

Consultation Submission

New Aged Care Bill 2023 (“the Bill”) – Exposure Draft December 2023

Introduction

RSL LifeCare is a trusted sector leader, dedicated to providing exceptional care and support to both veterans and seniors across Australia.

RSL LifeCare is one of only a few organisations that deliver such a wide range of services. Our organisation has provided care and support services that respond to the needs of our community for more than a century. We are unrivalled in our dedicated support for veterans, particularly during the transition from military service to civilian life. Beyond veteran care, RSL LifeCare provides services in Home Care, Retirement Living and Residential Aged Care, with the goal of supporting each of these communities to live their best lives.

<p>Veteran Services</p> 	<p>Enriches the lives of veterans and their families by providing a range of wellbeing programs, claims and advocacy assistance, employment, and housing support.</p>	<p>Operates four Veteran Wellbeing Centres:</p> <ul style="list-style-type: none"> • Riverina – opened March 2022 • Nowra – opened December 2022 • Northern Beaches – opened February 2023 • Hunter – opened March 2023 	<p>2,395 veterans or families of veterans were provide with support.</p>
<p>Home Care</p> 	<p>Empowers our clients by providing choice and quality services to support independence in their homes and community.</p>	<p>Operates from 22 locations across NSW and the ACT</p>	<p>4,649 veterans and seniors were supported by our home care services.</p>
<p>Retirement Living</p> 	<p>Operates retirement living villages to create proud communities and enrich residents' lives.</p>	<p>Manages 27 retirement living villages across three regions:</p> <ul style="list-style-type: none"> • Greater Sydney and South Coast Region • Northern Region • Sydney North and South and ACT Region 	<p>2,923 veterans and seniors called our villages home.</p>
<p>Residential Aged Care</p> 	<p>Operates residential aged care homes that deliver quality care and enable residents to live their best lives.</p>	<p>Manages 29 residential aged care homes across four regions:</p> <ul style="list-style-type: none"> • Northern NSW • Western Sydney and South West NSW • Metro Sydney and Western NSW • ACT and Far South NSW 	<p>3,886 veterans and seniors were cared for in our homes.</p>

Our Story

Our journey started in 1911 when we recognised the need and advocated tirelessly for a solution to help veterans living in poverty. In 1912 we achieved our goal and officially opened The Veterans Home on Bare Island, Botany Bay.

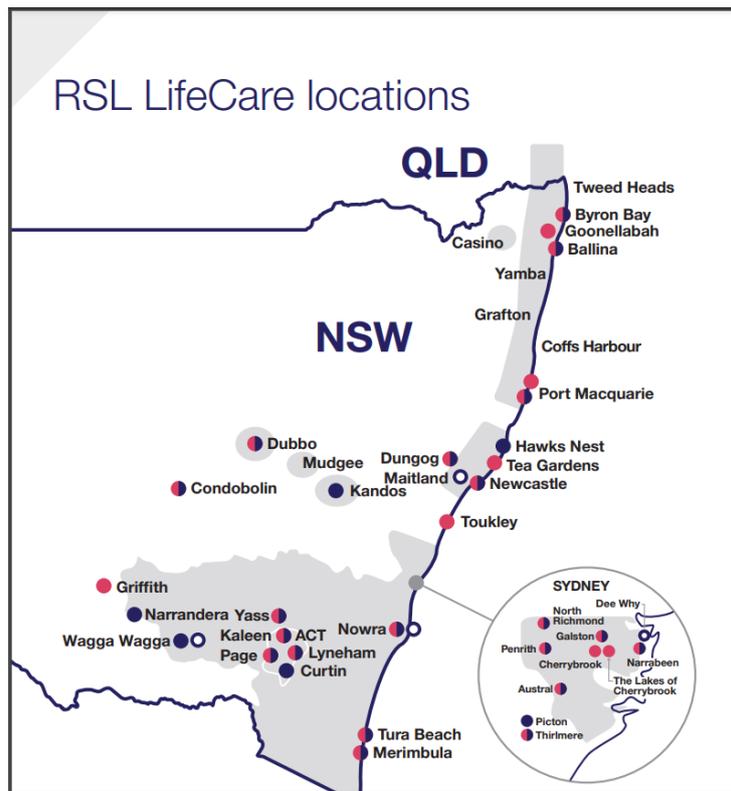
Crossing the bridge to Bare Island signified new chapter for these veterans. A brighter future where they could live rewardingly, with purpose, in a proud community.

Today, our rich heritage has afforded us unique insight into the diverse and evolving needs, goals and desires of veterans, seniors and their families during life transitions.

Our integrated range of wellness and care solutions reflects this diversity, empowering emerging generations with the confidence they need to make decisions that will enrich their lives.

Tomorrow, our team will continue to build proud communities, anticipate change and champion meaningful innovation.

Veterans and seniors will trust us to add life to their years and honour our legacy of supporting them with the individualised care and support they desire.



Our Contribution to the new Aged Care Bill

RSL LifeCare welcomes the opportunity to provide a response to the current consultation on the draft exposure new Aged Care Bill. We support the intention to strengthen this legislation, ensuring it underpins a respectful, transparent, and effectively regulated aged care system that prioritises quality of life, the rights and needs of older people and supports aged care providers, and workers across the aged care sector in achieving these goals.

While acknowledging the positive shift in focus from funding and providers to the individual, we highlight the importance of strengthening the Bill to encompass all facets of aged care. We advocate for comprehensive reform that champions person-centered care, fosters respect, and raises awareness of the need for a greater focus on the diversity and inclusion needs of everyone involved in the aged care ecosystem.

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Summary of Key Recommendations

Commencement Date

RSLLC recommends maintaining the July 1, 2024, commencement date for aged care reforms, however stresses the need for flexibility if subordinate legislation significantly alters these regimes. We propose at least a twelve-month transition period post-issuance of subordinate legislation to accommodate adjustments, particularly in revising policies, conducting staff training, and updating IT systems. RSLLC emphasises the importance of adequate time for these revisions to mitigate the significant risk of implementing such complex change in such a short period. Overall, we advocate for a balanced approach to ensure timely implementation while addressing practical considerations for aged care providers.

Meaning of High Quality Care

RSLLC proposes a comprehensive review of the definition of 'high-quality care' to address the challenges outlined. This review should focus on incorporating objective, measurable outcomes to ensure clarity and consistency in assessing care standards. Alternatively, if revising the definition proves challenging, RSLLC suggests reconsidering high-quality care as a condition of registration, especially given the strict liability offenses associated with non-compliance. Moreover, RSLLC emphasises the importance of government guidance and support, particularly in addressing complexities in subsections 19(c)(vii) through to (xi). This includes implementing inclusive policies, providing cultural competency training, worker retention and training, and ensuring equitable resource allocation within the aged care sector.

One potential avenue for consideration involves incorporating reasonableness qualifiers, such as 'so far as reasonably practicable,' into the legislation, as recommended by the Royal Commission. Additionally, there appears to be ambiguity surrounding the criteria for meeting the requirements related to 'worker retention and training,' leaving uncertainties regarding compliance and potential statutory liabilities.

Effect of Statement of Rights

RSLLC emphasises the urgent need for guidance from the Aged Care Quality and Safety Commission (ACQSC) on two critical issues: balancing the rights of different residents and navigating the hierarchy of other laws. Clear directives are necessary for resolving conflicts between residents' rights and prioritising obligations under various laws, such as Statement of Rights (SORs) and workplace health and safety (WHS) regulations. RSLLC urges the ACQSC to provide timely and comprehensive guidance to assist Approved Providers (APs) in effectively managing conflicts and upholding regulatory compliance, thereby safeguarding the quality of care and organisational integrity within the aged care sector.

This could be easily solved by including words to the effect of 'so far as reasonably practicable after considering the rights and safety and wellbeing of other individuals or persons'.

Statement of Principles

RSLLC urges a review of Section 22(4) language for inclusivity while considering the broader impact on all consumers. We draw attention to the aged care sector's limitations and advocate for realistic expectations to ensure appropriate care provision. This approach prioritises safety, quality of life, and respect for individual needs. The governments approach fails to acknowledge that aged care providers cannot feasibly meet the needs of every individual requiring care. Mixing individuals with distinct care

needs, especially younger people, with older residents introduces significant risks that Approved Providers (APs) may struggle to manage effectively.

Supporters and Representatives

RSLLC suggests measures to protect all parties involved:

1. Aged Care Provider (AP) Protection: Similar to existing provisions, safeguards should shield APs when acting based on instructions from supporters or representatives.
2. Non-Compliance Penalties: Introducing penalties for supporters and representatives failing to fulfill obligations would strengthen accountability and encourage adherence to legal requirements.
3. Individual Protections: Provisions should ensure individuals needing representatives are not left without support if they remove them, safeguarding the rights of those unable to make significant decisions independently.

Requirements for applications for classification assessments

RSLLC recommends that clear guidelines be established regarding funding procedures to address the concerns around Funding Retroactivity, Private Fee Charging and Security of Tenure.

Conditions of registration

RSLLC strongly recommends that the ACQSC have discretion around amount, and instances of application, of penalty points. The ACQSC do not appear to have any discretion around the application of penalty points and statutory offences under the Bill can be trigger for minor offences with a maximum (not “up to”) penalty points applying.

Strict liabilities

RSLLC strongly recommends that the proposed statutory duties and compensation pathway (as currently drafted) be carefully reviewed.

Responsible Person Duty

RSLLC recommends the Bill should limit the exposure of responsible persons solely to executives and board members as they are not in control of the elements of ‘due diligence’ (s.121(2)). However, we recognise the importance of placing obligations on workers akin to s.28 of the AHS Act (NSW) and consequential penalties. Criminal offenses should only apply in instances of recklessly or intentionally causing harm which would align with recognised concepts under similar laws like WHS Act (NSW).

General observation of existing regime

RSLLC suggests that the obligation on APs to re-house residents they are unable to care for should be transferred to the Aged Care Quality and Safety Commission (ACQSC). This shift would alleviate the burden on APs and ensure that residents receive appropriate care without compromising safety. We further urge that the ACQSC should be empowered with the authority to incentivise residents to adhere to decency standards or codes of conduct, thereby mitigating risks posed to others. This may include measures such as the removal of funding for non-compliance, incentivising responsible behaviour and promoting a safer environment for all residents and workers.

Whistleblower Protections

Section 361 should exclude any overlap with the Corporations Act any other regimes to streamline regulatory efforts and avoid unnecessary duplication. In addition, we recommend giving consideration

to limiting the recipients of disclosures to regulators or responsible persons to ensure proper handling and accountability.

In addition, we would like to see a revision of obligations on APs regarding the non-disclosure of the identities of disclosers to strike a balance between confidentiality and safety concerns together with clear definitions for terms such as 'detriment' to strengthen clarity and consistency in enforcement. Finally, we desire an exploration of options for also holding aged care workers or responsible persons personally liable for breaches to promote accountability and deterrence.

Recommendations in Detail

Commencement Date

Bill Reference: Chapter 1, Section 2 - Commencement

The proposed commencement date of July 1, 2024, presents a significant challenge for Approved Providers (APs) within the aged care sector. This timeframe is insufficient for APs to adequately plan, prepare, and execute the necessary adjustments to comply with the reforms outlined in the Bill. Such adjustments include but are not limited to staff training, policy drafting, recruitment processes, and the procurement or amendment of IT systems. Additionally, the absence of certain sections of the Bill and the issuance of the 'rules' further complicates the preparation process.

Without adequate preparation time, APs are likely to face non-compliance issues once the reforms come into effect on July 1, 2024. This could have detrimental effects on the delivery of aged care services and the overall quality of life of older individuals relying on such services. This situation is also very likely to have significant impacts on providers who find the burden too great and instead choose to no longer provide much needed aged care services.

RSLLC firmly believes that a carefully planned transition period is essential to ensure the successful implementation of the proposed reforms while minimising disruption to aged care services.

To this end, RSLLC proposes the following measures:

Commencement Date Clarification:

RSLLC recommends that the commencement date of July 1, 2024, be upheld for reforms introduced by the Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022 and the Aged Care Amendment (Implementing Care Reform) Act 2022. However, RSLLC emphasises the need for flexibility if subordinate legislation significantly alters these regimes. In such cases, APs may require additional time to adjust, although predicting the extent of these changes without issued subordinate legislation poses a significant challenge.

Transition Period Extension:

Following the issuance of subordinate legislation, RSLLC proposes granting APs a transition period of at least twelve months to accommodate all other necessary adjustments. This extended timeframe would allow APs time to effectively digest the new obligations, revise policies, implement staff training programs, recruit essential personnel, and procure or amend information technology (IT) systems as required. RSLLC stresses that insufficient time for IT and system revisions more broadly could introduce unforeseen risks, potentially compromising the quality and integrity of aged care services.

In summary, RSLLC advocates for a balanced approach that balances the need for timely reform implementation with the practical considerations of APs. By allowing for a considered transition period, APs can adequately prepare for the forthcoming changes, ensuring continuity of care and compliance with regulatory requirements.

Meaning of High Quality Care

Bill Reference: Section 19 - Meaning of high-quality care

The current definition of 'high-quality care', as outlined in section 19 of the Bill, is subjective and therefore presents significant challenges for Approved Providers (APs) within the aged care sector. This

definition predominantly focuses on the subjective concept of wellbeing, lacking objective measurable outcomes or clinical indicators. However, compliance with this definition is mandated as a condition of registration, with strict liabilities imposed if not met. APs are tasked with the daunting challenge of meeting an undefined and aspirational standard, which is heavily reliant on the subjective interpretation of the individual's needs or wishes by the Aged Care Quality and Safety Commission (ACQSC). This complexity is further compounded when dealing with individuals who may be cognitively impaired, making it exceedingly difficult to ascertain and fulfill their needs effectively.

Moreover, specific subsections of section 19, such as 19(c)(i) and (vii), present additional complexities. Prioritising 'mental health' (19(c)(i)) necessitates APs to undergo specialised training to adequately address the mental well-being and quality of life of residents without funding. Furthermore, reconciling conflicting resident rights, as exemplified by one resident's desire to have a pet versus another resident's safety or stress concerns (19(c)(vii)), poses intricate ethical dilemmas that require careful consideration and resolution.

Additionally, subsection 19(c)(viii) mandates the development of inclusive policies and procedures in collaboration with Aboriginal or Torres Strait Islander persons. This entails not only staff training but also fostering meaningful partnerships with First Nations individuals. However, given the diversity of languages and sub-cultures within these communities, creating comprehensive policies that are truly inclusive presents a formidable challenge. Guidance and support from the government are essential to navigate this complex terrain effectively.

Similarly, subsection 19(c)(x) emphasises the importance of making bilingual aged care workers and interpreters available. However, this raises questions regarding resource allocation and funding responsibility, particularly in the context of additional resources required to accommodate linguistic diversity within the aged care workforce.

The current definition of 'high-quality care' poses numerous challenges for APs, including navigating subjective concepts, addressing specialised training needs, resolving ethical dilemmas, fostering inclusive practices, and allocating resources effectively.

In light of the aforementioned challenges, RSLLC proposes a comprehensive review of the definition of high-quality care. This review should aim to incorporate objective, measurable outcomes to provide clarity and consistency in assessing care standards. Alternatively, if revising the definition proves impractical, RSLLC recommends reconsidering high-quality care as a condition of registration, particularly given the strict liability offenses associated with non-compliance. Additionally, RSLLC underscores the importance of government guidance and support in addressing the complexities outlined in subsections 19(c)(viii) and (x), emphasising the need for inclusive policies, cultural competency training, and equitable resource allocation within the aged care sector.

Effect of Statement of Rights

Bill Reference : Section 21 - Effect of Statement of Rights (SORs)

A potential challenge arises with the implementation of Statement of Rights (SORs) when conflicts emerge between these rights and other applicable laws. Approved Providers (APs) face the challenge of balancing the rights of different residents while fulfilling their obligations under competing laws, such as Work Health and Safety (WHS) regulations. The absence of clear guidance on navigating these conflicting obligations raises concerns about compliance and potential breaches of registration conditions.

Failure to effectively manage conflicts between SORs and other laws may lead to breaches of registration conditions, triggering substantial fines and the risk of de-registration for APs. Without proper guidance, APs may inadvertently infringe upon the rights of residents or violate other legal obligations, jeopardising the quality of care and organisational integrity.

RSLLC emphasises the urgent need for guidance from the Aged Care Quality and Safety Commission (ACQSC) to address two critical issues:

(i) Balancing the Rights of Different Residents: APs require clear directives on how to navigate situations where the rights of one resident may conflict with those of another. This includes establishing protocols for resolving disputes and ensuring equitable treatment for all residents while upholding their individual rights.

(ii) Hierarchy of Other Laws: APs need comprehensive guidance on how to prioritise and reconcile conflicting obligations under various laws, including SORs and WHS regulations. Clarity on the hierarchy of these laws and the appropriate course of action in case of conflicts is essential for compliance and risk management.

RSLLC urges the ACQSC to provide timely and comprehensive guidance to assist APs in effectively managing conflicts between SORs and other legal obligations. Clear directives will enable APs to navigate complex scenarios confidently, uphold residents' rights, and maintain regulatory compliance, thereby safeguarding the quality of care and organisational integrity within the aged care sector.

Statement of Principles

Bill Reference: Section 22(4) - Statement of Principles

The Commonwealth aged care system aims to provide accessible services to a diverse range of groups, each with their own unique needs. However, many of these groups have highly specific needs that necessitate specialised training and resources. Unfortunately, the government's approach fails to acknowledge that aged care providers cannot feasibly meet the needs of every individual requiring care. Mixing individuals with distinct care needs, especially younger people, with older residents introduces significant risks that Approved Providers (APs) may struggle to manage effectively. Additionally, APs face challenges in refusing care to individuals whose needs they are unable to meet, or to residents whose behaviours pose risks to others, due to security of tenure rules. This situation often prioritises the rights of individual residents over the collective safety and quality of life of the resident community.

The current approach is likely to have adverse effects on the rights of consumers with highly specific care needs and on the overall safety of the resident community. This could potentially lead to systemic failures within the aged care system.

RSLLC urges a reconsideration of the wording in Section 22(4) to ensure inclusivity while also recognising the potential impact on all consumers. It is essential to acknowledge that the aged care sector cannot be expected to serve as a catch-all solution for every individual in need of care. Rather than overburdening the sector with unrealistic expectations, there needs to be a recognition of the sector's limitations and a focus on providing appropriate care for those it can reasonably accommodate. This approach will help ensure the safety and quality of life of all residents while also respecting the rights and needs of individuals with specific care needs.

Supporters and Representatives

Bill Reference: Chapter 1, Part 4 - Supporters and Representatives

Lack of Provisions for Ensuring Compliance: The current legislation does not outline who will be responsible for ensuring the compliance of 'supporters' and 'representatives' with their obligations. This includes obligations such as consulting with other appointed supporters or representatives, or with the 'individual' themselves. Approved Providers (APs) are left uncertain about how to ensure that the actions of supporters and representatives align with legal requirements.

Absence of Penalties: There are no penalties specified for supporters or representatives who breach their obligations under the legislation. This lack of accountability may result in non-compliance with the law without any repercussions for those responsible.

Inconsistency with Guardianship Regime: The concept of representatives introduced in the legislation is inconsistent with the rights offered by the current guardianship regime. If an individual requires a representative due to cognitive impairment and later decides to remove that representative, they are left without a decision-maker, potentially compromising their ability to make important decisions.

The absence of clear mechanisms for ensuring compliance by supporters and representatives may lead to decisions or actions that do not align with the wishes of the individual or the requirements of the legislation. This lack of accountability may inadvertently result in APs breaching conditions of registration, leading to significant fines or deregistration.

RSLLC proposes, in a similar vein to the protections for supporters and representatives under sections 33 and 34 of the Bill, provisions should be included to protect providers when they rely on decisions or directions from supporters or representatives.

We also suggest that penalties should be introduced for supporters and representatives who fail to meet their obligations under the legislation. This would strengthen accountability and incentivise compliance with legal requirements.

The regime should also incorporate rights for individuals who require representatives, ensuring that they are not left without decision-making support if they decide to remove their representative. This would safeguard the rights and quality of life of individuals who may lack capacity to make material decisions for themselves.

Requirements for applications for classification assessments

Bill Reference: Section 63(1) & (2) - Requirements for applications for classification assessments

Section 63(1) of the legislation suggests the possibility of residents entering a residential aged care facility before the Aged Care Quality and Safety Commission (ACQSC) has completed a comprehensive assessment. Presently, there exists no specified timeframe for the System Governor to conclude these assessments. Furthermore, while both an 'individual' and an Approved Provider (AP) have the right to apply for a classification assessment using the prescribed form and paying the requisite fee, the legislation remains silent on whether the AP can recover this fee from the resident.

The ambiguity surrounding the timing of assessments and fee responsibility yields several consequences. Firstly, the uncertainty regarding care needs persists, posing challenges for the AP in delivering suitable care. Secondly, the financial burden may either fall upon the AP or the individual, potentially straining financial resources.

RSLLC recommends that clear guidelines be established regarding funding procedures to address the following concerns:

Funding Retroactivity: Provide clarification on whether funding granted post-assessment will be applied retroactively. This clarification is crucial for both Approved Providers (APs) and individuals to understand their financial obligations accurately and make informed decisions.

Private Fee Charging: Specify the circumstances under which APs are permitted to charge individuals private fees for care rendered if funding is denied following the assessment. Clarity on this matter is essential to ensure transparency and equity in financial arrangements.

Security of Tenure: Clarify whether security of tenure still applies to residents in the event that funding is declined. There must be clarity around the rights and responsibilities of both parties in the absence of governmental funding support.

Conditions of registration

Bill Reference: Section 88(3) - Conditions of registration

The current structure of the Bill establishes a punitive system that lacks a collaborative, transparent, and supportive relationship between the Aged Care Quality and Safety Commission (ACQSC) and Approved Providers (APs), aimed at fostering continuous improvement. The ACQSC assumes the dual roles of both law enforcement and adjudicator, wielding increased powers without discretion. For instance, the legislation imposes a blanket penalty of 250 points (\$78,250) for non-compliance, without specifying any flexibility or discretion for mitigating circumstances. Moreover, the Bill includes numerous "hair-trigger" provisions that automatically trigger strict liability with significant consequences, even for minor non-material breaches, such as failing to meet an administrative requirement related to the Aged Care Standards (Section 97).

The implementation of a punitive regime undermines efforts to promote transparency and cooperation between the ACQSC and APs. This approach may deter APs from openly sharing information or seeking assistance, ultimately compromising the quality of care provided to residents.

RSLLC strongly recommends that the ACQSC have discretion around amount, and instances of application, of penalty points.

Strict liabilities

Bill Reference: Statutory duties for registered providers (s.120) and responsible persons (s.121)

We broadly support the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and for this duty to apply to both providers and officers (like Work Health and Safety Laws). However, as drafted, the proposed statutory duties and compensation pathway in the Bill risks:

- undermining the stated policy aims of reforming aged care, including by deterring individuals from being employed or otherwise engaged (including as directors or volunteers or both) in funded aged care services; and
- injustice and an abrogation of criminal law "safeguards" such as the doctrines of innocence until proven guilty, burden of proof being on the prosecution, having an element of fault and intention and goes against natural justice that is the foundation of our common law system.

Undermining stated policy aims

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

Further, these duties and pathway threaten to impugn not only remunerated individuals, but also the many dedicated volunteers who are critical to the ongoing viability of the aged care sector where providers are already experiencing challenges to meet legislated governing body independence requirements. This includes volunteers who serve as governing body members and directors on not-for-profit providers. By contrast, s.34 of the WHS Act (NSW) excludes volunteers from the statutory duties.

In the medium to long term, this will undermine sector sustainability and detract from the quality of aged care services (to the detriment of consumers). This is contrary to legislative objectives (for example, section 22(6) - an aged care system that values workers and carers) and disregards circumstances where typically aged care workers are *not* highly paid and have other employment options available to them. These options include adjacent sectors like public and private health and NDIS where there are *no* equivalent duties, criminal penalties nor compensation pathway.

Abrogation of criminal law

The proposed statutory duties do *not* accord with the Royal Commission's recommendation 101 – that recommendation proposed civil penalties, *not* criminal penalties. Instead, Part 5 of Chapter 3 of the Bill now imposes *only* strict criminal (and *not* civil) penalties.

Further, none of the offences under s.120(6) and 121(7) include a “fault” element which prescribe a penalty of 5 years imprisonment. There is no requirement for the prosecution to prove either recklessness or negligence, nor that there was no reasonable excuse. Instead, sections 120(7) and 121(8) assume guilt (not innocence) by reversing the onus of proof so that the defendant must prove the defence of reasonable excuse.

By contrast, Section 31 of the WHS Act prescribes a Category 1 (criminal) offence which must include the requirements of recklessness or negligence (each as defined in the Criminal Code).

The position under the Bill is inconsistent with the Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers¹ (the **Guide**) which states at page 22, *‘The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (i.e. recklessness)’*.

Also, the Guide provides at page 52 that *‘the defence of reasonable excuse should generally be avoided’* including as *‘[t]he defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established’*. Accordingly, the defence of reasonable excuse cannot be used as a “workaround” for statutory overreach. Instead, these

¹ See: <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>

penalty provisions must be carefully drafted - the defendant should not bear the risk (and evidential burden) of having to prove their innocence by way of this defence.

In addition to the strict liability offences, inclusive of fines and/or imprisonment, 'responsible persons' could also find themselves personally exposed to civil claims by individuals. In contrast, the WHS Act (NSW) which excludes the civil rights of individuals. S.127 of the Bill should specifically exclude civil claims against responsible persons to follow approach in s.267(a) of the WHS Act (NSW).

The compensation pathway under s.127 of the Bill will also reduce the ability or likelihood of parties entering into privately agreed compensation settlements between registered providers and individuals if the parties cannot excluded subsequent claims by the ACQSC under s.127.

s.120(2) of the Bill does not include a reasonableness qualifier around the cost of eliminating or minimizing the risk being grossly disproportionate to the risk as provided for in section 18(e) of the WHS Act (NSW).

s.127(2)(b) applies a statutory liability period of 6 years in contrast to the 2 year period under the WHS Act (NSW). The 6 year period under the Bill is also inconsistent with the 3 year statutory liability period for personal injury and the evidentiary reasons behind setting this period.

s.120 and s.121 of the Bill do not include a rising scale of penalties depending on the materiality of the offence, only a blanket maximum penalty.

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

Punitive measures don't consider contributory negligence by forces outside of a registered providers control eg funding levels set by the Department of Health will dictate resourcing levels, the actions or advice of ACQSC or its agents or MyAged Care system breaks.

s.18(2) of the Bill defines 'systemic pattern of conduct' in relation to certain offences which if satisfied attracts higher penalty points yet it does not have any element of "materiality". If 'significant failure' is a one off "significant" departure from the standards that results in harm or risk to residents, 'systemic pattern of conduct' should mean multiple minor departures from standards that collective results in a significant departure from standards that results in harm or risk to residents thus achieving the same net outcome and warranting a higher penalty.

Accordingly, we recommend the proposed statutory duties and compensation pathway (as currently drafted) be carefully reviewed having regard to the matters raised in this submission, including:

1. reducing the asymmetric nature of the Bill with other industries to avoid discouraging workers to the aged care industry;
2. reduce exposure on volunteers to mirror the WHS Act (NSW);
3. limit strict liability offences to civil only and include fault-based elements such as recklessness or negligence in sections 120(6) and 121(7);

4. the prosecution should bear the burden of proof under sections 120 and 121, including reasonable excuse;
5. the (strict liability) criminal penalties proposed in Part 5 of Chapter 3 (e.g. sections 120(3) and (5) and 121(4) and (6)) should be removed as they do not include a fault element;
6. exclude additional civil claims against responsible person by mirroring s.267 of the WHS Act (NSW);
7. statutory liability period of 6 years should either mirror personal injury regime of 3 years or WHS period of 2 years; and
8. ACQSC should have more discretion on when to apply penalties and the ability to apply a sliding scale.

Responsible Person Duty

Bill Reference: Section 121 - Responsible Person Duty

The extension of strict liability to 'responsible persons' is likely to dissuade workers from participating in an already challenged sector, potentially impacting the quality of candidates willing to join. The threshold for imposing strict liability on responsible persons under Section 121(2) is notably low and subjective and open to interpretation by the ACQSC. Responsible persons within RSLLC encompass approximately 80 individuals at various levels within the organisation, from the executive team down to care managers. This level of regulation imposes impractical burdens on lower levels of management, who may not have control over all aspects of 'due diligence' required by s.121(2).

RSLLC recommends the Bill should limit the exposure of responsible persons solely to executives and board members. Criminal offenses should only apply in instances of recklessly or intentionally causing harm. Worker liability should be limited to civil penalties and matters within their control. Additionally, the ACQSC are able to impose banning orders which we think is a significant deterrent.

General observation of existing regime

Bill Reference: General observation of existing regime (Section 56-1(f) of the Aged Care Act 1997 & Section 6 of the Uniform Rights Principles 2014).

The current regime concerning security of tenure poses challenges for Approved Providers (APs) in managing residents who pose risks to others or exhibit intentionally malicious behaviour. APs are obligated to find alternative accommodation for residents they can no longer care for, which proves difficult as other facilities may be reluctant to accept residents with problematic behaviours, even if transparency is maintained regarding the reasons for the transfer. Additionally, APs are unable to physically remove a resident unless the resident voluntarily chooses to leave, making it challenging to balance the safety of other residents and staff against the needs of certain individuals. For instance, we encountered a resident who, despite being fully cognisant, engaged in racist behaviour and intentionally created unsanitary conditions for certain staff to address. Another resident with cognitive impairment displayed violent tendencies towards fellow residents, requiring one-on-one care that we were unable to provide. However, we were unable to relocate the resident and were left with a situation where the safety of other residents and staff was compromised. Resolution only occurred when the resident required hospitalisation, forcing the hospital to find suitable accommodation. This is not an uncommon situation and places a significant burden on other care sectors.

The current system jeopardises the safety of both residents and staff.

RSLLC suggests that the obligation on APs to re-house residents they are unable to care for should be transferred to the Aged Care Quality and Safety Commission (ACQSC). This shift would alleviate the burden on APs and ensure that residents receive appropriate care without compromising safety. We further urge that the ACQSC should be empowered with the authority to incentivise residents to adhere to decency standards or codes of conduct, thereby mitigating risks posed to others. This may include measures such as the removal of funding for non-compliance, incentivising responsible behaviour and promoting a safer environment for all residents and staff.

Whistleblower Protections

Bill Reference: Sections 355–361 - Whistleblower Protections

Section 361 of the Bill establishes a whistleblower regime that operates alongside similar provisions in the Corporations Act and other regimes. However, this redundancy is deemed unnecessary and potentially problematic. The penalties outlined in the Corporations Act significantly surpass those in the Bill, leading to duplicative efforts and inconsistencies between regulatory frameworks. Furthermore, certain exemptions allowing for the disclosure of a whistleblower's identity may inadvertently conflict with provisions in the Corporations Act, particularly in cases where disclosure is crucial for safety reasons.

Section 355 presents a challenge with its broad definition of individuals eligible to receive disclosures, including 'aged care workers'. This expansive scope encompasses the entire workforce, placing a considerable burden on organisations like RSLLC to educate all workers, regardless of their readiness or sophistication to handle sensitive information. This potential lack of capability among some workers may heighten the risk of inadvertent breaches of confidentiality.

Section 358 introduces penalties for entities where whistleblowers face victimisation. However, the terms 'detriment' or 'threat to cause detriment' are left undefined, resulting in a lack of clarity that hampers interpretation and enforcement efforts.

Section 360 places a responsibility on RSLLC to take 'reasonable measures' to prevent disclosure or victimisation by aged care workers or responsible persons. However, without holding these individuals personally liable for breaches, RSLLC may struggle to exert control over their actions, potentially leading to inadvertent breaches of the Bill.

The current framework risks breaches of the Bill without the AP's awareness or ability to mitigate the situation effectively.

To ensure compliance with the Bill and an effective scheme for whistleblowers, RSLLC recommends Section 361 should exclude overlap with the Corporations Act regime to streamline regulatory efforts and avoid unnecessary duplication. We further recommend limiting the recipients of disclosures to regulators or responsible persons to ensure proper handling and accountability.

We further recommend that the obligations on APs be limited to not victimise workers that assist the ACQSC with enquiries. Other reasonable measures to avoid the victimisation of disclosers could include not disclosing identity of workers where victimisation may occur and only to those that need to know.

We also suggest that key definitions, such as 'detriment', will require further guidance or redefinition to well established definitions in the law such as bullying and harassment in the workplace.

RSLLC also urges that aged care workers or responsible persons should be personally liable if they breach the disclosure or victimisation provisions, in line with whistleblower provisions under Corporations Act.

‘Aged care worker’ Definition and Delivery

Bill Reference: Section 10(1) & (4) - Who delivers funded aged care services and definition of ‘aged care worker’

The exclusion of 'responsible persons' from the definition of 'aged care worker' within the Bill inadvertently eliminates obligations on these individuals. Consequently, individuals such as Chief Clinical Officers or General Managers, who may be deemed 'responsible persons', would be unable to deliver 'funded aged care services' as stipulated in Section 10(1).

This exclusion results in inconsistency in the application of the Bill, potentially leading to inadvertent breaches by Approved Providers (APs).

The Aged Care Quality and Safety Commission (ACQSC) should assess and provide guidance on this matter to ensure clarity and consistency in the application of the legislation.

Right to care provided by ‘trained and appropriately skilled workforce’

Bill Reference: Section 22(6) - Right to care provided by ‘trained and appropriately skilled workforce’

Many workers in the aged care sector lack formal training, yet they are vital for the functioning of the system. The absence of clear guidelines raises questions about who is responsible for providing training—will it be the providers, individuals themselves, or education providers funded to encourage people to join the sector? Furthermore, Approved Providers (APs) require clear direction on the specific training requirements and deadlines, such as those to be fulfilled by 1 July 2024.

Without clear guidance, APs will not be able to ensure compliance by the specified deadline, potentially leading to breaches with significant penalties for unmet obligations.

As a matter of urgency, we recommend that the new Bill ought to:

- *Define the minimum training and appropriate skills required for each role within the aged care workforce.*
- *Clarify the source of funding for workforce training initiatives.*
- *Establish clear deadlines for when workers must complete their training and establish protocols for cyclical training requirements.*

General observation of existing regime & Section 131

Bill Reference: General observation of existing regime & Section 131

The Aged Care Quality and Safety Commission (ACQSC) is obligated to investigate all complaints, including those deemed 'vexatious'. This means that individuals can repeatedly submit complaints on the same issue, even if previous complaints were disproven. Consequently, this creates a significant drain on both regulator and Approved Providers (APs) resources, diverting attention and resources away from providing quality care and implementing improvements. Additionally, the Complaints Commissioner, being a member of the staff of the Commissioner, lacks independence.

RSLLC believes the Complaints Commissioner should be empowered to dismiss 'vexatious' complaints. Further, the Complaints Commissioner should operate independently from the Aged Care Commissioner to ensure impartiality and fairness in handling complaints.