Law Council
OF AUSTRALIA

A new model for regulating Aged Care— Consultation Paper No. 2

Department of Health and Aged Care

10 July 2023

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Acknowledgements

The Law Council of Australia (**Law Council**) is grateful to its National Elder Law and Succession Law Committee, its National Human Rights Committee, its Indigenous Legal Issues Committee, the Migration Law Committee of the Federal Dispute Resolution Section, the New South Wales Bar Association (**NSW Bar**), Law Society of New South Wales (**LSNSW**), Law Institute of Victoria (**LIV**) and the Law Society of South Australia (**LSSA**) for their respective contributions to this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to make a submission to the Department of Health and Aged Care (**Department**) in relation to its 'A new model for regulating Aged Care—Consultation Paper No. 2' (**Consultation Paper No. 2**).

2. The Law Council appreciates the Department's open and consultative approach. It is evident that submissions made in response to Consultation Paper No. 1, including the Law Council's, have been considered in developing the regulatory framework. The Law Council also appreciates that the proposed framework generally reflects the spirit and intent of the recommendations in the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) Final Report: Care, Dignity and Respect (**Final Report**). It notes that Consultation Paper No. 2 links back to those recommendations where applicable. However, the Law Council considers there should be greater transparency in directly addressing recommendations that have not been accepted.

3. This submission does not answer all the questions in Consultation Paper No. 2.[1] It is divided into parts which respectively address the proposed regulatory framework by reference to the manner in which it will regulate aged care providers, and the identity, role and powers of the regulators. The submission conveys several observations and suggestions from the Law Council's Constituent Bodies on each element for consideration.

4. The Law Council and Constituent Bodies generally support the proposed shift in regulatory focus. That is, from the one-off approval of providers and annual accreditation for residential care services, to a multiple provider, periodical risk-proportionate registration process, underpinned by a new consolidated suite of provider responsibilities. The Law Council recommends providing for tailored registration requirements, education and training for non-corporate entities which will be subject to the aged care regulatory framework for the first time.

5. In relation to regulatory governance and transparency, the Law Council is concerned by the lack of detail as to:

   - whether the governance model of the regulator will be reformed in the manner recommended in the Final Report; and
   - the process under which complaints about the conduct of the regulator and system governor (the Secretary of the Department) will be handled by those bodies, noting that the new Inspector-General will not have powers to handle such complaints, which was recommended in the Final Report.

6. The Law Council seeks further detail on these issues to finalise its position on them.

7. The Law Council supports the enshrinement of a Statement of Rights attached to provider obligations. This Statement should be underpinned by Australia's international human rights obligations. The new framework should provide guidance to providers as to their obligations when rights are in conflict, including in the context of supported decision-making. It should provide effective and accessible remedies where the rights of aged care recipients, family members or carers are violated.

[1] The Law Council has indicated which subheadings relate to questions asked in the Paper.

8. The Law Council would welcome direct consultation on proposed new measures discussed in this submission, including the establishment of an interim First Nations Aged Care Commissioner.

Approach taken in this submission

9. The Law Council submission draws significantly on the views of its Constituent Bodies.[2]. The submission is divided into three parts, which respectively address:

   - the regulation of aged care providers—this part contrasts the current scheme, which regulates the approval of providers and their responsibilities, with the registration process and responsibilities imposed under the proposed new framework. It provides some initial views on some of these changes;
   - the regulatory framework—this part examines the current regulator, the reforms to the regulator function recommended in the Final Report, and the regulatory model which appears intended under the proposed model. It focusses on the monitoring, compliance and enforcement functions of the regulator under the new system and raises some queries about the approach taken; and
   - additional legal policy questions—this part reiterates previous observations about how the proposed system's foundational principles may overlap and conflict. It examines Royal Commission recommendations which appear to remain as yet unaddressed.

Providers

Approval/registration

Current system

10. Currently, under the *Aged Care Act 1997* (Cth), the Commonwealth subsidises 'approved providers' to provide aged care.[3] The term 'aged care' is defined as residential care, home care and flexible care.[4]

11. A person (in effect a corporation)[5] may apply to the Commissioner of Aged Care Quality and Safety Commission (**ACQSC**) for approval as an approved provider under the *Aged Care Quality and Safety Commission Act 2018* (Cth) (**ACQSC Act**).[6]

12. The Commissioner must not approve the person as a provider of aged care unless satisfied that they (and their key personnel) are *suitable* to provide aged care.[7] The suitability assessment must consider experience, demonstrated understanding of responsibilities, systems, record of financial management, and previous conduct.[8]

13. Approved providers provide care through aged care services.[9] Services provided under the Commonwealth funded National Aboriginal and Torres Strait Islander

[2] Cited above, in 'Acknowledgments'.
[3] Aged Care Act section 7-1.
[4] Ibid Schedule 1 clause 1.
[5] *Aged Care Quality and Safety Commission Act 2018* (Cth) (**ACQSC Act**) paragraph 63D(2)(a).
[6] Ibid section 63B.
[7] Ibid paragraphs 63D(2)(b) and (c).
[8] Ibid subsection 63D(3).
[9] Aged Care Act Schedule 1 clause 1.

Flexible Aged Care Program (**NATSIFACP**) and Commonwealth Home Support Programme (**CHSP**) do not require approval.[10]

14. The Commissioner *accredits* individual residential care services annually.[11] The primary mandatory consideration is whether the Commissioner is satisfied that the approved provider will undertake continuous improvement in relation to the service as measured against the Aged Care Quality Standards.[12]

15. The Commissioner also conducts quality reviews of home care services and NATSIFACP and CHSP providers,[13] which includes 'an assessment of the … service provider's performance … against the Aged Care Quality Standards'.[14]

Proposed system

16. The new regulatory framework will replace the approved provider, accreditation and quality reviews features with a universal 'registration' framework.

Key differences between registration and approved providers

17. The new registration process will differ from the current approved provider framework in the following ways:

- registration will replace the approved provider, accreditation of aged care services and quality reviews process—that is, registration will become the one common means to regulate the ongoing ability of aged care providers to provide aged care services, rather than there being several different means to do so;[15]
- it will be necessary to re-register at least every three years—currently, approval as a provider applies indefinitely (subject to sanction, noted below);
- *all* providers of Commonwealth subsidised aged care services will be required to be registered—including those (e.g., NATSIFACP and CHSP providers) currently engaged through funding agreements outside the Aged Care Act who do not need to be 'approved providers';[16]
- residential aged care providers will 'enrol' sites at which they will provide subsidised residential aged care as part of their registration—this replaces the need to 'accredit' each service;[17]
- while currently only corporations may provide aged care services, under the new model, sole traders and partnerships will be able to register to deliver in-home aged care services (although, 'to reduce prudential risk' residential aged care providers will still be required to be a corporation);[18] and
- care recipients may have more than one registered provider providing care services.

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[10] Royal Commission into Aged Care Quality and Safety Final Report - Care, Dignity and Respect: Volume 2 (**Final Report Vol 2**) 42 https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-2_0.pdf.
[11] ACQSC Act subparagraph 19(a)(i) and *Aged Care Quality and Safety Commission Rules 2018* (Cth) (**ACQSC Rules**) Part 3, specifically paragraph 29(4)(a).
[12] ACQSC Rules paragraph 28(1)(c).
[13] Ibid paragraph 52(2)(c) and section 58.
[14] Ibid subsection 56(2).
[15] Ibid.
[16] Consultation Paper No. 2 25.
[17] Ibid 26.
[18] Ibid.

Fundamental features of registration

18. A provider may register in one of more of six *registration categories*:[19]

    (1) home and community services;
    (2) assistive technology and home modifications;
    (3) social support;
    (4) clinical and specialised support;
    (5) home or community based respite; and
    (6) residential care.

19. The standard *registration period* will be three years, with the need to re-register after that time.[20] There will be provision to shorten this period on a 'risk-based approach'.[21]

20. At the point of registration, it is anticipated there will be an assessment of the 'suitability' of the entity to provide the services for which they seek registration.[22] This is likely to include a demonstrated understanding of the services, ability to meet conditions applying to registration, appropriateness to provide services to older people depending on their needs (including culturally safe and appropriate care for First Nations people), financial management, and part performance including compliance with laws. It will also assess the suitability of key personnel.[23]

21. Risk-proportionate registration requirements will be imposed.[24] Evidentiary requirements imposed on providers will be graduated within the categories—extending from mere declaration (categories (1)–(3)) to stringent quality assessments (categories (4)–(6)).[25]

Comments on the new registration system

Views on the proposed care categories[26]

22. The LIV, while generally supportive of the six proposed registration categories, recommends that consideration be given to consolidating the requirements of diverse providers who may be eligible to be registered under multiple categories.

23. Consultation Paper No. 2 sought input on how to address the challenges allocating the following service types onto the registration framework:[27]

    - care management—this involves a wide range of tasks, 'from coordinating a person's home and community services through to clinical services that should meet the Clinical Care Quality Standard'; and
    - personal care—this gives rise to risks related to the level of contact and visibility of the service.

[19] Ibid 29-31, 41.
[20] Ibid 26.
[21] Ibid.
[22] Ibid 35.
[23] Ibid.
[24] Ibid 26.
[25] Ibid 41.
[26] Broadly addresses questions 1 and 2 on page 36 of Consultation Paper No. 2.
[27] Consultation Paper No. 2 34

24. The LIV recommends that care management and personal care be included in categories (3)–(6), as these categories rely heavily on building strong interpersonal relationships and are generally combined with a need for continuous care. Its view is that services in the other categories are more centred on the provision of services rather than personal care.

25. The LSSA queries whether 'domestic assistance' (category (1)) and 'personal care' (category (4)) should be combined into a new category. It notes that the other services with which 'domestic assistance' is listed in category (1) (e.g. meals, transport and maintenance work) are less likely to involve the kind of relationship a worker may develop with an aged care recipient when providing domestic assistance. It notes that domestic assistance is likely to pose similar risks to personal care, as it will require extended periods in the care recipient's home on a regular basis. It notes that, while other regulators generally regulate the other category (1) services,[28] there is no regulation of domestic assistance.

26. The LSSA also queries whether there would be benefit in placing care management within a category on its own. It notes that care management may involve an element of financial management and other services, such as the plan manager role in the National Disability Insurance Scheme (**NDIS**), that are unlikely to be applicable to any other service types. This may allow the conditions of registration based on care management to be better tailored to the role.

General comments about registration

27. The LSSA notes that the proposed registration process appears to be modelled on that of the NDIS. It suggests that consideration be given to any issues with the current approaches under the NDIS legislation that are being flagged as needing reform when developing the new Aged Care Act. It was separately suggested by members of the legal profession, by way of example, that excessive or false claims by providers and how these may be mitigated by way of audits or financial reporting would need to be considered and addressed.

28. The LIV recommends the development of an aged care provider registration guide, akin to the NDIS Provider Registration Guide to Suitability.[29] It notes that where NDIS participants reside at an aged care facility, the provider is required to be registered under both the Aged Care and NDIS regulatory schemes. The LIV submits that alignment between the schemes, and perhaps a system of 'deeming' compliance based on one or other accreditation, would assist by reducing the administrative burden on providers.

29. The LIV seeks clarification on the rationale for a fee for re-registration (currently a one-off fee is paid for approval), and the basis on which fees be calculated—e.g. whether it will be based on total revenue, aged care revenue, or on resident or client numbers. It also suggests there be clarification as to what is involved in the re-registration process, including whether providers will be notified of the need to re-register.

30. The Law Council supports the proposal that services provided under the NATSIFACP be brought within a universal registration framework, noting that now providers of these services do not need to be 'approved' to provide them. The Law Council emphasises that it is important to ensure that individual NATSIFACP service

[28] As noted at page 29 of Consultation Paper No. 2.
[29] NDIS, 'Provider Registration Guide to Suitability' (July 2028), accessed at https://www.ndis.gov.au/media/868/download accessed on 25 June 2023.

providers do not bear additional costs because of the need to register their services on an ongoing basis under the new framework. To do so would impair the quality of services they provide.[30] The Law Council notes that the Departmental website states that:[31]

> *While we implement the aged care reforms, current NATSIFAC service providers will receive ongoing funding to 30 June 2025. This will ensure continuity of care and delivery of quality services. Funding arrangements beyond 30 June 2025 will need to reflect changes from the broader aged care reforms, including the new Age Care Act.*

31. The costs of re-registering services periodically should form part of changes to these funding arrangements.

Expansion beyond corporations[32]

32. The LSNSW considers that permitting non-corporations to register to deliver in-home aged care services has the potential to encourage competition and consumer choice, particularly in rural and regional areas. It supports, a rigorous, and largely standardised, registration and reporting process to minimise the risk of entities abusing the system and reduce the future enforcement burden on the regulator.

33. It appears to the Law Council that in-home care services would come within category (5), which is already subject to the more rigorous registration process. However, it is not clear that the risk-proportionate model will be adapted to, for example, any prudential risks arising from non-corporations specifically.

34. The LSSA similarly considers that it will be necessary to ensure appropriate oversight of protections to address elder abuse arising from sole traders, given that there will not be the protection that an organisational structure would provide in monitoring the behaviour of workers. The LSSA also suggests an education and training regime be implemented as part of the registration process, to assist new entities, including sole traders, to understand and comply with their obligations as registered providers.

35. The Law Council supports this position.

Recommendations

- **In relation to the aged care services provided by non-corporations, consideration should be given to:**
  - **adapting the registration process to anticipate and address any potential risks specific to non-corporations; and**
  - **providing tailored education and training for non-corporation service providers entering the system for the first time.**

[30] The current NATSIFACP service providers are listed here: Department, 'Support for older Aboriginal and Torres Strait Islanders | My Aged Care' https://www.myagedcare.gov.au/support-aboriginal-and-torres-strait-islander-people.
[31] Department, 'National Aboriginal and Torres Strait Islander Flexible Aged Care Program' (webpage, accessed on 5 July 2023) https://www.health.gov.au/our-work/national-aboriginal-and-torres-strait-islander-flexible-aged-care-program.
[32] Question 4 of page 36.

- **Funding agreements with NATSIFACP service providers should ensure these providers do not bear additional costs of re-registering their services.**

Responsibilities of providers

Current system

36. Under the current system, approved providers have responsibilities in relation to:

    - the quality of care they provide;[33]
    - the 'user rights' of the people to whom care is provided;[34] and
    - accountability for the care that is provided (including, for example, recordkeeping), and the basic suitability of their key personnel.[35]

37. If an approved provider has not complied with these responsibilities, they may be sanctioned by the Commissioner.[36] These sanctions can include revoking or suspending approval, restricting the services the provider is approved to provide, restricting the payment of subsidies, or varying the conditions on which places are allocated to the provider.[37]

Proposed system

Overarching obligations

38. A provider will be required to comply with all conditions of registration. They will also be under statutory duties to notify the Regulator of certain matters including circumstances that may affect their suitability to be registered; to comply with requests for information from the Regulator or Department, and to cooperate with persons exercising powers under the new Act.[38]

39. Consideration is being given to an overarching duty on providers to 'make sure that the health and safety of persons in their care is not unnecessarily put at risk taking into account the rights of older people'.[39] There will be a 'Statement of Rights', with which all providers will be obliged to comply.[40]

Conditions

40. Once registered, providers will be subject to conditions of registration, again imposed on a graduated 'risk proportionate' basis.

[33] Aged Care Act Part 4.1; *Quality of Care Principles 2014* (Cth), of which the Aged Care Quality Standards are a part.
[34] Ibid Part 4.2.
[35] Ibid Part 4.3.
[36] ACQSC Act section 63N.
[37] Ibid section 63R.
[38] Consultation No. 2 42
[39] Ibid 43.
[40] Ibid 45.

41. *All providers* will be obliged to *comply in the same way* with the following conditions:[41]

- a Code of Conduct, which relates to the nature of their actions and the standard of care they provide;[42]
- worker screening requirements, applicable laws and personal information requirements; and
- to have practices to ensure they deliver services consistently with rights and the principles in the new Act.

42. *All providers* will be obliged to *comply in a differentiated manner*, depending on their category, with conditions relating to record-keeping; fees and payments; reporting and disclosure; and incident management and complaint and feedback systems.[43]

43. *Category specific conditions* will also be imposed in areas of provider governance, delivery of care and services (such as restrictive practices and minimum nursing requirements), and standards. Specifically, categories (4)–(6) will need to comply with new Quality Standards again tailored to the registration category.[44] In relation to these standards, providers 'will be graded to incentivise continuous improvement, innovation, and excellence … [replacing] the current pass or fail approach'.[45] Those grades are anticipated to be 'elements of best practice conformance', 'conformance', 'minor non-conformance', and 'major non-conformance'.[46]

44. *Provider specific conditions* may be imposed 'based on any additional risk factors that may be present at registration, re-registration or identified through risk-based monitoring activities'.[47]

45. The regulatory framework will be underpinned by a definition of 'high quality care'. It suggests that this concept will be sought to be embedded within the provider's obligations,[48] sought to be facilitated through monitoring, compliance, and enforcement activities,[49] and incentivised through graded assessment.[50]

46. A failure to comply with conditions may result in a range of regulatory enforcement powers being used, as described below.

Worker registration scheme

47. It is proposed that an aged care worker registration scheme will be established, made up of four elements: 'the Code of Conduct for Aged Care (implemented); worker screening; minimum English language proficiency; and ongoing training requirements'.[51]

[41] Ibid 45.
[42] Ibid 46-48.
[43] Ibid 49.
[44] Ibid 50.
[45] Ibid 11.
[46] Ibid 37.
[47] Ibid 39.
[48] Ibid 16 and 41
[49] Ibid 16 and 52.
[50] Ibid 22
[51] Ibid 24.

Law Council comments on the responsibilities of providers under the new system

Human rights and a human rights based approach to aged care reform

Issue of human rights generally

48. The Law Council supports the intended use of a Statement of Rights to underpin the new Act, subject to the following comments. The Statement of Rights should include, though it may go beyond, a statement of fundamental human rights and freedoms. Also, human rights should be explicitly and in substance embodied in the substantive provisions of the Act, not simply listed in a separate Statement of Rights.

49. Consultation Paper No. 2 does not detail the source or content of these rights. It does not make clear whether international human rights which Australia is obliged to protect will be contained in the Statement. Nor is it clear what remedies will be available for a failure to respect and protect the human rights and other rights to be included in a Statement of Rights. The Law Council reiterates the need for there to be effective and accessible remedies where the rights of aged care residents and their family members or carers are violated.[52]

50. Consultation Paper No. 2 notes that the inclusion of a Statement of Rights will be consistent with Recommendation 2 of the Final Report.[53] As the Law Council noted in its previous submission,[54] the rights expressed in Recommendation 2 appear to have been informed by applicable human rights in the International Covenant on Economic, Social and Cultural Rights,[55] the International Covenant on Civil and Political Rights,[56] the Convention on the Elimination of All Forms of Discrimination against Women;[57] and the Convention on the Rights of Persons with Disabilities (**CRPD**).[58]

51. The Law Council reiterates its previous submission that it is essential that Australia's international human rights obligations underpin Commonwealth aged care.[59]

52. As noted in its previous submission,[60] in addition to the rights referred to above, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**)[61] is also clearly applicable. The Australian Government and the Department should also proceed on the basis that the Optional Protocol to the Convention against Torture (**OPCAT**)[62] applies to the regulated aged care scheme. Currently, it is understood that aged care facilities are not given priority by the

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[52] Law Council, Submission to the Department, 'A new model for regulating Aged Care—Consultation Paper No. 1' (2 November 2022) [59]-[60] https://lawcouncil.au/publicassets/67ceb09a-375b-ed11-9475-005056be13b5/2022%2011%2002%20-%20S%20-%20A%20New%20Model%20for%20Regulating%20Aged%20Care.pdf (**Law Council submission on Consultation Paper No. 1**).
[53] Ibid footnote 24 on page 45.
[54] Law Council submission on Consultation Paper No. 1 [27].
[55] *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.
[56] 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).
[57] 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).
[58] Convention on the Rights of Persons with Disabilities (CRPD)(entry into force 3 May 2008; entry into force for Australia 16 August 2008).
[59] Law Council submission on Consultation Paper No. 1 [30].
[60] [40]-[49].
[61] 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)
[62] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

Commonwealth Ombudsman in performing its inspection function as the National Preventative Mechanism for federal places of detention.[63]

53. Consideration should also be given to the United Nations Declaration on the Rights of Indigenous Persons (**UNDRIP**). 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.[64] The International Convention on the Elimination of All Forms of Racial Discrimination[65] should also be considered.

54. The Law Council looks forward to the opportunity to consider, and provide feedback on, a proposed Statement of Rights.

Challenges balancing rights

55. Particular care will be required in setting out guidance for providers as to their obligations when resident rights come in conflict. For example, when a resident's right to physical autonomy may come into conflict with the rights of other residents to be protected from harm. This potential tension is alluded to in Consultation Paper No. 2, in both:

- the description of the potential overarching duty to 'make sure that the health and safety of persons in their care is not unnecessarily put at risk taking into account the rights of older people';[66] and
- in raising the possibility of compensation for failing to ensure that the health and safety of persons in their care is not put at risk 'while taking into account the rights of older persons' (discussed further below).[67]

56. The need for care to balance resident's rights is also evident in some of the proposed provisions of the Code of Conduct, for example in the obligations:

- to '*act with respect for people's rights to freedom of expression, self-determination and decision-making in accordance with applicable laws and principles*';[68] and
- to '*take all reasonable steps to prevent and respond to: all forms of violence, discrimination, exploitation, neglect and abuse and sexual misconduct*'.[69]

57. The Department appears cognisant of the need to balance these rights. Consultation Paper No. 2 indicates that obligations on providers to act consistently with the Statement of Rights will be subject to 'necessary limits to balance competing or conflicting rights', such as the 'rights of other individuals also accessing aged care services in the same facility'.[70]

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[63] Commonwealth Ombudsman, Submission by the Commonwealth Ombudsman to the Committee against Torture in its consideration of Australia's sixth periodic report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (30 September 2022) [99]-[104], [111] https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/290572/Concluding-Observations-UN-CAT.pdf.
[64] Ibid.
[65] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195
[66] Consultation Paper No. 2 48.
[67] Ibid 63.
[68] Ibid 46.
[69] Ibid 48.
[70] Ibid 45.

58. The stated intention in the Consultation Paper is that the rights articulated in the Statement of Rights will be embedded throughout the regulatory framework:[71]

> *It is intended that specified rights will be able to be tracked through to operational provisions under the Act, for example, through new policy settings regarding system entry and assessment, and through provider obligations (e.g., requirements under the Code and/or the Quality Standards) to enforcement pathways.*

59. The Law Council commends the Department for this approach, which reflects the following paragraph in its submission on Consultation Paper No. 1:[72]

> *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.*

60. The Law Council's previous submission set out a framework for determining the scope and content of international human rights, which should be taken into account in undertaking that balancing exercise.[73]

61. The Law Council recommends that the Statement, and the provider obligations that sit under it, address the balance between supporting the exercise of autonomy and the protection of the health and safety of care recipients, their families and staff.

62. The Law Council seeks clarity as to the role of the care services agreement made between the provider and the care recipient and in particular the expansion of the relative roles and responsibilities of providers and care recipients in balancing these rights. This also includes any responsibilities of providers to respond to the particular needs and situation of individual residents (for example, those who live with dementia) and to adopt effective ways of engaging with residents as part of a human rights-based approach.

63. Some of the practical issues raised with the Law Council in this regard include:

- providing clarity in the law around the responsibilities and obligations on a provider in providing entry for a Commonwealth funded advocate, under the National Aged Care Advocacy Program,[74] to provide support to an older person in aged care. This can be particularly challenging if the entry of the advocate is resisted by a family member of the care recipient; and
- clarifying the right in law for aged care recipients to receive copies of their own care plans, medical assessments, Advance Healthcare Directives and Enduring Power of Attorney documents etc.

Supported decision-making

64. The LSNSW expressed concern that even with appropriate support, some aged care recipients will lack capacity to make certain types of decisions. It recommended the new model be strengthened by providing practical guidance for

[71] Ibid.
[72] Consultation Paper No. 1 [50]
[73] Law Council submission on Consultation Paper No. 1 [50]-[53].
[74] Department, 'National Aged Care Advocacy Program' (webpage, accessed on 28 June 2023) https://www.health.gov.au/our-work/national-aged-care-advocacy-program-nacap.

providers to address those kinds of circumstances, particularly where the rights of other residents or staff are affected.

65. The Law Council addressed supported decision-making principles at length in its previous submission.[75] Supported decision-making has its foundation in Article 12 of the CRPD and the basic principle is that persons with impaired capacity:

- 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 unable to make or participate in the making of such decisions—should have their will and preferences determine the outcome of the decision, rather than someone else's assessment of what is in their 'best interests'.[76]

66. The uneven take-up of supported decision-making in state and territory laws that authorise decisions to be made on behalf of a person who has lost mental or functional capacity will present a challenge. This includes laws authorising the use of power of attorneys, and guardians and administrators.[77]

67. The Department has already faced this challenge in amendments to connect the restrictive practices regime in the Aged Care Act and under the *Quality of Care Principles 2014* (Cth) (**Quality of Care Principles**), with state and territory laws which authorise decision-makers.

68. The Quality of Care Principles provide 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.[78]

69. The Quality of Care Principles initially defined that person as 'someone who, under the law of the State or Territory in which the care recipient is provided with aged care, can give informed consent'. However, it was later determined that in many jurisdictions it was unclear whether the laws in that jurisdiction authorised such a person.[79] As a result, the Quality of Care Principles were amended to identify who was so authorised if the state and territory laws did not provide for that authorisation.[80]

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[75] Law Council submission on Consultation Paper No. 1: [68]-[83]. The Department may be assisted in this regard by the discussion at [1.4.36]-[1.4.42] of South Australian Law Reform Institute, 'Autonomy and Safeguarding are not Mutually Inconsistent': A Review of the Operation of the Ageing and Adult Safeguarding Act 1995 (SA)' Report 17 (September 2022).
[76] Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws**',** ALRC Report 124 (August 2014) [2.73]-[2.90].
[77] The Law Council has detailed the extent of the divergence in decision-making laws and the challenges it raises in a recent submission on re-making of a new *Disability Services Act 1986* (Cth). Law Council, Submission to the Department of Social Services, 'Consultation Paper: A New Act to Replace the Disability Services Act 1986' [25]-[33] https://lawcouncil.au/publicassets/8c6654c3-a9ad-ed11-9479-005056be13b5/2023%2002%2015%20-%20L%20-%20Disability%20Services%20Act.pdf (**Law Council's Disability Services Act submission**).
[78] Subparagraph 15FA(1)(f)(ii) of the Quality of Care Principles.
[79] Explanatory Statement Quality of Care Amendment (Restrictive Practices) Principles 2022 2.
[80] Section 5B of the Quality of Care Principles, inserted into the Principles by item 3 of Schedule 1 to the Quality of Care Amendment (Restrictive Practices) Principles 2022.

70. The Explanatory Statement for that amending instrument provided [emphasis added]:[81]

> *As these arrangements relate to the **interim measures** to allow time for State and Territory governments to make amendments to their consent and guardianship laws, **they are not intended to be ongoing**. The Government will continue its engagement with State and Territory governments on this issue, including seeking their continued cooperation to investigate options to establish clear arrangements for the provision of substituted consent to the use of restrictive practices.*
>
> *The Government will monitor these arrangements over the next two years and **does not intend to continue the arrangements in the new Aged Care Act**.*

71. The empowering provisions for the restrictive practice framework were introduced by the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (Cth).[82] In its scrutiny report on that bill, the Parliamentary Joint Committee on Human Rights (**PJCHR**) queried the compatibility of the framework with Article 12 of the CRPD. The PJCHR queried specifically why there is no requirement for a model of supported, rather than substituted, decision making in relation to obtaining informed consent for the use of a restrictive practice.[83] In response, the then Minister stated:[84]

> *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*

72. Given these arrangements are interim and are not intended to be continued in the new Act, the Law Council encourages the Department to consider now how restrictive practices will be authorised and employed in the new Act in a manner consistent with Article 12 of the CRPD.

73. More generally, as the LSNSW identifies, it will be necessary for the new model to address the tension in these divergent decision-making regimes and provide a clear mechanism for making decisions where mental or functional capacity is challenged, without unduly exposing providers, workers or aged care recipients or their representatives to the risk of liability or even harm.

74. The Law Council supports greater consistency across a range of laws concerning individual decision-making as a matter of priority.[85] It supports in principle a move towards a model of supported decision making in states and territories, subject to consideration of the need for national leadership. This is evident in light of the number of reform projects on foot, which relate to legislative frameworks conferring decision-making powers.[86] The Law Council is aware that this will be a complex

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[81] Explanatory Statement Quality of Care Amendment (Restrictive Practices) Principles 2022 3.
[82] Schedule 9 to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (Cth).
[83] Parliamentary Joint Committee on Human Rights, 'Human rights scrutiny report - Report 1 of 2022' [2.10(d)].
[84] Ibid [2.14].
[85] Law Council of Australia (Law Council), submission to the Department of Social Services, 'National Disability Strategy (30 October 2020) (**Law Council's National Disability Strategy submission**) [100] https://lawcouncil.au/publicassets/65659bed-f61e-eb11-9435-005056be13b5/3907%20-%20National%20Disability%20Strategy.pdf; Law Council's Disability Services Act submission [31].
[86] Law Council's Disability Services Act submission [33].

task, with multiple matters to work through and a need for accompanying education.[87]

'Deinstitutionalisation'

75. The Law Council raises the broader human rights and public policy issue of the application of article 19 of the CRPD in medium- and long-term aged care planning and policy development.

76. Article 19 of the CRPD has practical application to older persons, given around half of Australians over 65 have a disability, with prevalence increasing significantly as age increases.[88]

77. Article 19 provides for the recognition of 'the equal right of all persons with disabilities to live in the community, with choices equal to others', and requires States Parties to 'take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community'.

78. The CRPD provides that States Parties should undertake 'deinstitutionalisation' processes as part of their duties to give effect to Article 19.[89] It describes these as comprising 'interconnected processes that should focus on restoring autonomy, choice and control to persons with disabilities as to how, where and with whom they decide to live'.[90]

79. In its interim report, the Royal Commission raised a concern that younger people with disability who were offered no option other than to live in residential aged care facilities are not enjoying the right in Article 19.[91] In response to the Interim Report, the Australian Government accepted that no younger person should have to live in residential aged care.[92] The Royal Commission made a recommendation to this end[93] and the Law Council notes the work being undertaken to achieve this by the Department.[94]

80. However, the Law Council suggests consideration also be given to how to give effect to the right in Article 19 of the CRPD as it applies to older persons. The Law Council acknowledges that this is a broad public policy issue with several dimensions, including the availability and adequacy of home care and supports; and access to housing options, including social housing, to support people to live in the

[87] Law Council's National Disability Strategy submission [92]-[100]; Law Council's Disability Services Act submission [30].
[88] Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings* (2018), https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#:~:text=Disability%20prevalence%20over%20time&text=one%2Dquarter%20(26.9%25)%20of,had%20disability%2C%20down%20from%2012.1%25.
[89] United Nations Committee on the Rights of Persons with Disabilities, 'General comment No. 5 (2017) on living independently and being included in the community' CRPD/C/GC/5 (27 October 2017) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/328/87/PDF/G1732887.pdf?OpenElement [57].
[90] United Nations Committee on the Rights of Persons with Disabilities, 'Guidelines on deinstitutionalization, including in emergencies' CRPD/C/5 (10 October 2022) [19].
[91] Royal Commission, Interim Report: Neglect (Volume 1) 241. See also, Volume 2 82-83.
[92] Royal Commission into Aged Care Quality and Safety Final Report - Care, Dignity and Respect: Volume 3A (**Final Report Vol 3A**) 92 https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf 351.
[93] Ibid Recommendation 74.
[94] Department, Younger people in residential aged care' (webpage, accessed on 28 June 2023) https://www.health.gov.au/our-work/younger-people-in-residential-aged-care.

community should they prefer to.[95] The Law Council would be pleased to consider its application in the present regulatory context, if that would assist.

Recommendations

- **Australia's international human rights obligations should underpin the Commonwealth aged care framework and be the foundation of the proposed Statement of Rights.**
- **The framework should provide key guidance to providers as to their obligations when rights are in conflict, including in the context of supported decision-making.**
- **The Commonwealth should develop greater consistency across a range of laws concerning individual decision making as a matter of priority.**

High quality care[96]

81. The Law Council supports the enshrinement of 'high quality care' as a concept underpinning the regulatory scheme in the new Act, consistent with Recommendation 13 of the Final Report.[97] The Law Council notes that the proposed elements of a definition of high-quality care set out on page 52 of Consultation Paper No. 2 closely resemble each limb of recommendation 13.2 of the Final Report.

82. The NSW Bar concurs with the Royal Commission that high quality care begins with the older person's wellbeing and quality of life, which extends beyond health and personal care to social and emotional fulfilment.[98] It suggests that the Australian Government should share the following ambition, asserted in the Final Report:[99]

> *The aged care system should deliver high quality clinical and personal care **and** quality of life. Consistent with the new purpose of aged care that we propose in Recommendation 1, aged care should assist older people to live an active, meaningful and self-determined life, **lived** with dignity. Accessing aged care should help older people achieve happiness and fulfilment. Like everyone, older people want the chance to experience joy, meaning and purpose. This does not change simply because a person needs aged care services. The capacity of the aged care system to support quality of life, as well as to provide quality clinical and personal care, is a key part of achieving the vision for high quality care that we set out in this report.* [emphasis in the original]

Conditions

83. The Law Council generally supports the framework for imposing conditions, outlined above, as providing a transparent and accountable means to regulate the activities of aged care providers. The LSNSW suggests consideration should be given to permitting providers to dispute or seek review of any provider-specific conditions imposed under this power.

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[95] Older Persons Advocacy Network, Deinstitutionalisation in Aged Care – Position statement (December 2022) 6-7 https://media.accessiblecms.com.au/uploads/opan/2023/02/OPAN-Deinstitutionalisation-in-Aged-Care-Position-Statement.pdf.
[96] Consultation Paper No. 2, broadly addresses question 6 on page 53.
[97] Final Report Vol 3A 92 https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf.
[98] Ibid.
[99] Ibid 93.

Worker registration scheme

84. While the worker registration scheme is being developed separately to Consultation Paper No. 2, some initial views on the proposed scheme are set out below.

Minimum English language proficiency aspect

85. The Royal Commission recommended that the Australian Government should establish a national registration scheme for the personal care workforce, which included minimum levels of English language proficiency.[100]

86. The Final Report states, by way of justification for this recommendation:[101]

> *The ability of an older person to develop quality relationships with their carers is central to high quality care. We consider that it is vital to the provision of high quality and safe care that personal care workers can communicate effectively with older people, their families and their colleagues. Minimum levels of English language proficiency should therefore be part of the registration standard for personal care workers, although we recognise having additional language capability beyond English is also helpful for Aboriginal and Torres Strait Islander people, ethnic communities and people with a hearing impairment.*

87. The LSNSW notes it is vital that aged care recipients can communicate easily with workers responsible for their care. However, its view is that a blanket English proficiency requirement for all workers in the aged care sector has the potential to exacerbate the chronic labour shortages in the sector.

88. It notes that Australia currently has a shortage of nurses and care workers, and relies to a large degree on sourcing workers from non-English speaking countries to staff and resource the aged care industry. Its view is that a blanket requirement for English language proficiency will not necessarily achieve the objective of ensuring that older Australians are able to communicate with staff, as many aged care recipients do not speak English.

89. The LSNSW suggests consideration be given to restricting the proposed English language proficiency requirement to managers or key staff based on their specific duties and/or level of responsibility within an organisation. At a minimum, it suggests further clarification is required regarding the types of workers that would be subject to the proposed requirement, and the level of English proficiency that would apply.

90. The chronic shortage of aged care sector workers was noted in the recent Migration Review Report [footnotes retained from original]:[102]

> *Jobs and Skills Australia projects the largest employment growth by 2026 to be in aged and disabled care*[103] *with a possible shortfall of more than 400,000 workers by 2050.*[104]

91. The Law Council has recently submitted that it considers that the Skilled Migration Program, as opposed to other visa programs, should be used to fill workforce

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[100] Final Report Vol 3A Recommendation 77.1.c, 392.
[101] Final report Vol 1 126.
[102] Dr Martin Parkinson AC PSM, Chair Professor Joanna Howe Mr John Azarias, 'Review of the Migration System' 93 <https://www.homeaffairs.gov.au/reports-and-pubs/files/review-migration-system-final-report.pdf>.
[103] National Skills Commission (2022) Projecting employment to 2026, National Skills Commission, Australian Government, accessed on 1 March 2023.
[104] CEDA (2021) Duty of care: Meeting the aged care workforce challenge, CEDA, accessed 1 March 2023.

shortages and labour market demand, in order to: reduce the risk of exploitation; recruit migrant workers with sufficient skills, experience and training to perform the work; and ensure pathways for permanent residency for such workers.[105]

92. Visas available under the Skilled Migration Program generally impose minimum English language requirements.[106]

93. The Law Council notes that an Aged Care Industry Labour Agreement (**ACILA**) is currently being offered. Under the ACILA, Australian aged care providers can sponsor Nursing Support Workers, Personal Care Assistants and Aged or Disabled Carers for a Temporary Skill Shortage (**TSS**) (subclass 482) visa and a permanent residence Employer Nomination Scheme (**ENS**) (subclass 186) visa, which are part of the Skilled Migration Program.[107] Access is dependent on the aged care provider negotiating a Memorandum of Understanding with the relevant union/s. The information provided by the Department includes the following information about English language requirements for applicants:

> *[H]ave an English language proficiency level of at least IELTS 5.0 or equivalent. Workers with target community language skills employed by culturally and linguistically diverse aged care providers need at least IELTS 4.5 or equivalent.*

94. The Law Council also notes that, to qualify for the TSS visa, an applicant will need:[108]

- to hold at least a relevant Australian AQF Certificate III or equivalent or higher-level qualification obtained in Australia or if relying on an overseas qualification it must be equivalent to an AQF Certificate III or higher-level qualification;
- a skills assessment will be required; and
- at least one year of relevant work experience.

95. To qualify for an ENS visa the visa applicant must have a least two years relevant work experience in Australia[109] and be less than 45 years of age.[110] The position must also be full-time.[111]

96. The Law Council reserves its position on whether the eligibility requirements for a TSS or ENS visa under the ACILA for Nursing Support Workers, Personal Care Assistants and Aged or Disability Carers are sufficient. However, it raises this issue to demonstrate the bespoke approach taken to the English language requirements for aged care workers.

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[105] Law Council, Submission to the Joint Standing Committee on Migration, 'Migration, Pathway to nation Building' [93] < https://lawcouncil.au/publicassets/e96123eb-04d4-ed11-947b-005056be13b5/2023%2004%2003%20-%20S%20-%20%20Migration%20-%20Pathway%20to%20Nation%20Building.pdf>.
[106] See, for example, cl 482.232 of Sch 2 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**).
[107] Department of Home Affairs, 'Skilled migration program – Recent Changes – New Aged Care Industry Labour Agreement' (website, accessed 27 June 2023) https://immi.homeaffairs.gov.au/what-we-do/skilled-migration-program/recent-changes/new-aged-care-industry-labour-agreement#:~:text=The%20Aged%20Care%20Industry%20Labour%20Agreement%20streamlines%20the,this%20where%20appropriately%20qualified%20Australians%20are%20not%20available (**Labour Agreement webpage**).
[108] Ibid.
[109] Ibid.
[110] Paragraph 186.221(a) of Schedule 2 to the Migration Regulations.
[111] Labour Agreement webpage.

97. The Law Council considers that any English language requirements imposed on aged care sector workers should be consistent with English language requirements imposed under the Skilled Migration Program or at the very least no less than the minimum requirements for a TSS short term stream (being an overall IELTS[112] score of 5.0 with no less than 4.5 in each).

Generally

98. However, the Law Council notes an adequate number of staff, properly paid, trained and skilled, is critical to achieving the high quality of care to which the proposed framework aspires, particularly in residential aged care. The Law Council has previously emphasised the need for proper resourcing to achieve this outcome.[113] In light of this, it welcomes the establishment of a taskforce to consider the sustainability of the sector, as well as current and future funding approaches.[114]

99. The LSSA considers that the current worker screening requirements are deficient and should be reformed as part of the new framework. Its view is that the NDIS approach is a significant improvement on the current aged care screening requirements.

Recommendation

- **Any English language requirements imposed on aged care sector workers generally should be consistent with any English language proficiency obligations imposed through the Skilled Migration Program.**

The Regulator, their functions and powers

Identity of the Regulator

Current Regulator

100. The current regulator, ACQSC**,** is a 'listed entity',[115] which means that it is a non-corporate Commonwealth entity—in other words, part of the Commonwealth.

101. The Commission consists of a Commissioner and staff.[116] The Commissioner is appointed by the Minister—there are no statutory criteria for this appointment.[117] Relevantly, the Commissioner must comply with any written directions from the Minister as to the performance of their functions.[118]

102. In addition to the approval and sanctioning powers already mentioned, those powers include ensuring provider compliance with their responsibilities, promoting the

[112] The International English Language Testing System.
[113] Law Council, Submission to the Community Affairs Legislation Committee, 'Aged Care Amendment (Implementing Care Reform) Bill 2022' (16 August 2022) [74]-[76] https://lawcouncil.au/publicassets/5a85853b-542a-ed11-9460-005056be13b5/2022%2008%2016%20-%20S%20-%20Aged%20Care%20Amendment%20%20Implementing%20Care%20Reform%20%20Bill%202022%20-%20final%20%201.pdf.
[114] Department, 'Aged Care Taskforce' (webpage, accessed on 26 June 2023) https://www.health.gov.au/committees-and-groups/aged-care-taskforce.
[115] ACQSC Act paragraph 11(2)(a).
[116] Ibid section 12.
[117] Ibid section 24
[118] Ibid section 22.

provision of quality aged care and services, consumer engagement, complaints, regulatory functions and education functions.[119]

Royal Commission recommendations

103. Both Royal Commissioners proposed the ACQSC be abolished and replaced with a new regulator or regulators, but they proposed different models.

Pagone Model

104. Commissioner Pagone recommended an Australian Aged Care Commission be established in place of an abolished ACQSC (the **Pagone Model**).[120] Under this model, the new Commission would, in contrast to the present model, be:[121]

- a corporate Commonwealth entity—that is, have a separate legal personality than the Commonwealth;
- constituted by a board of commissioners appointed by the Governor-General;
- run on a day-to-day basis by a Chief Executive Officer (**CEO**) engaged by the Commission; and
- independent of Ministerial direction, and any advice it provides to the Minister must be made public.

105. It would have responsibility for system governance, 'including the responsibility of continuously monitoring the performance of the system'[122] and regulatory functions.[123]

106. Commissioner Pagone stated in justification of his proposed approach:[124]

> *Quality outcomes, financial risk and program administration all require coherent monitoring and responses. The management of all these matters, and governance responsibility, should be placed in the hands of a statutory body with dedicated purposes and clear responsibilities confined to ensuring that high quality aged care reaches those who need it. That body should be independent from the short-term distractions that beset the government of the day.*

Briggs Model

107. Commissioner Briggs (**Briggs Model**) recommended a new Aged Care Safety and Quality Authority be established in place of an abolished ACQSC.[125]

108. The legal structure of the new Authority was not made clear, except that it would be 'independent'.[126] It would be overseen by a board of five members with clinical, professional and community representatives, chosen by the Minister for Health and Aged Care.[127] It would have a CEO responsible to it.[128]

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[119] Ibid Division 2 of Part 3.
[120] Final Report Vol 3A Recommendation 5.
[121] Ibid 45-49.
[122] Ibid Recommendation 5.3.d.
[123] Ibid Recommendation 5.3.c.
[124] Ibid 45. See also 58.
[125] Final Report Vol 3A Recommendation 10.
[126] Ibid Recommendation 10.1.
[127] Ibid.
[128] Ibid.

109. It would have regulatory functions (e.g. approval, monitoring and compliance, enforcement action, and complaints handling).[129] However, unlike the Pagone Model, the Department would have a role as 'steward'.[130] The stewardship role would have the 'overriding aim of ensuring that all of the component parts of the aged care system work together in an efficient and effective way to achieve high quality and safe care for older people'. The functions would include 'direction-setting and system development, program design, program implementation, system financing, funding delivery, prudential oversight of providers and day-to-day management of service delivery through the network of service providers'.[131]

110. The Royal Commissioners recommended that complaints about the system governor and regulator would be made to the Inspector-General of Aged Care:[132]

> *Complaints are a key source of information about systemic problems. They provide a practical sense of issues facing people receiving aged care and their families. If a systemic oversight role is conferred without any responsibilities for complaint-handling, there is a risk that the oversight body will never develop the understanding it needs to identify systemic issues.*[133]

The Regulator in the new model

111. The information about the identity and governance of the regulator under the new model remains scant. Consultation Paper No. 2 does not address either of these models expressly. In practice, it more closely resembles the Commissioner Briggs model, given the Secretary of the Department will act as System Governor or 'steward'.[134] However, it appears intended that the ACQSC will be maintained.[135]

112. The Department will also have access to 'enhanced monitoring, compliance, and enforcement powers under the Act'.[136] The Department's powers will include to 'collect, analyse, and advise on a range of data to identify trends and systemic risks' to 'allow active management of the aged care system' and 'inform ongoing program management and policy development to support reform to address issues or make improvements to the aged care system'.[137]

113. These powers will not 'overlap with the activities of the Regulator, who will remain responsible for ensuring registered providers are compliant with legislative requirements related to the quality and safety of [subsidised aged care] services, and prudential requirements'.[138]

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[129] Ibid Recommendation 10.3.
[130] Ibid 65.
[131] Ibid 67.
[132] Ibid Recommendation 12.
[133] Ibid 82.
[134] Consultation Paper No. 2 55.
[135] Ibid footnote 3 on 6. See also 64.
[136] Ibid 55.
[137] Ibid.
[138] Ibid.

114. If the Inspector-General of Aged Care Bill 2023 (Cth) (**IGAC Bill),** presently before the Senate, is enacted, an Inspector-General of Aged Care will have functions to monitor, investigate and report to the Minister and Parliament on, relevantly:[139]

- the operation and administration of an aged care law, and the exercise of powers, the performance of functions and duties and systems established under such laws;
- the Commonwealth's administration of an aged care funding agreement or performance of obligations and the exercise of rights under an aged care funding agreement; and
- the implementation by the Commonwealth of the recommendations of the Aged Care Royal Commission.

Law Council views on the Regulator in the new model

Generally

115. Consultation Paper No. 2 does not provide any justification for not expressly adopting either the Pagone Model or Briggs Model. As noted, the intended model generally resembles the Briggs Model. However, Consultation Paper No. 2 does not address whether the ACQSC will be subject to governance reforms of the kind recommended by the Commissioners, and if not, why not.

116. The NSW Bar remains of the view that the Pagone model is the best option for the Department to adopt for the redesign of the aged care system.[140]

117. The NSW Bar has, for the purpose of this submission, reiterated its concern that the Pagone Model has not been taken up. It considers that the Pagone Model is likely to be 'the most effective in securing the rights and interests of older persons'. This is due to its independence, in particular having independent, statutory officers with defined areas of responsibility, which it considers 'critical' to successfully performing responsibilities for 'monitoring, compliance, enforcement and complaints'.

118. The NSW Bar would not support the ACQSC being maintained. Its view is that the ACQSC does not regulate independently because it is attached to the Department. It also noted that the Royal Commission found the ACQSC had failed to demonstrate strong and effective regulation.[141] It shares the view of the Royal Commission that the regulator must be independent of the Australian Government and providers to enable prompt and robust action to ensure consumer protections and foster public confidence in quality aged care. It considers that this independence would enable it to effectively regulate Commonwealth service delivery and have a national presence.

119. The NSW Bar notes that the Royal Commission found 'unacceptable' levels of substandard care in Australia's aged care system and heard evidence of wide-ranging abuse of older persons in aged care.[142] Its view is that injury, deaths and harm to the wellbeing of older persons will persist without substantial reform involving an independent regulator, as recommended by the Final Report.

120. The Law Council agrees with the benefits of the Pagone Model articulated by the NSW Bar. However, it remains open to an approach based on Commissioner

[139] Inspector-General of Aged Care Bill 2023 (Cth) (**IGAC Bill**) clause 10.
[140] Law Council submission on Consultation Paper No. 1 [12]-[17].
[141] Vol 2 226.
[142] Ibid 94-99, 169.

Briggs' recommendations, subject to there being detail as to whether the key governance reforms expressed by Commissioner Briggs—such as the expansion to a board made up of industry representatives, supported by a CEO—will be taken up. This detail should address the measures to oversee the performance of the human rights sought to be assured by the new Act, noting that, under the IGAC Bill, the Inspector-General of Aged Care does not have an explicit human rights function.

Recommendation

- **The Department or Minister should detail:**
  - **the transparency and accountability measures which will ensure the proper performance by the Regulator and Secretary (as System Governor) of their functions and powers;**
  - **the governance structure which will apply to the Regulator under this model; and**
  - **why this model is appropriate to ensure high-quality aged care with reference to the recommendations in the Final Report.**

Independent complaints function

121. One of the objects of the IGAC Bill is to provide oversight of the Commonwealth's administration of complaints management processes across the aged care system.[143] However, as noted in the report of the Senate Community Affairs Legislation Committee (**Senate Committee**) inquiry into the IGAC Bill, that bill will not provide the Inspector-General with the responsibility for investigating complaints about the system governor and regulator.[144]

122. The report of the Senate Committee recorded evidence given by the Office of the Commonwealth Ombudsman (**OCO**) that resolution of individual complaints would continue to be managed by the relevant entities themselves, while OCO would continue to have oversight of the administrative actions of those entities in handling complaints.[145] The report records that the Department suggested that this approach 'safeguards the Inspector-General's independence and impartiality, and ensures the role and functions complement, rather than duplicate, those of other government agencies'.[146]

123. It is not clear to the Law Council why the function of receiving complaints about the Regulator and Secretary (as System Governor) about their management of the aged care framework would undermine the Inspector-General's independence, particularly given this was the role that the Royal Commission anticipated it would have.

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[143] IGAC Bill paragraph 3(b).
[144] Senate Community Affairs Legislation Committee, 'Inspector-General of Aged Care Bill 2023 [Provisions] and Inspector-General of Aged Care (Consequential and Transitional Provisions) Bill 2023 [Provisions] – Final Report' (April 2023) [2.17] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000086/toc_pdf/Inspector-GeneralofAgedCareBill2023%5bProvisions%5dandInspector-GeneralofAgedCare(ConsequentialandTransitionalProvisions)Bill2023%5bProvisions%5d.pdf.
[145] Ibid [2.23]. The Law Council unpacked the regulatory framework underpinning the Commonwealth Ombudsman's functions in its submission to the Royal Commission: Law Council, Submission to the Royal Commission (29 July 2020) [152]-[154] https://lawcouncil.au/publicassets/5b9b103f-3bdc-ea11-9434-005056be13b5/3854%20-%20Aged%20Care%20Royal%20Commission.pdf.
[146] Ibid [2.25].

124. The Senate Committee 'acknowledged' the safeguarding policy intent and recommended the bill pass without amendment.[147] The Australian Greens recommended the bill be amended to provide for a complaints-handling function recommended by the Royal Commission.[148]

125. The Law Council is open to the presently proposed complaints-management system. However, it reserves its position subject to further information being provided.

Recommendation

- **The Department should detail the full framework for the Regulator and Secretary (as System Governor) to handle complaints about their own conduct, including the available avenues for third party oversight of the complaints-handling function, and detail why this is an appropriate response to the substance of Recommendation 12 of the Final Report.**
- **At a minimum, the processes by which a person may make a complaint to the Regulator and Secretary (as System Governor) about their own conduct should be authorised by law.**

Regulatory functions and powers

Monitoring, compliance and enforcement under the proposed system

126. The new framework will provide the Regulator with monitoring, investigation and enforcement powers which are strengthened, broadened, streamlined, and more flexible'.[149] It will employ 'risk-based monitoring' methodologies, which could be 'site based, desk based, announced, or unannounced' and range from a phone call to a full investigation.[150]

127. The Regulator's powers will include the power to request documents and information; undertake site visits; interview older people, workers, and others, at any time', and to 'enter and remain in a premises at any time without warrant or consent, to exercise their monitoring and investigation powers'.[151]

128. The monitoring activities may result in investigations into whether a registered provider is complying with the conditions of their registration or other legislative requirements, such as applicable standards.[152]

129. It is proposed that the Regulator will have:

    - power to issue two notices:
        - a Requirement for Action Notice—non-compliance with such a notice may lead to a Compliance Notice, further monitoring, investigation by the Regulator or an enforcement action; and

[147] Ibid [2.61].
[148] Senate Community Affairs Legislation Committee, 'Inspector-General of Aged Care Bill 2023 [Provisions] and Inspector-General of Aged Care (Consequential and Transitional Provisions) Bill 2023 [Provisions] – Australian Greens Additional Comments' (April 2023) [1.16].
[149] Consultation Paper No. 2 55
[150] Ibid 56
[151] Ibid.
[152] Ibid.

- a Compliance Notice—non-compliance with such a notice could have more significant consequences, including, potentially, a civil penalty;[153]

- power to vary, suspend or revoke a provider's registration, including the conditions of their registration;
- power to issue banning orders for providers and individual workers;
- power to issue an infringement notice, enter into enforceable undertakings, or apply for civil penalties using powers derived from the *Regulatory Powers (Standard Provisions) Act 2014* (Cth); and
- 'critical failure powers' to
  - 'appoint a statutory manager to take over management of a provider in circumstances that represent an unacceptable risk to care recipients'; and/or
  - 'help facilitate the appointment of a voluntary administrator of a provider in cases where a provider is trading insolvent in breach of other applicable laws'.[154]

Comments on monitoring, compliance and enforcement under the proposed system

Enforcement powers

130. The LSNSW suggests that consideration be given to subjecting the Regulator's powers to 'request documents and information, undertake site visits, interview older people, workers, and others, at any time' to a threshold level of seriousness or risk involved.

131. It considers that the proposed power of the Regulator to enter and remain in a premises at any time without warrant or consent in exercising their monitoring and investigation powers represents a significant expansion of the current law. Accordingly, it suggests that consideration should be given to limiting this power to situations where the Regulator considers that a material risk to the safety, care or wellbeing of care recipients exists. Its view is that such a construction would better enable the Regulator to investigate and address serious risks, without imposing an undue compliance burden on providers and intrusion upon the lives of care residents.

New compliance notices

132. The LIV queries the extent to which the new compliance notices will improve upon the extensive range of actions that the Regulator can take in relation to non-compliance, which presently includes issuing an infringement notice to the provider, applying to a court for an injunction or an order to enforce a civil penalty, and suspending or revoking the approval of approved providers.[155]

133. The LIV also queries whether the data can be published on the Regulator's responses to non-compliance with compliance notices, similar to the Aged Care Register of banning orders which is currently available online.[156] To aid

[153] Ibid 61
[154] Ibid 62.
[155] Aged Care Quality and Safety Commission, Australian Government. (14 July 2021). Compliance and Enforcement Policy (v2.2) Compliance and enforcement policy (14 July 2021) (agedcarequality.gov.au).
[156] Aged Care Quality and Safety Commission, Australian Government. (Changed 5 June 2023) Aged Care Register of banning orders, Aged Care Register of banning orders | Aged Care Quality and Safety Commission.

transparency regarding an aged care worker's suitability to provide a service and to strengthen overall compliance, the LIV recommends a system be implemented akin to the NDIS Worker Screening Check,[157] which allows anyone to check whether a person who works, or seeks to work, with people with disability, poses an unacceptable risk to the safety and wellbeing of NDIS participants.

134. The Law Council notes that Schedule 2 to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (Cth) (**2021 Amendment Bill**), if passed, would have amended the ACQSC Act to require the Commissioner to establish, operate and maintain an Aged Care Screening Database.[158] The Database would have contained up-to-date information about individuals who had applied for an aged care screening check, including the outcome of those checks and any sanction decisions which relate to them.[159]

135. That Database was part of an aged care screening check framework, which would have been inserted into the Aged Care Act by the 2021 Amendment Bill. That framework would have been effectively established by the Minister determining a law of a state or territory to be an aged care screening law.[160] The Database may have included information about applications for an aged care screening check under those laws and the decisions relating to such applications.[161]

136. The 2021 Amendment Bill lapsed at the proroguing of the last Parliament.

137. The Law Council notes that a worker screening framework will be established as part of a new aged care worker registration scheme, which is under development. The Law Council refers the Department to the submissions it made to the Senate Community Affairs Legislation Committee inquiry into the 2021 Amendment Bill. That submission made several recommendations in relation to the screening framework which would have been inserted by that bill.[162] The Law Council suggests the Department take those recommendations into account in designing the worker screening framework for the new Act.

Penalties

138. The Law Council notes that civil penalties, and potentially criminal offence provisions, for breaches of, or non-compliance with, aged care legislation are still under design. The Final Report recommended that civil penalty provisions be available for a breach by an approved provider of the general duty to provide high quality safe aged care, if it 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 services.[163]

139. The LSNSW seeks further clarification regarding the extent to which civil penalties and criminal offences may apply to 'key personnel' in light of the Royal

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[157] vic.gov.au 'NDIS Worker Screenings Check', https://www.vic.gov.au/ndis-worker-screening-check.
[158] Proposed subsection 74AG(1) of the ACQSC Act, as would have been inserted by item 8 of Schedule 2 to the Aged Care and Other Legislation Amendment (Royal Commission response No. 2) Bill 2021 (Cth).
[159] Ibid proposed subsection 74AG(3).
[160] Ibid proposed section 7A.
[161] Ibid proposed subsection 74AG(5).
[162] Law Council, Submission to the Senate Community Affairs Legislation Committee, 'Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021' (8 November 2021) [31]-[55] https://lawcouncil.au/publicassets/8490f01e-e441-ec11-9443-005056be13b5/4120%20-%20Aged%20Care%20and%20Other%20Legislation%20Amendment%20%20No%202.pdf.
[163] Royal Commission into Aged Care Quality and Safety Final Report - Care, Dignity and Respect: Volume 3B - The new system Recommendation 101.1 https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3b-1.pdf.

Commission's recommendation that civil penalty provisions attract accessorial liability for key personnel in certain circumstances.[164] It suggests there be clarity as to the specific responsibilities of key personnel that may attract liability (as distinct from those of the provider), and the inclusion of appropriate defences.

Audit

140. The LSNSW supports the introduction of 'graded assessment against the strengthened Quality Standards'[165] in the audit process. It considers that this provides a more sophisticated scheme for identifying issues of concern to providers, and improving service quality, than the current binary system.

141. The Law Council supports this submission. It also notes that a concern has been raised about the risk of persons establishing providers and collapsing the structures during a registration cycle. It notes the importance of audit, regulatory or other mechanisms or safeguards to prevent this.

Complaints and compensation under the proposed system

Complaint model

142. Consultation Paper No. 2 describes a four-part complaints model:[166]

- prevention/early response—including policies to encourage early response to concerns and issues, training, empowering colleagues to intervene, and making it easy for older people to raise concerns;
- response—acknowledging complaints quickly and empathetically, including by employing a restorative justice approach, keeping the complainant and their family informed about the process, limiting handovers between complaints officers and using a triage process;
- resolution—focusing on '*person-centred complaints resolution by seeking to address the problem as perceived by the older person and/ or their family, not on finding fault or blame with other individuals or parties. Informing the older person about the decision, and having a review process in place should the older person be unhappy with the outcome*'; and
- continuous improvement—*brings together all the information relating to complaints to identify trends and root causes, and then compares this with a provider's strategy and objectives to inform areas for improvement and initiative*.

143. Consultation Paper No. 2 sets out a number of principles, which will underpin the complaints framework, including that it will be 'procedurally fair [and] modelled on fairness, accessibility, responsiveness, and efficiency'.[167]

144. There will also be whistleblower protections,[168] including new penalties for providers who retaliate against complainants.

145. A new Aged Care Complaints Commissioner will be established to oversee the complaints model.

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[164] Ibid 101.2.
[165] Consultation Paper No. 2 18.
[166] Ibid 59.
[167] Ibid 58.
[168] This was recommended in the Final Report – see Vol 3B Recommendation 99.

Compensation

146. Consideration is being given to including provision for compensation to be available to older people:

    (a) 'who are negatively affected by registered providers that fail to meet their obligations', on agreement by the provider—for example, as part of a conciliation process or as an element of an enforceable undertaking;[169]

    (b) for serious breaches of statutory obligations and/or failing to ensure, while taking into account the rights of older persons outlined in the new Act, that the health and safety of persons is not put at risk.[170]

147. Consideration is being given to providing for compensation via a private right of action to be claimed, 'with the assistance of the Regulator, on behalf of a class of impacted individuals'. The Final Report recommended compensation be available for a breach of a civil penalty provision,[171] and the Consultation Paper suggests that this may be one circumstance where compensation may be available.[172]

Law Council comments on complaints management under the proposed system

Complaints

General comments on the four-part model[173]

148. It is not entirely clear how this 'four-part' model will be applied (e.g. whether it will have any lawful basis). It appears to refer to the actions of the provider in preventing and responding to complaints to them about their own conduct, but it is unclear what role the Age Care Complaints Commissioner will have in relation to this process. It is also unclear whether complaints must be made to providers before they can be made to that Commissioner. The Law Council suggests these matters be made clear.

149. The LIV broadly supports the four-part complaint model. However, it suggests the following suggested changes:

- the 'response' branch should clarify that complaints must be received without the complainant being adversely impacted, which is a key, recognised limitation of the approach under the current complaints system;[174]
- the 'continuous improvement' branch should require continuous improvement to be based on respect and trust, and ensure that it is flexible and responsive to the diverse needs (including cultural needs) of aged care consumers; and
- the 'resolution' branch should provide that in circumstances where complaints have not been resolved, the review process should consider detailed reasons as to why the complaint has not been acted upon and/or escalated.

150. Further, the LIV respectfully submits that there is no reason that a finding of fault or blame should prohibit a productive resolution to a complaint. Its view is that older people and their families are likely to be satisfied only with a review process that ascertains whether there is someone at fault for the alleged problem. Its view is that

[169] Ibid 62
[170] Ibid 63.
[171] Final Report Vol 3B Recommendation 102.
[172] Ibid 63.
[173] These views generally relate to questions 1 and 2 on page 63.
[174] Consultation Paper No. 2 55

it is only by attributing blame or fault that appropriate disciplinary measures, including the existing banning orders, can be implemented.

151. The LSNSW considers that a reformed complaints system should include mechanisms to strike out or otherwise deal with vexatious complaints, as well as timely and effective processes for finalising complaints.

152. The Law Council notes, with approval, that the complaints framework will be underpinned by a principle of procedural fairness. It emphasises the importance of providing a meaningful procedural fairness mechanism, particularly if the outcome of complaints has a regulatory consequence for a provider.

153. Clarity should also be provided as to the process under which complaints or issues arising will be addressed in circumstances where care recipients may be receiving care from multiple providers. A person receiving home care could conceivably receive it from different providers registered in different categories at the same time—for example domestic assistance (category (1)), home modifications (category (2)), social support (category (3)) and nursing (category (4)). It should be clear to the providers and the care recipient how responsibilities are managed, and how complaints can be made when issues arise in this context.

Early intervention and restorative justice[175]

154. Constituent Bodies raised queries about aspects of the proposed early intervention and restorative justice approach to complaints management. The Law Council has also added its own views, below.

155. The LSNSW recognises the utility of a restorative justice approach to complaints handling in some circumstances, however queries whether providers will choose to 'apologise' in this context, given the significant legal implications associated with potentially admitting responsibility or guilt. It suggests the legal status of such apologies may require further clarification.

156. Another concern separately expressed from the legal profession is that a restorative justice model may dissuade providers from introducing innovations or any services that carry any risk, however minimal.

157. The LIV supports the introduction of early intervention powers; however, it queries the stage at which they would be available during the process of responding to a complaint, and what early intervention would specifically entail.

158. The LIV queries how a restorative justice model would fit in the new Act, in that it may contradict the objective of seeking continuous improvement in the quality and delivery of care, as well as the safeguarding of human rights (discussed below).

159. Its view is that while restorative justice can be beneficial in criminal justice settings by bringing together people who have been affected by harm, in a safe, structured, and facilitated way to talk about what happened, how they were impacted, and how the harm can be repaired or addressed moving forward, this may not be appropriate in an aged care setting. This is due to several factors, including inherent power imbalances between an aged care recipient and their care provider, and the fact that an elderly person may be reliant on the aged care provider for future care.

[175] Question 4 on page 63.

160. The Law Council also emphasises the importance of ensuring that a restorative justice process takes place within a framework that is mindful of, and adjusted to overcome, structural power imbalances which may exist between aged care recipients and providers.

161. In its Justice Project, the Law Council detailed barriers to effective participation in alternative dispute resolution (**ADR**) proceedings faced by older persons:[176]

> *Key barriers include lower awareness of the law and their legal rights, lack of support, aids and adjustments to accommodate disability- and age-related needs, and psychological barriers, such as disempowerment, diminished self-confidence and feelings of shame, embarrassment or stoicism. These barriers can place older persons in a position of considerable disadvantage when participating in complaint-based systems, as these systems require self-advocacy and often involve power differentials between parties. Appropriate and tailored measures to support older persons' effective participation in alternative dispute resolution proceedings should therefore be developed. Such measures should include robust safeguards to address power imbalances between parties and/or other barriers which inhibit older persons' willingness or ability to participate in proceedings.*

162. The Law Council ultimately recommended in that Report that Governments should consider funding the expansion of appropriate models of legally assisted ADR for vulnerable client groups.[177] It identified Legal Aid Commission Family Dispute Resolution programs, which employ safeguards including screening out inappropriate cases, 'shuttle' or remote conferencing and specially trained mediators, as a model which could be looked it.[178]

Access to legal assistance

163. The Law Council reiterates[179] that it has been informed that there is a particular need to increase access to legal assistance services for persons in residential aged care. Legal assistance services provide specialist advice, representation and education for older persons and play a fundamental role in ensuring transparency and scrutiny of aged care.

164. The underfunding of legal assistance services means that, for example, in the 2022–23 financial year, just over one per cent of approved legal aid grants were provided to assist persons aged 65 years and over,[180] despite this group constituting 16 per cent of the population.[181]

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[176] Law Council, 'Justice Project, Final Report – Part 1 Older Persons' (August 2018) https://lawcouncilaustralia.sharepoint.com/sites/PolicyDivision/Shared%20Documents/Policy%20development/Elder%20Law/New%20Aged%20Care%20Bill/CP%20No%202/2023%2006%2026%20-%20S%20-%20A%20New%20Model%20for%20Regulating%20Aged%20Care%20No%202%20%20(back%20to%20NELSC).docx.

[177] Law Council, 'Justice Project, Final Report – Part 2 Dispute Resolution Mechanisms' (August 2018) 16-18 https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Dispute%20Resolution%20Mechanisms%20%28Part%202%29.pdf.

[178] Ibid 18 (Recommendation 3.2).

[179] Law Council, Submission to The Treasury (3 February 2023) [48]-[49] https://lawcouncil.au/publicassets/ab6bba63-bea5-ed11-9479-005056be13b5/2023%2002%2003%20-%20S%20-%20Pre-Budget%20Submission%20%202023-24.pdf.

[180] 1,812 out of 133,424 - National Legal Aid Statistics Report, 'Age' (for Financial Year 2022-23) https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=AgeIndicator.

[181] Australian Bureau of Statistics, 'National, state and territory population Dec 2022, Table 6 Age distribution, by sex, preliminary – 30 June 2022 (Released 15 June 2022) https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/dec-2022/31010do002_202212.xlsx.

165. Access to specialised legal assistance services for older persons is critical to ensuring that older people can uphold their rights at all stages of a complaints process. Improved access to such services must accompany aged care reforms in order to better protect aged care rights into the future. Aged care providers should be required to facilitate this access to legal assistance bodies generally and legal representatives of the person's choice.

Whistleblower protections

166. The LSNSW agrees that there is a need for effective whistleblower processes and protections, which should empower residents and their representatives to raise complaints without fear of retribution. In considering how whistleblower protections might be enhanced under the new model, it suggests consideration of the following:

- how the current complaints system has failed to adequately protect whistleblowers that have raised concerns; and
- what further protections could be implemented, noting the sanctions that currently exist.

Ombudsman proposal

167. The LIV considers that more independence is required in the complaints-handling processes than appears to be provided by the proposed model. It considers that the ACQSC holding the dual roles of regulator and complaints handler led to delays and poor enforcement.[182] The limited separation between these responsibilities and a lack of transparency regarding complaint outcomes weakens the Commission's capacity to act impartially.[183]

168. The LIV recommends the establishment of an Aged Care Ombudsman, separate to the Regulator. It considers the Ombudsman should have powers to investigate residential aged care facilities on its own motion or upon receipt of a complaint. It considers that the Ombudsman must be easily contactable and prompt in its responses to complaints.

169. It envisages that this body would be granted the ability to utilise complaint information to inform preventative strategies, best practice guides, and education workshops to further assist the Regulator. It queries whether the ambition stated in Consultation Paper No. 2 of building a 'responsive and collaborative' environment between the ACQSC, the Department, and providers can be achieved when the ACQSC and the Department primarily operate as regulators—that is, are primarily responsible for assessing and determining the compliance or otherwise of providers. For this reason, also, it sees a role for an impartial third party, such as an Aged Care Ombudsman, to assist in providing education to providers and mitigating identified risks

[182] Daniel Peet, 'Challenges in Advancing Aged Care Complaints' (Webpage, 17 August 2022) <https://www.agedcarejustice.org.au/challenges-advancing-aged-care-complaints/>.
[183] Ibid.

Compensation

Generally

170. The LIV submits that financial compensation should be available in the circumstances recommended in the Final Report. It suggests that a system akin to the Australian Financial Complaints Authority (**AFCA**) regulation of financial organisations could be implemented whereby recommendations of compensation could be made. Moreover, it considers that the Regulator should be empowered to seek or to recommend financial compensation with powers akin to those afforded to AFCA. Its view is that the AFCA system is accessible with or without legal representation and complaints are dealt with more efficiently than if they were brought through a court mechanism. Furthermore, its view is that the AFCA system avoids unnecessary legal costs which is a major barrier in consumers seeking justice. In this respect, the LIV notes that historically, consumers seeking to bring private litigation against well-funded residential aged care providers have faced barriers to accessing justice.

Class actions

171. The LSNSW suggests that there is some ambiguity in what 'the assistance of the Regulator' means in the context of class action complaints. It suggests that if it is intended that individual or group claims will be funded or supported by the Regulator, this may raise questions as to whether the balance of power between the parties is appropriate.

172. It also notes that there may be some difficulty in incorporating class actions into the new model, as these claims rely upon common sets of facts and circumstances amongst the complainants to demonstrate a systemic failure. The recent class action litigation involving retirement village provider Aveo Group, which was ultimately withdrawn, highlights the difficulty in maintaining class actions in the context of seniors living environments in retirement villages which is akin to aged care, given the wide variety of contracts, contracting parties and relevant terms involved.[184]

Publicly available information under the proposed framework

Certificates

173. A register will publish certificates which will contain information about 'the period of their (provider's) registration, the types of services they (providers) are registered to deliver, and the obligations they (providers) must meet'.[185]

[184] See Lauren Croft, '6 year class action withdrawn, $11m settlement reached', Lawyers Weekly (Online, 28 March 2023), https://www.lawyersweekly.com.au/wig-chamber/36993-6-year-class-action-withdrawn-members-to-receive-11m-settlement.
[185] Consultation Paper No. 2 27.

Information to inform choice

174. The Department has begun to launch mechanisms directed towards publishing information about aged care providers. This includes:

- Star Ratings, which provide ratings against four indices—compliance, quality measures, residents' experience and staffing.[186] Consultation Paper No. 2. Suggests ratings could be affected by, for example, an audit outcome.[187]
- Monthly Care Statements for each resident, which will include a summary of the care the resident has received and any significant changes or events which occurred in that month.[188]

Provider and community focussed education

175. Education directed at providers will relate to provider obligations, ways to improve the quality and safety of care, learning from each other, understanding their performance, and the rights of older people when using care and services.[189]

176. The Regulator will take a 'prevent, detect, correct approach' to 'produce insights on systemic issues that require targeted development and education campaigns to support the sector'.[190] Education campaigns will be directed to the community to build capability in the community to further the rights of older people.[191]

Law Council comments about proposed regulatory powers and functions

Publicly available information

Monthly care statements

177. The LSNSW supports, in principle, the introduction of Monthly Care Statements; however, it considers the current proposal would impose a significant and potentially onerous obligation on large providers in particular. It suggests that further guidance and support may be required to assist providers in complying with their obligations.

178. The Law Council notes that these Statements are expressed as intended to give effect to issues raised by the Royal Commission, in relation to a lack of information flow from aged care providers to older people and their representatives.[192] It supports this objective and in-principle supports the provision of Monthly Care Statements as an appropriate means to give effect to it. It notes that the introduction of these Statements remains in the pilot stage,[193] and it suggests consideration be given to ensuring that providers are supported by systems and guidance, as suggested by the LSNSW.

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[186] Department, Star Ratings for residential aged care (webpage accessed on 25 June 2023) https://www.health.gov.au/our-work/star-ratings-for-residential-aged-care.
[187] Consultation Paper No. 2 37.
[188] Department, Monthly Care Statements for residential aged care (webpage, accessed 25 June 2023). https://www.health.gov.au/our-work/monthly-care-statements-for-residential-aged-care (**Monthly Care Statements webpage**).
[189] Consultation Paper No. 2 21.
[190] Ibid.
[191] Ibid 22.
[192] Monthly Care Statements webpage.
[193] Ibid.

Generally[194]

179. The LSSA suggests the information about aged care providers be consolidated into a single website. While there is a range of information about providers on the My Aged Care register, audit reports on residential aged care facilities can only be accessed via the ACQSC website. It further suggests that the My Aged Care website should be easy to use and facilitate comparison between aged care providers with ease.

Education to support providers continuously improve[195]

180. The LSSA submits that being equipped to manage complex behaviours of people with dementia is critical to being able to provide quality of care to the affected resident and other residents. Its members have indicated some aged care providers have difficulty with this issue, owing to limited resources and the typically shared environment of aged care. It is reported that residents with dementia can be hospitalised because the facility does not have the resources to manage their behaviour, or the harm to other residents and staff arising from the behaviour of the resident with dementia.

181. The LSSA queries whether training staff in managing and responding to complex behaviour may assist in addressing this challenge.

182. The Law Council supports the availability of education to providers about the nature and content of the rights of care recipients.

Regulation of online platforms to connect users to services[196]

183. In relation to the regulation of online platforms that connect older people to aged care services, the LSSA suggests:

- imposing a requirement that the online platform must verify that the provider using the online platform is compliant with at least basic requirements, such as worker screenings;
- determining a complaints mechanism to enable consumers to refer complaints about a provider to the platform, particularly to enable the platform to identify whether there are patterns occurring that are identifying a particular provider as presenting risks to consumers;
- a separate more general reporting obligation on the part of the online platform to notify the Regulator of any significant concerns about a particular provider or worker using the platform, particularly as it is likely the providers using this type of platform will be sole traders or small organisations; and
- a need for online platforms to ensure that banned workers or providers are not permitted to operate on their platforms.

[194] Responds generally to question 5 on page 23.
[195] Responds generally to question 4 on page 23.
[196] Responds generally to question 3 on page 38.

Transition

Proposed approach

184. It is proposed there will be a single 'go-live' commencement date, where the existing regulatory framework ceases and the new model commences. It is intended that all providers delivering Commonwealth subsidised aged care services will transition into the new mode, and in doing so, be deemed part of a new registration category. The Regulator will communicate with providers about their registration category, providing an opportunity to provide feedback on their proposed registration category.

185. To avoid the need for all re-registration to take place at the same time, it is proposed the period of the deemed registrations will be 'staggered', based on risk-based considerations, past performance and the timing of the provider's most recent accreditation or quality review under the current framework.

Comments on the proposed approach[197]

186. The LIV broadly supports the proposed transition approach, but makes some suggestions to ease the process. The LIV considers it is essential that the ACQSC and Department continue to engage with providers and offer timely and detailed advice and assistance in ensuring a successful transition. It has received feedback from its members that historically the ACQSC has been slow to communicate the details of proposed changes to aged care providers, and this has resulted in additional stress being placed on the aged care sector to comply with time-critical timelines and looming key commencement dates.

187. The LIV notes that changes to the regulatory approach will most likely be compounded by changes to the business model and operational requirements of many aged care providers. It suggests aged care providers be given sufficient time to plan for these proposed changes, and the proposed changes should not adversely impact new providers seeking to join the sector in good faith. It suggests a reasonable period of time, such as six months, be provided for providers to provide feedback on their proposed registration category and have an opportunity to challenge any conditions proposed to be attached to their registration.

Additional legal policy comments

Business considerations

188. The LSNSW notes that, while it supports a consumer-centred approach to regulation, due consideration must also be given to the business and financial viability of aged care providers. It emphasises the importance that the new model for regulatory oversight does not create unsustainable administrative or cost burdens for providers, or unduly stifle competition, innovation and consumer choice in the aged care market. It states that such economic considerations are particularly important in relation to regional areas, where the availability, and therefore choice, of aged care is often limited.

189. The Law Council has previously emphasised the need to factor in cost implications for providers in designing aged care regulatory reform.[198] It notes that higher costs

[197] This response generally addresses questions 1-4 on page 66.
[198] Law Council of Australia, Submission to the Community Affairs Legislation Committee, 'Aged Care Amendment (Implementing Care Reform) Bill 2022' (16 August 2022) [5]-[6] and [120]-[124]

conceivably reduce the funds available for care and services and the amount that providers are able to afford the costs associated with compliance.[199]

Responding to key Royal Commission recommendations

Generally

190. The Law Council appreciates the Department's efforts, in Consultation Paper No. 2 to map the features of the new model more clearly to the Royal Commission recommendations.[200] However, there are still key recommendations that remain unaddressed through reform proposals.

191. The NSW Bar reiterates its concern that the Department, through the Consultation Papers, has not engaged with the structure and detail of the Royal Commission recommendations. Its view is that the questions posed in the Consultation Paper do not reflect the structure of the recommendations in the Final Report, particularly Chapter 14, *Quality Regulation and Advocacy*.

192. It remarks that recommendation 96 appears not to be addressed. That recommendation requires the system governor to establish a register of reports sent to them by a Coroner that concern the death of persons in connection with the receipt of aged care, and to publish a response within three months. Noting that under the current model the system governor will be the Secretary of the Department, the Law Council queries whether the Department intends to perform this function.

193. The Law Council notes that it will be a function of the new Inspector-General of Aged Care to monitor, investigate and report to the Minister and Parliament on the implementation by the Commonwealth of the Royal Commission recommendations.[201] Nevertheless, the Law Council suggests that the Department should increase transparency with respect to the extent to which the regulatory framework responds to the recommendations in the Financial Report. One option may be to build upon or update the then Australian Government's initial tabulated response to the Final Report.[202] The update table could be appended to the Aged Care Reform Roadmap released on 9 June 2023.[203]

Aged care for First Nations peoples

194. The Law Council reiterates the importance of implementing the recommendations in Chapter 7 of Volume 3A of the Final Report titled, Aged Care for Aboriginal and Torres Strait Islander People. Recommendations 47–53 call for, amongst other things, establishment of an Aboriginal and Torres Strait Islander aged care pathway

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'https://lawcouncil.au/publicassets/5a85853b-542a-ed11-9460-005056be13b5/2022%2008%2016%20-%20S%20-%20Aged%20Care%20Amendment%20%20Implementing%20Care%20Reform%20%20Bill%202022%20-%20final%20%201.pdf.

[199] [122].

[200] Footnote 2 on 6 provides: '[t]he the new model also responds to Royal Commission's Recommendations 92 and 93 (provider approval and accreditation), Recommendations 13,14, 50, 131, 123, 133 and 135 (provider registration and obligations), Recommendations 97, 101, 102, 103, 134 and 136 (monitoring and enforcement), and Recommendations 10, 98 and 99 (complaints and whistleblower protections).

[201] IGAC Bill paragraph 10(1)(d).

[202] Australian Government, Australian Government response to the final report of the Royal Commission into Aged Care Quality and Safety (May 2021) https://www.health.gov.au/sites/default/files/documents/2021/05/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety.pdf.

[203] Department, 'The Aged Care Reform Roadmap has been released' (9 June 2023) https://agedcareengagement.health.go v.au/blog/the-aged-care-reform-roadmap-has-been-released/.

within the new aged care system,[204] the establishment of an Aboriginal and Torres Strait Islander Aged Care Commissioner as a statutory role within the administrative structure of the aged care regulator,[205] and the regulation of cultural safety and worker training.[206]

195. The Law Council notes that Consultation Paper No. 2 suggests the Department is 'undertaking other consultations to explore options for integrated care models, with a focus on identifying opportunities in thin markets, in particular for First Nations people as well as for those in regional, rural and remote communities'.[207]

196. It also notes that the 2023–24 Federal Budget provided for the establishment of an interim First Nations Aged Care Commissioner, who 'will ensure First Nations people have a voice in shaping the role and functions of the permanent Commissioner, to ensure maximum impact on the aged care system'.[208] The Aged Care Reform Roadmap suggests that the interim First Nations Aged Care Commissioner will commence in the first part of the 2023–24 financial year.

197. The Law Council looks forward to the opportunity, supported by the advice of its Indigenous Legal Issues Committee, to contribute to consultations on the performance of Recommendations 47–53 of the Final Report.

Conclusion

198. The Law Council thanks the Department again for the opportunity to make these submissions and would welcome the opportunity to discuss any of the issues raised within.

[204] Final Report vol 3A Recommendation 47 on page 246.
[205] Ibid Recommendation 49 on page 252.
[206] Ibid 48 on page 250.
[207] Consultation Paper No. 2 70.
[208] Department, 'Improving the lives of all Australians' 2 Improving the lives of all Australians (health.gov.au) . Commonwealth, 'Budget 2023-24 Budget Measures – Budget Paper No. 2' (9 May 2023) 135.