



UnitingCare Queensland's Submission

A new Aged Care Act – Stage 2 Consultation

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Executive Summary

UnitingCare Queensland provides health, aged care, disability and community services to over 450,000 Australians a year as Australia's charitable employer with 17,302 staff and 7,456 volunteers.

UnitingCare Queensland, trading as BlueCare is Australia's third largest Home Care Package Program provider (HCPP), ninth largest Residential Aged Care (RAC) provider as well as one of the largest Commonwealth Home Support Program (CHSP) providers in Australia. Trading as Australian Regional and Remote Community Services (ARRCS), we are also the largest aged care provider in the Northern Territory and the largest provider of the National Aboriginal and Torres Strait Islander Flexible Aged Care (NATISFAC) program in Australia.

UnitingCare Queensland is extremely concerned the rollout of the new Aged Care Act will be both costly and chaotic given the start date of 1 July 2024. We note that the introduction of the 1997 Aged Care Act saw an implementation and transition period of four years.

UnitingCare Queensland priority recommendations

1. Publish a clear implementation timeline including the following items:

- When guidance material will be issued for each relevant section
- When interim rules, new draft rules, and consultation periods will

be released and when the new rules will come into effect

- *Outline the specific transition periods for sections that aren't being implemented from 1 July 2024*
- *Any grandfathering arrangements for existing arrangements and grace periods for implementation.*

2. *A Regulatory Impact Analysis be conducted on the new Aged Care to an 'exemplary' standard to ensure changes benefit all Australians.*

3. *Federal Government provide additional funding in the 2024-25 Federal Budget to assist aged care providers with the transition to the new Act and its associated regulatory changes based on Regulatory Impact Analysis.*

If funding is not provided in the 2024 – 2025 Federal Budget, UnitingCare Queensland recommends that a two-year transition period be implemented.

4. *The statutory duty of care about "reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care" be removed to ensure older Australians have systems that encourage them to live their life with dignity of risk.*

UnitingCare Queensland other recommendations

Implementation timelines

UnitingCare Queensland recommends the following phased in approach to the reforms:

- *Rights, principles, quality safety standards, registration requirements, assessment, eligibility, fees, payments and subsidies, all governance (except complaints see below), banning orders and review rights to start from 1 July 2024;*
- *Penalties regime and new notice period to start 3 – 6 months after comprehensive guidance and details are issued;*
- *Supporter and Representative framework to start from 1 July 2024 if our recommendations are adopted. Otherwise require 2 – 3 months (if funded) after comprehensive guidance and details are issued; otherwise 12 – 18 months if no funding provided;*
- *New notices, penalties, duty of care and critical failures to be implemented 6 - 12 months after comprehensive guidance and details are issued; and*
- *Complaints, whistle-blower and information management requirements to be implemented 2 – 3 months (if funded) after comprehensive guidance and details are issued otherwise 12 – 18 months if no funding provided.*

Changes to the Act

- *The Federal Government review and simplify overlapping areas of legislation and consider how the Act may better address future issues in the sector.*

The Act includes:

- *A legislative framework for when rights may be reasonably limited and how competing rights and responsibilities should be balanced;*

- *Outline responsibilities for older Australians to ensure the safety and well-being of other aged care participants, their families, visitors, aged care workers and providers similar to the National Consumer Laws; and*
- *Outline explicitly aged care staff and provider rights.*
- *Include provision of training, tools and resources for aged care providers and workers to implement rights-based decision making at practice and policy levels in the Aged Care Act transition plan.*
- *The statement of rights expressly calls out the addition of independent system navigators to assist older Australians from end-to-end navigation of the aged care system.*
- *Act guarantees independent system navigators to assist older Australians with end-to-end navigation of the aged care system.*

Complaints Commissioner

- *The Complaints Commissioner becomes an independent Statutory Authority supported by the aged care quality safety commission.*
- *The management, analysis and review of coroner report and finds be moved to sit with the Inspector General of Aged Care or if an Independent Complaints Commissioner with them.*
- *An Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including*

managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

- *An Independent Statutory Commissioner (or if the Complaints Commissioner becomes an independent Statutory as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing the complaints and whistle-blowing as well as the enforcement of duties and penalties*

Supporter and representative changes:

- *The supporter right to communicate on behalf of the older person be removed and if removed also remove the duties, responsibilities and penalties for supporters from the Act. Additionally, an older person should be able to appoint a representative to purely communicate on their behalf if desired*
- *There be a 'sole' primary representative who the provider communicates with and is responsible for co-ordinating and communicating with any other representatives / decision-makers.*
- *Restrict the number of supporters and representatives to less than three until adequate funding is provided*

Assessment changes:

- *The development, monitoring and enforcement of standards for wait times for assessments, services and financial eligibility matters*
- *The introduction of an Alternative Entry Arrangement (AEA) for regional and remote areas whereby an aged care provider / qualified*

individual (e.g. GP) can conduct an aged care assessment / re-assessment

- *Where a classification decision is brought before a review, a person must manually re-assess the classification and be required to report any systematic issues to the System governor.*

Statutory Duty of Care

- *The statutory duty of care about "reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care" be removed to ensure older Australians have systems that encourage them to live their life with dignity of risk.*
- *If the government keeps the duty then*
 - *Ensuring 'reasonably practical' is consistent with workplace health and safety law including a consideration of cost;*
 - *Publish clear and detailed guidelines about:*
 - *Who it covers;*
 - *How the compliance and enforcement mechanisms and processes will work;*
 - *Clarity on concepts and how defences will apply;*
 - *Definitions, details, case studies, examples, and frequently asked questions.*
 - *Add a requirement for residents and their visitors to take reasonable care to*

prevent adverse health effects to their health and safety AND comply with reasonable instruction;

- *Require for strict liability breaches that an imposition of fault be found;*
- *Adding the three categories of fault found in workplace and health safety law;*
- *That onus to prove there wasn't a reasonable excuse be put on the prosecution rather than the defendant;*
- *Either delete the addition to responsible of 'any person who is responsible for the day-to-day operations of the registered provider'*
 - *Or narrow it substantially down and provide concrete guidance;*
- *Add the following details to what reasonably practical means including:*
 - *the likelihood of the adverse effect concerned occurring; and*
 - *the likely degree of harm from the adverse effect; and*
 - *what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and*
 - *the availability and suitability of ways to prevent the adverse effect; and*

- *the rights of individuals under the Statement of Right*

Fines and penalties

- *Review the size of fines and penalties considered who is it meant to be targeting to be consistent and proportionate*

Whistle-blower framework

- *The government adopt the Corporations Act requirements and framework for whistle-blowers.*
- *If the Government wishes to retain the proposed Act requirements then*
 - *Whistle-blower complaints be restricted to appropriately qualified and skill staff members;*
 - *Setup an independent hotline to take and investigate whistle-blower complaints under the complaint's commissioner; and*
 - *Consider the proportionality of penalties for mishandling whistle-blower complaints given the wide range of pay and skill levels.*

Further funding, information, support, implementation and guidance on the new Act

- *Rules be published and widely consulted on prior to the introduction of the new supporter and representative regime including clear guidance on how the framework is intended to function, a comprehensive FAQ as well as clear responsibilities for handling of complaints and whistle-blowing. The current regime to be used in the interim.*
- *Government provide additional funding, training, guidance, promotional and*

educational activities to explain supported decision-making

- *Additional funding and support be provided for First Nation assessments*
- *A plain-english document be provided to older Australians to help them and their family and friends to understand an older person's assessment.*
- *The government consider and review funding arrangements to ensure regional and remote communities have access to social services at a level similar to urban Australians including whether or not additional funding would allow residential aged care facilities to act as an appropriate hub and substitute service to enable economies of scale and scope in these regional and remote communities.*
- *The Department / the Commission publish a map of how the new notices match to the existing notices including overlaps*
- *The government publish further guidance and definition on:*
 - *How 'no fault' provisions will work and how penalties will be applied*
 - *Around seizure of failure and significant failure.*
- *Senior government staff should not delegate any lower the assessment and penalty regime for serious and significant breaches / failures as well as for the review of these decisions. Particularly there needs to be a clear and transparent process to get serious notices, authorisations and conditions reviewed.*

UnitingCare Queensland recommends the following phased in approach to the reforms:

- *Rights, principles, quality safety standards, registration requirements,*

assessment, eligibility, fees, payments and subsidies, all governance (except complaints see below), banning orders and review rights to start from 1 July 2024;

- *Penalties regime and new notice period to start 3 – 6 months after comprehensive guidance and details are issued;*
- *Supporter and Representative framework to start from 1 July 2024 if our recommendations are adopted. Otherwise require 2 – 3 months (if funded) after comprehensive guidance and details are issued; otherwise 12 – 18 months if no funding provided;*
- *New notices, penalties, duty of care and critical failures to be implemented 6 - 12 months after comprehensive guidance and details are issued; and*
- *Complaints, whistle-blower and information management requirements to be implemented 2 – 3 months (if funded) after comprehensive guidance and details are issued otherwise 12 – 18 months if no funding provided.*
- *Further clarity on how retirement villages are captured under section 9 "where funded aged care services are delivered" specifically:*
 - *Seeking clarity on the inclusion of 'retirement villages' in the definitions of a residential care home per s9(2) and s9(3)(b), and question any unintended consequences of this definition and practical interpretation and implementation of s9(3)(b).*
 - *There is no definition of "retirement village" in the Bill. RVs are defined in applicable Retirement Villages Act (RV Act) which is state/ territory based.*
 - *"A place within" (as referenced above in section 9(3)(b)) a retirement village is broad and not clearly defined in the*

current drafting. Retirement communities typically refer to dwellings as 'independent living units', however a place within a retirement village could also extend to a bed, serviced apartment or common areas within the village setting. It is recommended that this terminology be clarified for better understanding.

- *There is limited explanation or understanding of the term "converted". Is it the intention of the Bill that, once converted, that a "place" within a retirement village no longer operates under the relevant state RV Act? What are the impacts to residents who have existing rights and obligations under the relevant RV Act?*

Introduction

Every day in the community, we engage with people from all walks of life. We deliver high quality evidence-based interventions for those facing adversity, and utilise our reach and vision to confront injustice.

**“Live life
in all its
fullness”**

We are leaders in providing care and support to older Australians. We meet people where they are and walk alongside them to achieve positive change and growth. Right across Queensland and the Northern Territory, UnitingCare Queensland supports our older Australians redefining what’s possible in their lives.

UnitingCare Queensland provides health, aged care, disability and community services to over 450,000 Australians a year as Australia’s charitable employer with 17,302 staff and 7,456 volunteers. UnitingCare Queensland has 70 years’ experience in providing in-home care to our older Australians, residential care in our 56 aged care facilities and four private hospitals.

UnitingCare Queensland, trading as BlueCare is Australia’s third largest Home Care Package Program provider (HCPP), ninth largest Residential Aged Care (RAC) provider as well as one of the largest Commonwealth Home Support Program (CHSP) providers in Australia. Trading as Australian Regional and Remote Community Services (ARRCS), we are also the largest aged care provider in the Northern Territory and the largest provider of the National Aboriginal and Torres Strait Islander Flexible Aged Care (NATISFAC) program in Australia.

The outline of this paper has a comprehensive and readable paper with each consultation questions feedback outlined in Appendix 1 with duplicated content highlighted in grey due to the overlapping nature of the questions posed.

A summary of our operations can be found in Appendix 2. UnitingCare Queensland welcomes the opportunity to provide any additional feedback and engagement on the proposed new Aged Care Act.

Chapter 1 – Rights, Principle & Supporters

The Stage 2 consultation draft New Aged Care Act (the Act) is an improvement on Stage 1 and we appreciate our feedback being incorporated, particularly around high- quality care definitions.

UnitingCare Queensland notes however the framework still significantly overlaps with other laws and regulations rather than delegating to another law for example, criminality and other workplace health and safety requirements).

There is significant risk that in attempting to replicate elements of these legislations, confusion and contradiction may occur as well as triggering constitutional conflicts.

Furthermore, we do not believe the proposed Act is a ‘future-focused’ piece of legislation, as it fails to consider the technological change occurring in the sector, such as around digital experience, technology-enabled assessment and care delivery privacy, rights and responsibilities.

UnitingCare Queensland recommends the Federal Government review and simplify overlapping areas of legislation and consider how the Act may better address future issues in the sector.

UnitingCare Queensland is supportive of the revised definition of high-quality care as it is an outcomes-focused framework with a greater emphasis on enabling providers and the community to deliver holistic person-centred care. UnitingCare advocated for this change, and we are pleased to see this inclusion.

Disappointingly, whilst the Act promotes values that enhance and provide for holistic, high quality, person-centred care, it does not contemplate the rights and protections of other aged care users, providers, workers and the communities that older Australians reside in.

For instance, it does not consider how both providers and their employees are central in providing holistic, high quality, person-centred care. It does not consider how they are also entitled to certain protections and rights. It also doesn’t account for how the rights of one aged care participant may need to be balanced against the rights of another.

For this reason, the government could consider outlining the responsibilities of older Australians when accessing the system. Rights without responsibilities can lead to a culture of entitlement without regard to workers and communities.

There is also no recognition older Australians are increasingly likely to access aged care services as part of a community or based on the shared experiences of others. Our experience shows that other residents play a significant role in the decision-making process of others, especially whether someone has had a positive or negative experience at a service.

The proposed Act does not contemplate as part of the Objects how the rights of the individual will be balanced within a community. Additionally, there is a longer-term trend of older Australians moving into

retirement living communities supported by in-home care services. This trend will increasingly highlight the need to balance the experiences of communities older Australians reside in.

Understanding how the rights of individuals are balanced against the rights of others in community is a critical part of any human rights approach.

Navigating competing rights while taking account of power imbalances is improved by understanding the responsibilities we have to each other. Having clear guidance on this will support a rights-based approach in practice.

It will also ensure older Australians are aware of their rights and understand that rights are not free from responsibilities. Under no circumstances should violent behavioural issues, which impact on other residents and staff, be tolerated. The rights of older Australians need be balanced with the rights of providers, staff and the community.

A common example of a responsibility of aged care participants is to pay for their services if assessed as appropriate. Based on our experience, we have around half a million dollars in outstanding debts a month that need to be accounted for. There should be established arrangements for participants in the aged care system who do not pay. These could include mechanisms such as cut-off funding or the creation of a debt collection process. Requirements to pay will ensure providers are not carrying losses to the detriment of other older Australians who do pay. This will be increasingly important should the Government move to increase consumer contributions to their care.

We note National Consumer Laws set out responsibilities of consumers and as such a similar set of responsibilities could be provided for in the Act to make explicit the responsibilities of users of the system.

This can also be managed within a human rights framework, which commonly recognises that not all rights are absolute and there are cases where limitations are reasonable and justifiable. For example, people's rights to safety and freedom from abuse and exploitation would generally be considered absolute.

Whereas people's rights to choice and access may at times be limited based on how resources are shared and managed across a community, or where protections need to be made for the most vulnerable. Any limitations being made to people's rights must be done through a process of critical reflection and transparent decision-making, which should have legislative guidance. For example, the *Human Rights Act 2019 (Qld) (Part 2, Div 1, Sec 13)* states:

3 Human rights may be limited

- 1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- 2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
 - a) the nature of the human right;
 - b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - d) whether there are any less restrictive and reasonably available ways to achieve the purpose;

- e) the importance of the purpose of the limitation;
- f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- g) the balance between the matters mentioned in paragraphs (e) and (f).

By omitting a legislative framework for when rights may be reasonably limited or how competing rights and responsibilities should be balanced, the Act creates inconsistent understandings and expectations across the community. This increases the difficulty of managing complex situations where there are competing rights between parties and risks inappropriate responses and outcomes.

While we believe established arrangements and requirements would assist providers; however, handled poorly it has the potential to add another layer of administration taking away from frontline care. For this reason, we believe the government would be better equipped to take on the role of managing consumer contributions to care.

UnitingCare Queensland recommends the Act includes:

- **A legislative framework for when rights may be reasonably limited and how competing rights and responsibilities should be balanced;**
- **Outline responsibilities for older Australians to ensure the safety and well-being of other aged care participants, their families, visitors, aged care workers and providers similar to the National Consumer Laws; and**
- **Outline explicitly aged care staff and provider rights.**

- **Include provision of training, tools and resources for aged care providers and workers to implement rights-based decision making at practice and policy levels in the Aged Care Act transition plan.**

Retirement Living Clarification

Additionally, there are several parts of the Act where Retirement Living Villages are impacted by their inclusion in section 9 'where funded aged care services are delivered'.

UnitingCare Queensland recommends that further clarity and guidance be provided to cover:

- **Seeking clarity on the inclusion of 'retirement villages' in the definitions of a residential care home per s9(2) and s9(3)(b), and question any unintended consequences of this definition and practical interpretation and implementation of s9(3)(b).**
- **There is no definition of "retirement village" in the Bill. RVs are defined in applicable Retirement Villages Act (RV Act) which is state/ territory based.**
- **"A place within" (as referenced above in section 9(3)(b)) a retirement village is broad and not clearly defined in the current drafting. Retirement communities typically refer to dwellings as 'independent living units', however a place within a retirement village could also extend to a bed, serviced apartment or common areas within the village setting. It is recommended that this terminology be clarified for better understanding.**

- **There is limited explanation or understanding of the term “converted”. Is it the intention of the Bill that, once converted, that a “place” within a retirement village no longer operates under the relevant state RV Act? What are the impacts to residents who have existing rights and obligations under the relevant RV Act?**

Single Service List

The proposed single service is not helpful given the current service list is complex and overlapping for the ordinary person with a supply driven model.

Whilst the Support at Home reforms will help simplify the system, more works needs to be done to educate and assist people as the Act doesn't recognise the current and future difficulty in navigating the Aged Care system.

We strongly support the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe the principle and support needs to be extended for all older Australians.

UnitingCare Queensland recommends the statement of rights expressly call out the addition of independent system navigators to assist older Australians from end-to-end navigation of the aged care system.

Supporters and Representatives

The Act seems to contradict the intentions noted in the consultation paper. Specifically, whilst it highlights it won't override State and Territory laws, by putting such terms into the Act, s109 of the constitution means that in actual fact the proposed regime in the Act would in fact likely override the laws of the State and Territory where there is inconsistency.

For instance, as drafted this could prove problematic in the First Nations space as it has the potential to cut across the Guardianship legislation at State and Territory level. Legislation frequently used in the NT to protect older Australians with dementia from financial abuse.

Additionally, we note the consultation paper and the Act are not clear on:

- The hierarchy and process for decision making;
- How it works in practice: who is the key representative and how it is managed;
- How the types of responsibilities and delegations will be split / allocated to supporters / representatives e.g. financial, personal, health etc.;
- loss of capacity removal;
- What the step into arrangement is;
- How the regime will deal with varying point in time directives e.g. enduring power of attorney and health directives;
- Conflicts in enduring power of attorney and health directives
- How it handles a decline in cognitive ability given it usually gradual and hard to notice;
- Who is responsible for arbitrating (managing) and enforcing representative duties including whistle-blowing and complaints reporting;
- How mental health issues and other comorbidities be accounted for;
- How the duties, rights and penalties proposed overlap with other State and Federal legislation; and

- How it complies with the Federal regulations on substitute decision-making and its consistency with NDIS and family law.

UnitingCare Queensland recommends rules be published and widely consulted on prior to the introduction of the new regime including clear guidance on how the framework is intended to function, a comprehensive FAQ as well as clear responsibilities for handling of complaints and whistleblowing. The current regime to be used in the interim.

UnitingCare Queensland supports the position an older person may only appoint a person to be either a supporter or representative as a representative has all the rights of supporter. We do not foresee under the proposed arrangement a situation where a person needs to both a representative and supporter given that the representative has all the rights of a supporter.

UnitingCare Queensland notes the supporter model proposed could significantly reduce the complexity and penalties regime proposed in the Act, as well as encouraging more people to act as supporters for older Australians as there won't be punitive penalties.

If supporters were not be able to communicate on behalf of the older person the duties, responsibilities and penalties for supporters could be removed. This is because they wouldn't have rights or duties or decision-making capacity and instead act in purely advisory function.

If a person is unable to communicate they should be encouraged to appoint a representative who if the older person wishes has the sole responsibility of communicating on behalf of the older person.

UnitingCare Queensland recommends the supporter right to communicate on

behalf of the older person be removed and if removed also remove the duties, responsibilities and penalties for supporters from the Act. Additionally, an older person should be able to appoint a representative to purely communicate on their behalf if desired.

The Act is too ambitious and complicated in its design for the representative framework. We note the following items:

- Multiple representatives beyond a primary and secondary are unusual;
- Decision-making processes are left unclear as well as what will be the enforcement mechanism outside the courts;
- Who bears the cost of additional people to communicate to; and
- What invalidates a decision of the older person if a representative/s is not communicated with due to administrative error.

We also note the representative framework could be significantly simplified by mandating in the Act that there shall be a sole primary representative who communicates the wishes on behalf on any other appointed representatives (e.g. micro-board) and responsibilities and duties fall to that person. Additionally, they should be responsible for communicating any information and co-ordinating meetings etc. with the other representatives.

UnitingCare Queensland recommends there be a 'sole' primary representative who the provider communicates with and is responsible for co-ordinating and communicating with any other representatives / decision-makers.

Transition of supporter and representative arrangements for providers

The transition to the new supporter and representative arrangement by providers presents an expensive and complex due to the increased requirements proposed from the current arrangement.

Under the current arrangement most nominated representatives are done verbally (often over the phone) and then documented in My Aged Care.

The proposed arrangement would significantly increase administrative burden for older Australians, the Department and providers. Additionally, feedback from our teams indicates it is rare to see an Enduring Power of Attorney noted in the My Aged Care portal.

These changes will require an interim arrangement to limit the number of supporters and representatives receiving communications whilst providers upgrade their IT infrastructure and Customer Relationship Management systems. This will be required as most provider's current systems only allow for a limited number of additional representatives and are often unable to filter and restrict information and communications by representative type. This transition cost should be funded.

These changes will be both expensive and time-consuming as retraining and re-educating staff and the new processes will be required as well replacing and updating IT and communications systems.

In addition, supported decision-making is new and novel to most Australians as it hasn't been applied more generally outside NDIS. This will require additional funding and advertising to explain expectations and requirements to consumers and their families as well as (usually face-to-face) training for aged care workers.

UnitingCare Queensland recommends the Government restrict the number of supporters and representatives to less than three until adequate funding for provider system upgrades is provided

UnitingCare Queensland recommends the Government provide additional funding, training, guidance, promotional and educational activities to explain supported decision-making

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;
- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older Australians from people who seek to take advantage of them (i.e. stewardship of the system);
- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the

responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Lastly, UnitingCare Queensland does not support an older person being able to appoint a representative when they have decision-making capacity, but would prefer someone else to make decisions about their aged care. This would run counter to taxation law, financial and our current system.

Additionally, even where, a person should be a part of any conversation or decision, even when they are not cognitively capable

Chapter 2 – Entry to the aged care system

UnitingCare Queensland notes almost all major aged care providers as well as various consultancies, brokers, advocates and other aged care participants have created various how to guides on top of the government provided documents. The need for this additional guidance is a symptom of the ongoing complexity of our aged care system.

Navigating the system

An initial and central point of contact that provides an avenue for older Australians to go to have their needs understood and facilitated would be a great improvement of the system. There is often a crisis or event that gives rise to an older Australian entering an aged care facility or services. When this is the case, there may be limited, or no understanding of the journey and pathway required prior to an older Australian accessing an aged care service. Initial points of contact may be particularly pertinent for those in regional locations or from lower socioeconomic backgrounds.

There is a need for a navigator in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers.

There is a need for navigators in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers. These navigators will be able to assist with the end-to-end identification of needs in an independent

way, including eligibility requirements, ability for self-care, support services in the event the older Australian being cared for declines, and access for older Australians.

UnitingCare Queensland is strongly supportive of the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe this support needs to be extended to all older Australians.

UnitingCare Queensland recommends the Act guarantees independent system navigators to assist older Australians with end-to-end navigation of the aged care system.

Aged Care Assessments

The entry into the aged care system begins with an aged care assessment. UnitingCare Queensland supports the Royal Commission recommendation to introduce a single-assessment process with no secondary assessment.

Whilst the system-wide statistics support the notion that aged care assessments are conducted and completed in a timely manner. We note the anecdotal evidence from our regional and remote sites is that assessments and re-assessments can be significantly delayed due to the low number of people requiring assessments combined with the cost to send an independent assessor to these areas. Older Australians in these areas can often be left waiting 6-12 months for an assessment / re-assessment.

Additionally, we note that the cost to assess First Nation elders requires a significant uplift in funding as these assessments can up to 2-3 times longer with a language barrier that often can't be resolved due to short notice of when a person is being assessed combined with a lack of 'official' documentation for the individual.

Specifically, the notion of a right to undergo an aged care needs assessment (after having applied for funded aged care services) itself an issue given the legislated descriptors are not culturally specific, i.e. have a report prepared for approval and access granted and prioritised by the System governor (the Department) prior to admission.

This problematic in areas where potential residents "turn up" outside the gates and admission is clearly appropriate.

Furthermore, assessment by people who know and understand both the First Nations culture as well as the individuals and family context are vital, and this will not be possible using independent assessors who will rarely travel the vast distances required to make such in-depth assessments.

We have been advised that these "ad hoc" residents will be able to be covered under "Emergency admission", but these are not emergencies, these are urgent admissions that may never be supported through the proposed needs-assessment process.

Furthermore, the application of the legislation in terms of "eligibility" in remote Australia is problematic, since the elements of rights-based legislation indicate freedom of choice in areas where choices are extremely limited (noting that choice is not only limited in remote areas, but also in urban areas where First Nations specific are rare and their speciality services not recognised).

UnitingCare recommends that the development, monitoring and enforcement of standards for wait times for assessments, services and financial eligibility matters

UnitingCare recommends additional funding and support be provided for First Nation assessments

UnitingCare notes that the previous Aged Care Financing Instrument (ACFI) assessments allows assessments and re-assessments to be conducted onsite by a qualified person. Whilst we support the introduction of independent assessors, the model seems to be only for older Australians in metropolitan areas. To help resolve the city rural divide and developing culturally appropriate First Nations processes, **UnitingCare Queensland recommends the introduction of an Alternative Entry Arrangement (AEA) for regional and remote areas whereby an aged care provider / qualified individual (e.g. GP) can conduct an aged care assessment / re-assessment.**

This AEA could be done in conjunction with a telehealth call with an independent assessor. Alternatively, or in conjunction with the telehealth call, an independent assessment of a sample of the eligible provider / individual could be audited after X number assessments with a site visit to ensure the validity of the assessments.

This AEA would be a more appropriate and cost-effective mechanism to supply these services assessments in remote and regional areas. Financial support would need to be provided to train and for each assessment noting that could be funded from the significant travel and travel-time labour costs from not getting assessors out to conduct one or two assessments each time.

Review of Aged Care Assessment

The ability to contest an assessment decision is clouded in mystery. The fact that the Act creates a mechanism for a computer program to help assign an assessment rating and priority speaks volumes about the complexity of how a classification decision is reached.

The lack of publicly available information for how computer programming and artificial intelligence will be used in this assessment context is deeply concerning.

We have learnt through the Robodebt Inquiry that the unchecked use of AI in a human service and welfare context can have deadly consequences. The lack of consultation and public scrutiny about the use of AI in the single aged care assessment process, which is scheduled to commence on 1 July 2024 alongside the Act, is alarming.

Coupled with the fact the Act does not provide a clear explanation of how a decision is to be reviewed and changed, this is a high-risk area for Government. There is a need for greater accountability and transparency for how this process is going to function, and it needs to be understandable to all Australians.

UnitingCare Queensland recommends that a plain-english document be provided to older Australians to help them and their family and friends to understand their assessment.

UnitingCare Queensland recommends that where a classification decision is brought before a review, a person must manually re-assess the classification and be required to report any systematic issues to the System governor.

Alternative Services

UnitingCare Queensland's experience as one of Australia's largest provider of aged

care services to First Australians in regional and remote Australia highlights important items we believe need to be addressed:

- Residential Aged Care facilities are often the only social service provider in remote and outer regional areas meaning they often receive Australians ineligible for aged care services who if turned away have nowhere else to go. Particularly for those who are younger than 65 with complex needs.
- Due to the lack of a specialised First Australian uplift for facilities in MMM1 – 5 areas, which we have separately advocated for in residential aged care pricing submission with IHACPA, our First Australian facilities in these areas are classified as Homelessness services. Our experience is that non-First Australian people entering these facilities experience a culture shock.
- Specialised homelessness services are required to assist those with low-level care needs to move into appropriate and secure accommodation. Residential Aged Care facilities are often not equipped or funded to provide these services and do not have staff with the appropriate expertise to help these Australians with their needs.
- The Act needs to support Aged Care services integrate with other service systems in harmonious and frictionless way, e.g. NDIS.
- Due to funding, population preferences, and demographic changes residential aged care facilities have shifted to providing

care for highly acute older Australians. Therefore, this is not always an appropriate setting to provide care for other cohorts that require 24/7, but less intensive, care e.g. people with a disability or people experiencing homelessness with high care needs.

UnitingCare Queensland recommends the government consider and review funding arrangements to ensure regional and remote communities have access to social services at a level similar to urban Australians including whether or not additional funding would allow residential aged care facilities to act as an appropriate hub and substitute service to enable economies of scale and scope in these regional and remote communities.

Chapter 3 – Registered Providers and Aged Care Workers

The Act contains the new statutory duty that:

“A registered provider must ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse 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”

When considering how this duty will interact with the penalty’s regime, compliance mechanisms, aged care worker and responsible persons duties and reverse onus on the reasonable defence, we see this duty as very concerning.

The statutory duties create the following issues that remain unresolved:

- The compliance mechanisms associated with reasonable instructions and directions are quite punitive and contradictory, such as between staff and consumer directions;
- Contradictory statements to minimise risks means providers will tie themselves in knots about processes, procedures and decisions whilst also trying to uphold an older Australian’s right to choice, self-determination and dignity of risk;
- There is already heightened anxiety about working in the aged care sector and statutory duties may further drive workers, managers, and board directors away from the

industry. The punitive language around complying with reasonable instructions and directions, such as penalising workers if there is a breach, should be tempered down. It also needs to be clarified whether this means employer, employee or both;

- The new Act will give individuals choice and decision-making rights that may contribute to or lead to adverse health and wellbeing outcomes, even death. This is a complex issue to manage in the current regulatory environment, without the threat of criminal liability.
 - An unintended consequence of this duty is likely to be increased risk aversion and increased restrictive practices.

The government needs to provide guidance on how to balance conflicts of duties and conflicts of workplace health and safety requirements, and duty of care. Even at the most basic level, aged care provides care to people where they live versus a purely clinical setting. The proposed Act delegates much the framework to unpublished rules.

Based on the proposed Act, the current design will:

- Drive staff (including board members) out of the aged care sector leading to increased wages

and salaries significantly driving up the cost of delivering aged care;

- Lower the skill and talent diversity in the aged care sector leading to more expensive and poorer care outcomes; and
- Reduce volunteering due to more onerous duties and training;
- Changing the cultural and personal behaviour of stakeholders in the system:
 - At a high level it will lead to the opposite of an open disclosure regime and hinder a continuous improvement approach as people may under-report incidents and issues;
 - As individuals will be personally liable, all current processes will have an added complication that individuals should seek individual legal advice resulting in increased costs, delays and blame-shifting;
- Incentivise under-reporting as well as reversing the hard work done to promote a continuous improvement culture.

Additionally, we note the strict liability component for breaches does not include the following protections:

- Requirement for residents and visitors to take reasonable care to prevent adverse health effects to their health and safety AND comply with reasonable instruction;
- Strict liability imposed for breach of criminal events without requirement to impose fault by the regulator. This is substantially different from workplace health and safety law, imposing a considerably higher

onus for aged care providers above the existing system;

- Adding the three categories of fault found in workplace and health safety law;
- The onus to prove reasonable excuse is on the defendant not the prosecution, which is once again different to workplace health and safety law, resulting in considerable disadvantage for providers and staff who do not have the resources of a government department;
- Consider adding further details about what reasonably practical means including:
 - the likelihood of the adverse effect concerned occurring; and
 - the likely degree of harm from the adverse effect; and
 - what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and
 - the availability and suitability of ways to prevent the adverse effect; and
 - the rights of individuals under the Statement of Rights.

Furthermore, the change from key personnel to responsible person definition involves the addition of 'any person who is responsible for the day-to-day operations of the registered provider'. This addition will see a large number of staff not currently captured by the key personnel definition and could include supervisors and other staff and is unnecessarily broad and needs to be restricted.

UnitingCare Queensland recommends the statutory duty of care about

“reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care” be removed to ensure older Australians have systems that encourage them to live their life with dignity of risk.

If the government keeps the duty then
UnitingCare Queensland recommends:

- **Ensuring ‘reasonably practical’ is consistent with workplace health and safety law including a consideration of cost;**
- **Publish clear and detailed guidelines about:**
 - **Who it covers;**
 - **How the compliance and enforcement mechanisms and processes will work;**
 - **Clarity on concepts and how defences will apply;**
 - **Definitions, details, case studies, examples, and frequently asked questions.**
- **Add a requirement for residents and their visitors to take reasonable care to prevent adverse health effects to their health and safety AND comply with reasonable instruction;**
- **Require for strict liability breaches that an imposition of fault be found;**
- **Adding the three categories of fault found in workplace and health safety law;**
- **That onus to prove there wasn’t a reasonable excuse be put on the prosecution rather than the defendant;**
- **Either delete the addition to responsible of ‘any person who is responsible for the day-to-day**

operations of the registered provider’

- **Or narrow it substantially down and provide concrete guidance;**
- **Add the following details to what reasonably practical means including:**
 - **the likelihood of the adverse effect concerned occurring; and**
 - **the likely degree of harm from the adverse effect; and**
 - **what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and**
 - **the availability and suitability of ways to prevent the adverse effect; and**
 - **the rights of individuals under the Statement of Rights.**

Aged Care Detail platforms

UnitingCare Queensland’s agrees with the regulatory framework and responsibilities for digital providers. Where digital platforms take care and administration fees, they should will be made responsible for the service and care provided by their subcontractors.

We also consider it appropriate that digital platform providers be required to have complaints and incident management frameworks, including reporting obligations to the Serious Incident Reporting Scheme.

From a consumer perspective, it is reasonable to expect the ability to raise any incidents and issues they experience

with workers engaged through a platform with the managers of that platform.

Therefore, digital platforms should come under the same complaints and incident reporting requirements as other registered providers. Even comparable service platforms such as Uber and Air BnB have complaints processes, and where online services do not have these mechanisms, consumer issues can and do occur.

We note the consultation paper could do a better job highlighting government

regulation of digital providers that operate in Uber style model as and that the aged care digital platform is more like an online classified model.

We also note the current IT systems for both providers and workers are not sophisticated or easily accessible to provide real-time checks and could create Problems where out-of-date information is on websites.

Chapter 4 – Fees, payments and subsidies

UnitingCare Queensland notes the fees, payments and subsidies section is missing from the proposed Act and the details in the consultation are insufficient to form a view. Additionally, the Act notes much of the detail will also be delegated to the rules. Without these details we are unable to form a detailed or considered view.

As the largest provider across the four main programs (Residential Aged Care, Commonwealth Home Support Program, Home Care Package Program, and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program), we support the intent that Commonwealth funding must be used for a particular purpose rather than to deliver specific aged care services because it provides greater flexibility to deliver high quality, holistic person-centred care.

Our only caveat is that all funding should not be clawed back by the government and instead a more innovative arrangement needs to be considered, including funding to cover capacity provision costs.

Chapter 5 – Governance of the aged care system

UnitingCare Queensland notes that whilst the roles of the System Governor and Commissioner are differentiated and relatively clear on what each does, there are additional considerations that would improve governance and operation of the aged care system.

The biggest issue with the proposed governance of the aged care system is the complaints commissioner is not independent of the aged care quality safety commissioner (the regulator). This would lead to a conflict of interest if they deal with complaints about the regulator. This could be solved by making them an Independent Statutory Authority that is supported by the aged care quality safety commissioner.

UnitingCare Queensland recommend the Complaints Commissioner becomes an independent Statutory Authority supported by the aged care quality safety commission.

Hidden in the Act is the fact the System Governor is both responsible for managing, analysing and reviewing coroner reports and findings as well as the outcomes of the system. This is clearly a conflict of interest under the proposed model.

UnitingCare Queensland suggests the management, analysis and review of coroner report and finds be moved to sit with the Inspector General of Aged Care or if an Independent Complaints Commissioner with them.

Additionally, we note there is conflict for the System Governor to be responsible for the enforcement and management of the supporter and representative regime.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or if the Complaints Commissioner becomes an independent Statutory as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing the complaints and whistle-blowing as well as the enforcement of duties and penalties.

Prudential requirements for Home Service Providers

UnitingCare Queensland's notes the Government is yet to release details of the new Support at Home Program. These details would inform whether a prudential requirement for liquidity and capital adequacy is required for Home Service Providers. There would be two reasons to impose a prudential regulation:

- 1) Holding significant amounts of government funds prior to expenditure

Based on the current arrangements for Home Care Package Program providers and Commonwealth Home Support Program providers, this is not required for sector-wide consideration given that providers no longer hold material amounts of government money. We note the

current proposal for the Support at Home takes this further by only allowing services to be billed in arrears.

2) Consumer deposits

Home Service Providers do not hold any sizable deposits by consumers and as such do not require the regulation of the residential aged care providers

As such, UnitingCare Queensland does not believe the costs of a prudential system for Home Service Providers is less than the benefits based on the risk profile.

Chapter 6 – Regulatory mechanisms

The Act is proposing to expand, simplify and formalise many of the powers that are currently used by the Aged Care Quality and Safety Commission (the Commission). UnitingCare Queensland is supportive of such arrangements as long as they support a continuous improvement culture and no-fault element where possible.

The simplification of notices into three categories dependent on the rules published should help simplify when the Commission is sanctioning a Provider and provide clearer transparency and accountability. It would be helpful for both the public and providers if the Department / the Commission published a map of how the new notices match to the existing notices including overlaps.

Additionally, further guidance is needed on how the no fault element is intending to work and how the penalties will be applied as a single breach may result in multiple offences. Furthermore, the size of the strict liability penalties needs to be weighed against the earning of the individuals it is intended to punish. In many cases in the Act, the size of fines is disproportionate and inconsistent amongst different classes of staff e.g. a personal carer faces a similar fine to a senior executive.

We also note that there needs to be further guidance and definitional material around the seizure of electronic equipment to ensure it is limited to where it does not compromise care and details of the tiered registration and penalties.

UnitingCare Queensland recommends that the Department / the Commission publish a map of how the new notices match to the existing notices including overlaps

UnitingCare Queensland recommends that the government publish further guidance on how 'no fault' provisions will work and how penalties will be applied

UnitingCare Queensland recommends that the review the size of fines and penalties considered who is it meant to be targeting to be consistent and proportionate

UnitingCare Queensland notes that 'new' powers for the Commission to enter a residential care home without a warrant is not really a new power given the current powers and that practically, we are unsure what this addition adds.

Critical Failure Powers

UnitingCare Queensland is unsure about the reintroduction of the seizure of failure powers due to a significant failure. This is due to there being a limited number of nurse advisors and administrators in the sector and uncertainty around if the government is willing to bear the cost of operating these facilities and how will the operational transition work e.g. will there be government aged care award etc.

At a practical level, the second limb of critical failure could be removed.

UnitingCare Queensland recommends that the government publish further guidance and definition around seizure of failure and significant failure.

Chapter 7 – Information Management

Information management by both providers and government is an essential component for a successful aged care system. The consultation paper does not adequately identify if its proposed solution is compliant with the Privacy Act and the best practice issued by the Office of the Privacy Commissioner.

UnitingCare Queensland recommends that the government engage with the Privacy Commissioner to ensure best practise.

Whistle-Blower Framework

UnitingCare Queensland is disappointed that the government has not listened to the wide array of stakeholders who pointed out the list of individuals proposed to take whistle-blower complaints is incredibly broad and covers volunteers and low-skilled staff.

This is a serious concern given the significant penalties for these individuals if they mishandle a whistle-blowing complaint. Indeed, many volunteers and aged care workers are from culturally and linguistically diverse backgrounds and significant attention and resourcing is needed to ensure the workforce is supported to understand and meet their legislative requirements.

The Act continues to use the definition of aged care worker that includes volunteers (s10 (4)a) and for entities with more than aged care services will be required to train non-aged care workers in framework and aged care code of conduct.

Additionally, this part of the Act presents a duplication of the Corporations Act requirement to have whistle-blowing policy and framework

(<https://download.asic.gov.au/media/5702691/rq270-published-13-november-2019-20200727.pdf>). Instead of again

duplicating another piece of Federal legislation, **UnitingCare Queensland recommends that the government adopt the Corporations Act requirements and framework for whistle-blowers.** This will simplify the process and ensure that only properly qualified and skilled staff and an independent hotline are able to take whistle-blower complaints.

As the proposed arrangements are not currently in-step with the Corporations Act, whistle-blowers are exposed to significant risks and individual workers to significant penalties. Those who serve as volunteers are also not appropriately placed to take on these types of complaints.

If the Government wishes to retain the proposed Act requirements, UnitingCare Queensland recommends that:

- **Whistle-blower complaints be restricted to appropriately qualified and skill staff members;**
- **Setup an independent hotline to take and investigate whistle-blower complaints under the complaint's commissioner; and**
- **Consider the proportionality of penalties for mishandling whistle-blower complaints given**

the wide range of pay and skill levels.

Chapter 8 – Decisions and review-rights

A long-standing tradition of Australia's system of government is the ability to get an independent review of a decision including access to easily understandable and transparent information used to make that decision.

UnitingCare Queensland is particular concerned about the review rights related to aged care assessments identified in Chapter 2 under s398 and s399.

Additionally, the governance of representatives' particulars needs review rights as highlighted in Chapter 1.

UnitingCare Queensland believes that significant and serious decisions should be delegated to staff of senior levels by the System Governor or the Commissioner and include the assessment and penalty regime for serious and significant breaches / failures, as well as for the review of these decisions. Particularly there needs to be a clear and transparent process to get serious notices, authorisations and conditions reviewed.

UnitingCare Queensland recommends that senior staff should not delegate any lower the assessment and penalty regime for serious and significant breaches / failures as well as for the review of these decisions. Particularly there needs to be a clear and transparent process to get serious notices, authorisations and conditions reviewed.

Chapter 9 - The reform timeline and readiness support

The consultation paper into a new Aged Care Act (the Act) foreshadows it will be brought to Parliament in March 2024 at the earliest. Given this Act will supersede the previous Act that was introduced in 1997, there is a high likelihood that it may take months to pass Parliament. This would delay passage to May or June 2024 before an almost immediate start date of 1 July 2024. This very short timeframe would leave all participants in the sector scrambling to meet whatever changes or additions are made to the Act in the legislative process.

The changes generated by the new Act, include a new regulatory model, aged care quality standards, changes to the aged care quality safety commission, compensation framework, complaints framework, and new statutory duty of care. These changes will have flow on effects for existing policies, procedures, and IT systems across all frontline operations and back of house functions that will require significant investment, training, reworking of processes, and possible restructuring of organisations.

Adequate engagement and implementation timelines for all changes under the new Act is absolutely critical to avoid an expensive and chaotic implementation phase. Comparable legislative changes include the Royal Commission for Financial Services which is still undergoing implementation (over six years later); and the introduction of the 1997 Aged Care Act, which saw an implementation and transition period of four years.

Additionally, we note that the following sections of the Act are empty:

- The entirety of Chapter 4: fee, payments and subsidies
- Chapter Six, Part 11: Critical failure powers

We also note that the draft Act does not include the rules. The Act refers to rules 263 times throughout the Act and cover the following:

- Aged care service list
- Aged care funding
- Registration of providers including registration categories, conditions, eligibility, process, decision-making, timeframes, audits, penalties and suspensions, and registry
- Responsible person and suitability matters
- Aged care quality standards (draft standards but not the detailed rules)
- Workforce and care worker requirements
- Aged care code of conduct and associated matters
- Restrictive practises regime including reporting
- Representative and Supporter details
- Access to aged care including timeframes, eligibility, decision

making process, assessments, reassessments, what services they can access, classification and prioritisation regime

- Information and data storage
- Incident management
- Complaints
- Whistle-blowing
- Financial and Prudential Standards
- Reporting requirements of providers
- 24/7 Registered Nursing requirements and any exemptions
- Regulations of the aged care digital platform regime
- Register of coroner's reports
- Regulatory powers of the Aged Care Quality Safety Commission
- Banning Orders
- Fees for services

UnitingCare Queensland recommends the publishing of a clear implementation timeline including the following items:

- **When guidance material will be issued for each relevant section;**
- **When interim rules, new draft rules, consultation periods and when the new rules will start;**
- **Outline the specified transition periods for sections that aren't being implemented from 1 July 2024;**
- **What success looks like to move onto the next stage of implementation; and**
- **Any grandfathering arrangements for existing**

arrangements and grace periods for implementation.

The current timing of items for the Act means that there is insufficient time for a full and comprehensive regulatory impact analysis that transparently outlines the impact on providers and consumers. The last major change in this government's term, the analysis of capping home care charges, notably did not include if the cost of 24 / 7 registered nursing was classed as adequate and did not capture the costs providers incurred due to quick turnaround time.

UnitingCare Queensland recommends that Regulatory Impact Analysis be conducted on the new Aged Care to an 'exemplary' standard to ensure changes benefit all Australians.

The current aged care funding system allocates funding on a status quo basis and does not provide funding or mechanisms for providers to charge additional fees or recoup these regulatory costs. As such, we support the provision of appropriate funding to assist providers with the transition to the new Act will provide a basis for ongoing funding for regulatory cost across the system.

UnitingCare Queensland recommends the Federal Government provide additional funding in the 2024-25 Federal Budget to assist aged care providers with the transition to the new Act and its associated regulatory changes based on Regulatory Impact Analysis.

This is vitally important for the residential aged care sector, with research conducted by both StewartBrown and the Department of Health and Aged Care (the department) showing that most providers are operating at a loss.

Staged Implementation of the Aged Care Act

UnitingCare Queensland is strongly supportive of a staged implementation approach for the implementation of the new Act as we strongly advocated in Stage 1 submissions. Given all the missing sections outlined previously included rules and missing chapters, we suggest that a staged approach is not just smart but an essential part of ensuring that older Australians continue to receive high quality whilst benefitting from the improvements proposed.

The key item to ensuring a successful staged implementation is a clear timeline including objectives and proposed success milestones to highlight when the next stage implementation will happen.

An expensive in both time and cost exercise for all providers will be conducting a gap analysis of each of the sections that are changing from the current Act to the new Act. For instance, the list of items to review includes:

- How the Act's new objects, statement of rights and principles interact with our current operating processes
 - How the new regulatory (registration) model interacts with our current process
 - How the new responsible person obligation matches the current key personnel framework
 - How the new civil and criminal penalties apply and to what circumstances and what existing processes cover those risks
 - How the new provider obligations (including subcontracting) compare to the current obligations including:
 - How the new statutory duty "as far as reasonably practicable, do not cause adverse effects to the health and safety of care recipients" compares to current requirements
- How the new "significant failure and systemic pattern of conduct" requirement fits into existing risk and quality framework and processes
 - What the new single aged care service list regulatory structure means compared to current practice
 - Comparing the new audit requirements to current state, including new entry powers for the regulator
 - Comparing the new aged care quality standards to the current age care quality standards and what needs to change
 - Ensuring incident management systems in place are compliant with new rules
 - How the new "ceasing to provide services" obligation to the current regime
 - How the current responses to the new "notices and powers" regime of the regulator
- How our current complaints and compensation framework to the new proposed framework (including a Complaints Management System)
 - How our obligations under the new whistle-blower regime to current practice
 - How our current and proposed consumer attraction and retention processes align to the new assessment model and access pathways

- How the current nominee arrangement to the new supporters and representatives' arrangement
- How our information handling process and storage aligns with the new requirements

Just conducting this type comprehensive gap analysis can take between 2-12 months depending on the complexity of the organisation and changes and complexity of the new framework.

Additionally, any aged care providers prepare their budgets at least a year in advance. Budgeting for the proposed Act is already quite late for the 2024 – 2025 financial year, as the majority of providers would finalised their budgets in preparation for approval by their executives and their board well before the implementation date of the Act.

Given the lack of specific details creating incredible uncertainty and variance for a gap analysis, whatever figure is budgeted is unlikely to be sufficient to cover the new Act changes from 1 July 2024. Indeed, its more likely provider is entering the financial year with no guidance / budget on what the new Act changes will cost will be in 2024 – 2025.

*As such, if funding is not provided in the 2024 – 2025 Federal Budget, **UnitingCare Queensland recommends that a two-year transition period be implemented.***

The following insights about phasing in the various changes proposed in the new Act depend on the details of the rules and other such interpretations to determine the cost of implementing the changes. Our recommendation based on available evidence suggests the following staggered implementation:

UnitingCare Queensland recommends the following phased in approach to the reforms:

- **Rights, principles, quality safety standards, registration requirements, assessment, eligibility, fees, payments and**

subsidies, all governance (except complaints see below), banning orders and review rights to start from 1 July 2024;

- **Penalties regime and new notice period to start 3 – 6 months after comprehensive guidance and details are issued;**
- **Supporter and Representative framework to start from 1 July 2024 if our recommendations are adopted. Otherwise require 2 – 3 months (if funded) after comprehensive guidance and details are issued; otherwise 12 – 18 months if no funding provided;**
- **New notices, penalties, duty of care and critical failures to be implemented 6 - 12 months after comprehensive guidance and details are issued; and**
- **Complaints, whistle-blower and information management requirements to be implemented 2 – 3 months (if funded) after comprehensive guidance and details are issued otherwise 12 – 18 months if no funding provided.**

Conclusion

UnitingCare Queensland appreciates the government's consideration of our submission. We are always keen to engage and participate in roundtables, committees, forums, discussions and one-on-one meetings.

Please contact our Senior Manager for Advocacy and Government Relations, Daniel Wong, on [REDACTED] or at [REDACTED] if you have any queries or wish to discuss our submission further.

Appendix 1: Feedback by Consultation Question

Q1. Are the revised Objects, Statement of Rights and/or Statement of Principles clear and do they achieve their intent? If not, what changes are required?

The Stage 2 consultation draft New Aged Care Act (the Act) is an improvement on Stage 1 and we appreciate our feedback being incorporated, particularly around high-quality care definitions.

UnitingCare Queensland notes however the framework still significantly overlaps with other laws and regulations rather than delegating to another law for example, criminality and other workplace health and safety requirements).

There is significant risk that in attempting to replicate elements of these legislations, confusion and contradiction may occur as well as triggering constitutional conflicts.

Furthermore, we do not believe the proposed Act is a 'future-focused' piece of legislation, as it fails to consider the technological change occurring in the sector, such as around digital experience, technology-enabled assessment and care delivery privacy, rights and responsibilities.

UnitingCare Queensland recommends the Federal Government review and simplify overlapping areas of legislation and consider how the Act may better address future issues in the sector.

UnitingCare Queensland is supportive of the revised definition of high-quality care as it is an outcomes-focused framework with a greater emphasis on enabling providers and the community to deliver

holistic person-centred care. UnitingCare advocated for this change, and we are pleased to see this inclusion.

Disappointingly, whilst the Act promotes values that enhance and provide for holistic, high quality, person-centred care, it does not contemplate the rights and protections of other aged care users, providers, workers and the communities that older Australians reside in.

For instance, it does not consider how both providers and their employees are central in providing holistic, high quality, person-centred care. It does not consider how they are also entitled to certain protections and rights. It also doesn't account for how the rights of one aged care participant may need to be balanced against the rights of another.

For this reason, the government could consider outlining the responsibilities of older Australians when accessing the system. Rights without responsibilities can lead to a culture of entitlement without regard to workers and communities.

There is also no recognition older Australians are increasingly likely to access aged care services as part of a community or based on the shared experiences of others. Our experience shows that other residents play a significant role in the decision-making process of others, especially whether someone has had a positive or negative experience at a service.

The proposed Act does not contemplate as part of the Objects how the rights of the

individual will be balanced within a community. Additionally, there is a longer-term trend of older Australians moving into retirement living communities supported by in-home care services. This trend will increasingly highlight the need to balance the experiences of communities older Australians reside in.

Understanding how the rights of individuals are balanced against the rights of others in community is a critical part of any human rights approach.

Navigating competing rights while taking account of power imbalances is improved by understanding the responsibilities we have to each other. Having clear guidance on this will support a rights-based approach in practice.

It will also ensure older Australians are aware of their rights and understand that rights are not free from responsibilities. Under no circumstances should violent behavioural issues, which impact on other residents and staff, be tolerated. The rights of older Australians need be balanced with the rights of providers, staff and the community.

A common example of a responsibility of aged care participants is to pay for their services if assessed as appropriate. Based on our experience, we have around half a million dollars in outstanding debts a month that need to be accounted for. There should be established arrangements for participants in the aged care system who do not pay. These could include mechanisms such as cut-off funding or the creation of a debt collection process. Requirements to pay will ensure providers are not carrying losses to the detriment of other older Australians who do pay. This will be increasingly important should the Government move to increase consumer contributions to their care.

We note National Consumer Laws set out responsibilities of consumers and as such

a similar set of responsibilities could be provided for in the Act to make explicit the responsibilities of users of the system.

This can also be managed within a human rights framework, which commonly recognises that not all rights are absolute and there are cases where limitations are reasonable and justifiable. For example, people's rights to safety and freedom from abuse and exploitation would generally be considered absolute.

Whereas people's rights to choice and access may at times be limited based on how resources are shared and managed across a community, or where protections need to be made for the most vulnerable. Any limitations being made to people's rights must be done through a process of critical reflection and transparent decision-making, which should have legislative guidance. For example, the *Human Rights Act 2019 (Qld) (Part 2, Div 1, Sec 13)* states:

Human rights may be limited

- 1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
- 2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—
 - a) the nature of the human right;
 - b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;

- d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- e) the importance of the purpose of the limitation;
- f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- g) the balance between the matters mentioned in paragraphs (e) and (f).

By omitting a legislative framework for when rights may be reasonably limited or how competing rights and responsibilities should be balanced, the Act creates inconsistent understandings and expectations across the community. This increases the difficulty of managing complex situations where there are competing rights between parties and risks inappropriate responses and outcomes.

While we believe established arrangements and requirements would assist providers; however, handled poorly it has the potential to add another layer of administration taking away from frontline care. For this reason, we believe the government would be better equipped to take on the role of managing consumer contributions to care.

UnitingCare Queensland recommends the Act includes:

- **A legislative framework for when rights may be reasonably limited and how competing rights and responsibilities should be balanced;**
- **Outline responsibilities for older Australians to ensure the safety and well-being of other aged care participants, their families, visitors, aged care workers and**

providers similar to the National Consumer Laws; and

- **Outline explicitly aged care staff and provider rights.**
- **Include provision of training, tools and resources for aged care providers and workers to implement rights-based decision making at practice and policy levels in the Aged Care Act transition plan.**

Retirement Living Clarification

Additionally, there are several parts of the Act where Retirement Living Villages are impacted by their inclusion in section 9 'where funded aged care services are delivered'.

UnitingCare Queensland recommends that further clarity and guidance be provided to cover:

- **Seeking clarity on the inclusion of 'retirement villages' in the definitions of a residential care home per s9(2) and s9(3)(b), and question any unintended consequences of this definition and practical interpretation and implementation of s9(3)(b).**
- **There is no definition of "retirement village" in the Bill. RVs are defined in applicable Retirement Villages Act (RV Act) which is state/ territory based.**
- **"A place within" (as referenced above in section 9(3)(b)) a retirement village is broad and not clearly defined in the current drafting. Retirement communities typically refer to dwellings as 'independent living units', however a place within a retirement village could also extend to a bed, serviced apartment or common areas**

within the village setting. It is recommended that this terminology be clarified for better understanding.

- **There is limited explanation or understanding of the term “converted”. Is it the intention of the Bill that, once converted, that a “place” within a retirement village no longer operates under the relevant state RV Act? What are the impacts to residents who have existing rights and obligations under the relevant RV Act?**

Q2. Some First Nations stakeholders indicated that they would also like to see a right to remain connected to Island Home (in addition to ‘Country’) included in the Statement of Rights? Do you agree?

Support

Q3. Do you consider the revised definition of high-quality care will encourage providers to aim higher? Does it align with your future vision for aged care?

UnitingCare Queensland is supportive of the revised definition of high-quality care as it is an outcomes-focused framework with a greater emphasis on enabling providers and the community to deliver holistic person-centred care. UnitingCare advocated for this change, and we are pleased to see this inclusion.

Disappointingly, whilst the Act promotes values that enhance and provide for holistic, high quality, person-centred care, it does not contemplate the rights and protections of other aged care users, providers, workers and the communities that older Australians reside in.

Q4. Do you think a single service list will increase clarity of the services that the Commonwealth aged care system provides to older people?

The proposed single service is not helpful given the current service list is complex and overlapping for the ordinary person with a supply driven model.

Whilst the Support at Home reforms will help simplify the system, more works needs to be done to educate and assist people as the Act doesn't recognise the current and future difficulty in navigating the Aged Care system.

We strongly support the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe the principle and support needs to be extended for all older Australians.

UnitingCare Queensland recommends the statement of rights expressly call out the addition of independent system navigators to assist older Australians from end-to-end navigation of the aged care system.

Q5. Are the proposed roles of supporters and representatives clear and distinctive?

The Act seems to contradict the intentions noted in the consultation paper. Specifically, whilst it highlights it won't override State and Territory laws, by putting such terms into the Act, s109 of the constitution means that in actual fact the proposed regime in the Act would in fact likely override the laws of the State and Territory where there is inconsistency.

For instance, as drafted this could prove problematic in the First Nations space as it has the potential to cut across the Guardianship legislation at State and Territory level. Legislation frequently used

in the NT to protect older Australians with dementia from financial abuse.

Additionally, we note the consultation paper and the Act are not clear on:

- The hierarchy and process for decision making;
- How it works in practice: who is the key representative and how it is managed;
- How the types of responsibilities and delegations will be split / allocated to supporters / representatives e.g. financial, personal, health etc.;
- loss of capacity removal;
- What the step into arrangement is;
- How the regime will deal with varying point in time directives e.g. enduring power of attorney and health directives;
- Conflicts in enduring power of attorney and health directives
- How it handles a decline in cognitive ability given it usually gradual and hard to notice;
- Who is responsible for arbitrating (managing) and enforcing representative duties including whistle-blowing and complaints reporting;
- How mental health issues and other comorbidities be accounted for;
- How the duties, rights and penalties proposed overlap with other State and Federal legislation; and
- How it complies with the Federal regulations on substitute decision-making and its consistency with NDIS and family law.

UnitingCare Queensland recommends rules be published and widely

consulted on prior to the introduction of the new regime including clear guidance on how the framework is intended to function, a comprehensive FAQ as well as clear responsibilities for handling of complaints and whistle-blowing. The current regime to be used in the interim.

UnitingCare Queensland notes the supporter model proposed could significantly reduce the complexity and penalties regime proposed in the Act, as well as encouraging more people to act as supporters for older Australians as there won't be punitive penalties.

If supporters were not be able to communicate on behalf of the older person the duties, responsibilities and penalties for supporters could be removed. This is because they wouldn't have rights or duties or decision-making capacity and instead act in purely advisory function.

If a person is unable to communicate they should be encouraged to appoint a representative who if the older wishes has the sole responsibility of communicating on behalf of the older person.

UnitingCare Queensland recommends the supporter right to communicate on behalf of the older person be removed and if removed also remove the duties, responsibilities and penalties for supporters from the Act. Additionally, an older person should be able to appoint a representative to purely communicate on their behalf if desired.

The Act is too ambitious and complicated in its design for the representative framework. We note the following items:

- Multiple representatives beyond a primary and secondary are unusual;
- Decision-making processes are left unclear as well as what will be the

enforcement mechanism outside the courts;

- Who bears the cost of additional people to communicate to; and
- What invalidates a decision of the older person if a representative/s is not communicated with due to administrative error.

We also note the representative framework could be significantly simplified by mandating in the Act that there shall be a sole primary representative who communicates the wishes on behalf on any other appointed representatives (e.g. micro-board) and responsibilities and duties fall to that person. Additionally, they should be responsible for communicating any information and co-ordinating meetings etc. with the other representatives.

UnitingCare Queensland recommends there be a 'sole' primary representative who the provider communicates with and is responsible for co-ordinating and communicating with any other representatives / decision-makers.

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;
- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older

Australians from people who seek to take advantage of them (i.e. stewardship of the system);

- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Q6. Are you comfortable that an older person is only able to have representatives or supporters? Are there situations where an older person, or their families and support networks, might want both a representative and a supporter?

UnitingCare Queensland supports the position an older may only appoint a person to be either a supporter or representative as a representative has all the rights of supporter. We do not foresee under the proposed arrangement a situation where a person needs to both a representative and supporter given that the representatives has all the rights of a supporter

Q7. Registered providers will be required to interact with supporters and representatives to exchange information and in relation to a wide range of decisions that can be made by people accessing aged care services. What support will providers need to transition to these new arrangements?

The Act seems to contradict the intentions noted in the consultation paper.

Specifically, whilst it highlights it won't override State and Territory laws, by putting such terms into the Act, s109 of the constitution means that in actual fact the proposed regime in the Act would in fact likely override the laws of the State and Territory where there is inconsistency.

For instance, as drafted this could prove problematic in the First Nations space as it has the potential to cut across the Guardianship legislation at State and Territory level. Legislation frequently used in the NT to protect older Australians with dementia from financial abuse.

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UnitingCare Queensland recommends rules be published and widely consulted on prior to the introduction of the new regime including clear guidance on how the framework is intended to function, a comprehensive FAQ as well as clear responsibilities for handling of complaints and whistle-blowing. The current regime to be used in the interim.

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- Multiple representatives beyond a primary and secondary are unusual;
- Decision-making processes are left unclear as well as what will be the enforcement mechanism outside the courts;
- Who bears the cost of additional people to communicate to; and

- What invalidates a decision of the older person if a representative/s is not communicated with due to administrative error.

We also note the representative framework could be significantly simplified by mandating in the Act that there shall be a sole primary representative who communicates the wishes on behalf on any other appointed representatives (e.g. micro-board) and responsibilities and duties fall to that person. Additionally, they should be responsible for communicating any information and co-ordinating meetings etc. with the other representatives.

UnitingCare Queensland recommends there be a 'sole' primary representative who the provider communicates with and is responsible for co-ordinating and communicating with any other representatives / decision-makers.

Transition of supporter and representative arrangements for providers

The transition to the new supporter and representative arrangement by providers presents an expensive and complex due to the increased requirements proposed from the current arrangement.

Under the current arrangement most nominated representatives are done verbally (often over the phone) and then documented in My Aged Care.

The proposed arrangement would significantly increase administrative burden for older Australians, the Department and providers. Additionally, feedback from our teams indicates it is rare to see an Enduring Power of Attorney noted in the My Aged Care portal.

These changes will require an interim arrangement to limit the number of supporters and representatives receiving communications whilst providers upgrade their IT infrastructure and Customer

Relationship Management systems. This will be required as most provider's current systems only allow for a limited number of additional representatives and are often unable to filter and restrict information and communications by representative type. This transition cost should be funded.

These changes will be both expensive and time-consuming as retraining and re-educating staff and the new processes will be required as well replacing and updating IT and communications systems.

In addition, supported decision-making is new and novel to most Australians as it hasn't been applied more generally outside NDIS. This will require additional funding and advertising to explain expectations and requirements to consumers and their families as well as (usually face-to-face) training for aged care workers.

UnitingCare Queensland recommends the Government restrict the number of supporters and representatives to less than three until adequate funding for provider system upgrades is provided

UnitingCare Queensland recommends the Government provide additional funding, training, guidance, promotional and educational activities to explain supported decision-making

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;

- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older Australians from people who seek to take advantage of them (i.e. stewardship of the system);
- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Q8. What sort of penalty should apply to supporters and representatives who do not comply with their duties, if any?

UnitingCare Queensland notes the supporter model proposed could significantly reduce the complexity and penalties regime proposed in the Act, as well as encouraging more people to act as supporters for older Australians as there won't be punitive penalties.

If supporters were not be able to communicate on behalf of the older person the duties, responsibilities and penalties for supporters could be removed. This is because they wouldn't have rights or duties or decision-making capacity and instead act in purely advisory function.

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UnitingCare Queensland recommends the supporter right to communicate on behalf of the older person be removed and if removed also remove the duties, responsibilities and penalties for supporters from the Act. Additionally, an older person should be able to appoint a representative to purely communicate on their behalf if desired.

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- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Q9. Noting that representatives must always try to help a person to make their own decisions, should an older person be able to appoint a representative when they have decision-making capability but would prefer someone else to make decisions about their aged care?

UnitingCare Queensland does not support an older person being able to appoint a representative when they have decision-making capacity, but would prefer someone else to make decisions about their aged care. This would run counter to taxation law, financial and our current system.

Additionally, even where, a person should be a part of any conversation or decision, even when they are not cognitively capable

Q10. What transitional arrangements would you like to see put in place to ensure there is a smooth transition to the new eligibility arrangements and to manage any impacts on people who do not meet the eligibility criteria?

Single Service List

The proposed single service is not helpful given the current service list is complex and overlapping for the ordinary person with a supply driven model.

Whilst the Support at Home reforms will help simplify the system, more works needs to be done to educate and assist people as the Act doesn't recognise the current and future difficulty in navigating the Aged Care system.

We strongly support the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe the principle and support needs to be extended for all older Australians.

UnitingCare Queensland recommends the statement of rights expressly call out the addition of independent system navigators to assist older Australians from end-to-end navigation of the aged care system.

UnitingCare Queensland notes almost all major aged care providers as well as various consultancies, brokers, advocates and other aged care participants have created various how to guides on top of the government provided documents. The need for this additional guidance is a symptom of the ongoing complexity of our aged care system.

Navigating the system

An initial and central point of contact that provides an avenue for older Australians to go to have their needs understood and facilitated would be a great improvement of the system. There is often a crisis or event that gives rise to an older Australian entering an aged care facility or services. When this is the case, there may be limited, or no understanding of the journey and pathway required prior to an older Australian accessing an aged care service. Initial points of contact may be particularly pertinent for those in regional locations or from lower socioeconomic backgrounds.

There is a need for a navigator in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers.

There is a need for navigators in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers. These navigators will be able to assist with the end-to-end identification of needs in an independent way, including eligibility requirements, ability for self-care, support services in the event the older Australian being cared for declines, and access for older Australians.

UnitingCare Queensland is strongly supportive of the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe this support needs to be extended to all older Australians.

UnitingCare Queensland recommends the Act guarantees independent system navigators to assist older Australians with end-to-end navigation of the aged care system.

Aged Care Assessments

The entry into the aged care system begins with an aged care assessment. UnitingCare Queensland supports the Royal Commission recommendation to introduce a single-assessment process with no secondary assessment.

Whilst the system-wide statistics support the notion that aged care assessments are conducted and completed in a timely manner. We note the anecdotal evidence from our regional and remote sites is that assessments and re-assessments can be significantly delayed due to the low number of people requiring assessments combined with the cost to send an independent assessor to these areas. Older Australians in these areas can often be left waiting 6-12 months for an assessment / re-assessment.

Additionally, we note that the cost to assess First Nation elders requires a significant uplift in funding as these assessments can up to 2-3 times longer with a language barrier that often can't be resolved due to short notice of when a person is a being assessed combined with a lack of 'official' documentation for the individual.

Specifically, the notion of a right to undergo an aged care needs assessment (after having applied for funded aged care services) itself an issue given the

legislated descriptors are not culturally specific, i.e. have a report prepared for approval and access granted and prioritised by the System governor (the Department) prior to admission.

This problematic in areas where potential residents “turn up” outside the gates and admission is clearly appropriate.

Furthermore, assessment by people who know and understand both the First Nations culture as well as the individuals and family context are vital, and this will not be possible using independent assessors who will rarely travel the vast distances required to make such in-depth assessments.

We have been advised that these “ad hoc” residents will be able to be covered under “Emergency admission”, but these are not emergencies, these are urgent admissions that may never be supported through the proposed needs-assessment process.

Furthermore, the application of the legislation in terms of “eligibility” in remote Australia is problematic, since the elements of rights-based legislation indicate freedom of choice in areas where choices are extremely limited (noting that choice is not only limited in remote areas, but also in urban areas where First Nations specific are rare and their speciality services not recognised).

UnitingCare recommends that the development, monitoring and enforcement of standards for wait times for assessments, services and financial eligibility matters

UnitingCare recommends additional funding and support be provided for First Nation assessments

UnitingCare notes that the previous Aged Care Financing Instrument (ACFI) assessments allows assessments and re-assessments to be conducted onsite by a qualified person. Whilst we support the

introduction of independent assessors, the model seems to be only for older Australians in metropolitan areas. To help resolve the city rural divide and developing culturally appropriate First Nations processes, **UnitingCare Queensland recommends the introduction of an Alternative Entry Arrangement (AEA) for regional and remote areas whereby an aged care provider / qualified individual (e.g. GP) can conduct an aged care assessment / re-assessment.**

This AEA could be done in conjunction with a telehealth call with an independent assessor. Alternatively, or in conjunction with the telehealth call, an independent assessment of a sample of the eligible provider / individual could be audited after X number assessments with a site visit to ensure the validity of the assessments.

This AEA would be a more appropriate and cost-effective mechanism to supply these services assessments in remote and regional areas. Financial support would need to be provided to train and for each assessment noting that could be funded from the significant travel and travel-time labour costs from not getting assessors out to conduct one or two assessments each time.

Q11. Do you consider there are alternative services that can, or should, be made available for Aboriginal or Torres Strait Islander persons aged 45-49 who are homeless or at risk of homelessness? Does aged care currently meet the needs of this particular group of individuals?

Alternative Services

UnitingCare Queensland’s experience as one of Australia’s largest provider of aged care services to First Australians in regional and remote Australia highlights important items we believe need to be addressed:

- Residential Aged Care facilities are often the only social service provider in remote and outer regional areas meaning they often receive Australians ineligible for aged care services who if turned away have nowhere else to go. Particularly for those who are younger than 65 with complex needs.
- Due to the lack of a specialised First Australian uplift for facilities in MMM1 – 5 areas, which we have separately advocated for in residential aged care pricing submission with IHACPA, our First Australian facilities in these areas are classified as Homelessness services. Our experience is that non-First Australian people entering these facilities experience a culture shock.
- Specialised homelessness services are required to assist those with low-level care needs to move into appropriate and secure accommodation. Residential Aged Care facilities are often not equipped or funded to provide these services and do not have staff with the appropriate expertise to help these Australians with their needs.
- The Act needs to support Aged Care services integrate with other service systems in harmonious and frictionless way, e.g. NDIS.
- Due to funding, population preferences, and demographic changes residential aged care facilities have shifted to providing care for highly acute older Australians. Therefore, this is not always an appropriate setting to provide care for other cohorts that require 24/7, but less intensive,

care e.g. people with a disability or people experiencing homeless with high care needs.

UnitingCare Queensland recommends the government consider and review funding arrangements to ensure regional and remote communities have access to social services at a level similar to urban Australians including whether or not additional funding would allow residential aged care facilities to act as an appropriate hub and substitute service to enable economies of scale and scope in these regional and remote communities.

Q12. Are you under 65 and currently accessing aged care services in the home or community? If so, we would welcome your feedback about whether you have considered other available services and your reasons for continuing to access aged care

Same as (answered in) Q11

Q13. Is there anything else you would like to see specified in the legislation regarding the need's assessment process?

UnitingCare Queensland notes almost all major aged care providers as well as various consultancies, brokers, advocates and other aged care participants have created various how to guides on top of the government provided documents. The need for this additional guidance is a symptom of the ongoing complexity of our aged care system.

Navigating the system

An initial and central point of contact that provides an avenue for older Australians to go to have their needs understood and facilitated would be a great improvement of the system. There is often a crisis or event that gives rise to an older Australian entering an aged care facility or services.

When this is the case, there may be limited, or no understanding of the journey and pathway required prior to an older Australian accessing an aged care service. Initial points of contact may be particularly pertinent for those in regional locations or from lower socioeconomic backgrounds.

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UnitingCare Queensland is strongly supportive of the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe this support needs to be extended to all older Australians.

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Whilst the system-wide statistics support the notion that aged care assessments are conducted and completed in a timely

manner. We note the anecdotal evidence from our regional and remote sites is that assessments and re-assessments can be significantly delayed due to the low number of people requiring assessments combined with the cost to send an independent assessor to these areas. Older Australians in these areas can often be left waiting 6-12 months for an assessment / re-assessment.

Additionally, we note that the cost to assess First Nation elders requires a significant uplift in funding as these assessments can up to 2-3 times longer with a language barrier that often can't be resolved due to short notice of when a person is being assessed combined with a lack of 'official' documentation for the individual.

Specifically, the notion of a right to undergo an aged care needs assessment (after having applied for funded aged care services) itself an issue given the legislated descriptors are not culturally specific, i.e. have a report prepared for approval and access granted and prioritised by the System governor (the Department) prior to admission.

This problematic in areas where potential residents "turn up" outside the gates and admission is clearly appropriate. Furthermore, assessment by people who know and understand both the First Nations culture as well as the individuals and family context are vital, and this will not be possible using independent assessors who will rarely travel the vast distances required to make such in-depth assessments.

We have been advised that these "ad hoc" residents will be able to be covered under "Emergency admission", but these are not emergencies, these are urgent admissions that may never be supported through the proposed needs-assessment process.

Furthermore, the application of the legislation in terms of “eligibility” in remote Australia is problematic, since the elements of rights-based legislation indicate freedom of choice in areas where choices are extremely limited (noting that choice is not only limited in remote areas, but also in urban areas where First Nations specific are rare and their speciality services not recognised).

UnitingCare recommends that the development, monitoring and enforcement of standards for wait times for assessments, services and financial eligibility matters

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This AEA could be done in conjunction with a telehealth call with an independent assessor. Alternatively, or in conjunction with the telehealth call, an independent assessment of a sample of the eligible provider / individual could be audited after X number assessments with a site visit to ensure the validity of the assessments.

This AEA would be a more appropriate and cost-effective mechanism to supply these services assessments in remote and

regional areas. Financial support would need to be provided to train and for each assessment noting that could be funded from the significant travel and travel-time labour costs from not getting assessors out to conduct one or two assessments each time.

Review of Aged Care Assessment

The ability to contest an assessment decision is clouded in mystery. The fact that the Act creates a mechanism for a computer program to help assign an assessment rating and priority speaks volumes about the complexity of how a classification decision is reached.

The lack of publicly available information for how computer programming and artificial intelligence will be used in this assessment context is deeply concerning.

We have learnt through the Robodebt Inquiry that the unchecked use of AI in a human service and welfare context can have deadly consequences. The lack of consultation and public scrutiny about the use of AI in the single aged care assessment process, which is scheduled to commence on 1 July 2024 alongside the Act, is alarming.

Coupled with the fact the Act does not provide a clear explanation of how a decision is to be reviewed and changed, this is a high-risk area for Government. There is a need for greater accountability and transparency for how this process is going to function, and it needs to be understandable to all Australians.

UnitingCare Queensland recommends that a plain-english document be provided to older Australians to help them and their family and friends to understand their assessment.

UnitingCare Queensland recommends that where a classification decision is brought before a review, a person must manually re-assess the classification

and be required to report any systematic issues to the System governor.

Q14. Are you comfortable with the proposed arrangements to maintain flexibility to vary services that a person can access under the CHSP when the Act is introduced?

UnitingCare Queensland notes almost all major aged care providers as well as various consultancies, brokers, advocates and other aged care participants have created various how to guides on top of the government provided documents. The need for this additional guidance is a symptom of the ongoing complexity of our aged care system.

Navigating the system

An initial and central point of contact that provides an avenue for older Australians to go to have their needs understood and facilitated would be a great improvement of the system. There is often a crisis or event that gives rise to an older Australian entering an aged care facility or services. When this is the case, there may be limited, or no understanding of the journey and pathway required prior to an older Australian accessing an aged care service. Initial points of contact may be particularly pertinent for those in regional locations or from lower socioeconomic backgrounds.

There is a need for a navigator in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers.

There is a need for navigators in the system to identify the needs of older Australians and provide end-to-end support, independent of government agencies and providers. These navigators will be able to assist with the end-to-end identification of needs in an independent way, including eligibility requirements,

ability for self-care, support services in the event the older Australian being cared for declines, and access for older Australians.

UnitingCare Queensland is strongly supportive of the Government's introduction of First Australian Aged Care Navigators for the complex First Australian system (Elder Care Support Program) and believe this support needs to be extended to all older Australians.

UnitingCare Queensland recommends the Act guarantees independent system navigators to assist older Australians with end-to-end navigation of the aged care system.

Aged Care Assessments

The entry into the aged care system begins with an aged care assessment. UnitingCare Queensland supports the Royal Commission recommendation to introduce a single-assessment process with no secondary assessment.

Whilst the system-wide statistics support the notion that aged care assessments are conducted and completed in a timely manner. We note the anecdotal evidence from our regional and remote sites is that assessments and re-assessments can be significantly delayed due to the low number of people requiring assessments combined with the cost to send an independent assessor to these areas. Older Australians in these areas can often be left waiting 6-12 months for an assessment / re-assessment.

Additionally, we note that the cost to assess First Nation elders requires a significant uplift in funding as these assessments can up to 2-3 times longer with a language barrier that often can't be resolved due to short notice of when a person is a being assessed combined with a lack of 'official' documentation for the individual.

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Q15. Are you comfortable that there are clear arrangements in place under the new Act for a classification decision to be reviewed and changed if required?

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Q16. Do you have any feedback about emergency entry to aged care that you would like to see addressed in developing the alternative entry arrangements for the new Act?

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created various how to guides on top of the government provided documents. The need for this additional guidance is a symptom of the ongoing complexity of our aged care system.

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Q17. Do you think the draft statutory duties on registered providers and responsible persons meet the aims of the policy?

The Act contains the new statutory duty that:

“A registered provider must ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services while the provider is delivering those service”

When considering how this duty will interact with the penalty’s regime, compliance mechanisms, aged care worker and responsible persons duties and reverse onus on the reasonable defence, we see this duty as very concerning.

The statutory duties create the following issues that remain unresolved:

- The compliance mechanisms associated with reasonable instructions and directions are quite

punitive and contradictory, such as between staff and consumer directions;

- Contradictory statements to minimise risks means providers will tie themselves in knots about processes, procedures and decisions whilst also trying to uphold an older Australian’s right to choice, self-determination and dignity of risk;
- There is already heightened anxiety about working in the aged care sector and statutory duties may further drive workers, managers, and board directors away from the industry. The punitive language around complying with reasonable instructions and directions, such as penalising workers if there is a breach, should be tempered down. It also needs to be clarified whether this means employer, employee or both;
- The new Act will give individuals choice and decision-making rights that may contribute to or lead to adverse health and wellbeing outcomes, even death. This is a complex issue to manage in the current regulatory environment, without the threat of criminal liability.
 - An unintended consequence of this duty is likely to be increased risk aversion and increased restrictive practices.

The government needs to provide guidance on how to balance conflicts of duties and conflicts of workplace health and safety requirements, and duty of care. Even at the most basic level, aged care provides care to people where they live versus a purely clinical setting. The

proposed Act delegates much the framework to unpublished rules.

Based on the proposed Act, the current design will:

- Drive staff (including board members) out of the aged care sector leading to increased wages and salaries significantly driving up the cost of delivering aged care;
- Lower the skill and talent diversity in the aged care sector leading to more expensive and poorer care outcomes; and
- Reduce volunteering due to more onerous duties and training;
- Changing the cultural and personal behaviour of stakeholders in the system:
 - At a high level it will lead to the opposite of an open disclosure regime and hinder a continuous improvement approach as people may under-report incidents and issues;
 - As individuals will be personally liable, all current processes will have an added complication that individuals should seek individual legal advice resulting in increased costs, delays and blame-shifting;
- Incentivise under-reporting as well as reversing the hard work done to promote a continuous improvement culture.

Additionally, we note the strict liability component for breaches does not include the following protections:

- Requirement for residents and visitors to take reasonable care to prevent adverse health effects to

their health and safety AND comply with reasonable instruction;

- Strict liability imposed for breach of criminal events without requirement to impose fault by the regulator. This is substantially different from workplace health and safety law, imposing a considerably higher onus for aged care providers above the existing system;
- Adding the three categories of fault found in workplace and health safety law;
- The onus to prove reasonable excuse is on the defendant not the prosecution, which is once again different to workplace health and safety law, resulting in considerable disadvantage for providers and staff who do not have the resources of a government department;
- Consider adding further details about what reasonably practical means including:
 - the likelihood of the adverse effect concerned occurring; and
 - the likely degree of harm from the adverse effect; and
 - what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and
 - the availability and suitability of ways to prevent the adverse effect; and
 - the rights of individuals under the Statement of Rights.

Furthermore, the change from key personnel to responsible person definition involves the addition of 'any person who is responsible for the day-to-day operations

of the registered provider'. This addition will see a large number of staff not currently captured by the key personnel definition and could include supervisors and other staff and is unnecessarily broad and needs to be restricted.

UnitingCare Queensland recommends the statutory duty of care about “reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care” be removed to ensure older Australians have systems that encourage them to live their life with dignity of risk.

If the government keeps the duty then
UnitingCare Queensland recommends:

- **Ensuring ‘reasonably practical’ is consistent with workplace health and safety law including a consideration of cost;**
 - **Publish clear and detailed guidelines about:**
 - **Who it covers;**
 - **How the compliance and enforcement mechanisms and processes will work;**
 - **Clarity on concepts and how defences will apply;**
 - **Definitions, details, case studies, examples, and frequently asked questions.**
 - **Add a requirement for residents and their visitors to take reasonable care to prevent adverse health effects to their health and safety AND comply with reasonable instruction;**
 - **Require for strict liability breaches that an imposition of fault be found;**
- **Adding the three categories of fault found in workplace and health safety law;**
 - **That onus to prove there wasn’t a reasonable excuse be put on the prosecution rather than the defendant;**
 - **Either delete the addition to responsible of ‘any person who is responsible for the day-to-day operations of the registered provider’**
 - **Or narrow it substantially down and provide concrete guidance;**
 - **Add the following details to what reasonably practical means including:**
 - **the likelihood of the adverse effect concerned occurring; and**
 - **the likely degree of harm from the adverse effect; and**
 - **what the person concerned knows, or ought reasonably to know, about ways of preventing the adverse effect; and**
 - **the availability and suitability of ways to prevent the adverse effect; and**
 - **the rights of individuals under the Statement of Rights.**

Q18. Does the proposed definition of aged care digital platform appropriately identify the kinds of online platforms that should be regulated?

Aged Care Detail platforms

UnitingCare Queensland's agrees with the regulatory framework and responsibilities for digital providers. Where digital platforms take care and administration fees, they should will be made responsible for the service and care provided by their subcontractors.

We also consider it appropriate that digital platform providers be required to have complaints and incident management frameworks, including reporting obligations to the Serious Incident Reporting Scheme.

From a consumer perspective, it is reasonable to expect the ability to raise any incidents and issues they experience with workers engaged through a platform with the managers of that platform.

Therefore, digital platforms should come under the same complaints and incident reporting requirements as other registered providers. Even comparable service platforms such as Uber and Air BnB have complaints processes, and where online services do not have these mechanisms, consumer issues can and do occur.

We note the consultation paper could do a better job highlighting government regulation of digital providers that operate in Uber style model as and that the aged care digital platform is more like an online classified model.

We also note the current IT systems for both providers and workers are not sophisticated or easily accessible to provide real-time checks and could create Problems where out-of-date information is on websites.

Q19. What information should be displayed on aged care digital platforms to help protect people receiving services within the Commonwealth aged care system? What obligations should operators of digital platforms have to check information provided by aged care workers and registered providers? Can you identify any practical issues with operators validating the proposed information?

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Q20. Do the proposed additional obligations on digital platform operators address the key risks and areas of oversight for online platforms?

Same as (answered in) Q19

Q21. How does the proposed structure of Chapter 4 read to you?

UnitingCare Queensland notes the fees, payments and subsidies section is missing from the proposed Act and the details in the consultation are insufficient to form a view. Additionally, the Act notes much of the detail will also be delegated to the rules. Without these details we are unable to form a detailed or considered view.

As the largest provider across the four main programs (Residential Aged Care, Commonwealth Home Support Program, Home Care Package Program, and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program), we support the intent that Commonwealth funding must be used for a particular purpose rather than to deliver specific aged care services because it provides greater flexibility to deliver high quality, holistic person-centred care.

Q22. Do you think categorising the subsidies into person-centred and provider based reflects the person-centred approach to the new Act?

Same as (answered in) Q21

Q23. Are there any other improvements you would like to see made to the subsidy framework for the new Act?

Same as (answered in) Q21

Q24. Do you support registered providers being given access to specific additional Commonwealth funding which must be used for a particular purpose, rather than to deliver specific aged care services?

Our only caveat is that all funding should not be clawed back by the government and instead a more innovative arrangement needs to be considered, including funding to cover capacity provision costs.

Q25. Do you think there are any additional functions missing from the role of the Commissioner?

UnitingCare Queensland notes that whilst the roles of the System Governor and Commissioner are differentiated and relatively clear on what each does, there are additional considerations that would improve governance and operation of the aged care system.

The biggest issue with the proposed governance of the aged care system is the complaints commissioner is not independent of the aged care quality safety commissioner (the regulator). This would lead to a conflict of interest if they deal with complaints about the regulator. This could be solved by making them an Independent Statutory Authority that is supported by the aged care quality safety commissioner.

UnitingCare Queensland recommend the Complaints Commissioner becomes an independent Statutory Authority supported by the aged care quality safety commission.

Hidden in the Act is the fact the System Governor is both responsible for managing, analysing and reviewing coroner reports and findings as well as the outcomes of the system. This is clearly a conflict of interest under the proposed model.

UnitingCare Queensland suggests the management, analysis and review of coroner report and finds be moved to sit with the Inspector General of Aged Care or if an Independent Complaints Commissioner with them.

Additionally, we note there is conflict for the System Governor to be responsible for the enforcement and management of the supporter and representative regime.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or if the Complaints Commissioner becomes an independent Statutory as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing the complaints and whistle-blowing as well as the enforcement of duties and penalties.

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;
- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older Australians from people who seek to take advantage of them (i.e. stewardship of the system);

- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Q26. Is it clear how the roles of the System Governor and Commissioner differ, but also fit together, as regulators of the aged care system?

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Q27. Do you think the proposed arrangements for the Complaints Commissioner clearly demonstrate their role in the aged care system?

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Q28. Do you think there would be a benefit to requirements regarding liquidity and capital adequacy extending to home services providers, to protect continuity of care and monitor financial viability and sustainability in the home services sector?

Prudential requirements for Home Service Providers

UnitingCare Queensland's notes the Government is yet to release details of the new Support at Home Program. These details would inform whether a prudential requirement for liquidity and capital adequacy is required for Home Service Providers. There would be two reasons to impose a prudential regulation:

- 1) Holding significant amounts of government funds prior to expenditure

Based on the current arrangements for Home Care Package Program providers and Commonwealth Home Support Program providers, this is not required for sector-wide consideration given that providers no longer hold material amounts of government money. We note the current proposal for the Support at Home takes this further by only allowing services to be billed in arrears.

- 2) Consumer deposits

Home Service Providers do not hold any sizable deposits by consumers and as such do not require the regulation of the residential aged care providers

As such, UnitingCare Queensland does not believe the costs of a prudential system for Home Service Providers is less than the benefits based on the risk profile.

Q29. Do you consider the expanded powers made available to the Commissioner will ensure they can take a pro-active and risk-proportionate approach to the regulation of the sector?

The Act is proposing to expand, simplify and formalise many of the powers that are currently used by the Aged Care Quality and Safety Commission (the Commission). UnitingCare Queensland is supportive of such arrangements as long as they support a continuous improvement culture and no-fault element where possible.

The simplification of notices into three categories dependent on the rules published should help simplify when the Commission is sanctioning a Provider and provide clearer transparency and

accountability. It would be helpful for both the public and providers if the Department / the Commission published a map of how the new notices match to the existing notices including overlaps.

Additionally, further guidance is needed on how the no fault element is intending to work and how the penalties will be applied as a single breach may result in multiple offences. Furthermore, the size of the strict liability penalties needs to be weighed against the earning of the individuals it is intended to punish. In many cases in the Act, the size of fines is disproportionate and inconsistent amongst different classes of staff e.g. a personal carer faces a similar fine to a senior executive.

We also note that there needs to be further guidance and definitional material around the seizure of electronic equipment to ensure it is limited to where it does not compromise care and details of the tiered registration and penalties.

UnitingCare Queensland recommends that the Department / the Commission publish a map of how the new notices match to the existing notices including overlaps

UnitingCare Queensland recommends that the government publish further guidance on how 'no fault' provisions will work and how penalties will be applied

UnitingCare Queensland recommends that the review the size of fines and penalties considered who is it meant to be targeting to be consistent and proportionate

Q30. Do you have any concerns about the new powers for the Commissioner to enter a residential care home without consent or a warrant? Are there any additional safeguards you think should be put in place?

UnitingCare Queensland notes that 'new' powers for the Commission to enter a residential care home without a warrant is not really a new power given the current powers and that practically, we are unsure what this addition adds.

Q31. Does the new Act provide sufficient clarity regarding the role of the Department in managing the integrity of the aged care program? Is there anything you would like to see included in the new framework to ensure program assurance is maintained?

The Act is proposing to expand, simplify and formalise many of the powers that are currently used by the Aged Care Quality and Safety Commission (the Commission). UnitingCare Queensland is supportive of such arrangements as long as they support a continuous improvement culture and no-fault element where possible.

The simplification of notices into three categories dependent on the rules published should help simplify when the Commission is sanctioning a Provider and provide clearer transparency and accountability. It would be helpful for both the public and providers if the Department / the Commission published a map of how the new notices match to the existing notices including overlaps.

Additionally, further guidance is needed on how the no fault element is intending to work and how the penalties will be applied as a single breach may result in multiple offences. Furthermore, the size of the strict liability penalties needs to be weighed against the earning of the individuals it is intended

to punish. In many cases in the Act, the size of fines is disproportionate and inconsistent amongst different classes of staff e.g. a personal carer faces a similar fine to a senior executive.

We also note that there needs to be further guidance and definitional material around the seizure of electronic equipment to ensure it limited to where it does not comprise care and details of the tiered registration and penalties.

UnitingCare Queensland recommends that the Department / the Commission publish a map of how the new notices match to the existing notices including overlaps

UnitingCare Queensland recommends that the government publish further guidance on how 'no fault' provisions will work and how penalties will be applied

UnitingCare Queensland recommends that the review the size of fines and penalties considered who is it meant to be targeting to be consistent and proportionate

Supporters and Representatives

The Act seems to contradict the intentions noted in the consultation paper. Specifically, whilst it highlights it won't override State and Territory laws, by putting such terms into the Act, s109 of the constitution means that in actual fact the proposed regime in the Act would in fact likely override the laws of the State and Territory where there is inconsistency.

For instance, as drafted this could prove problematic in the First Nations space as it has the potential to cut across the Guardianship legislation at State and Territory level. Legislation frequently used in the NT to protect older Australians with dementia from financial abuse.

Additionally, we note the consultation paper and the Act are not clear on:

- The hierarchy and process for decision making;
- How it works in practice: who is the key representative and how it is managed;
- How the types of responsibilities and delegations will be split / allocated to supporters / representatives e.g. financial, personal, health etc.;
- loss of capacity removal;
- What the step into arrangement is;
- How the regime will deal with varying point in time directives e.g. enduring power of attorney and health directives;
- Conflicts in enduring power of attorney and health directives
- How it handles a decline in cognitive ability given it usually gradual and hard to notice;
- Who is responsible for arbitrating (managing) and enforcing representative duties including whistle-blowing and complaints reporting;
- How mental health issues and other comorbidities be accounted for;
- How the duties, rights and penalties proposed overlap with other State and Federal legislation; and
- How it complies with the Federal regulations on substitute decision-making and its consistency with NDIS and family law.

UnitingCare Queensland recommends rules be published and widely consulted on prior to the introduction of the new regime including clear

guidance on how the framework is intended to function, a comprehensive FAQ as well as clear responsibilities for handling of complaints and whistle-blowing. The current regime to be used in the interim.

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;
- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older Australians from people who seek to take advantage of them (i.e. stewardship of the system);
- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well

as the enforcement of duties and penalties.

UnitingCare Queensland notes that whilst the roles of the System Governor and Commissioner are differentiated and relatively clear on what each does, there are additional considerations that would improve governance and operation of the aged care system.

The biggest issue with the proposed governance of the aged care system is the complaints commissioner is not independent of the aged care quality safety commissioner (the regulator). This would lead to a conflict of interest if they deal with complaints about the regulator. This could be solved by making them an Independent Statutory Authority that is supported by the aged care quality safety commissioner.

UnitingCare Queensland recommend the Complaints Commissioner becomes an independent Statutory Authority supported by the aged care quality safety commission.

Hidden in the Act is the fact the System Governor is both responsible for managing, analysing and reviewing coroner reports and findings as well as the outcomes of the system. This is clearly a conflict of interest under the proposed model.

UnitingCare Queensland suggests the management, analysis and review of coroner report and finds be moved to sit with the Inspector General of Aged Care or if an Independent Complaints Commissioner with them.

Additionally, we note there is conflict for the System Governor to be responsible for the enforcement and management of the supporter and representative regime. **UnitingCare Queensland recommends an Independent Statutory Commissioner (or if the Complaints Commissioner becomes an**

independent Statutory as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing the complaints and whistle-blowing as well as the enforcement of duties and penalties.

Q32. What are the advantages and disadvantages of the proposed new critical failures powers? Are these powers necessary to ensure urgent and decisive action can be taken to protect older persons in residential care and maintain service continuity?

Critical Failure Powers

UnitingCare Queensland is unsure about the reintroduction of the seizure of failure powers due to a significant failure. This is due to there being a limited number of nurse advisors and administrators in the sector and uncertainty around if the government is willing to bear the cost of operating these facilities and how will the operational transition work e.g. will there be government aged care award etc.

At a practical level, the second limb of critical failure could be removed.

UnitingCare Queensland recommends that the government publish further guidance and definition around seizure of failure and significant failure.

Q33. Are the conditions identified to trigger the critical failures powers reasonable, or are there other conditions that could be considered?

Same as (answered in) Q33

Q34. Do you agree with the proposed scope of protected information under the new Act? What information do you think should be protected under the new Act?

Information management by both providers and government is an essential component for a successful aged care system. The consultation paper does not adequately identify if its proposed solution is compliant with the Privacy Act and the best practice issued by the Office of the Privacy Commissioner.

UnitingCare Queensland recommends that the government engage with the Privacy Commissioner to ensure best practise.

Q35. What challenges could there be with the proposed whistle-blower framework, and do you have any proposed solutions?

Whistle-Blower Framework

UnitingCare Queensland is disappointed that the government has not listened to the wide array of stakeholders who pointed out the list of individuals proposed to take whistle-blower complaints is incredibly broad and covers volunteers and low-skilled staff.

This is a serious concern given the significant penalties for these individuals if they mishandle a whistle-blowing complaint. Indeed, many volunteers and aged care workers are from culturally and linguistically diverse backgrounds and significant attention and resourcing is needed to ensure the workforce is supported to understand and meet their legislative requirements.

The Act continues to use the definition of aged care worker that includes volunteers (s10 (4)a) and for entities with more than aged care services will be required to train

non-aged care workers in framework and aged care code of conduct.

Additionally, this part of the Act presents a duplication of the Corporations Act requirement to have whistle-blowing policy and framework

(<https://download.asic.gov.au/media/5702691/rq270-published-13-november-2019-20200727.pdf>).

Instead of again duplicating another piece of Federal legislation, **UnitingCare Queensland recommends that the government adopt the Corporations Act requirements and framework for whistle-blowers.** This will simplify the process and ensure that only properly qualified and skilled staff and an independent hotline are able to take whistle-blower complaints.

As the proposed arrangements are not currently in-step with the Corporations Act, whistle-blowers are exposed to significant risks and individual workers to significant penalties. Those who serve as volunteers are also not appropriately placed to take on these types of complaints.

*If the Government wishes to retain the proposed Act requirements, **UnitingCare Queensland recommends that:***

- **Whistle-blower complaints be restricted to appropriately qualified and skill staff members;**
- **Setup an independent hotline to take and investigate whistle-blower complaints under the complaint's commissioner; and**
- **Consider the proportionality of penalties for mishandling whistle-blower complaints given the wide range of pay and skill levels.**

Q36. What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

Same as (answered in) Q35

Q37. Do you have any concerns about review rights under the current aged care legislative framework that you would like to see addressed under the new Act?

A long-standing tradition of Australia's system of government is the ability to get an independent review of a decision including access to easily understandable and transparent information used to make that decision.

UnitingCare Queensland is particular concerned about the review rights related to aged care assessments identified in Chapter 2 under s398 and s399.

Additionally, the governance of representatives' particulars need review rights as highlighted below.

Governance of Supporter and Representative Framework

The transition to the new supporter and representative framework needs clear accountability for who is governing the system. The proposed Act and consultation paper are unclear about:

- What checks will be performed over supporters and / or representatives;
- Who will assess an older Australian is of sound-mind and free of any associated conflicts of interests;
- Who is responsible for the governance of this process and what penalties apply to them;
- Who will be responsible for the enforcement and protection of older Australians from people who seek

to take advantage of them (i.e. stewardship of the system);

- Who will manage the whistle-blower and complaint system associated with this framework; and
- What happens when an individual does not have people they can rely on to be a supporter / representative.

UnitingCare Queensland recommends an Independent Statutory Commissioner (or the Complaints Commissioner if they are made an independent Statutory body as recommended) be given the responsibility to manage and arbitrate the supporter and representative framework including managing complaints and whistle-blowing as well as the enforcement of duties and penalties.

Review of Aged Care Assessment

The ability to contest an assessment decision is clouded in mystery. The fact that the Act creates a mechanism for a computer program to help assign an assessment rating and priority speaks volumes about the complexity of how a classification decision is reached.

The lack of publicly available information for how computer programming and artificial intelligence will be used in this assessment context is deeply concerning.

We have learnt through the Robodebt Inquiry that the unchecked use of AI in a human service and welfare context can have deadly consequences. The lack of consultation and public scrutiny about the use of AI in the single aged care assessment process, which is scheduled to commence on 1 July 2024 alongside the Act, is alarming.

Coupled with the fact the Act does not provide a clear explanation of how a

decision is to be reviewed and changed, this is a high-risk area for Government. There is a need for greater accountability and transparency for how this process is going to function, and it needs to be understandable to all Australians.

UnitingCare Queensland recommends that a plain-english document be provided to older Australians to help them and their family and friends to understand their assessment.

UnitingCare Queensland recommends that where a classification decision is brought before a review, a person must manually re-assess the classification and be required to report any systematic issues to the System governor.

Q38. Are there any decisions that should only be delegated to staff of senior levels by the System Governor and the Commissioner?

UnitingCare Queensland believes that significant and serious decisions should be delegated to staff of senior levels by the System Governor or the Commissioner and include the assessment and penalty regime for serious and significant breaches / failures, as well as for the review of these decisions. Particularly there needs to be a clear and transparent process to get serious notices, authorisations and conditions reviewed.

UnitingCare Queensland recommends that senior staff should not delegate any lower the assessment and penalty regime for serious and significant breaches / failures as well as for the review of these decisions. Particularly there needs to be a clear and transparent process to get serious notices, authorisations and conditions reviewed.

Q39. Do you support a phased approach to reform?

The consultation paper into a new Aged Care Act (the Act) foreshadows it will be brought to Parliament in March 2024 at the earliest. Given this Act will supersede the previous Act that was introduced in 1997, there is a high likelihood that it may take months to pass Parliament. This would delay passage to May or June 2024 before an almost immediate start date of 1 July 2024. This very short timeframe would leave all participants in the sector scrambling to meet whatever changes or additions are made to the Act in the legislative process.

The changes generated by the new Act, include a new regulatory model, aged care quality standards, changes to the aged care quality safety commission, compensation framework, complaints framework, and new statutory duty of care. These changes will have flow on effects for existing policies, procedures, and IT systems across all frontline operations and back of house functions that will require significant investment, training, reworking of processes, and possible restructuring of organisations.

Adequate engagement and implementation timelines for all changes under the new Act is absolutely critical to avoid an expensive and chaotic implementation phase. Comparable legislative changes include the Royal Commission for Financial Services which is still undergoing implementation (over six years later); and the introduction of the 1997 Aged Care Act, which saw an implementation and transition period of four years.

Additionally, we note that the following sections of the Act are empty:

- The entirety of Chapter 4: fee, payments and subsidies

- Chapter Six, Part 11: Critical failure powers

We also note that the draft Act does not include the rules. The Act refers to rules 263 times throughout the Act and cover the following:

- Aged care service list
- Aged care funding
- Registration of providers including registration categories, conditions, eligibility, process, decision-making, timeframes, audits, penalties and suspensions, and registry
- Responsible person and suitability matters
- Aged care quality standards (draft standards but not the detailed rules)
- Workforce and care worker requirements
- Aged care code of conduct and associated matters
- Restrictive practises regime including reporting
- Representative and Supporter details
- Access to aged care including timeframes, eligibility, decision making process, assessments, reassessments, what services they can access, classification and prioritisation regime
- Information and data storage
- Incident management
- Complaints
- Whistle-blowing
- Financial and Prudential Standards
- Reporting requirements of providers

- 24/7 Registered Nursing requirements and any exemptions
- Regulations of the aged care digital platform regime
- Register of coroner's reports
- Regulatory powers of the Aged Care Quality Safety Commission
- Banning Orders
- Fees for services

UnitingCare Queensland recommends the publishing of a clear implementation timeline including the following items:

- **When guidance material will be issued for each relevant section;**
- **When interim rules, new draft rules, consultation periods and when the new rules will start;**
- **Outline the specified transition periods for sections that aren't being implemented from 1 July 2024;**
- **What success looks like to move onto the next stage of implementation; and**
- **Any grandfathering arrangements for existing arrangements and grace periods for implementation.**

The current timing of items for the Act means that there is insufficient time for a full and comprehensive regulatory impact analysis that transparently outlines the impact on providers and consumers. The last major change in this government's term, the analysis of capping home care charges, notably did not include if the cost of 24 / 7 registered nursing was classed as adequate and did not capture of the costs providers incurred due to quick turnaround time.

UnitingCare Queensland recommends that Regulatory Impact Analysis be conducted on the new Aged Care to an 'exemplary' standard to ensure changes benefit all Australians.

The current aged care funding system allocates funding on a status quo basis and does not provide funding or mechanisms for providers to charge additional fees or recoup these regulatory costs. As such, we support the provision of appropriate funding to assist providers with the transition to the new Act will provide a basis for ongoing funding for regulatory cost across the system.

UnitingCare Queensland recommends the Federal Government provide additional funding in the 2024-25 Federal Budget to assist aged care providers with the transition to the new Act and its associated regulatory changes based on Regulatory Impact Analysis.

This is vitally important for the residential aged care sector, with research conducted by both StewartBrown and the Department of Health and Aged Care (the department) showing that most providers are operating at a loss.

Staged Implementation of the Aged Care Act

UnitingCare Queensland is strongly supportive of a staged implementation approach for the implementation of the new Act as we strongly advocated in Stage 1 submissions. Given all the missing sections outlined previously included rules and missing chapters, we suggest that a staged approach is not just smart but an essential part of ensuring that older Australians continue to receive high quality whilst benefitting from the improvements proposed.

The key item to ensuring a successful staged implementation is a clear timeline including objectives and proposed success

milestones to highlight when the next stage implementation will happen.

An expensive in both time and cost exercise for all providers will be conducting a gap analysis of each of the sections that are changing from the current Act to the new Act. For instance, the list of items to review includes:

- How the Act's new objects, statement of rights and principles interact with our current operating processes
- How the new regulatory (registration) model interacts with our current process
- How the new responsible person obligation matches the current key personnel framework
 - How the new civil and criminal penalties apply and to what circumstances and what existing processes cover those risks
- How the new provider obligations (including subcontracting) compare to the current obligations including:
 - How the new statutory duty "as far as reasonably practicable, do not cause adverse effects to the health and safety of care recipients" compares to current requirements
 - How the new "significant failure and systemic pattern of conduct" requirement fits into existing risk and quality framework and processes
 - What the new single aged care service list regulatory structure means compared to current practice
 - Comparing the new audit requirements to current state, including new entry powers for the regulator
- Comparing the new aged care quality standards to the current age care quality standards and what needs to change
- Ensuring incident management systems in place are compliant with new rules
- How the new "ceasing to provide services" obligation to the current regime
- How the current responses to the new "notices and powers" regime of the regulator
- How our current complaints and compensation framework to the new proposed framework (including a Complaints Managements System)
- How our obligations under the new whistle-blower regime to current practice
- How our current and proposed consumer attraction and retention processes align to the new assessment model and access pathways
- How the current nominee arrangement to the new supporters and representative's arrangement
- How our information handling process and storage aligns with the new requirements

Just conducting this type comprehensive gap analysis can take between 2-12 months depending on the complexity of the organisation and changes and complexity of the new framework.

Additionally, any aged care providers prepare their budgets at least a year in advance. Budgeting for the proposed Act is already quite late for the 2024 – 2025 financial year, as the majority of providers would finalised their budgets in preparation for approval by their executives and their

board well before the implementation date of the Act.

Given the lack of specific details creating incredible uncertainty and variance for a gap analysis, whatever figure is budgeted is unlikely to be sufficient to cover the new Act changes from 1 July 2024. Indeed, its more likely provider is entering the financial year with no guidance / budget on what the new Act changes will cost will be in 2024 – 2025.

*As such, if funding is not provided in the 2024 – 2025 Federal Budget, **UnitingCare Queensland recommends that a two-year transition period be implemented.***

The following insights about phasing in the various changes proposed in the new Act depend on the details of the rules and other such interpretations to determine the cost of implementing the changes. Our recommendation based on available evidence suggests the following staggered implementation:

UnitingCare Queensland recommends the following phased in approach to the reforms:

- **Rights, principles, quality safety standards, registration requirements, assessment, eligibility, fees, payments and subsidies, all governance (except complaints see below), banning orders and review rights to start from 1 July 2024;**
- **Penalties regime and new notice period to start 3 – 6 months after comprehensive guidance and details are issued;**
- **Supporter and Representative framework to start from 1 July 2024 if our recommendations are adopted. Otherwise require 2 – 3 months (if funded) after comprehensive guidance and details are issued; otherwise 12 – 18 months if no funding provided;**
- **New notices, penalties, duty of care and critical failures to be**

implemented 6 - 12 months after comprehensive guidance and details are issued; and

- **Complaints, whistle-blower and information management requirements to be implemented 2 – 3 months (if funded) after comprehensive guidance and details are issued otherwise 12 – 18 months if no funding provided.**
- **Transition of supporter and representative arrangements for providers**
- The transition to the new supporter and representative arrangement by providers presents an expensive and complex due to the increased requirements proposed from the current arrangement.
- Under the current arrangement most nominated representatives are done verbally (often over the phone) and then documented in My Aged Care.
- The proposed arrangement would significantly increase administrative burden for older Australians, the Department and providers. Additionally, feedback from our teams indicates it is rare to see an Enduring Power of Attorney noted in the My Aged Care portal.
- These changes will require an interim arrangement to limit the number of supporters and representatives receiving communications whilst providers upgrade their IT infrastructure and Customer Relationship Management systems. This will be required as most provider's current systems only allow for a limited number of additional representatives and are often unable to filter and restrict information and communications by representative type. This transition cost should be funded.

- These changes will be both expensive and time-consuming as retraining and re-educating staff and the new processes will be required as well replacing and updating IT and communications systems.
- In addition, supported decision-making is new and novel to most Australians as it hasn't been applied more generally outside NDIS. This will require additional funding and advertising to explain expectations and requirements to consumers and their families as well as (usually face-to-face) training for aged care workers.
- **UnitingCare Queensland recommends the Government restrict the number of supporters and representatives to less than three until adequate funding for provider system upgrades is provided**
- **UnitingCare Queensland recommends the Government provide additional funding, training, guidance, promotional and educational activities to explain supported decision-making**

Q40. Do you consider this will allow for staged implementation and more time for consultation on key changes? Or do you consider that it will add complexity and prove challenging for the aged care sector?

Same as (answered in) Q39

Q41. What do you consider to be the benefits that will be delivered via each phase of the reforms?

Same as (answered in) Q39

Q42. Do you have any views on the best approach to schedule the implementation of these important reforms to help ensure a smooth transition and compliance with the new legislative framework?

Same as (answered in) Q39

Q43. Are there any particular reform initiatives that you consider must be prioritised for commencement? Alternatively, are there any initiatives that you think would benefit from delayed commencement?

Same as (answered in) Q39

Q44. What type of activities will you need to do to transition to the new aged care system (e.g. structural changes, staff training etc) and how much time will you need for these activities prior to the new system taking effect?

Same as (answered in) Q39

Q45. Are there factors that may impact your readiness for transition that you would like the Government to consider?

Same as (answered in) Q39

Q46. Do you have any concerns about the sector being ready to transition to the new aged care system from 1 July 2024? How much time do you think the sector realistically needs?

Same as (answered in) Q39

Appendix 2: Summary of UnitingCare Queensland

