Law Council
OF AUSTRALIA

A new model for regulating Aged Care—Consultation Paper No. 1

Department of Health and Aged Care

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Table of Contents

About the Law Council of Australia **3**
Acknowledgement **4**
Executive Summary **5**
Responding to key Royal Commission recommendations **6**
Regulatory model 6
Aged Care for First Nations peoples 7
Foundation 1—a rights-based approach **8**
Rights as addressed in the Final Report 8
A more rigorous consideration of human rights is required as a priority 9
'Rights' and 'human rights' 9
Applying existing human rights frameworks 10
Further rights arising from the instruments identified in the Final Report 10
United Nations Declaration on the Rights of Indigenous Persons 11
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 11
Determining the scope and content of rights 12
Enforcement and remedies 13
The absence of a thematic rights-based framework relating to the human rights of older persons 14
Recommendations and next steps 15
Foundations 2 and 3—Balancing a Person-centred approach with a Risk-based approach **15**
Foundation 4—Continuous improvement **18**
The regulatory model **18**
Registration 18
Provider registration 18
Worker registration 18
Market Oversight 19
Enforcement 19
Complaints 19
Engagement and capability building 20
Information sharing 20
Information for Consumers 20
Regulatory Intelligence 20
The Inspector-General of Aged Care 21

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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 internationally, 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:

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- 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
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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.asn.au.

Acknowledgement

The Law Council is very grateful to the Law Society of New South Wales, the New South Wales Bar Association, and the Queensland Law Society for their substantive contributions to this submission. It also acknowledges, with thanks, the input of its National Elder Law and Succession Law Committee, National Human Rights Committee and National Indigenous Legal Issues Committee.

Executive Summary

1. The Law Council thanks the Department of Health and Aged Care (**Department**) for the opportunity to make a submission in response to its 'A new model for regulating Aged Care—Consultation Paper No. 1' (**Consultation Paper**).[1]

2. The Final Report of the Royal Commission into Aged Care Quality and Safety (**Final Report**) called for a 'philosophical shift' in the Commonwealth regulation of aged care to place 'the people receiving care at the centre of quality and safety regulation', underpinned by a system which empowers care recipients and respects their rights.[2]

3. The Law Council has long expressed support for fundamental reforms to the aged care framework which are consistent with this call,[3] and has specifically supported[4] the recommendations of the Final Report that a new rights-based Aged Care Act come into force by 1 July 2023.[5]

4. In this context, the Law Council is pleased to see that the Consultation Paper commits to introducing a 'modern and fit-for-purpose regulatory model' to underpin a new Aged Care Act,[6] which is founded on, in part:

   - a rights-based approach, which ensures that 'protections are in place to uphold the rights of older persons';[7] and

   - a person-centred approach, which places the 'needs, goal, values and preferences of older Australians … at the heart of the regulatory model'.[8]

5. These are worthy aspirations. However, more detail is required on each to form a view as to whether, based on these foundations, the new Aged Care Act will give effect to the 'philosophical shift' envisaged in the Final Report.

6. While acknowledging that the Consultation Paper is drafted in very general terms and marks the start of a more detailed consultation process, the Law Council considers there are matters of detail and substance that should be resolved at this initial stage of regulatory development.

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[1] Department, Consultation Paper, https://consultations.health.gov.au/best-practice-regulation/aged-care-regulatory-framework/user_uploads/final-new-model-for-regulating-aged-care-sep-2022.pdf (webpage, accessed on 25 October 2022).
[2] *Final Report of the Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) vol 1 (**Final Report vol 1**) 21.
[3] Law Council of Australia, Submission to the Royal Commission into Aged Care Quality and Safety, *Aged Care Quality and Safety*, 29 July 2020 (**Submission to the Royal Commission**) https://www.lawcouncil.asn.au/publicassets/5b9b103f-3bdc-ea11-9434-005056be13b5/3854%20-%20Aged%20Care%20Royal%20Commission.pdf; Law Council of Australia, 'Government must act on Royal Commission recommendations' (media release, 1 March 2021) https://www.lawcouncil.asn.au/media/media-releases/government-must-act-on-royal-commission-recommendations.
[4] Law Council of Australia, Submission to the Senate Standing Committee on Community Affairs, *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*, [33]-[34] https://www.lawcouncil.asn.au/publicassets/d0e4ed75-47c7-eb11-943c-005056be13b5/4015%20-%20Aged%20Care%20Royal%20Commission%20Response%20No%201%20Bill%202021.pdf; Law Council of Australia, 'Call to Parties' (April 2022) Law Council of Australia, 20 https://www.lawcouncil.asn.au/publicassets/919cc01e-23b9-ec11-944c-005056be13b5/Call%20To%20Parties%20Final-Web.pdf; 'Australia must address elder abuse' (media release, 15 June 2022) https://www.lawcouncil.asn.au/media/media-releases/australia-must-address-elder-abuse.
[5] Final Report vol 1, recommendations 1-3, 205-207.
[6] Consultation Paper 5.
[7] Ibid 11.
[8] Ibid 11.

7. The Law Council's primary concern is that the Consultation Paper does not:

   - detail which (if any) international human rights will make up the 'rights-based approach' that the Act will take; or
   - address how these rights will be ensured by the Act, consistent with Australia's obligations under the relevant international instruments.

8. The Law Council considers it is essential to identify these rights and understand their scope and content to frame the regulatory regime. The Law Council recommends that the Department convene a roundtable of key human rights stakeholders, including the Australian Human Rights Commission and the Australian Law Reform Commission (ALRC), addressed to this issue.

9. The Law Council also suggests that future consultation papers more clearly describe the proposed features of the proposed regulatory scheme by reference to recommendations made in the Final Report. By way of example, the Law Council considers the following matters, which are not addressed in the Consultation Paper, should be squarely addressed in future consultations:

   - which of the alternative regulatory structures proposed in the Final Report has been adopted or whether there is still an opportunity to make submissions on these models; and
   - the manner in which the recommendations relating to the regulation of aged care for First Nations persons are intended to be addressed.

10. Finally, the Law Council provides the following initial comments about discrete aspects of the regulatory model set out in the Consultation Paper.

Responding to key Royal Commission recommendations

11. The Consultation Paper appears to reflect a very general distillation of several of the detailed recommendations of the Final Report. However, it does not engage with the structure and detail of the recommendations set out in the Final Report, nor address them categorically. The following passages detail recommendations which the Law Council recommends be squarely addressed at an early stage.

Regulatory model

12. The Consultation Paper does not address which of the alternative regulatory structures proposed in the Final Report is intended to be pursued. That is:

   - the Australian Aged Care Commission model as proposed by Commissioner Pagone (see recommendations 5–7) (the **Pagone Model**); or
   - the more traditional approach preferred by Commissioner Briggs involving a new Aged Care Safety and Quality Authority as the regulator in place of the former Aged Care Quality and Safety Commission (recommendation 10).

13. The Law Council has not resolved a final position on the preferred model and would welcome the opportunity to consult further on this issue it if remains to be determined.

14. For the purpose of this consultation, the New South Wales Bar Association (**NSW Bar**) expressed the view that the Pagone model is the best option for the Department to adopt for the redesign of the aged care system, based on the reasons expressed

by Commissioner Pagone. The following passages reflect the views of the Bar Association.

15. It is understood that an 'Australian Aged Care Commission' will be made up of a number of independent, statutory officers (commissioners) each with defined areas of responsibility. While these commissioners would often act together to manage the aged care system, the Bar Association considers their independence from each other will provide checks and balances that are lacking in the current system. The independence of the commission would result in it giving undivided attention to its task of being an effective system governor of aged care.

16. The NSW Bar notes that the Productivity Commission recommended a dedicated and independent agency to manage aged care in its 2011 report *Caring for Older Australians*.[9] The NSW Bar further notes that the recommendation was not accepted by the then Australian Government on the basis that similar outcomes could be achieved at lower cost by modifying the current arrangements— a view which the Bar Association considers has not been vindicated.

17. Whichever model is ultimately adopted, the NSW Bar is of the view that independent determination of the level of subsidies to be paid should be an indispensable element of the new system.

Aged Care for First Nations peoples

18. The Consultation Paper does not address how the proposed regulatory model will implement Chapter 7 of Volume 3A of the Final Report titled, Aged Care for Aboriginal and Torres Strait Islander People.

19. Recommendations 47–53 call for, amongst other things, establishment of an Aboriginal and Torres Strait Islander aged care pathway within the new aged care system,[10] the establishment of an Aboriginal and Torres Strait Islander Commissioner as a statutory role within the administrative structure of the aged care regulator,[11] and the regulation of cultural safety and worker training.[12]

20. Recommendation 50 articulates ways in which the Australian Government should enhance the involvement of Aboriginal and Torres Strait Islander people in the planning, running, and delivery of aged care services for Aboriginal and Torres Strait Islander people. Care is required in developing a regulatory model when it comes to the challenges faced by a great many aged care providers run by Aboriginal and Torres Strait Islander community-controlled organisations in rural and remote areas.

21. It is suggested that an Aboriginal and Torres Strait Islander Commissioner, if established, should be involved in the development of any new regulatory model.

22. The new regulatory model should make specific and adequate provision for the diverse and changing needs of Aboriginal and Torres Strait Islander people and future consultations should consult First Nations communities on the implementation of recommendations 47–53.

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[9] Productivity Commission, *Caring for Older Australians* (No. 53, 28 June 2011) recommendation 15.1.
[10] *Final Report of the Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) Volume 3A (**Final Report vol 3A**) Recommendation 47 on page 246.
[11] Ibid Recommendation 49 on page 252.
[12] Ibid 48 on page 250.

Foundation 1—a rights-based approach

Rights as addressed in the Final Report

23. Recommendation 2 of the Final Report is that the Act should:

    - specify a list of rights of people seeking and receiving aged care, which are listed in the recommendation; and
    - declare that it is a purpose of the Act to secure those rights.[13]

24. The Final Report indicated that the proposed rights are (footnote retained from the original) 'elements of a core human right from Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* [**ICESCR**][14] …: the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.[15]

25. However, the Final Report also mentions three other international human rights instruments that 'stand out in significance in the context of aged care':[16]

    - the International Covenant on Civil and Political Rights (**ICCPR**);[17]
    - the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);[18]
    - the Convention on the Rights of Persons with Disabilities (**CRPD**).[19]

26. The CRPD has practical application to older persons, given that around half of Australians over 65 have a disability, with prevalence increasing significantly as age increases.[20]

[13] Final Report vol 1 recommendation 2 206.
[14] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 12.
[15] Final Report vol 1 79; Final Report vol 3A 17.
[16] Ibid 18.
[17] International Covenant on Civil and Political Rights (ICCPR) (entry 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).
[18] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (entry into force 3 September 1981; entry into force for Australia 27 August 1983).
[19] Convention on the Rights of Persons with Disabilities (CRPD)(entry into force 3 May 2008; entry into force for Australia 16 August 2008).
[20] Australian Bureau of Statistics (**ABS**), *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#:~:text=Disability%20prevalence%20over%20time&text=one%2Dquarter%20(26.9%25)%20of,had%20disability%2C%20down%20from%2012.1%25.

27. A number of rights in those instruments, properly, appear to have informed the rights listed in recommendation 2 of the Final Report, including:

International human right	Relevant right in recommendation 2
the right to freedom from cruel, inhuman, or degrading treatment contained in article 7 of the ICCPR and article 15 of the CRPD	2(b)(i)
the right to liberty in article 9 of the ICCPR and article 14 of the CRPD	2(b)(ii)
the right to liberty of movement in article 12 of the ICCPR	2(b)(ii)
the right to freedom of expression in article 19 of the ICCPR	2(b)(v)
the right to equality and non-discrimination before the law in article 26 of the ICCPR and article 5 of the CRPD	2(a)(i), 2(b)(iv), 2(c)
the right to enjoy legal capacity on an equal basis as others and to support in exercising their legal capacity in article 12 of the CRPD	2(b)(iii)
the right to the enjoyment of the highest attainable standard of health without discrimination in article 12 of the ICESCR and article 25 of the CRPD	2(b)(iv), 2(c), 2(d)

A more rigorous consideration of human rights is required as a priority

'Rights' and 'human rights'

28. The Final Report refers to the underlying goal of introducing a 'rights-based' approach to aged care.[21] While on some occasions the 'rights' referred to include some of those affirmed in international human rights treaties, neither the Final Report nor the Consultation Paper clearly affirms that the 'rights' that will form the basis of the new system will include all internationally guaranteed human rights and fundamental freedoms.

29. The Consultation Paper does not detail the source or content of the 'rights' that will underpin the new Aged Care Act, including which, if any, international human rights conventions ratified by Australia will be incorporated within the new Act. It states that:[22]

> *the Government [is] exploring how rights can be incorporated into the new framework in such a way that they are both aspirational, but also have practical impact for older Australians as intended by the Royal Commission.*

30. The Law Council considers that it is essential that Australia's international human rights obligations underpin the Commonwealth aged care legislative framework.

31. There are two key reasons for this. The first is that it is a fundamental principle of the rule of law that states comply with their international legal obligations.[23] The Law Council further confirms that every treaty to which Australia is party is binding upon it,

[21] For example, Final Report vol 1 12.
[22] Consultation Paper 12.
[23] Law Council of Australia, 'Policy Statement – Rule of Law Principles' (March 2011) Principle 8 https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf.

and must be performed by it in good faith;[24] that the human rights treaties which Australia has entered into set out in clear terms Australia's international human rights obligations; and that Australia is bound to comply with their provisions and to implement them domestically.

32. The Law Council's position is that implementation of Australia's international human rights obligations should be implemented by federal charter or bill of rights but, in lieu of such a charter, each piece of legislation should comply with those obligations.[25]

33. Most, if not all, of the human rights that Australia is obliged to respect, protect, and fulfil are engaged in a regulated aged care setting.

34. Accordingly, the Law Council respectfully submits that the realisation of these rights is not 'aspirational'—that is, an ambition or something to aim for. Nor should it be limited to having a 'practical impact' for aged care recipients.

35. The Law Council submits that Australia's obligations under those international human rights conventions are a necessary starting point to determining the scope and content of the regulatory settings imposed under the Act. That is, the Act must be directed towards ensuring Australia's international human rights obligations.

36. The other reason is that embedding international human rights principles into the aged care legislative framework will have a demonstrative impact on the experience of persons in aged care.

37. A human-rights informed approach to persons who live in aged care facilities should start by viewing those people as members of the community who happen to live in a congregate setting, rather than viewing them initially and primarily as aged care residents and determining their human rights as aged care residents.

Applying existing human rights frameworks

38. The first step is to identify the key rights applicable to an aged care setting.

Further rights arising from the instruments identified in the Final Report

39. The international human rights identified in the Final Report (detailed at [24]–[25], above) are a good starting point. However, the Law Council suggests a more comprehensive review is required. The Law Council suggests the following international human rights are also applicable to a new Aged Care Act:

- the right to privacy and to respect for family in article 17 of the ICCPR and article 22 of the CRPD;
- the right to vote and take part in the conduct of public affairs in article 25 of the ICCPR and the participate in political and public life in article 29 of the CRPD;
- the right to an adequate standard of living, including adequate food, clothing, and housing, in article 11 of ICESCR and article 28 of the CRPD; and

[24] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331(entered into force 27 January 1980), art 26.
[25] Law Council of Australia, 'Policy statement on Human Rights and the Legal Profession – Key Principles and commitments' (May 2017) commitments 1,2 and 4 on page 6 (**Law Council's Human Rights and the Legal Profession Policy**) https://www.lawcouncil.asn.au/publicassets/312ca6ff-2052-e711-93fb-005056be13b5/Human%20Rights%20Policy.pdf.

- the right to take part in cultural life in article 25 of the ICESCR and article 30 of the CRPD, which also includes a right to participate on an equal basis with others in recreational, leisure and sporting activities.

United Nations Declaration on the Rights of Indigenous Persons

40. Consideration should also be given to the United Nations Declaration on the Rights of Indigenous Persons (**UNDRIP**) in the construction of the Aged Care Act, including, but not limited to, the way the Act addresses recommendations 47–53 of the Final Report.

41. The UNDRIP is the authoritative international standard informing the way governments across the globe should engage with and protect the rights of Indigenous peoples.[26] Australia formally announced its support for the UNDRIP on 3 April 2009.

42. While the UNDRIP is not a treaty and, therefore, does not itself create legally binding obligations, its articles echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on Indigenous peoples.[27] Insofar as the UNDRIP relies on and elaborates well-established human rights obligations in international treaty and customary international law, it is binding on Australia.

43. Particular consideration may be given to Article 21, which provides that:

- Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including in the areas of housing and health; and

- States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of economic and social conditions of Indigenous peoples and shall pay particular attention to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

44. While the Final Report suggested that the right to freedom from cruel, inhuman, or degrading treatment should be secured, it did not expressly address the operation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**).[28]

45. Article 16 of the CAT requires state parties to prevent acts of cruel, inhuman, or degrading treatment or punishment committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, and to take actions to prevent and investigate such acts.

46. The Law Council recommends that the Australian Government and the Department should also proceed on the basis that the Optional Protocol to the Convention against Torture (**OPCAT**)[29] applies to the regulated aged care scheme.

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[26] Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination.
[27] Ibid.
[28] 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)
[29] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

47. OPCAT is designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman, or degrading treatment or punishment. It requires the Australian Government to:

- establish a system of regular visits to places of detention in Australia by independent national bodies known as National Preventive Mechanisms (**NPM**); and
- accept inspection visits from the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

48. The Law Council considers that government funded residential aged care facilities fall within the ambit of the OPCAT monitoring framework, being a place where people may be deprived of their liberty (to pick up a term used in the definition of 'places of detention in article 4(1) of OPCAT), by virtue of their health and/or capacity, or the type of care, treatment or restrictive practices to which they are subjected.[30]

49. The Law Council has previously expressed the view (and maintains that view) that monitoring of aged care facilities by NPM teams with expertise in human rights, as well as geriatric care and mental health care, would provide an 'important additional oversight of human rights standards'.[31]

Determining the scope and content of rights

50. Once the relevant rights are identified, it will be necessary to determine the content and scope of these rights to understand how they may be pursued in the legislation and how they may be resolved when rights come in conflict. Ultimately, the legislative scheme should make clear the extent or limit of the rights of care recipients and, correspondingly, the extent and limit of the obligations on providers.

51. This will require understanding the extent to which rights sought to be pursued by the new Aged Care Act can be limited. When examining the new Aged Care Bill for compatibility with international human rights,[32] the Parliamentary Joint Committee on Human Rights (**PJCHR**) will consider three key questions:[33]

(1) whether and how the limitation is aimed at achieving a legitimate objective;
(2) whether and how there is a rational connection between the limitation and the objective; and
(3) whether and how the limitation is proportionate to that objective.

[30] Law Council of Australia, Submission to the Australian Human Rights Commission, 'Response to Consultation Paper OPCAT in Australia: Stage 2' (24 September 2018) [51]-[52] and [60]-[63] https://www.lawcouncil.asn.au/publicassets/651125eb-ccf2-e811-93fc-005056be13b5/3510%20-%20OPCAT%20in%20Australia%20Stage%202.pdf, and Law Council of Australia, Submission to the Royal Commission into Aged Care Quality and Safety, 'Aged Care Quality and Safety' (29 July 2020) [103]—[112] https://www.lawcouncil.asn.au/publicassets/5b9b103f-3bdc-ea11-9434-005056be13b5/3854%20-%20Aged%20Care%20Royal%20Commission.pdf (**2020 submission to the Royal Commission**).
[31] 2020 submission to the Royal Commission [112].
[32] In performing its functions under paragraph 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[33] Parliamentary Joint Committee on Human Rights, 'Guide to human rights' (June 2015) [1.15]-[1.22].

52. Under international human rights law, certain human rights are absolute and no limitation upon them is permissible.[34] These include, relevantly, freedom from torture; cruel, inhuman, or degrading treatment; or punishment.[35]

53. For all other rights, limitations (or restrictions) may be imposed provided certain standards are met.[36] Some rights have express limitation clauses, setting out when the rights may be limited, while others have implied limitations, and some treaties contain a general limitation clause.[37]

Enforcement and remedies

54. As a corollary, the legislative scheme should detail the legal mechanisms for the enforcement of those rights. The intended enforcement regime is not made clear in the Consultation Paper.

55. The Final Report states that, with the exception of the right to freedom from restraint, it is not proposed that each of the proposed rights 'should be separately and directly enforceable in the courts'; instead, the rights should be seen as 'aspects of a general duty to provide high quality care imposed by the new Act on approved providers'.[38]

56. This general duty is detailed in recommendation 14 of the Final Report, which is that the new Act should include a general, positive, and non-delegable statutory duty on any approved provider to ensure that the personal care or nursing care they provide is of high quality and safe.[39]

57. The Final Report also envisages the maintenance of the safety and quality Standards presently employed in the *Aged Care Act 1997* (Cth) (**current Aged Care Act**), albeit amended to better direct them to the achievement of high quality aged care (see recommendation 13).[40]

58. The Final Report recommends that a breach by an approved provider of the general duty be a contravention of the Act if:

- the act, omission, or conduct giving rise to the breach also gives rise to a failure to comply with one or more of the Aged Care Quality Standards, and
- the breach gives rise to harm, or a reasonably foreseeable risk of harm, to a person to whom the provider is providing care, or engaged under a contract or understanding to provide care.[41]

59. While the Consultation Paper suggests that Standards will apply,[42] there is no mention in the paper of a general duty. Further, while the Consultation Paper refers to enforcement in general,[43] it does not particularise which kinds of breaches will enliven enforcement powers, and whether this includes contraventions of rights. The Consultation Paper also does not detail the available remedies that may be accessed for a breach of rights and whether, for example, existing civil causes of action enabling

[34] Law Council's Human Rights and the Legal Profession Policy [19].
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Final Report vol 3A 19.
[39] Ibid 97.
[40] Final Report vol 1, recommendations 13 and 20.
[41] Ibid recommendation 101.
[42] Consultation Paper 12, 26, 35, 39-40, 43.
[43] Ibid 28 and 44.

a recipient to obtain injunctive or compensatory relief against a provider will be preserved.

60. These matters should all be made clear in future consultations.

61. The New South Wales Bar Association is of the view that a new model for regulating aged care must implement recommendations 13 and 14 of the Final Report, given that one of the inadequacies of the existing system has been the assertion of 'rights' in the Quality of Care Principles 2014 (Cth) (**Quality of Care Principles**) which cannot be directly enforced.

62. The Law Society of New South Wales notes that, if the main mechanisms for enforcing rights are complaints processes[44] and processes for reporting non-compliance with the Standards, the rights of care recipients must be clearly expressed in the Standards, and complaints processes must be capable of delivering swift and effective remedies to care recipients.

The absence of a thematic rights-based framework relating to the human rights of older persons

63. Finally, as a general comment, one of the difficulties in formulating a tailored human rights-based approach is the lack of a comprehensive international (or national) statement of the human rights of older persons, corresponding to those contained in the thematic instruments on racial discrimination, discrimination against women, the rights of the child, and the rights of persons with disabilities.

64. Work by the Office of the United Nations High Commissioner for Human Rights, the United Nations Independent Expert on the human rights of older persons, and the United Nations General Assembly Open-ended Working Group on Ageing, along with that of many national human rights institutions, scholars and advocates, has demonstrated the conceptual and practical limitations, gaps and difficulties with seeking to apply the existing human rights framework to the situation of older persons in a coherent and comprehensive way.[45]

65. In this context, the Law Council reiterates its in-principle support for the development of a Convention on the Rights of Older Persons.[46]

66. For present purposes, the Law Council suggests it would be prudent for the Department, in developing its new Aged Care Act, to make inquiries within the Commonwealth as to the Australian Government's position on supporting this new convention, and to adapt its planning accordingly.

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[44] Ibid 12, 28, 45

[45] See most recently Office of the United Nations High Commissioner on Human Rights, *Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons - Report of the United Nations High Commissioner for Human Rights,* A/HRC/49/70 (2022).

[46] Law Council, 'Calling on government to support a Convention on the Rights of Older Persons' (media release, 1 October 2020) https://www.lawcouncil.asn.au/media/media-releases/calling-on-government-to-support-a-convention-on-the-rights-of-older-persons.

[46] Law Council, 'Calling on government to support a Convention on the Rights of Older Persons' (media release, 1 October 2020) https://www.lawcouncil.asn.au/media/media-releases/calling-on-government-to-support-a-convention-on-the-rights-of-older-persons.

Recommendations and next steps

67. Unless the Department has already undertaken comprehensive work to identify rights and understand their scope and content, it is recommended that this work be undertaken expeditiously.

Recommendation

- **The Department convene a roundtable of relevant stakeholders, including the Australian Human Rights Commission, the Law Council, and bodies representing the interests of care recipients and aged care providers, to:**
  - **identify the key international human rights that are engaged by the new Aged Care Act;**
  - **take submissions on their scope and content;**
  - **understand some of the practical challenges to ensuring that these rights are respected, protected, and fulfilled; and**
  - **ultimately create a scheme that enables the realisation of these rights, and enforcement of actions in breach of them, including through practical civil remedies.**

Foundations 2 and 3—Balancing a Person-centred approach with a Risk-based approach

68. Foundation 2 (Person-centred approach) and Foundation 3 (Risk-based approach) seek, respectively, to ensure that:

- the needs, values, preferences, and maintenance of dignity of the individual older person underpin the legislative framework; and
- the model for regulating aged care be based on the prevention, detection, and correction of risks arising from the 'safety, quality and financial aspects of aged care service delivery'.

69. It is submitted that it be kept in mind that the maintenance of dignity through supporting a person to exercise choice and independence may include support for engaging in risk.

70. This concept presently underpins Standard 1(1) of the Aged Care Quality Standards, prescribed in Schedule 2 to the Quality of Care Principles*:*

> *(1) I am treated with dignity and respect, and can maintain my identity. I can make informed choices about my care and services, and live the life I choose.*

71. This concept is discussed in the Final Report as follows:[47]

> *Self-determination is having autonomy, control and choice over your own life. It is closely connected with dignity. Choice and control, and involvement in decision-making, promotes dignity. It is hard to maintain dignity when there is an inability to be involved in decisions about your own life.*
>
> *…*
>
> *Connected to self-determination is the concept of 'dignity of risk', where older people have the freedom to choose how to live their lives.*
>
> *…*
>
> *The right to take risks that align with personal goals and values is an important part of life. People have different risk appetites, so risk will mean something different to each person. Some people have a high-risk appetite, while others want to be largely protected from all risks. It is important to older people that they set the boundaries about what is acceptable and important to them, and that this is reflected in the aged care system.*

72. The Final Report goes on to endorse a supported decision-making approach, which is founded in the 'premise that everyone has the right to make their own decisions, and they should be supported to do so',[48] as opposed to a substitute decision-making approach, 'where a person steps in to make a decision on another person's behalf'.[49]

73. The principle of supported decision-making arises from Article 12 of the CRPD. Article 12 has been described by the ALRC as marking a 'paradigm shift' in recognising the right of people with disabilities as persons before the law and their right to make choices for themselves.[50]

74. The 'paradigm shift' in principles that apply to decisions made on behalf of persons with impaired capacity is that:

- such persons should be empowered to make or at least be supported to participate in the making of decisions which affect them, rather than have decisions made for them; and
- if such persons are unable to make or participate in the making of such decisions, it should be their will and preferences which determine the outcome of the decision rather than someone else's assessment of what is in their 'best interests'.[51]

75. In 2014, the ALRC derived its National Decision-Making Principles and Guidelines,[52] which provide a practical manifestation of the obligation in Article 12. The ALRC has recommended that reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines.[53]

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[47] Final Report vol 3A 9.
[48] Ibid 9.
[49] Ibid.
[50] Australian Law Reform Commission (**ALRC**), 'Equality, Capacity and Disability in Commonwealth Laws**',** ALRC Report 124 (August 2014), [1.5].
[51] See generally, ibid [2.73]-[2.90].
[52] Ibid recommendation 3.
[53] Ibid [3.3].

76. The Law Society of New South Wales expressed a concern that the language used in Foundation 2 does not clearly express the principles of autonomous and supported decision-making, and the dignity of making decisions about risk. In its view, these principles should be clearly expressed as a foundation of the new model, and should be buttressed by obligations imposed upon providers to facilitate supported decision-making.

77. The Law Council is aware that the application of a supported decision-making approach may present challenges in light of the uneven take-up of that approach in state and territory laws that authorise decisions to be made on behalf of a person who has lost capacity.

78. The Law Council notes, by way of example, that the current restrictive practices scheme in the Quality of Care Principles provides for a substitute decision-making approach—specifically, by providing for a restrictive practices substitute decision-maker to give consent to the use of a restrictive practice when the care recipient lacks capacity.[54]

79. In its report on the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (Cth), the PJCHR queried the compatibility with Article 12 of the CRPD of a measure in that bill which would have allowed the Quality of Care Principles to make provision for a person who, or a body that, may be a restrictive practices substitute decision maker.

80. The PJCHR queried specifically why there is no legal requirement setting out a model of supported, rather than substituted, decision making in relation to obtaining informed consent for the use of a restrictive practice.[55]

81. In the Government's response to a request by the PJCHR for advice on why the proposed measure did not adopt a supported decision-making approach,[56] the then Minister indicated that:[57]

> *It is acknowledged that supported decision-making is a best practice approach and would provide greater protections for consumers. However, the Australian Government is implementing this interim solution as quickly as possible, in acknowledgment of the time it may take state and territory governments to be able to address limitations in their laws.*

82. The PJCHR considered that response, and went on to conclude that, while this 'temporary measure' is in place, 'there is a significant risk that the amendments are incompatible with the right to equal recognition before the law'.[58]

83. The exact same measure was inserted in the Aged Care Act through a separate amendment Act, which commenced from 6 August 2022. The Law Council submits that, now that the Department has more time, it is critical that it address supported decision making as a foundational step in the development of its framework. This is another example of the importance of ensuring that Australia's international human rights obligations are understood and applied from the outset.

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[54] Subparagraph 15FA(1)(f)(ii) of the Quality of Care Principles.
[55] Parliamentary Joint Committee on Human Rights, 'Human rights scrutiny report - Report 1 of 2022' [2.10(d)].
[56] Ibid [2.12].
[57] Ibid 30.
[58] Ibid [2.30].

Foundation 4—Continuous improvement

84. Foundation 4 places an emphasis on continuous improvement by aged care providers through positive measures such as recognition, incentivisation, and encouragement. It would be helpful to provide further clarity as to what types of recognition and incentives are contemplated, and how they might be delivered.

85. It is also noted that 'continuous improvement' is one of the current Aged Care Standards.[59] It is suggested that future consultation papers make clear how the proposed model improves upon the present scheme.

The regulatory model

86. The remaining paragraphs address key aspects of the proposed regulatory model discussed from page 22 of the Consultation Paper. The Law Council did not receive a comprehensive response from its constituent bodies regarding this model. At this stage, it largely reserves its position on several aspects until the detail is presented in future consultation papers. In this context, much of the following feedback is attributed to individual constituent bodies.

87. The regulatory model is broken into four categories: registration, provider responsibilities, market oversight, and engagement and capability building. It would be helpful if future consultation papers could consider how each of the elements interact so it is clear how the regulatory scheme will operate as a whole.

Registration

Provider registration

88. According to the Consultation Paper, it will be mandatory for aged care providers to register in order to deliver subsidised aged care services.[60]

89. While the Consultation Paper indicates that aged care providers will be subject to reporting obligations[61] and benchmarks related to financial performance in the Standards,[62] it is not clear whether provider registration will involve demonstrating the financial security of the provider, or what standards of financial security would be required.

90. It is suggested that the financial security of providers is fundamental to a robust aged care system, and should be contemplated at the outset.

Worker registration

91. It is understood that provider registration and re-registration, will, in part, depend on providers maintaining appropriate levels of registered workers.

92. The Final Report documents a shortage in the aged care workforce and notes:[63]

> *We are very concerned that the current aged care workforce is not large enough to provide high quality aged care services on a consistent basis. Staffing levels within*

[59] Standard 8(3)(c)(ii) of the Aged Care standards in Schedule 2 to the Quality of Care Principles.
[60] Consultation Paper 23.
[61] Ibid 25.
[62] Ibid 26.
[63] Final Report vol 3A 373.

large parts of residential aged care, as a whole, fall well short of good or even acceptable practice standards.

These staff shortages will be further exacerbated by the recommendations we make to increase total staffing levels, provide additional nurses and allied health professionals, change the mix of staffing, and remove the waiting list for home care.

93. Very recent amendments to the Aged Care Act[64] and further announced measures in the Budget[65] will require aged care providers to have increased numbers of staff on duty. These are worthy measures, consistent with recommendations in the Final Report. However, there must be sufficient available workers of sufficient skill and training available to be employed by providers for those providers to meet Standards and, therefore, retain their registration.

94. Recommendation 79 of the Final Report addressed Aged Care Workforce Planning.[66] The extent to which this recommendation has addressed is unclear, and the Law Council suggests that the Department remain mindful of the need for an available workforce when setting requirements in the new scheme in relation to staffing numbers.

Market Oversight

Enforcement

95. The Law Society of New South Wales supports a model:

- in which the Regulator's approach to non-compliance is proportionate, with an emphasis on education, remediation, and accountability; and
- underpinned by monitoring of non-compliant providers to ensure that breaches are remedied with a view to maximising choice and flexibility of care.

96. Multiple constituent bodies have suggested that thought be given to the use of proactive, random monitoring in addition to incident management and risk-based monitoring.

97. It is also suggested that compliance be enforced at the point of service delivery—directed at an individual service provider or facility, rather than merely penalising a corporate parent provider.

98. The NSW Bar does not support a self-reporting system for non-compliance. It notes that many families will not be in a position to make complaints for various reasons, and a self-reporting system would only increase the prevalence of litigation and/or the need for civil penalty (as foreshadowed in Recommendation 101) rather than addressing the emerging challenges of an ageing society.

Complaints

99. It is understood that further information about the complaints process will be addressed in a further discussion paper.[67]

[64] Effected through Schedule 1 to the *Aged Care Amendment (Implementing Care Reform) Act 2022* (Cth).
[65] Commonwealth of Australia, 'Budget Paper No. 2, Budget Measures October 2022–23' 125.
[66] Final Report vol 3A 373.
[67] Ibid 45.

100. It is suggested that that discussion paper:

- provide further clarity around the complaints process—for example, in relation to:
  - the degree of seriousness of complaint which will warrant investigation;
  - the complaint investigation process, including the provision of procedural fairness to the complainant, the recipient, and the provider; and
- set as high level principles:
  - benchmarks for responding to and resolving complaints; and
  - the importance of ensuring swift, appropriate remedies for care recipients.

Engagement and capability building

Information sharing

101. Noting that information is already shared between relevant Government entities, it would be helpful to understand the extent to which the adoption of information sharing as a regulatory safeguard in the new scheme will improve upon present processes.

Information for Consumers

102. It is suggested that later consultation papers further detail how information on providers will be made 'transparent, meaningful and accessible' to consumers.[68] The time at which a person and their family turn their minds to the (often immediate and urgent) need for aged care can be very stressful for all involved, including adult children, grandchildren, relatives, and friends.

103. The need for transparent information arises, in particular, in light of concerns raised during the Royal Commission about the treatment of the most vulnerable community members, including those with dementia and those unable to voice concerns about the use of physical and chemical restraints, and issues such as medical mismanagement and failures to transfer residents to hospital for critical care.[69]

Regulatory Intelligence

104. Page 31 of the Consultation Paper refers to regulatory intelligence and regulatory agility as follows:

> *"regulatory intelligence is about collecting and synthesising the right data and information to help underpin evidence-based decision making"*
>
> *"[regulatory agility provides for] system-wide agility as the Regulator establishes its risk appetite and a risk management framework. A contemporary risk framework enables flexible priorities to meet evolving strategic intent"*

[68] Ibid 29.

[69] In this regard, the Bar Association of New South recommended that consideration, in particular, of the following evidence at the Royal Commission should inform future consultation papers: Associate Professor Edward Strivens, Geriatrician; Dr Harry Nespolon of the Royal Australian College of General Practitioners; and Ms Annie Butler of the Australian Nursing and Midwifery Federation.

105. The NSW Bar notes that the need for regulatory intelligence is put in more imperative terms in the Final Report, as follows:[70]

> *The aged care regulator must adopt a proactive and flexible approach to its functions. It needs to be more curious about what is happening in the system based on a wider range of information about the quality and safety of services, and the circumstances of a service provider's track-record and current operations. It should be prepared to follow through on events that may point to risks to the wellbeing of older people. It needs to be less trusting of what providers tell it. The regulator must be equipped with appropriate powers and be adequately resourced so that it can identify deficiencies in the quality and safety of care, and respond appropriately. The prospect of genuine accountability for those responsible for poor care is vital*.

106. The NSW Bar suggests that the Royal Commission's approach to regulatory intelligence should be built into the new regulatory model, and that there should be close consideration of and consultation on how this will be achieved, and how it will assist in implementing the Recommendations.

The Inspector-General of Aged Care

107. The Consultation Paper refers to the planned establishment of an independent office of the Inspector-General of Aged Care to investigate, monitor, and report on the administration and governance of the aged care system.[71]

108. The NSW Bar supports this proposal and suggests that the Inspector-General be given the functions set out in recommendation 148 of Final Report. That recommendation provides timeframes for the Inspector-General to monitor the implementation of recommendations of the Final Report, undertake independent evaluations of the effectiveness of measures and actions taken in response to the recommendations, and report on these evaluations five and ten years after tabling of the Final Report.

109. The NSW Bar also suggests that it would be helpful if:

- future consultation papers could provide a timeframe for the establishment of the office of the Inspector-General; and
- the Inspector-General were able to independently review each of the Consultation Papers in their draft and final forms.

[70] *Final Report of the Royal Commission into Aged Care Quality and Safety* (Final Report, 26 February 2021) Volume 3b 488.
[71] Consultation Paper 10.