case of a provider breach of statutory duty. The proposed introduction of criminal penalties was *not* recommended by the Royal Commission. Indeed, it is apparent from the Royal Commission's recommendation that civil penalties are adequate and sufficient – an objective need for criminal penalties was *not* established. Despite this, as noted above, the Exposure Draft proposes in Part 5 of Chapter 3 only criminal (and *not* civil) penalties.

[1] https://anthonyalbanese.com.au/media-centre/stronger-penalties-to-protect-older-australians-in-aged-care

Further, the ALP Media Release contemplates that criminal penalties (only) apply where there is a fault element. For example, that release references (emphasis added) "introducing criminal penalties – including jail time - for *dodgy* aged care providers who seriously and repeatedly *facilitate or cover up* abuse and neglect of older Australians, and who *deliberately* breach the general duty of care they owe to their residents."

Indeed, that Release is consistent with the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers[2] (the **Guide**) which provides 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)."*

In the circumstances, if criminal penalties are to apply for breach of statutory duties, then (especially in the case of individuals) those penalties should be confined to circumstances where there is a fault element (e.g. recklessness or negligence as defined in the *Commonwealth Criminal Code Act 1995 (Cth)* (**Criminal Code**)). Criminal penalties should *not* apply (at least in the case of individuals) for a failure to exercise due diligence.

Accordingly:

i) like the Model WHS Law and HVN Law, the requirement of a fault-based element (e.g. recklessness or negligence) should be included in sections 120(6) and 121(7);

ii) the (strict liability) criminal penalties proposed in in Part 5 of Chapter 3 (e.g. sections 120(3) and (5) and 121(4) and (6)) should be removed as they do *not* include a fault element; and

iii) as part of establishing any offence under sections 120 and 121 the prosecution should also prove that there is no reasonable excuse.

Finally, Royal Commission recommendation 101 provided that (civil) penalties (on a provider) would only apply where (amongst other things) there was a failure to comply with the Aged Care Quality Standards. This important requirement (and safeguard) has *not* been included in either section 120 or section 121 of the Exposure Draft.

Proposed solution: *The statutory duties penalties: (a) either accord with the Royal Commission's recommendations being civil penalties only (not criminal penalties) or otherwise require proof of a fault element (particularly in the case of individuals); and (b) include a requirement of prosecution proof of failure to comply with the Aged Care Quality Standards (as applicable to provider registration categories) and no reasonable excuse.*

b) Duties imposed on individuals are unjust:

The primary duty under the Model WHS Law and section 180 of the *Corporations Act 2001 (Cth)* (**Corporations Act**) (care and diligence) is confined to officers (only) (as defined in section 9 of that Act). The definition of officer is well understood. Conversely, under section 121 of the Exposure Draft, statutory duties apply to "responsible persons" (as defined in section 11 of the Exposure Draft). That definition is *not* well understood and extends beyond officers to other persons including "middle management" – for example, a registered nurse in a managerial role at a residential care home is a responsible person.

However, unlike an officer, those other persons are unlikely to *"make or participate in making decisions that affect the whole, or a substantial part, of the business of the corporation"* (per section 9 of the Corporations Act). Consequently, the proposed statutory duty risks imposing criminal liability and a compensation pathway, even where that person is unable to exercise due diligence (pursuant to section 121(2) of the Exposure Draft). For example, section 121(2)(c) of the Exposure Draft provides that due diligence includes *"to ensure that the registered provider has… appropriate resources…to manage adverse effects to health and safety of individuals accessing funded aged care services delivered by the provider"*.

By way of illustration, in the case of a provider with multiple residential care homes, it is unrealistic (and unjust) to require that a nurse in a managerial role in one residential care home *"ensure appropriate resourc[ing]"* within that home or across other residential care homes operated by that provider or both. This is contrary to other provisions in the Exposure Draft including section 22(6) - an aged care system that values workers and carers.

[2] See: https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices- and-enforcement-powers

As a matter of completeness, we note that sections 120(7) and 121(8) of the Exposure Draft provide for the general defence of "reasonable excuse". Notably, the defendant bears the evidential burden of proof of establishing this defence. Also, the Guide provides at page 52 that *"the defence of reasonable excuse should generally be avoided"* including as *"[t]he defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established."* Accordingly, the defence of reasonable excuse cannot be used as a "workaround" for statutory overreach. Instead, these penalty provisions must be carefully drafted - the defendant should *not* bear the risk (and evidential burden) of having to prove their innocence by way of this defence.

Further, section 10(6) of the Exposure Draft deems conduct of an associated provider to be conduct of a provider for the purposes of the Act. This means that a provider and responsible persons may contravene their statutory duties and be subject to criminal penalties and the compensation pathway by conduct of an associated provider. This is too broad and may lead to a miscarriage of justice. This should be contrasted with the extension of attribution liability by: (a) section 12.4 of the Criminal Code, where liability is attributed in respect (only) of a *"high managerial agent: being a senior person within an organisation whose conduct could be fairly assumed to represent the body corporate's policy"*; or (b) an "authorised person" being officers, employees and agents acting within their actual or apparent authority.

Proposed solution: *(a) the statutory duty in section 121 applies to persons on the provider's governing body (as defined in section 7 of the Exposure Draft) or responsible for executive decisions (per section 11(1)(a) of the Exposure Draft), and not responsible persons; and (b) attribution liability accord with established concepts of high managerial agent or authorised person.*

c) Consequences for breach of duty are indeterminate under civil law:

Sections 120(1) and 121(1) of the Exposure Draft create statutory duties on providers and responsible persons (as the case may be). It is unclear what the consequences are if a provider or responsible persons or both breach their statutory duties (in circumstances where such breach does not constitute an offence under sections 120(3) – (6) or 121(4) – (7) or both (as the case may be)).

This is illustrated by corresponding legislation, for example:

i) section 33 of the *Work Health and Safety Act 2011 (Cth)* (**WHS Act**) provides that if a person has a health and safety duty and that person fails to comply with that duty, then that person commits a (Category 3) offence; and

ii) section 26H of the HVN Law provides that if a person has a safety duty and that person contravenes that duty, then that person commits a (Category 3) offence.

Accordingly, does a breach of the statutory duty in sections 120(1) or 121(1) or both (as the case may be) give rise to a penalty? If so, does an individual affected (or their family members) have an action in tort for breach of statutory duty against the provider or responsible persons or both?

If it is proposed that a breach of statutory duty by responsible persons under section 121(1) "lifts the corporate veil" and exposes that person to risk of regulatory or other actions (including civil litigation), then this further reinforces our concerns described above.

If not, then the Act must expressly provide accordingly. For example, section 267(a) of the WHS Act provides that (except as expressly provided) nothing in that Act confers a right in civil proceedings in relation to a contravention of that law. There is no such provision in the Exposure Draft.

These matters need to be addressed. Otherwise, providers and responsible persons risk indeterminate liability in tort for breach of the statutory duty in sections 120(1) or 121(1). This will undermine the viability of the aged care sector.

Proposed solution: *The new Aged Care Act expressly provide in a (new) section that (except as expressly set out in section 127 (Compensation pathway)) nothing in that Act confers a right in civil proceedings in relation to a contravention of that Act.*

d) The proposed statutory duties omit important safeguards that are included in corresponding laws:

Part 2 of the WHS Law and Chapter 1A of the HVN Law contain analogous statutory duties to those proposed in the Exposure Draft. However, the Model WHS Law and HVN Law each include important safeguards that are omitted from the Exposure Draft. These omissions include:

i) Section 18 of the WHS Act defines what is "reasonably practicable" in ensuring health and safety. Section 18(e) includes the requirement to assess *"the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk."* This requirement has *not* been included in the equivalent provision in the Exposure Draft, namely section 120(2). This requirement is a key element of risk management and a risk based regulatory framework (see section 5(e) of the Exposure Draft). Providers (just like other businesses and undertakings) do *not* have unlimited resources and nor should they. In fact, provider resources are further constrained by the Government funding they receive to deliver the services. Providers must exercise diligence and judgement to allocate (scarce) resources having regard to risk. Accordingly, section 120(2) should include a provision akin to section 18(e) of the WHS Act.

ii) Section 31 of the WHS Act prescribes a Category 1 (criminal) offence which must include the requirements of recklessness or negligence (each as defined in the Criminal Code). This approach has been taken to proscribe the very worst kind of disregard for duties imposed under that law. However, contrary to the heading *"Fault-based offence-death or serious injury or illness"* in sections 120(6) and 121(7), these requirements are *not* included in those sections. Instead, these sections simply proscribe strict criminal liability (with up to 5 years imprisonment). There is no requirement for the prosecution to prove either recklessness or negligence, nor that there was no reasonable excuse. Instead, sections 120(7) and 121(8) assume guilt (not innocence) by reversing the onus of proof so that the defendant must prove the defence of reasonable excuse.

iii) Importantly, section 34 of the WHS Act and section 26D(2A) of the HVN Law exclude volunteers from equivalent statutory duties. As noted above, volunteers play a key role at all levels in the aged care sector. No reason is given for this material and concerning disparity between Model WHS Law and HVN Law, and the Exposure Draft. Accordingly, the proposed statutory duties must exclude volunteers who are responsible persons (and other obligations on aged care workers who are volunteers should also be excluded). Otherwise, volunteers will be deterred from the aged care sector to the significant detriment of the aged care sector.

iv) Chapter 5 imposes offences for a serious failure. A "systematic pattern of conduct", as defined in section 18(2) of the Exposure Draft, may constitute a serious failure. Concerningly, that definition does *not* include any requirement of materiality - multiple immaterial contraventions may constitute a systematic pattern of conduct. Conversely, the WHS Act does *not* impose offences for a systematic pattern of conduct (per se) – see for example section 32 of the WHS Act (Category 2 offence). Accordingly, the concept of "systematic pattern of conduct" should be removed from Chapter 5.

v) Section 269 of the WHS Act and section 735A of the HVN Law each contain provisions to the effect that nothing in that law compels a person to give information to another person that is the subject of legal professional privilege. There is *no* such safeguard in the Exposure Draft. On the contrary, the powers of the Commissioner in Division 4 of Part 10 of Chapter 6 include issuing notices to attend to answer questions or give information or documents or both which may be subject to legal professional privilege. These powers abrogate common law rights and materially detract from a person's right to obtain legal advice (including so that they can be fully informed as to the scope of their duties). The proposed powers must not extend to information or documents the subject of legal professional privilege.

vi) Both the WHS Law and the HVN Law prescribe maximum time periods for the bringing of proceedings for offences (generally 2 years). Further, these laws expressly provide that the penalties are maximum penalties. No such equivalent provisions are included in the Exposure Draft.

Proposed solution: *"Safeguards" in Model WHS Law be included in the new Act (including burden of proof, volunteers, removal of "systematic pattern of conduct", legal professional privilege, limitation periods and maximum penalties). This necessitates a detailed side by side analysis be conducted as and between the Model WHS Law (and HVN Law) and the new Act. Where safeguards are not included then a detailed "if not, why not?" explanation should be provided.*

e) Onerous and uncertain obligations on aged care workers and responsible persons

The proposed definition of "aged care worker" in section 10(4)(a) of the Exposure Draft includes *"an individual employed or otherwise engaged (including as a volunteer) by the registered provider"*. This definition is too broad and captures (amongst others) any employee, volunteer etc. of a provider, regardless of whether that person is involved in the provision of funded aged care services or not. Many providers operate in sectors other than aged care and in doing so engage employees and other workers that are *not* in any way involved in aged care work (e.g. retirement living or non-aged care related community services). These other workers should not be regulated as aged care workers.

Further, sections 118 and 119 of the Exposure Draft create offence provisions for aged care workers and responsible persons (as the case may be) who do not comply with the Aged Care Code of Conduct. A penalty of about $78,000 is payable – an amount more than the annual wage of many aged care workers (who often work part time or on a casual basis). These sections rely upon the Aged Care Code of Conduct, which Code includes many standards of behaviour that are incapable of determining where the line falls between legality and illegality. For example, what constitutes a failure to *"act in a way that treats people with dignity and respect, and values their diversity"*? While this is a laudable value, it is ill defined, lacks clarity and should not be a matter subject to civil penalty.

Proposed solution: *The definition of aged care worker: (a) is confined to workers that are involved in the provision of aged care services; and (b) excludes volunteers. Further, sections 118 and 119 should be redrafted to clearly define obligations.*

f) Compensation pathway:

Our concerns with section 127 of the Exposure Draft include:

i) a compensation pathway is established against "an entity." In contrast, Consultation Paper No 2 expressly provides that an entity means a registered provider (i.e. not a responsible person). Consistent with that Consultation Paper, section 127 must expressly limit the compensation pathway to a provider only (and not responsible persons).

ii) compensation should be expressly limited to an individual receiving aged care services (and not to third parties). This limitation is consistent with the objects of the Exposure Draft – for example section 5(b)(i) of the Exposure Draft references "uphold[ing] the rights of individuals under the Statement of Rights".

iii) the section mitigates against restorative justice and the speedy resolution of disputes, including through alternative dispute resolution mechanisms. For example, there is *no* mechanism for the provider to reach an agreed final settlement with an individual in a manner which precludes a Court from subsequently making a compensation order. Consequently, a provider is at risk of having to pay compensation twice (first as part of an agreed settlement and second by way of a Court compensation order). This will result in providers being unable to reach timely settlements with individuals. An individual should not be able to recover the same damages twice under section 127 and general civil liability.

iv) the compensation pathway limitation period in section 127(2)(b) should be 3 years (not 6 years). A 6-year period is unduly protracted, unnecessary and inconsistent with other relevant statutory limitation periods (e.g. 3 years for personal injury and compensation to relatives under the *Limitation Act 1969 (NSW)* and similar legislation in other States and Territories); and

v) other provisions and safeguards should be included. For example: (a) the *Civil Liability Act 2002 (NSW)* addresses matters like contributory negligence and proportionate liability, but section 127 is silent on these matters; and (b) how is compensation to be determined by a Court?

Proposed solution: *That section 127 should be changed to address these matters.*

If you wish to discuss the matters raised in this letter, please contact:

Mr Simon Brookes
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[redacted]

Thank you for considering our letter. We look forward to engaging further with you on these matters.

Yours faithfully

[redacted]

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