



Law Council  
OF AUSTRALIA

# A new Aged Care Act: Exposure Draft— Consultation Paper No.2

Department of Health and Aged Care

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council is grateful for the contributions received from its National Elder Law and Succession Law Committee, National Human Rights Committee, Indigenous Legal Issues Committee, and its networks. The Law Council is also grateful to the following of its constituent bodies for their contributions to this submission:

- the Law Institute of Victoria (**LIV**)
- the Law Society of New South Wales (**LSNSW**)
- the Law Society of South Australia (**LSSA**); and
- the Queensland Law Society (**QLS**).

## Executive summary

1. The Law Council welcomes and supports the rights-based approach taken in designing the Exposure Draft of the Aged Care Bill (the **Exposure Draft Bill**). This represents an important step to implement the recommendations made by the Royal Commission into Aged Care Quality and Safety (the **Royal Commission**),<sup>1</sup> and an opportunity for Australia to domestically implement its international human rights treaty obligations with respect to older persons.<sup>2</sup>
2. At the same time, the Law Council is mindful of the significant resourcing and sustainability challenges faced by the aged care sector.<sup>3</sup> This includes a predicted shortfall of over 110,000 aged care workers by 2030 if the existing workforce expands at the current pace, and the need for at least an additional 17,000 aged care workers each year to meet basic standards of care whilst servicing a growing ageing population.<sup>4</sup>
3. Lifting the standard of aged care and attracting the resourcing and innovation needed for a sustainable Commonwealth aged care sector is a complex policy challenge that requires careful calibration across relevant stakeholders and Commonwealth portfolios, including Home Affairs and Attorney-Generals. This balancing act is reflected in the Law Council's recommendations about the Exposure Draft Bill.
4. There are five broad areas in which the Law Council recommends further work to advance and strengthen the Exposure Draft Bill:
  - (a) **A stronger rights—based foundation to the Act:** Increased reliance on Australia's international human rights treaty obligations will strengthen the Constitutional and rights-based foundation of the Act. Strengthening compliance mechanisms associated with the Statement of Rights will also elevate the current status of the Statement of Rights from an aspirational list of rights to a meaningful expectation of Commonwealth aged care recipients.
  - (b) **A supporters and representatives framework that is in tandem with State and Territory frameworks:** The current draft leaves open many questions about how the Commonwealth framework will interact with existing State and Territory guardianship and power of attorney laws. More work is required to ensure these legal frameworks work in tandem and do not create additional regulatory burdens for supporters and representatives and representatives.

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<sup>1</sup> The Royal Commission into Aged Care Quality and Safety, [Final Report: Recommendations](#), page 205 and Recommendation 1.

<sup>2</sup> The list of key human rights treaties engaged are the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966m 999 UNTS 171 (entered into force 23 March 1976, except Article 41 which came into force generally on 28 March 1979; entry into force for Australia 13 January 1980, except Article 41 which came into force for Australia on 28 January 1993) (**ICCPR**); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008; entry into force for Australia 16 August 2008) (**CRPD**); *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (**CEDAW**); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (**CAT**).

<sup>3</sup> Mike Woods et al., '[Sustainability of the Aged Care Sector](#)' (Discussion Paper, University of Technology Sydney, 17 June 2022).

<sup>4</sup> Committee for Economic Development of Australia, '[Duty of Care: Meeting the Aged Care Workforce Challenge](#)' (Final Report, 9 August 2021), 6.

- (c) **Proportionate statutory liability for providers and responsible persons:** The proposed criminal penalties scheme for providers and responsible persons risks discouraging skilled workers from entering the aged care sector and discouraging innovation in the sector. It is also excessive in the context of other available regulatory responses—and therefore should be removed. Also, the definition of ‘responsible persons’ should be limited to Directors and senior Chief Executives, who are in a better position to exercise influence and control over an aged care provider.
  - (d) **Workable regimes for restrictive practices and whistleblowers:** Obtaining consent from an individual for a restrictive practice is practically and conceptually odd—Providers should instead only be permitted to engage in a restrictive practice in accordance with law, which is itself framed in line with Australia’s international human rights obligations, and with permission from an independent expert. The proposed whistleblower regime will be more workable if the reporting regime does not apply to ‘aged care workers’ generally, but, instead, applies to a select group of workers trained to receive and handle whistleblowers complaints. This will promote the appropriate handling and escalation of complaints.
  - (e) **Incorporating First Nations perspectives into design approaches:** Aspects of the Exposure Draft Bill, including the Statement of Rights and the definition of ‘high quality care’, would benefit from co-design in partnership with First Nations communities. This would deliver on the Government’s commitment under the National Agreement on Closing the Gap under Priority Reform One for shared decision making.
5. Given the significance of the proposed changes to the Commonwealth aged care sector and the need for further work with States and Territories, the Law Council recommends delaying the introduction and commencement of the new Aged Care Act until late 2024.
  6. The Law Council is grateful to the Department of Health and Aged Care (the **Department**) for the opportunity to make this submission. This submission is informed by the Law Council’s technical expertise in statutory frameworks, Australia’s international human rights obligations, and practitioner experience within the aged care framework. Given the timing of the consultation period, the Law Council has not responded to all questions in the Department’s Consultation Paper, but has instead focused its submission on select topics in the Exposure Draft Bill that its Constituent Bodies and Committees have raised.

# Comments on the Exposure Draft Bill

## Objects of the Exposure Draft Bill—section 5

### International human rights treaty obligations

#### Constitutional foundations

7. In Consultation Paper No. 1,<sup>5</sup> the Department noted a new Constitutional foundation for the new Aged Care Act, to reflect a rights—based approach and reliance on Australia’s international human rights treaty obligations. The Law Council understands that the new Aged Care Act will draw support from the external affairs power in paragraph 51(xxix) of the Constitution.<sup>6</sup> However, the Exposure Draft Bill has limited the international human rights treaties referenced to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *Convention on the Rights of Persons with Disabilities (CRPD)*.<sup>7</sup>
8. The Department states in Consultation Paper No. 2 that the Exposure Draft Bill only includes those international human rights treaties it considers relevant to the Constitutional authority of the new Aged Care Act.<sup>8</sup> It is difficult to definitively comment on this assessment without being privy to the advice that has led to this conclusion. Nevertheless, for the reasons below, the Law Council queries the Department’s assessment that only the ICESCR and CRPD are relevant to provide the Constitutional foundation for the new Aged Care Act and to manage associated legal risk:
  - (a) The external affairs power in paragraph 51(xxix) of the Constitution enables Parliament to make laws that give effect to obligations within international treaties to which Australia is a party.<sup>9</sup> To be a law with respect to “external affairs”, the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.<sup>10</sup> The High Court has affirmed that legislation need not give effect to every aspect of a treaty to be Constitutionally valid:

*It is competent for the Parliament, in a law under s51(xxix), partly to carry a treaty into effect or partly to discharge treaty obligations leaving it to the States or to other Commonwealth legislative or executive action to carry into effect or discharge the outstanding provisions or obligations or leaving the outstanding provisions or obligations unimplemented or unperformed.*<sup>11</sup>
  - (b) While we agree that important aspects of the Exposure Draft Bill are capable of being considered reasonably appropriate and adapted to give effect to provisions of the ICESCR and CRPD, the following provisions in the Exposure

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<sup>5</sup> The Department of Health and Aged Care, ‘[A New Aged Care Act: the foundations – Consultation Paper No.1](#)’, 12 (Consultation Paper No. 1).

<sup>6</sup> The new Aged Care Act may also be supported by paragraph 51(xxiiA) of the Constitution (which covers amongst other things the provision of pharmaceutical, sickness and hospital benefits, and benefits to family allowances).

<sup>7</sup> [Exposure Draft Bill](#), s 5(c); ICESCR; CRPD.

<sup>8</sup> See [Consultation Paper No.2](#), 14.

<sup>9</sup> *Richardson v Forestry Commission* (1988) 164 CLR 261 at 205 (Mason CJ and Brennan J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 106 (Gibbs CJ).

<sup>10</sup> *Victoria v Commonwealth* (1996) 187 CLR 416, 488-489 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>11</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 268 (Deane J).

Draft Bill (owing to their nature as civil and political rights) may carry a degree of Constitutional risk in relying solely on the CPRD:

- (i) The right to be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct;<sup>12</sup>
  - (ii) The right to fair, equitable and non-discriminatory treatment;<sup>13</sup>
  - (iii) The right to be treated with dignity and respect;<sup>14</sup> and
  - (iv) The right to respect for personal privacy and information.<sup>15</sup>
- (c) The CPRD's remit is limited to persons with disabilities.<sup>16</sup> While many individuals accessing Commonwealth-funded or -subsidised aged care will have disabilities, not everyone will. For example, a person accessing aged care support services in their own home may need support due to a lack of public transport to reach shops and other amenities, which is unrelated to disability. While recognising that a higher proportion of persons accessing aged care services are likely to have a disability, it is worth noting that only half of Australia's population aged 65 and older is living with a disability.<sup>17</sup> This may expose the above provisions listed in paragraph (b) above to a degree of Constitutional invalidity risk. The *International Covenant on Civil and Political Rights (ICCPR)* on the other hand apply to all persons, and if incorporated into section 5(a) will eliminate this risk.
- (d) Characterising Commonwealth-funded aged care system as a form of disability support (which reliance on the CPRD to the exclusion of the ICCPR could suggest) increases legal risk relating to discrimination based on age. The Commonwealth provides lesser funding to the aged care system compared with the National Disability Insurance Scheme (**NDIS**) (which is not available to persons 65 years or older).<sup>18</sup>
9. We therefore strongly recommend the inclusion of, at the very least, reference to the ICCPR in section 5(a) of the Exposure Draft Bill. The ICCPR forms the foundation of the rights specified in paragraph [8b] above. For the reasons set out in our previous submission of 29 September 2023,<sup>19</sup> we also recommend reference to the following international human rights treaties to strengthen the rights-based foundation of the new Aged Care Act:
- (a) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (**CAT**);
  - (b) the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**); and

<sup>12</sup> [Exposure Draft Bill](#) s 20(4); ICCPR art 7; CAT art 16.

<sup>13</sup> [Exposure Draft Bill](#) s 20(3)(c); ICCPR art 2; ICERD art 4; CEDAW art 4; CRPD art 4.

<sup>14</sup> [Exposure Draft Bill](#) s 20(3)(a). ICCPR preamble; CRPD art 3.

<sup>15</sup> [Exposure Draft Bill](#) ss 19(c)(iv), 20(5); ICCPR art 17; CRPD art 22.

<sup>16</sup> CRPD art 1.

<sup>17</sup> One in two (49.6%) people aged 65 years and over in Australia have a disability: Australian Bureau of Statistics, Disability, Ageing and Carers, Australia: Summary of Findings (2018) <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release>.

<sup>18</sup> *National Disability Insurance Scheme Act 2013* (Cth) ss 22, 29(1)(b).

<sup>19</sup> Law Council of Australia, '[A new Aged Care Act: the foundations – Consultation Paper No.1](#)', (29 September 2023), [14] – [19] (**Law Council 29 September 2023 Submission**).



- (c) the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**).

#### **Recommendation**

- **To support the Constitutional validity of the new Aged Care Act and strengthen its rights-based foundation, insert a reference to at least the ICCPR, but also the CAT, CEDAW and the ICERD in section 5(a) of the Exposure Draft Bill.**

#### **Interpretation of the Exposure Draft Bill**

10. To strengthen the rights-based foundation of the new Aged Care Act and for clarity in the law, the Law Council recommends inserting a section that requires the new Aged Care Act to be interpreted in a manner consistent with Australia's international human rights obligations. This would codify the following existing common law statutory interpretation principles:
- (a) the presumption that in the absence of clear and unambiguous language to the contrary, legislation be interpreted consistently with fundamental rights (*Coco v Queen*).<sup>20</sup>
  - (b) In the face of ambiguity in statutory language, that a Court favour the construction that accords with Australia's international law obligations, including international human rights law treaties (*Teoh*).<sup>21</sup>

#### **Recommendation**

- **Insert a new section in the Exposure Draft Bill requiring the new Aged Care Act to be interpreted in a manner consistent with Australia's international human rights treaty obligations.**

#### **Conflicting rights and a federal Human Rights Act**

11. In our previous submission of 29 September 2023, we set out some of the challenges involved in reconciling conflicting rights arising out of the new Aged Care Act.<sup>22</sup> This includes the need for careful policy design to avoid conflicting rights from arising, acknowledging those rights under international human rights law that are absolute (including freedom from torture, cruel, inhuman or degrading treatment or punishment),<sup>23</sup> and placing reasonable and proportionate limitations on other rights where conflicts arise. An example of this is when a decision made by one resident in an aged care facility (in exercise of their right to autonomy) exposes another resident or an aged care worker to a risk of harm—warranting reasonable and proportionate limitations on the rights of the first resident.
12. While the Exposure Draft Bill recognises in the Statement of Rights in section 21(2) that limits on rights may be necessary,<sup>24</sup> it does not provide any further guidance to providers (including what kinds of conflicts in rights or objectives may arise in the

<sup>20</sup> *Coco v Queen* (1993) 179 CLR 427.

<sup>21</sup> *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>22</sup> Law Council 29 September 2023 Submission, [110]-[117].

<sup>23</sup> ICCPR arts 6 and 7.

<sup>24</sup> It may be necessary to subject some rights to reasonable and proportionate limitations to ensure the enjoyment of rights by other persons.

delivery of aged care services, and what is considered a reasonable and proportionate limitation on rights).

13. To aid with providing clarity to providers about their obligations under the new Aged Care Act, the Aged Care Quality Standards (the **Quality Standards**) should provide a practical and legal framework (including contractual) how to balance and manage conflicting rights arising from within the Statement of Rights, as well as balancing the various objects of the new Aged Care Act. In this regard, Australia would greatly benefit from a federal Human Rights Act to enable the development of jurisprudence on appropriately managing these types of conflicts in various legislative contexts.<sup>25</sup>

#### Recommendations

- **The Aged Care Quality Standards should include a practical and legal framework for providers to understand how, through the legal framework, to identify when it might be necessary to apply a reasonable and proportionate limitation on an individual's right so as to ensure the enjoyment of the rights of others under the new Aged Care Act.**
- **The Australian Government should enact a federal Human Rights Act to allow for the development of coherent jurisprudence on Australia's international human rights treaty obligations.**

#### Additional objects

14. From a statutory construction perspective, the objects section plays an important role in the interpretation of the new Aged Care Act,<sup>26</sup> and in guiding discretionary decisions made under the new Aged Care Act.<sup>27</sup> Bearing this in mind, the Law Council recommends the inclusion of additional objects to reflect the following practical considerations underpinning the delivery of Commonwealth-funded aged care:
  - (a) Sustainability of the aged care sector: Australia's aged care sector is facing significant sustainability challenges. This includes the demand pressures resulting from an ageing population, supply shortages in skilled aged care workers, and relatively poor financial performance of aged care providers.<sup>28</sup> To meet future needs, innovation is required in the delivery of aged care services and the design of regulatory settings to attract skilled aged care workers. The legislative framework should enable this.<sup>29</sup>
  - (b) While paragraphs 5(g) and (h) of the Exposure Draft Bill touch on this issue, we recommend strengthening these provisions by also reflecting the need to promote policy and regulatory settings that will attract skilled aged care workers from both domestic and international labour markets; and encourage providers to actively innovate without being prejudiced if the desired results do not always eventuate.
  - (c) Dignified living in old age: Recommendation 1 in the Royal Commission's Final Report recommends that the objects of the new Aged Care Act include ensuring older people 'receive high quality care in a safe and caring environment for

<sup>25</sup> See Law Council of Australia, '[Federal Human Rights Charter – Policy Position](#)', (November 2020).

<sup>26</sup> *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>27</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

<sup>28</sup> Mike Woods et al., '[Sustainability of the Aged Care Sector](#)' (Discussion Paper), University of Technology Sydney (17 June 2022) 4.

<sup>29</sup> *Ibid* 33.

dignified living in old age'.<sup>30</sup> This purpose was described in the Final Report as the 'touchstone' for the administration of the new aged care system.<sup>31</sup> Recommendation 1 in the Royal Commission Final Report also encapsulates a balance between safeguarding international human rights obligations<sup>32</sup> through the delivery of 'high quality care in a safe and caring environment', whilst recognising that 'dignified living in old age' ultimately reflects the level of care and resourcing and corresponding levels of risk agreed between the provider and individual.

#### Recommendations

- **Include in section 5 of the Exposure Draft Bill further recognition of the need to balance the existing objectives with the need to ensure the sustainability of Commonwealth-funded aged care services, including encouragement of innovation to attract skilled workers and protection for providers from adverse consequences arising from such innovation.**
- **Insert an additional object in section 5 of the Exposure Draft Bill that 'ensures older people receive high quality care in a safe and caring environment for dignified living in old age'.**

15. Aside from paragraph 5(g) of the Exposure Draft Bill, the objects section does not specifically address the role and expectations of the aged care provider in achieving the objects of the new Aged Care Act. It would be useful from a certainty perspective to clarify the role of the relationship between the provider and the individual to achieve the objects.

#### Recommendation

- **Clarify the role of the aged care provider to achieve the specified objects in section 5 of the Exposure Draft Bill.**

## Key concepts—sections 8–10

### Meaning of 'retirement village', 'complex of buildings' and 'place'

16. The Exposure Draft Bill does not make clear what is meant by the terms 'retirement village', 'complex of buildings', and 'place', noting there are various forms of communal living for seniors.
17. The word 'place' is used ambiguously throughout section 9 of the Exposure Draft Bill. Paragraphs 9(3)(a) and (b) of the Exposure Draft Bill use 'place' to refer to location 'within' a hospital or retirement village, but also use 'place' to describe a location 'which is' a complex of buildings. This gives rise to the question of whether 'place' refers to a single room, collection of rooms, a section of a building, a collection of buildings or something else; and whether 'place' also applies to future builds.

<sup>30</sup> See Recommendation 1 of the *Royal Commission into Aged Care Quality and Safety* ([Final Report: Recommendations](#), 1 March 2021), 205.

<sup>31</sup> *Royal Commission into Aged Care Quality and Safety* ([Final Report: Executive Summary](#), 1 March 2021) vol 1, 80.

<sup>32</sup> *Ibid.* The Royal Commission stated that, 'people seeking aged care, their rights include the right to freedom from degrading treatment or any form of abuse, right to liberty, the right to autonomy and to make decisions about one's care, the right to fair and non-discriminatory treatment, and the right to voice opinions and make complaints.'

18. The significance of these concepts can be illustrated by the following scenarios:
- (a) a couple lives together in a serviced apartment in a retirement village where one person needs to access services in a residential care setting, and the other in a home care group setting. Can they both access services from the same setting or 'place'? Can that one setting be an approved residential care home where one person receives residential care funded services and the other individual receives home care funded care services?
  - (b) a complex of buildings which is a 'retirement village' (in the ordinary meaning of State and Territory legislation) may have sections that are 'converted' to be a 'residential care home', but the remainder of the complex of buildings is not. Does the concept of 'complex of buildings' only apply to a complex of buildings that are not a retirement village in any form?

#### **Recommendations**

- **In subsection 9(3) of the Exposure Draft Bill, clarify whether the term 'retirement village' is intended to pick up or adopt definitions from State and Territory legislation, and what is meant by 'place' and 'complex of buildings'.**
- **Clarify how sections 8 and 9 of the Exposure Draft Bill intend to address situations where multiple individuals are living in a single mixed setting environment, and whether they can access different funded care services in the same physical setting.**

#### **Indemnification for breaches by an associated provider**

19. Subsection 10(6) of the Exposure Draft Bill has the effect of attributing contraventions by an associated provider to the registered provider with which it has an arrangement. It is worthwhile clarifying whether this provision is intended to prohibit the registered provider from seeking an indemnity from the associated provider.

#### **Recommendation**

- **Noting the obligations set out for an associated provider under section 10(6), clarify whether a registered provider can seek indemnities from an associated provider for contraventions of the new Aged Care Act occasioned by an associated provider.**

#### **Definition of 'high quality care'—section 19**

##### **Context specific meaning**

20. The current definition of 'high-quality care' is vague and lacks an objective basis. At the same time, the Law Council recognises that this is intended to be a flexible concept that will inform objective Quality Standards. This may however result in differing definitions based on context. The concept of 'high quality care' is directly linked to the resources, capacity and capability of the provider to deliver the promised care services as well as the individual's capacity and willingness to pay for some of the elements referred to in section 19 of the Exposure Draft Bill. Thus, a concept of

'high quality care' in a metropolitan setting may be vastly different to the concept when delivered in a regional or remote setting.<sup>33</sup>

21. The Law Council welcomes the opportunity to review these Quality Standards and make more detailed comments on 'high quality care' once they are available.

### **First Nations considerations**

22. The Exposure Draft Bill does not define 'high quality care' in the First Nations context. We encourage the Department to use this opportunity to deliver on the Government's commitment under the Closing the Gap Agreement in Priority Reform One for shared decision making with First Nations people and their organisations.

#### **Recommendation**

- **The Department work in partnership with First Nations communities to co-design what is to encompass 'high quality care' in the First Nations context.**

## **Statement of Rights—section 20**

### **Contents of the Statement of Rights**

#### **Visitation rights**

23. Section 20(12)(a) of the Exposure Draft Bill includes a general right to safe visitation by family members or friends. While reasonable limitations to this right may be imposed (including in situations where visitations may pose a significant risk of harm to the individual or visiting persons, such as during a pandemic or health outbreaks including influenza or gastrointestinal diseases), this needs to be balanced with an older person's psychosocial, physical and emotional wellbeing.<sup>34</sup>
24. The LIV has pointed to two examples where the psychosocial and emotional wellbeing considerations are likely to prevail over the risk of significant harm to the individual or visitors:
  - (a) the close and continuing relationship that an individual may have with a representative or supporter, which causes the representative or supporter to play a significant role in promoting the psychosocial and emotional wellbeing of the individual;
  - (b) given the limited life remaining for individuals receiving palliative care or end-of-life care, the likelihood that an individual will prioritise connection with friends and family members over minimising the associated risk of harm from the visit.

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<sup>33</sup> Law Council 29 September 2023 Submission, [81] – [82].

<sup>34</sup> Note that CRPD art 19(b) states: 'Persons with disabilities have access to a range of in-home, residential, and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community'.

### Recommendation

- **Strengthen the visitation rights in section 20(12)(a) of the Exposure Draft Bill by including a guaranteed visitation right from an appointed representative or supporter, and a guaranteed visitation right where an individual is receiving palliative or end-of-life care.**

### Consistency with the ICCPR, CRPD and CAT

25. Paragraph 20(4)(a) of the Exposure Draft Bill currently reads as giving an individual the right to be 'free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct'. This list reflects a truncated version of article 7 of the ICCPR, articles 15 and 16 of the CRPD, and the CAT.
26. It is not clear to us why the Exposure Draft Bill does not include the words 'torture' and 'cruel'. These are important aspects of article 7 of the ICCPR, articles 15 and 16 of the CRPD, and the CAT. The Law Council considers it crucial to include these words in the Exposure Draft Bill to accurately reflect Australia's international human rights obligations, and appropriately respond to the more alarming findings of the Royal Commission regarding substandard care and elder abuse, including acts of deliberate harm towards older persons.<sup>35</sup>

### Recommendation

- **Insert into paragraph 20(4)(a) of the Exposure Draft Bill a reference to 'cruel' treatment and 'torture' to reflect underlying international human rights treaty obligations under article 7 of the ICCPR, articles 15 and 16 of the CRPD, and CAT.**

### First Nations considerations—'Island Home'

27. The Law Council has not received any objections from its Constituent Bodies or Committees on the proposed insertion of the term 'Island Home' into section 20(12)(c) of the Exposure Draft Bill.

### Compliance with the Statement of Rights

#### Link between Statement of Rights, registration and complaints handling processes

28. Subsection 21(3) of the Exposure Draft Bill has the effect of making the Statement of Rights unenforceable in a court or tribunal. Some of the feedback the Law Council has received has expressed dissatisfaction with this position, noting the lack of directly available remedy is without explanation, and downgrades the strength of the Statement of Rights to an aspirational list of rights.
29. While this position in the Exposure Draft Bill makes the Statement of Rights directly unenforceable, the Statement of Rights indirectly flows into the assessment of whether to register a provider (section 92), the reasonably practicable steps to discharge a registered provider's statutory duty (section 120), and as part of the investigation of complaints (sections 142 and 144). It appears to us that the intention is therefore to enable the Statement of Rights to be indirectly enforced through these

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<sup>35</sup>Royal Commission into Aged Care Quality and Safety ([Final Report: Executive Summary](#), 1 March 2021) vol 1, 80.

channels—and if this is the intent, we recommend making it clear in the Exposure Draft Bill.

#### Recommendation

- **Clarify that the Statement of Rights is intended to be enforced through the registration and complaints handling systems under the new Aged Care Act.**

30. It is also worth clarifying, through the Exposure Draft Bill or otherwise:

- (a) how compliance with the Statement of Rights will be demonstrated, assessed, and prioritised as part of the assessment of 'reasonably practicable' steps under subsection 120(2) of the Exposure Draft Bill, to promote the consistent application of this test; and
- (b) how the Statement of Rights aligns with the legal relationship and obligations agreed between the provider and individual, for consistency and clarity in legal obligations.

#### Recommendations

- **Provide clear guidance on how the Statement of Rights must be weighed and assessed as part of the registration and complaints handling processes.**
- **Provide clear guidance on how the Statement of Rights is weighed and assessed in determining the provider's compliance with its statutory duty in section 120 of the Exposure Draft Bill, and against the final arrangements made between the provider and the individual as to the services to be provided.**

#### Reporting requirements for providers

31. The Law Council has received a range of views on how to best promote compliance with the Statement of Rights. Members of the Law Council's National Human Rights Committee have suggested that the Statement of Rights be made enforceable, consistent with the right to a remedy for violations under international human rights law.<sup>36</sup> The LIV has suggested the introduction of a positive duty on providers to uphold the Statement of rights, similar to the recent amendments made to the *Sex Discrimination Act 1984* (Cth).<sup>37</sup>
32. Noting the significant changes that the Exposure Draft Bill encompasses for providers,<sup>38</sup> the capacity of providers in the sector at this time to meet higher regulatory burdens,<sup>39</sup> and the need to accord expectations with the size, nature, resources and circumstances of each provider, the Law Council recommends the inclusion of reporting requirements for providers to outline the steps they have taken to comply with the Statement of Rights. This could take the form of a standalone

<sup>36</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (UDHR) art 8; ICCPR art 2(3); ICERD art 6; CAT art 14(1); the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (GA Res 60/147, 3rd Comm, 60th Session, 64th plen mtg, Agenda item 71 (a) UN Doc A/RES/60/147 (21 March 2006, adopted 16 December 2005).

<sup>37</sup> *Sex Discrimination Act 1984* (Cth) s 47C.

<sup>38</sup> See [Consultation Paper No.2](#).

<sup>39</sup> Mike Woods et al., '[Sustainability of the Aged Care Sector](#)' (Discussion Paper), University of Technology Sydney (17 June 2022) 4.

annual statement which is published online, or a component of a provider's annual report, having regard to a set of guidelines and training resources on how to best weigh and assess the Statement of Rights in making implementation choices, and any form requirements prescribed by Rules.

#### **Recommendation**

- **Insert within the Exposure Draft Bill a requirement for providers to report annually on the steps taken to comply with the Statement of Rights.**

### **Supporters and representatives framework**

33. The Exposure Draft Bill at Chapter 8, Part 4 contains the appointment framework for supporters and representatives. The Part proceeds on the basis that:
- (a) A 'supporter' is a person that does not have a decision-making role, whereas a 'representative' does;
  - (b) An individual can either have supporters or representatives (but not both);
  - (c) An individual can appoint multiple supporters or representatives;
  - (d) The appointment process for a representative has two tracks: a fresh appointment through an application to the System Governor ('Commonwealth track'), or an appointment based on an existing State or Territory appointment ('the State/Territory track').

#### **Exclusivity of supporter or representative appointments**

34. The Law Council supports the position in subsections 374(5) and 376(7) of the Exposure Draft Bill for an individual to be able to appoint either supporters or representatives, but not both. This promotes clarity to the appointee as to their role and purpose and avoids conflicts that can arise if both exist.
35. Having both supporters and representatives appointed will likely give rise to conflicts. For example, the supporter's role is to aid the individual in their decision-making, and this could be undermined by a decision made by a representative. Furthermore, a representative's role subsumes aspects of the supporter role, including requesting, accessing or receiving information or documents in relation to the individual (see paragraph 24(a) of the Exposure Draft Bill).

#### **Requesting a supporter or representative appointment**

36. Consistently with the recommendations made by the Australian Law Reform Commission (**ALRC**)<sup>40</sup> and upholding the autonomy of the individual, the Law Council recommends the default position be that an individual (rather than a body or the System Governor) make supporter or representative appointment requests respectively when they have decision-making capacity. A body, the System Governor or other persons should only be able to seek appointments for an individual once the individual has lost decision-making capacity, or if there are continuing circumstances

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<sup>40</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, (Report 124, August 2014) 112 [4.100].



that pose insurmountable barriers to the individual to make the request (following consideration of how such barriers may be reasonably addressed).

37. To give effect to this position, the Exposure Draft Bill or the Rules will need to include a framework to assess when an individual has decision-making capacity. The Law Council suggests that the following issues be addressed by the framework:
  - (a) what constitutes decision-making capacity;
  - (b) who will have the responsibility for assessing decision-making capacity;
  - (c) how will that assessment be performed; and
  - (d) how quickly the decision can be made.
38. The Exposure Draft Bill will also need to clarify the scope of continuing individual difficulties that will allow for a body, the System Governor or another person such as a registered provider to make the request instead. This power should only be exercised as a last resort after all reasonable efforts have been expended to assist an individual in overcoming any barriers (to enable the individual to exercise their right to make the appointment).
39. The Law Council also recommends:
  - (a) adding 'interested persons' to the list of persons that can make a supporter or representative appointment request on the individual's behalf. This will capture advocacy groups that represent the individual, which may not fit within the definition of a 'body';
  - (b) adding the 'registered provider' to the list of persons that can make a representative appointment request, to allow for circumstances where an individual does not have any other support person.

#### **Recommendations**

- **Limit in sections 374 and 376 the ability for a body or the System Governor to seek an appointment to only those situations where an individual has lost their decision-making capacity, or when the individual's continuing circumstances make it difficult for the individual to make a request.**
- **Include in the Exposure Draft Bill or the Rules a framework for assessing when an individual has decision-making capacity.**
- **Define in the Exposure Draft Bill the scope of insurmountable barriers to the individual that will allow for a body or System Governor to make the request instead.**
- **Insert 'interested persons' (to include entities such as the registered provider) into the list of persons that can request an appointment in subsection 374(2) and paragraph 376(2)(a) of the Exposure Draft Bill.**

#### **Interaction of representatives framework with State and Territory laws**

40. The Law Council's Constituent Bodies have expressed significant concerns about the interaction of the proposed representatives framework in Chapter 8, Part 4 of the Exposure Draft Bill with State and Territory Laws.

41. There are many scenarios that the Exposure Draft Bill does not provide an answer to, or guidance for. The Department needs to work closely with State and Territory Governments to calibrate the Exposure Draft Bill's settings appropriately, and should also consider the following situations that might arise from recognising existing State and Territory appointments (noting that this is a non-exhaustive list):
- (a) How will the System Governor be notified in a situation where the individual's State and Territory guardian, who is already their representative as per subsection 376(4), ceases?
  - (b) What happens if a person requests to be appointed as a representative of an individual when another person is already appointed under State or Territory legislation (noting that the obligation to consider existing State or Territory appointments only arises under the Exposure Draft Bill if that appointed person has also made a representative appointment request—see paragraph 376(4)(b))? Will the State or Territory appointee be notified, and what can they do about it?
  - (c) How will the System Governor manage a situation where an individual might not like the fact that their existing State or Territory guardian is being appointed as their representative under? What will the System Governor do practically, noting the requirement in paragraph 376(6)(c) of the Exposure Draft Bill?
  - (d) How will the existing duties of the individual's State or Territory guardian or enduring attorney sit alongside the duties of a representative under the Exposure Draft Bill? What happens if these duties come into conflict?
  - (e) What happens in the transition phase if a person who is a guardian and currently providing instructions does not make application to be the 'representative' and the individual lacks capacity to appoint another person?
  - (f) How does the broad scope of a representative's actions under section 27 of the Exposure Draft Bill sit with the reality under State and Territory laws that multiple representatives are typically appointed to manage discrete aspects of an individual's affairs (e.g., one enduring guardian may be empowered to decide where the individual lives, another enduring attorney may be empowered to decide the types of services an individual receives and the payment of fees for such services)?
  - (g) What happens if the registered provider observes that the representative is not acting in accordance with their obligations? Will there be a mechanism for the registered provider to object to, compel the performance of or challenge the actions of the representative?
  - (h) How will the Department minimise the regulatory burden associated with recognising State and Territory appointments? (One way could be to have a rebuttable presumption in favour of their appointment, however, this could be challenging if there are conflicts between the duties set at the federal, state and territory level. It appears from Consultation Paper No. 2 that this approach is broadly the intent of the Exposure Draft Bill,<sup>41</sup> however this is not reflected in the draft legislation.

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<sup>41</sup> See [Consultation Paper No.2](#), 31.

## Recommendation

- The Department work closely with State and Territory governments to ensure that the new Aged Care Act complements State and Territory frameworks regarding guardianship and power of attorney.
- The new Aged Care Act provide clear direction within transitional provisions to allow for the continuation of State and Territory appointments while transition occurs for the role of ‘representatives’.

## Statutory duties of registered providers and responsible persons

### Definition of ‘responsible person’—section 11

42. The definition of a ‘responsible person’ in section 11 of the Exposure Draft Bill includes not only persons that are responsible for making executive decisions for a provider (such as directors and senior chief executives), but also to a range of middle management positions via paragraphs 11(1)(b) and (c). This extends the definition of a ‘responsible person’ to include roles such as a nursing manager, catering manager, and a cleaning manager (all of whom have responsibility over an aspect of the activities the provider undertakes, but not the whole).
43. The Law Council is concerned that this definition of a ‘responsible person’ is too broad, for the following reasons:
- (a) The statutory duty for responsible persons in section 121 of the Exposure Draft Bill imposes both civil and criminal penalties for breaches. As such, extending the definition of responsible persons to middle management is likely to have a chilling effect on the availability of qualified aged care staff at the middle management level (noting that adjacent sectors e.g., healthcare do not have this type of personal criminal and civil liability regime and therefore attract less risk to the worker). This result would only place even greater pressure on resourcing in the aged care sector, which is currently facing a skills shortage.<sup>42</sup>
  - (b) The extension of civil and criminal penalties to middle managers will also have a chilling effect on the incentives for providers and their staff to innovate, or to take any form of risks in the delivery of care even if requested by an individual.
  - (c) The civil and criminal penalties (including maximum penalties of 2 years’ imprisonment) for middle managers are not proportionate, given their limited sphere of influence on a provider’s organisational-wide activities. These penalties are particularly disproportionate in cases where there are systemic failures within a provider that middle managers cannot control (despite their control over a portion of the organisation’s activities), and which fall squarely within the responsibilities of directors and senior executives to manage.
44. The Law Council therefore suggests limiting the definition of a ‘responsible person’ to those senior executives that determine and exercise a higher degree of influence and control over the provider such as directors and senior chief executive.

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<sup>42</sup> See Mike Woods et al., ‘[Sustainability of the Aged Care Sector](#)’ (Discussion Paper), University of Technology Sydney (17 June 2022).

### Recommendation

- **Limit the definition of a ‘responsible person’ in section 11 of the Exposure Draft Bill by excluding from its scope managers that only have limited authority or control over the provider.**
- **Paragraph 11(1)(b) and subparagraph 11(1)(c)(ii) should be amended to exclude middle managers who may be responsible for operational aspects of a provider’s activities.**

### Criticisms of the statutory duties—sections 120 and 121

45. Section 120 of the Exposure Draft Bill places a statutory duty on providers to ensure, as far as reasonably practicable, that their conduct doesn’t cause adverse effects to the health and safety of individuals. Section 121 requires a responsible person to exercise due diligence to ensure the provider complies with its duty under section 120. Both provisions attract both civil and criminal penalties (including up to 2 years’ imprisonment).

### **Duplication of duties and multiple obligations**

46. It is not clear why these duties are required in addition to the duties under sections 19 and 27 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) or how they might differ from the duties in the WHS Act. The WHS Act already requires directors to exercise due diligence to ensure a safe work environment for employees and persons potentially affected by activities of the business (which would include aged care recipients). It is also unclear as to why a statutory duty on registered providers and responsible persons is required in addition to their obligations under the Quality Standards and the Aged Care Code of Conduct (**Code of Conduct**), *Corporations Act 2001* (Cth), and potentially also the Australian Charities and Not-for-profits Commission Governance standards.<sup>43</sup>
47. Additionally, there are several other obligations (in addition to the duties under section 120(1) and 121(1)) on registered providers and responsible persons throughout the Exposure Draft Bill, which overlap:
- (a) registered providers must comply with the Code of Conduct and take reasonable steps to ensure that aged care workers and responsible persons of the registered provider comply with the Code of Conduct (see paragraphs 90 (1)(a) and (b));
  - (b) registered providers must demonstrate that they understand the rights of individuals under the Statement of Rights and have in place practices designed to ensure the delivery of the aged care services that are not incompatible with the Statement of Rights (see paragraphs 92(1)(a)–(b));
  - (c) registered providers must demonstrate that they understand that the safety, health, wellbeing, and quality of life of individuals is the primary consideration in the delivery of funded aged care services (see subsection 92(2));
  - (d) registered providers must comply with the Quality Standards (see section 97); and

<sup>43</sup> *Corporations Act 2001* (Cth) s 180(1); *Australian Charities and Not-for-profits Commission Governance Standards* Standard 5.

- (e) registered providers must demonstrate their capability for, and commitment to, continuous improvement towards the delivery of high-quality care (see section 99).

48. Duplicating duties and incorporating multiple obligations across primary legislation can result in conflicting obligations, present difficulties for the individuals delivering aged care services in prioritising and fulfilling their various responsibilities. It also creates confusion, increases regulatory compliance efforts, and inadvertently contributes to the oversight of certain important obligations. Should these obligations remain, clear guidance needs to be provided on how to meet them concurrently and manage any conflicts.

### **Adequacy of the Banning Orders framework**

49. In the Law Council's view, the Banning Order framework in Chapter 6, Part 12 of the Exposure Draft Bill adequately acts as a deterrent against improper conduct by registered providers and responsible persons. It is therefore not necessary to impose additional statutory duties on registered providers and responsible persons.<sup>44</sup>

### **Criminal penalties attached to the statutory duties**

- 50. The Law Council received strong feedback recommending the removal of criminal penalties from the Exposure Draft Bill.
- 51. The LIV noted that the introduction of criminal penalties for responsible persons may undermine the aged care sector's capacity to attract and retain quality aged care workers and volunteers who serve as Board members and directors for not-for-profit providers. The LIV noted further that, given the aged care sector already has difficulty attracting and retaining well-skilled people due to low wages and poor employment conditions, the imposition of criminal offences could lead aged care workers to seek employment options with less risk.
- 52. Members of the legal profession also noted the inherent injustice and unfairness to impose criminal penalties on negligent acts that are systematic failures of process. In those circumstances, there should be a level of intent or recklessness to enliven a criminal standard of responsibility for a breach of a statutory duty. Furthermore, it is unclear to us whether the Department has had regard to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,<sup>45</sup> and the range of relevant matters in proposing criminal offences (defences) and the framing and appropriateness of strict liability offences.
- 53. Accordingly, the Law Council recommends removing the criminal penalties associated with the statutory duties under sections 120(1) and 121(1) of the Exposure Draft Bill.

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<sup>44</sup>Law Council Australia, ['Aged Care and Other Legislation Amendment \(Royal Commission Response No.2\) Bill 2021](#), (8 November 2021) [86] – [116].

<sup>45</sup> Attorney-General's Department, ['A Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers'](#), September 2011 Edition, (9 January 2013).

## Compensation for breach of statutory duties

54. Should the Department retain a compensation mechanism within the Exposure Draft Bill in section 127 or otherwise, members of the legal profession have recommended that it be made clear:
- (a) that compensation can only be sought from a provider entity, and does not extend to 'responsible persons' (which is undesirable for the reasons described at paragraphs [42]–[44] above);
  - (b) that compensation be limited to those individuals that are receiving Commonwealth-funded aged care services (consistent with the objective of the legislation being a rights-based Act centred on aged care recipients);
  - (c) that the statutory limitation period be 3 years except with leave of the court<sup>46</sup> (this reflects the position of personal injury regimes in various Australian jurisdictions and avoids the complexity that arises with the passage of time in this context).<sup>47</sup> This includes evidentiary issues as changes occur to provider staffing and the services rendered to an aged care recipient, and the prejudice experienced by a provider in managing corresponding contingent liabilities, including in the potential sale of a provider business).

### Recommendation

- **Remove the separate statutory duties on registered providers and responsible persons.**
- **If the statutory duties framework under sections 120 and 121 of the Exposure Draft Bill remains, then:**
  - **provide clear guidance to individuals and providers involved in delivering Commonwealth-funded aged care services to effectively manage any competing obligations;**
  - **remove the criminal penalties associated with the statutory duties under subsections 120(1) and 121(1) of the Exposure Draft Bill.**
- **The statutory compensation mechanism under section 127 of the Exposure Draft Bill should:**
  - **clarify that the term 'entity' does not include responsible persons;**
  - **clarify that the term 'individual' refers only to recipients of Commonwealth aged care services; and**
  - **reduce the limitation period from 6 years to 3 years, consistent with personal injury limitation periods in Australian jurisdictions.**

<sup>46</sup> The Law Council recommends that such leave be granted after satisfying certain prescribed criteria. This could include for example if an action is only discovered later.

<sup>47</sup> See for example *Limitation Act 2005* (WA) s 14 (personal injury - 3 years); *Limitation Act 1985* (ACT) ss 16-16B (limitation period varies depending on the type of compensation); *Limitation Act 1969* (NSW) s 18A (personal injury – 3 years); *Limitation of Actions Act 1958* (VIC) s 5(1A) (personal injury – 3 years); *Limitation of Actions Act 1974* (QLD) s 11(1) (personal injury – 3 years); *Limitation of Actions Act 1936* (SA) s 36 (personal injury – 3 years); *Limitation Act 1981* (NT) s 17 (actions under the *Fatal Injuries Act 1974* (NT) has a limitation period of 3 years); *Limitation Act 1974* (TAS) s 5A(3) (personal injuries – 3 years).

## Restrictive Practices

### Restrictive practice in relation to individual—section 16

55. The Law Council recommends the following amendment to section 16(1) of the Exposure Draft to include the terms ‘activity’ and ‘ability to make decisions’ as follows:

A **restrictive practice** in relation to an individual is any practice, **activity**, or intervention, that has the effect of restricting the rights, **ability to make decisions**, or freedom of movement of that individual.

56. The proposed amendments above are consistent with the Royal Commission’s working definition on restrictive practices.<sup>48</sup> The inclusion of the term ‘activity’ covers an ad-hoc action that nevertheless restricts a person’s movement or ability to make decisions. The term ‘ability to make decisions’ in the Royal Commission’s working definition captures chemical restraints—that is ‘psychotropic medicines, which are capable of affecting the mind, emotions and behaviours of a person’.<sup>49</sup>

### Restrictive practice requirements—section 17

57. The Law Council recommends the following amendments to section 17 of the Exposure Draft Bill:
- (a) that any breach of the requirements in the use of restrictive practices should attract civil penalties with the ability to seek an order for compensation. This is consistent with recommendation 17(3)(b) in the Royal Commission’s Final Report which states that ‘any breach of the statutory requirements of engaging in restrictive practices should expose the approved provider to a civil penalty at the suit of the regulator’ and should have the power of ‘seeking an order of compensation’ should the affected individual wish to be compensated;<sup>50</sup>
  - (b) amend paragraph 17(1)(g) to include the term ‘regular’ to align with the Royal Commission’s recommendation that there should be a regular review of the use of restrictive practices (see Recommendation 17(b)(iv) in the Royal Commission’s Final Report);<sup>51</sup>
  - (c) given the conceptual difficulties of an individual or a substitute decision maker providing informed consent to a restrictive practice, we recommend deleting paragraph 17(1)(f) and subsection 17(2). The Law Council’s position on this largely aligns with the concerns raised by Dr John Chesterman in his article titled ‘*More Work Needed on the Aged Care Bill*’.<sup>52</sup> Dr Chesterman notes that ‘asking a person to consent to their own restrictive practices is simply odd. Asking someone else to consent on the individual’s behalf is equally problematic, especially when there is an increasing requirement that substitute decision-makers make decisions that accord with the “will and preferences” of the individual’.<sup>53</sup> The Law Council agrees with Dr Chesterman’s conclusion that

<sup>48</sup> *Royal Commission into Aged Care Quality and Safety (Final Report: Care, Dignity and Respect: Volume 2: The current system*, 1 March 2021) vol 2, 97.

<sup>49</sup> Ibid 98.

<sup>50</sup> See Recommendation 17 of the *Royal Commission into Aged Care Quality and Safety (Final Report: Recommendations*, 1 March 2021) 221-222.

<sup>51</sup> Ibid 221.

<sup>52</sup> Australian Ageing Agenda, Dr John Chesterman ‘*More work needed on aged care bill*’ (22 January 2024).

<sup>53</sup> Ibid.

it is sufficient for a restrictive practice to be administered in accordance with law;<sup>54</sup>

- (d) amend subsection 17(3) to include the term ‘reasonable’ after the term ‘necessary’ for the use of restrictive practices in an emergency; and note that the necessity may only arise ‘to avert the risk of physical harm’ to the individual or any other person (which would include another individual, aged care worker or a third party). What is considered ‘necessary in an emergency’ is broad and subjective, and opinions may differ. In contrast, ‘reasonably necessary’ is an objective test.

### Recommendations

- **Amend the restrictive practices definition under subsection 16(1) of the Exposure Draft Bill by including the terms ‘activity’ and ‘ability to make decisions’.**
- **Include an additional mandatory requirement under subsection 17(1) that any breach of the requirements in the use of restrictive practices should attract civil penalties with the ability for the regulator to seek an order for compensation.**
- **Amend paragraph 17(1)(g) to include the term ‘regular’ to align with the Royal Commission’s recommendation that there should be a regular review of the use of restrictive practices on an individual.**
- **Delete paragraph 17(1)(f) and subsection 17(2) due to the conceptual difficulties of an obtaining informed consent from an individual or a substitute decision maker to engage in a restrictive practice.**
- **Amend subsection 17(3) to ensure the use of restrictive practices in emergency situations is ‘reasonably necessary’ and make clear that the necessity may only arise ‘to avert the risk of physical harm’ to the individual or any other person.**

### Suggested information to include in the Rules regarding restrictive practices

58. The Law Council suggests the following information be included in the Rules—which should be disallowable legislative instruments—regarding restrictive practices:
- (a) definitions for the different types of restrictive practices which so far include physical, environmental, mechanical, verbal, seclusion or pharmacological. This information is best placed in subordinate legislation noting that the concept of restrictive practices may change over time and differ between States and Territories;
  - (b) the situations where compliance with the mandatory criteria under section 17 of the Exposure Draft Bill is not required, including situations where an individual may request an action that may restrict their freedom of movement for their own safety;<sup>55</sup>
  - (c) a requirement to seek authorisation from an independent expert before engaging in a restrictive practice. This is consistent with recommendation 6.35 in the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Disability Royal Commission**) which

<sup>54</sup> Ibid.

<sup>55</sup> Law Council Australia, [Aged Care and Other Legislation Amendment \(Royal Commission Response No.1\) Bill 2021](#), (7 June 2021) [66] – [71].



notes that ‘decisions to authorise restrictive practices should be subject to independent review, oversight and monitoring’.<sup>56</sup> If the Department considers including this requirement in the Rules, it will need to consider:

- (i) the process to engage an independent expert;
- (ii) the processes that need to be in place to provide authorisation;
- (iii) how quick a decision can (or should) be made in emergency situations;
- (iv) defining what is considered an ‘emergency’ under subsection 17(3). This will greatly assist the person delivering the aged care service and the independent expert when deciding whether to authorise and use a restrictive practice.

### Recommendations

- **Information in the Rules regarding restrictive practices should:**
  - **define the different types of restrictive practices;**
  - **provide for situations where compliance with the mandatory criteria under subsection 17(1) is not required if an individual requests an action to be taken that may restrict their freedom of movement, for their own comfort and safety;**
  - **require the use of restrictive practices to go through an independent expert and assessment; and**
  - **define what is considered an ‘emergency’ under subsection 17(3).**
- **The Rules should be disallowable legislative instruments to ensure appropriate parliamentary scrutiny.**

## Whistleblower regime—section 355

59. Members of the legal profession have raised concerns regarding the inclusion of ‘aged care workers’ under subparagraph 355(a)(iv) as persons who are able to receive disclosures of information from an individual.
60. Widening protected disclosures to aged care workers will likely result in an inadequate escalation of disclosures, and a lack of understanding of obligations to escalate complaints received. The current formulation captures a wide range of staff including food service assistance, maintenance staff, and other ad-hoc forms of care who may not be aware of the whistleblower protections or understand their obligations.
61. The wide-ranging nature of an aged care worker also adds a significant burden on providers to educate and train staff. The LIV also notes that many aged care workers are from culturally and linguistically diverse backgrounds, and may require training to be provided outside of their standard working hours. This may impede their ability to receive comprehensive, tailored training.

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<sup>56</sup>See Recommendation 6.35 of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, ([Final Report: Executive Summary, Our vision for an inclusive Australia and Recommendations](#), (29 September 2023) 233.

62. The Law Council instead recommends an approach similar to that undertaken in the *Public Interest Disclosure Act 2013* (Cth) through the appointment of certain aged care workers as ‘authorised officers’.<sup>57</sup> This would allow a provider to appoint specific workers within the organisation to receive, identify and handle whistleblower complaints, enable the deployment of targeted training to these workers, and ultimately facilitate the effective escalation of whistleblower complaints.

#### Recommendation

- **Remove the reference to ‘aged care worker’ in subparagraph 355(a)(iv) of the Exposure Draft Bill and replace it with a new concept similar to an ‘authorised officer’ in the *Public Interest Disclosure Act 2013* (Cth). An authorised officer will be appointed by the provider and receive training on receiving, identifying, and handing whistleblower complaints.**

## Contractual arrangements between individuals and aged care providers

63. The new Aged Care Act should address the status of contractual arrangements between providers and recipients and the interaction between these arrangements and statutory rights and obligations.<sup>58</sup>
64. The Law Council understands that Chapter 4 is still currently being drafted. However, it recommends the Department consider the following features when considering the legislative provisions regarding the contractual arrangements between individuals and aged care providers:
- (a) what services will actually be provided;
  - (b) the cost of those services;
  - (c) who is liable to pay for the services; and
  - (d) the extent to which other contractual matters, such as the consequences of a breach of contract and the relevant rights of third parties, will be regulated under the new Aged Care Act.

#### Recommendation

- **The Department consider how Chapter 4 of the Exposure Draft Bill will address the status of contractual arrangements between providers and recipients and the interaction between these arrangements, and statutory rights and obligations.**

## Role of the Commissioner and Complaints Commissioner

### The engagement and educative role of the Commissioner—section 143

65. Given there are several obligations that are imposed on registered providers, responsible persons and aged care workers throughout the Exposure Draft Bill, the Aged Care Quality and Safety Commissioner (**Commissioner**) should provide plain

<sup>57</sup> *Public Interest Disclosure Act 2013* (Cth), ss 36 and 42.

<sup>58</sup> Law Council 29 September 2023 Submission, [13], [72] - [74].

English explanations on the legislative provisions that govern each of their roles, and information on how to manage any competing obligations. The Law Council suggests that paragraph 143(d) of the Exposure Draft Bill be amended to this effect.

66. The Commissioner should also consider expanding its engagement and educative function on restrictive practices to persons who deliver aged care services. Understanding the restrictive practices framework in the practical context is necessary and will require significant training and understanding. Therefore, the Law Council suggests that section 143(d) be amended to include education on restrictive practices.
67. Finally, the Commissioner should also consider what kind of assistance aged care providers and other people delivering aged care services can receive in helping individuals update or prepare a will. The LIV has suggested that this could include facilitating the meeting for the individual with their requested lawyer and providing general personal support.

#### **Recommendations**

- **The Commissioner’s educative and engagement function be expanded under section 143(d) to provide plain English explanations of the legislative provisions that govern the role of persons who deliver aged care services; and restrictive practices.**
- **The Commissioner to consider what kind of assistance it may give to persons delivering aged care services to ensure that aged care recipients have appropriate access to expert advice and assistance with respect to will preparation.**

#### **Complaint handling in the Rules—section 183**

68. The Law Council recommends that the complaints scheme in the Rules (to which the Commissioner must have regard under section 183 of the Exposure Draft Bill) should include appropriately staffed and notionally available residential aged care facility inspectors who can:
  - (a) visit each facility on at least a quarterly basis;
  - (b) make unscheduled visits to facilities on an ‘as required’ basis;
  - (c) inspect facilities and conduct in person or phone conversations with residents and/or their supporter or guardian; and
  - (d) issue fines and take other appropriate actions in circumstances where an aged care provider facility is not compliant.
69. To ensure that inspectors have regard to all relevant materials, we also recommend including an obligation on inspectors to have regard to the contract between the provider and individual. This will assist the inspector in establishing the nature of the agreed services, including the range, standard, timing and elements.

### **Recommendations**

- **The information required in the Rules concerning how the Complaints Commissioner must deal with complaints must allow the Complaints Commissioner and its staff to:**
  - **visit each facility on at least a quarterly basis;**
  - **make unscheduled visits to facilities on an ‘as required’ basis;**
  - **inspect facilities and conduct in person or phone conversations with residents and their supporter or guardian; and**
  - **issue fines and take other appropriate actions in circumstances where an aged care provider facility is not compliant.**
- **Any complaints scheme must include an obligation on inspectors to consider the overall relationship of the parties including the contract made between the parties as to the range, standard, timing and elements of services to be provided.**

## Implementation considerations

### Commencement date for and review of the new Aged Care Act

70. The Law Council recommends revising the commencement date of the new Aged Care Act from 1 July 2024 to December 2024. This is due to significant parts of the Exposure Draft Bill being incomplete;<sup>59</sup> the absence of a finalised version of the draft Quality Standards, the Rules, and the Transitional Arrangements Exposure Draft Bill; and the need to give providers sufficient time to adjust their systems and processes to comply with the new Aged Care Act.
71. The Law Council also recommends staggering the commencement of the new Aged Care Act to enable sufficient time for compliance by providers, supporters, and representatives. The Department may wish to consider a staggered implementation of the provider's statutory duty based on the size of a provider, with smaller providers being given additional time and assistance with meeting their compliance obligations.
72. Ideally, the provisions relating to the appointment of supporters and representatives commence first, to allow time for State and Territory appointees to set up their appointments under the new Aged Care Act prior to the whole new Aged Care Act coming into force. To minimise the regulatory burden in establishing these appointments, the Department may wish to allow for the 'deeming' of enduring guardians under State and Territory legislation to be automatically nominated as 'representatives' for the purposes of the new Aged Care Act, and allowing a period of time for them to opt out (rather than an opt-in system).
73. The Law Council also recommends that there be a process to review the operation of the new Aged Care Act after a period of time. This will assist in assessing the effectiveness of the Act in meeting its objectives and allow for any further amendments necessary to give effect to the same.

#### Recommendations

- **The Department revise the commencement date of the new Aged Care Act from 1 July 2024 to late 2024 to give providers, supporters and representatives sufficient time to adjust their systems and processes to comply with the new Aged Care Act.**
- **The Department consider a process to review the operation of the new Aged Care Act after commencement.**

### Further consultation processes

74. It is imperative that the Department takes the time to consult in further developing this Exposure Draft Bill. Reforming the aged care system is a complex and critical endeavour that requires careful consideration and thorough consultation with stakeholders, including aged care providers, health care professionals, advocacy groups, State and Territory governments, and the elderly population. The new Aged Care Act will represent a transformational change to the delivery of Commonwealth funded aged care services, and successful implementation will take time.

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<sup>59</sup> The remaining parts of the Exposure Draft Bill are Chapter 2, Part 4 and 5 (relating to prioritisation and place allocation respectively); Chapter 4 (relating to fees, payments, and subsidies); Chapter 6, Part 11 (relating to critical failures powers); Chapter 8, Part 2 (relating to review of decisions); and Chapter 8, Part 11 (relating to the Rules).