



A new Aged Care Act

Statement of changes from the exposure draft

Acknowledgement of Country

The Department of Health and Aged Care acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respect to Aboriginal and Torres Strait Islander cultures; and to Elders past and present.

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Executive summary

This statement sets out the main changes to the Bill since the exposure draft.

The first recommendation of the Royal Commission into Aged Care Quality and Safety (Royal Commission) was for a new Aged Care Act (Recommendation 1) to give effect to fundamental reform of the aged care system. To assist in developing the [Aged Care Bill](#) (the Bill), the Department of Health and Aged Care (the department) undertook extensive [public consultation](#).

- from August to September 2023, the department consulted on the [foundations of the new Aged Care Act](#)
- from 14 December 2023 to 8 March 2024, the department consulted on an [exposure draft of the Bill](#) for the new Aged Care Act.

Feedback from foundations of the new Aged Care Act and the exposure draft consultation was summarised in [consultation feedback reports](#). These reports were used in the legislation development process. The department considered all feedback from the consultations and has worked with legislative writers to reflect that feedback, as summarised in this report.

It should be noted that the views of stakeholders did not always align. Some feedback also went beyond the scope of what aged care legislation can reasonably cover. This statement does not cover those matters, but further detail is available in the [Explanatory Memorandum](#).

Background

The Bill responds to around 60 recommendations of the Royal Commission. It establishes a modern rights-based legislative framework that focuses on the safety, health and wellbeing of older people and places their needs at the centre of the aged care system. It is beneficial legislation, which means that funding and regulation of programs is for the benefit of older people.

The Bill includes:

- a Statement of Rights for older people and a positive duty for providers to uphold those rights
- a single-entry point to the aged care system, with clear eligibility requirements and a fair, culturally safe assessment process
- the framework for delivery of a range of aged care services, including residential care and the new Support at Home program which will offer:
 - improved access to supports and services to help people remain independent at home
 - higher levels of care in the home so people can remain at home for longer.

- mechanisms for the Commonwealth to fund aged care services, including aged care related grant programs
- fair co-contributions from those who can afford to contribute to the cost of their aged care – to make sure the aged care system is sustainable into the future
- a new approach to regulating aged care - which will balance clear incentives for continuous improvement and the delivery of high-quality care – including through new Quality Standards - and stronger regulatory powers to protect people from harm
- a new, independent statutory Complaints Commissioner, and
- whistleblower protections to make sure that older people, workers and others have clear pathways to raise concerns about the quality of aged care services.

Chapter 1 – Introduction

Chapter 1 overview

Chapter 1 includes introductory and framing provisions, as well as definitions. They include:

- the objects of the Bill, which include that the Bill gives effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities
- the Statement of Rights, which recognises the rights of people accessing or seeking access to aged care services
- the Statement of Principles, which guides the actions of government agencies and bodies to ensure that the whole aged care system is directed towards the safety, health, wellbeing, and quality of life of people accessing aged care services.

Chapter 1 also sets out supporter arrangements for the aged care system. Under these arrangements, supporters who help people navigate the system may register that arrangement. They are required to act in accordance with principles that promote supported decision making. There is an offence provision relating to abuse of the position of supporter.

Feedback summary

Feedback from stakeholders on Chapter 1 of the exposure draft was largely positive, with the majority viewing the outlined objects as a progressive step in safeguarding the rights of older people accessing or seeking to access aged care services.

While the intent of the Statement of Rights and Statement of Principles were deemed clear by most, there were constructive suggestions to ensure they achieve their intended purpose. The aspirational definition of high quality care elicited a strong response, with many stakeholders concerned with the ability to meet the requirements outlined in the definition and how elements of high quality care will be measured. The role of supporters and representatives generated considerable feedback.

Changes

Positive duty and balancing rights

The Bill responds to stakeholder feedback that there should be a positive duty for providers to uphold rights. The changes clarify that registered providers delivering aged care services to people must take all reasonable and proportionate steps to act compatibly with the rights in the delivery of aged care services. The change also recognises that limits on rights may be necessary to balance:

- competing or conflicting rights

- the rights and freedoms of other people, including aged care workers, of the registered provider and other people accessing aged care services
- compliance with any other laws of the Commonwealth, such as obligations under the *Work Health and Safety Act 2011*.

As recognised in international law, a small number of human rights are recognised as absolute rights which cannot be limited for whatever reason, including freedom from torture and other cruel, inhuman or degrading treatment or punishment. However, most rights are subject to permissible limits (for example, on grounds such as public order and protection of rights and freedoms of others).

In response to stakeholder feedback about including a positive duty, the Bill replaces the language in clause 24 '*must not act in a way that is incompatible with the rights...*' with '*must take all reasonable and proportionate steps to act compatibly with the relevant rights specified in section 23 in the delivery of funded aged care services...*'. Using this positive language means registered providers will be required to actively ensure the aged care services they deliver meet the rights specified in the Statement of Rights.

In practice, to act 'compatibly with rights' means that any act or decision of the provider will need to be assessed against the Statement of Rights to ensure it does not limit a right under the Statement of Rights, except to the extent that is reasonable and demonstrably justifiable.

Island Home

In response to stakeholder feedback, the Bill includes reference to both 'Island Home' and 'Country'. The Bill provides that people who are Aboriginal and/or Torres Strait Islander have the right to opportunities, and assistance, to stay connected with community, Country and Island Home (where they choose). The Statement of Rights also recognises that people have the right to have their identity, culture, spirituality, and diversity valued and supported.

Service Groups

While drafting the Bill, changes were made to the service groups to consolidate them from 7 service groups to 4.

The 4 service groups are:

1. home support.
2. residential care.
3. assistive technology.
4. home modifications.

Service List

Some changes were also made to the definition of service list. These changes align with the constitutional authority that underpins the Bill.

Supporter arrangements and supported decision-making

Nominee arrangements generated substantial feedback from stakeholders. There was consensus that supporters should act in accordance with the will and preferences of older people. Concerns were raised about potential conflicts with existing state and territory legislation.

Stakeholders advocated for clear differentiation of roles and circumstances under which supporters could act, emphasising the need for swift and unencumbered decision-making processes, particularly in urgent scenarios. There was a sentiment that multiple supporters should be allowed to accommodate complex family dynamics and to ensure consistency with existing legal arrangements.

The Bill has been re-structured. In the exposure draft, supporter arrangements were split across 2 chapters (Chapter 1 and Chapter 8). All provisions relating to supporters and supported decision making are now in Chapter 1.

The Bill introduces a new model to embed supported decision-making across the aged care system. It aims to reinforce older peoples' right to make decisions that affect their lives and supports their right to autonomy and self-determination. The new supporter framework is intended to ensure that the will and preferences of older people are paramount in decision-making.

The supported decision-making provisions:

- include a single concept of supporter, rather than distinguishing between a supporter and a representative
- assume an older person has capacity to make decisions and places responsibility on their formal support network to only act where requested, or required, ensuring an older person's will and preferences are paramount
- recognise an older person's right to establish a formal support network under aged care legislation
- establish a supported decision-making continuum that assumes capacity of an older person and recognises that capacity is not static
- establish a requirement for supporters to obtain consent from an older person when accessing information or conveying decisions made by an older person
- allow for multiple people to be registered as part of the older person's formal support network, while still acknowledging the role of people who have been given legal authority to act on behalf of the older person under jurisdictional legal instruments
- enable a person who has been given authority to make decisions under a jurisdictional legal instrument to act without notifying the System Governor in circumstances where immediate action is required.

People will be required to register their supporter relationships with the System Governor, rather than the System Governor appointing those people. This will

ensure consistent operation with state and territory legislation, while retaining the ability of the aged care system to identify and recognise supporters.

The System Governor may determine that a registered supporter has authority to make decisions on behalf of the person in exceptional circumstances, and for a limited period.

The Bill clarifies the interaction with state and territory laws. It does not limit the operation of a state or territory law that can operate concurrently (that is, would not be contradictory). This helps in circumstances where a person can make a decision under a state or territory law but is not registered as a decision-making supporter under the Bill. A person who is making decisions for an older person because they are authorised by a state or territory law will still be required to act only to the extent, and as required or regulated, by that relevant law.

Chapter 2 – Entry to the Commonwealth aged care system

Chapter 2 overview

Chapter 2 includes the requirements for an individual to access funded aged care services. This includes:

- establishing clear age limit thresholds to meet the Government’s commitment to reduce the number of younger people in aged care
- a single assessment pathway for approvals
- classification for Support at Home and the Australian National Aged Care Classification (AN-ACC) funding model
- prioritising access to residential care and the Support at Home program
- allocations of places to individuals and registered providers to enable access to funded aged care services.

Feedback summary

The feedback from stakeholders on Chapter 2 highlighted concern about service gaps for people aged under 65 with ageing-related conditions or needs who are not eligible for aged care services. There were calls for more flexible eligibility criteria to accommodate various needs and conditions.

Some stakeholders also emphasised standardising qualifications and training for aged care workers and assessors to ensure high quality, inclusive, and culturally appropriate assessments and care. Some suggested that emergency entry into aged care should be considered for people experiencing significant changes in circumstances.

Changes

Constitutional head of power

The Bill clarifies which constitutional head of power applies when approving a person for aged care services, particularly with respect to Aboriginal or Torres Strait Islander persons.

Prioritisation

Chapter 2, Part 4, Prioritisation was not included in the exposure draft.

Priority categories will be assigned to people, to ensure that people with the most urgent need are prioritised for an allocation of a place, which they can use to access aged care. This will ensure equitable access to aged care services.

Chapter 2, Part 4¹ includes provisions for:

- prioritisation assessment
- prioritisation reports
- priority category decisions
- priority categories and urgency ratings
- notices of decision
- period of effect of decisions
- changing the priority category.

Place Allocation

Chapter 2, Part 5, Place Allocation, was not included in the exposure draft.

The Bill allows the Minister to determine a process and method for determining the number of places available for allocation to people for each service group in a financial year. The System Governor will then allocate those places to people directly.

This gives effect to the Government's Places to People policy for residential care, which takes a person-centred approach to the availability of aged care. This will also allow the allocation of budgets for Support at Home and Assistive Technology and Home Modifications.

Division 2 of Part 5 of Chapter 2 provides for the process to allocate places to registered providers who are delivering aged care services under specialist aged care programs. This includes the Multi-Purpose Service Program and the Transition Care Program, which are currently funded under the Aged Care Act as flexible care subsidy.

As with the current Act, different arrangements are in place to facilitate alternative funding arrangements for these specialist programs. The process for allocation of places to providers begins with the Minister determining the number of places that are available for allocation to providers for the delivery of aged care services under these programs as registered providers.

The System Governor can then decide whether to allocate those places to a particular entity, but only if certain criteria and requirements are met.

Recognising the needs of Aboriginal and Torres Strait Islander people

Chapter 2 also includes provisions recognising the needs of Aboriginal and Torres Strait Islander people as part of the approval of access for aged care services decision making. The Explanatory Memorandum to the Bill clarifies that the use of Aboriginal or Torres Strait Islander throughout the Bill is inclusive of those persons with both Aboriginal and Torres Strait Islander heritage.

¹ Part 4 was not drafted in the *Aged Care Bill 2023* exposure draft, at the time of consultation.

For example, when the System Governor makes an approval decision for access for aged care services, the System Governor will consider the specific needs of the individual as an Aboriginal and/or Torres Strait Islander person.

Emergency entry

Part 2 of Chapter 2 of the Bill includes an entry pathway for exceptional circumstances. This means that even if an aged care needs assessment has not been done, the System Governor may approve access for a person. Like the current Act, an example of where this power may be used is where an individual commences accessing aged care through an alternative entry pathway (see below) but can no longer undergo an aged care needs assessment.

The Bill also allows for an alternative entry pathway where a person may be able to access aged care services prior to having an aged care needs assessment.

The System Governor must first be satisfied that one of the three circumstances apply to the person:

1. the person urgently needed access to aged care services and there was a significant risk of harm if those services were not delivered before their approval was given
2. the person is an Aboriginal or Torres Strait Islander person, and at the time they were seeking access to aged care services, there was a lack of availability of an approved needs assessor to undertake a culturally safe aged care needs assessment, or
3. the person accessed aged care services through a specialist aged care program before approval was given due to a significant delay in the availability of approved needs assessors.

Cultural Safety

The term cultural safety is used throughout the Bill. The National Aboriginal and Torres Strait Islander Ageing and Aged Care Council developed a definition for cultural safety in aged care. While this definition is not included in the Bill, it is set out in the Explanatory Memorandum as meaning:

...the understanding of one's own culture and the impact that your culture, thinking, and actions may have on the culture of others through ongoing critical self-reflection. Gaining such truthful insight about oneself is critical for ensuring access to a culturally safe, respectful, responsive and racism free aged care system providing for the optimal safety, autonomy, dignity, and absolute wellbeing of Aboriginal and/or Torres Strait Islander Elders and individuals accessing funded aged care services, and their families. Only the Aboriginal and/or Torres Strait Islander person who is the recipient of a service or interaction can determine whether it is culturally safe.²

² Explanatory Memorandum, Aged Care Bill 2024 (Cth) 75.

Chapter 3 – Registered providers, aged care workers and aged care digital platform operators

Chapter 3 overview

Chapter 3 provides the mechanisms for the Aged Care Quality and Safety Commissioner (Commissioner) to consider and decide on applications for registration and renewal as a provider of aged care services and applications for approval of a residential care home.

These mechanisms empower the Commissioner to vary, suspend or revoke a registration to ensure only suitable entities who meet their responsibilities under the Bill operate in the Commonwealth aged care system.

Chapter 3 also states the conditions of registration and obligations that registered providers must meet, even where they subcontract delivery of services. There are separate obligations that apply to aged care workers and responsible persons of registered providers.

Failure to meet these conditions of registration and obligations allows the Commissioner to undertake regulatory action and may attract criminal and civil penalties.

Chapter 3 also outlines statutory duties imposed on registered providers, certain responsible persons of registered providers and digital platform operators, which includes a regime of civil penalties.

Feedback

Feedback on Chapter 3 indicated broad support for the conditions of registration and obligations applicable to registered providers. However, some stakeholders expressed concerns that the criminal penalties which applied to statutory duties on responsible persons of registered providers were unnecessary and could discourage suitably qualified and experienced individuals from participating in governing positions.

Changes

Invitation to renew registration and renewal of registration

Included since the exposure draft of the Bill are provisions for the renewal of registration, rather than ongoing registration. This ensures a provider's ability to meet registration criteria is subject to ongoing review and monitoring by the Commission. This approach reflects the Royal Commission's recommendation that repeated, rigorous testing was the best opportunity to ensure high quality and safe care is provided on a sustainable basis (Recommendation 92).

These provisions permit a registered provider to apply for renewal of their registration. This applies where the registered provider was invited by the Commissioner to apply to renew their registration and has responded to the invitation within the period specified in the invitation that they intend to make the application.

The Commissioner may invite existing registered providers to apply for renewal of their registration. An invitation may be issued within the 18 months prior to the end of a registered provider's registration period. A registered provider cannot apply for renewal of their registration until they have received and responded to the abovementioned invitation from the Commission.

Penalties

One of the primary changes to Chapter 3 is the replacement of criminal penalties with civil penalties for breaches of the statutory duties. The exposure draft included statutory duties on registered providers (provider duty) and responsible persons of registered providers (responsible person duty), as well as a regime of criminal penalties for serious breaches of the duties.

The Bill has been amended to replace all strict liability and fault based criminal offences with civil penalties. These civil penalties increase in severity for a serious failure to comply with the duty (a maximum 150 penalty units for an individual and 1,000 penalty units for an organisation) and serious failure to comply with the duty that results in death, serious injury or illness (a maximum of 500 penalty units for an individual or 4,800 penalty units for an organisation).

Reversal Burden of Proof

The Bill more closely aligns with the duties in the *Work Health and Safety Act 2011* by reversing the burden of proof for the defence of reasonable excuse. This means that the party bringing civil penalty proceedings bears the burden of proving that conduct was engaged in without reasonable excuse.

Responsible person duty

The feedback from stakeholders on Chapter 3 highlighted general support for the conditions of a registered provider and their obligations. However, there were reservations among stakeholders regarding the proposed statutory duties for registered providers and responsible persons within the aged care sector.

In response to stakeholder feedback, the responsible person duty is now limited to certain responsible persons. This addresses a material concern of stakeholders by carving out middle-management and nursing managers from liability for a failure to exercise due diligence.

We also heard concerns that the duty may inadvertently cover every instance an older person requires in-patient treatment at a hospital, and as such we updated the definition of serious injury or illness to exclude this scenario.

The Bill also enables the Rules to specify matters specific to the aged care context that may constitute a serious injury or illness (e.g. pressure injuries or dehydration).

Compensation Pathway

The ability for the Commissioner or an individual to apply to a court for an order of compensation is now linked to circumstances where, on the balance of probabilities, a provider is found to have breached their duty not to cause adverse effects to the health and safety of individuals to whom the provider is delivering aged care services.

Following feedback, we have made it clear that the compensation pathway is only available where a registered provider has been found liable for a civil penalty for breaching the registered provider duty and is not linked to the responsible person duty.

Aged care digital platforms

There was consensus that aged care digital platforms should be regulated. Stakeholders emphasised the vulnerability of some older people and the need for increased regulation and oversight of how these platforms operate, especially in terms of information management to ensure the safety of personal data. There was also strong consensus on the types of information that should be shared on these platforms and by registered providers.

Following the feedback, the Bill was updated to include that where an entity is advertising that they can deliver an aged care service, that the online platform must check and display on the digital platform whether an aged care banning order or an NDIS banning order is, or has at any time been, in force against the entity in addition to whether they are registered or not.

In addition, a further obligation was placed on aged care digital platforms to keep, and retain, the kinds of records prescribed by the rules, and disclose information contained in those records, in accordance with any requirements prescribed by the rules.

Conditions

Chapter 3 also contains new conditions for:

- registered providers of approved residential care homes to provide access to free vaccinations for workers and individuals
- registration related to the provision of information to individuals
- a new obligation related to direct care.

Vaccinations

The Bill includes a condition of registration for certain registered providers to provide access to influenza and COVID-19 vaccinations for free to people the provider is delivering services to and aged care workers who access relevant premises.

Providers also need to promote the benefits of vaccination. Other vaccination types can be specified in the Rules. It is intended this will apply to residential care providers.

This replicates provisions under the Quality of Care Principles 2014 and extends those requirements to include COVID-19 vaccinations.

Provision of information to individuals

The Bill includes a condition of registration that requires registered providers to provide and explain records and information to people accessing, or seeking to access, aged care services, in accordance with any requirements prescribed by the Rules. Providers may also need to provide documents or information to supporters of a person.

This replicates current requirements relating to the disclosure of certain information to a person accessing, or seeking to access, aged care. This includes the responsibilities of providers to give and explain certain documents to people, such as their individual monthly statements and a copy of the Statement of Rights. These responsibilities will be prescribed in the Rules.

Delivery of Direct care

The Bill states that the delivery of direct care must be in accordance with any requirements prescribed by the Rules. This allows the requirements for the delivery of direct care to apply differently to different kinds of registered providers to reflect the breadth of services that may be delivered under different provider registration categories or specialist aged care programs.

This will enable Rules relating to care minutes requirements.

Chapter 4 – Funding of aged care services

Chapter 4 overview

Chapter 4 incorporates the Government's response to the Aged Care Taskforce's recommendations.

It sets out the subsidies that apply to individuals for certain aged care services. The subsidies are described in 2 groups. Person-centred subsidies are linked to the eligibility of an individual, and provider-based subsidies are linked to a registered provider.

Provider based subsidies may be set by reference to the provider's mix of clients or characteristics such as the provider's location, capacity, or specialisation.

The new funding arrangements for person-centred subsidies covers aspects of the new Support at Home program like 8 classifications for ongoing budgets, the end of life pathway, a restorative care pathway, and a new Assistive Technology and Home Modifications Scheme.

Chapter 4 also sets out the individual fees and contributions for aged care services, including means testing to determine what individual contributions will be. A person's contribution to aged care services delivered in a home or community setting will be based on a combination of income and the service delivered.

No contributions will be required for the delivery of aged care services in the clinical supports category (e.g. nursing and physiotherapy) and moderate contributions will be required for the delivery of aged care services in the independence category (e.g. personal care).

Contributions required for the everyday living category (e.g. domestic assistance and gardening) will be the highest as Government will not typically fund these services at any other stage of life.

Assistive technology and home modifications will be equivalent to the independence category and prescriptions for assistive technology and home modifications will be fully funded by the Government under the clinical supports category.

The Government will pay the remainder of the price as a subsidy to the provider.

Chapter 4 also contains Rules about registered providers entering into accommodation agreements with people, charging accommodation payments and accommodation contributions, and managing refundable accommodation deposits.

Feedback

Although Chapter 4 had not been drafted at the time of consultation on the exposure draft, stakeholders shared their views about potential inclusions for this chapter.

Stakeholders expressed a need for equity in how fees are assessed and applied. There was also a specific focus on ensuring that older people are not unduly

penalised by fee structures. Stakeholders sought more flexible and sustainable funding models, that support high quality care delivery without impacting those with limited financial resources.

Changes

Lifetime Caps

The Bill provides for a lifetime cap on the total amount people will be expected to contribute to the cost of their aged care services through an individual contribution (for aged care services delivered in a home or community setting e.g. Support at Home, Assistive Technology and Home Modifications) and a non-clinical care contribution (for aged care services delivered in an approved residential care home). The total value of the combined contributions will be included in the Rules as \$130,000.

Similarly, the Bill enables a limit on the time individuals will be expected to pay non-clinical care contributions in an approved residential care home. This amount will be included in the Rules as 1,460 days (four years).³

The effect of these provisions are that people who have been accessing aged care for some time and have paid large amounts towards their aged care will no longer be expected to contribute to the cost of their aged care services via the individual contribution or non-clinical care contribution.

Taper rates

Chapter 4 includes the means testing provisions, including taper rates and calculator, which determine how much an individual will be asked to contribute to their aged care services, if any.

Some changes have been made to the taper rates in the calculator in response to the Taskforce recommendations related to the fiscal sustainability of the aged care system.

Under the Support at Home program, full pensioners will pay 5% of the cost of their supports and 17.5% of their everyday living costs. Self-funded retirees will pay 80% of their everyday living costs, and 50% of costs that go to supporting their independence.

Part pensioners and self-funded retirees with a Commonwealth Seniors Health Card will pay a rate based on an assessment of their income and assets. Depending on their income or assets, this cohort will pay between 5% and 50% toward services that go to supporting their independence and between 17.5% to 80% of their everyday living costs.

In residential care, an individual's daily means tested amount is calculated using a progressive scale of thresholds, with incremental increases applied as income

³ Definitions are clause 7 of the Bill and were also in clause 7 of the *Aged Care Bill 2023* exposure draft

or asset values exceed these thresholds. If an individual's assessable income exceeds the first threshold but not the second, 50% of the excess of income above the first threshold and below the second is included in the daily means tested amount. Similarly, if the income exceeds the third threshold but not the fourth, a further 50% of the excess of income above the third threshold and below the fourth is included.

A similar approach applies to assets. If the value of an individual's assets exceeds the first threshold but not the second, 17.5% of the excess is included. Further increments of 7.8% are applied if the asset value exceeds the third and fourth thresholds.

The total assessable income free and asset free areas are stated in the Bill and are aligned to the age pension and the *Social Security Act 1991*. The changes to means testing provisions, including the taper rates, the types of fees that individuals may be required to pay and whether they are means tested or not, are intended to make sure individuals do not pay for their clinical care which is fully funded by the Government.

Accommodation Changes

Chapter 4 includes new requirements for Refundable Accommodation Deposit (RAD) retention and Daily Accommodation Payment (DAP) indexation that are designed to improve viability of residential aged care accommodation funding.

RAD retention requires providers to keep a small proportion of an individual's RAD or Refundable Accommodation Contribution (RAC) each month while the individual remains in residential aged care. The rate of RAD retention will be set in the Rules at 2% per annum of the RAD or RAC balance. To protect individuals that remain in care for a long time, RAD retention is limited to five years.

Providers will also be required to index the DAP that residents pay, ensuring that the cost of accommodation remains constant in real terms. Indexation will be in line with the Consumer Price Index and will occur twice per year at the same time as the Accommodation Supplement is indexed (20 March and 20 September). DAP indexation arrangements will not be extended to Daily Accommodation Contributions (DACs) as these will continue to be updated with changes to the Accommodation Supplement and relevant means testing thresholds.

Chapter 5 – Governance of the aged care system

Chapter 5 overview

Chapter 5 establishes the governance of the aged care system. The system is governed by the Aged Care Quality and Safety Commissioner (as both the Quality Regulator and Prudential Regulator proposed by the Royal Commission) and by the Secretary of the Department of Health and Aged Care (referred to as the System Governor).

The governance framework also includes:

- the Inspector-General of Aged Care
- the Complaints Commissioner
- the Aged Care Quality and Safety Advisory Council

who collectively cover the administration of the aged care system (including facilitating equitable access to aged care services), provider registration functions, investigating systemic issues within the system and handling of complaints.

Feedback

Feedback from stakeholders on Chapter 5 indicated broad support for the proposed governance arrangements, though stakeholders indicated a need for clearer delineation of responsibilities among various oversight bodies.

There was strong consensus on the necessity for an independent Complaints Commissioner, distinct from the Aged Care Quality and Safety Commissioner (Commissioner), to enhance transparency and independence in the complaints resolution process.

However, confusion was noted regarding the roles, responsibilities, and interactions among the System Governor, Commissioner, Aged Care Quality and Safety Advisory Council, Complaints Commissioner, and Inspector-General.

Changes

Complaints Commissioner

The exposure draft proposed that the new aged care Complaints Commissioner would be an SES officer (employee) within the Aged Care Quality and Safety Commission.

In the Bill, the Complaints Commissioner is a ministerially appointed position, who is given the complaints functions in their own right.

Further amendments were made to allow the Complaints Commissioner to use the regulatory powers necessary to perform the complaints functions, including required

action notices. More detail has also been included in the Bill about what kinds of matters can be included in the Rules around dealing with complaints.

Although the Complaints Commissioner will be an independent statutory appointment, they will sit within the Aged Care Quality and Safety Commission. The Commissioner will remain the Statutory Head of the Commission and the accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

Chapter 6 – Regulatory mechanisms

Chapter 6 overview

Chapter 6 provides the regulatory framework which enables the Aged Care Quality and Safety Commissioner (Commissioner), the Complaints Commissioner and System Governor to access regulatory powers which support the exercise of their powers and performance of their respective functions.

This Chapter incorporates the regulatory framework established by the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) and modifies this framework where necessary and appropriate for the Commonwealth aged care system.

It also provides for:

- limited circumstances when the Commissioner can authorise entry to a residential care home without a provider's consent, or first obtaining a warrant under the Regulatory Powers Act
- a range of information gathering and notice issuing powers to ensure that the System Governor, Complaints Commissioner and Commissioner are able to be informed about matters relevant to their functions and address noncompliance by registered providers
- the System Governor to conduct assurance activities, to protect and uphold the integrity of the Commonwealth aged care system and recover overpayments
- banning orders, which will ensure that only those individuals and registered providers who continue to meet required standards can operate within the Commonwealth aged care system.

Feedback

Stakeholder feedback on Chapter 6 expressed concerns about the enhanced powers of the Commissioner. Opinions were divided on the Commissioner's new power to enter residential aged care homes without consent, while some saw it as a necessary step for ensuring quality care and accountability, others worried about potential privacy infringements for older people and aged care workers.

Stakeholders endorsed the expanded powers of the Commissioner but were concerned about the feasibility of their implementation without adequate resources such as appropriate staff, expertise, and management.

Changes

Removal of critical failures powers

The exposure draft noted that Critical Failures powers were not included at that stage but that these powers were still to be drafted. Critical Failures powers have not been included in the Bill as the department is continuing to progress work on these powers following stakeholder feedback.

Access to premises where there is a risk to safety of an individual

The exposure draft contained provisions dealing with entry to residential care home premises, without a consent or warrant. These provisions have been amended within the Bill.

Entry without warrant or consent

These provisions allow authorised Commission officers, who have appropriate training and qualifications, to enter and remain in a residential care home without a warrant or consent of the occupier. This power has the potential to impact on a person's rights and therefore can only be exercised in very limited circumstances.

The following requirements limit the power to enter a residential care home without a warrant:

- the Commissioner must be satisfied that entry without a warrant, or the occupier's consent, is reasonably necessary because there is an immediate and severe risk to the health, safety or wellbeing of an individual (the identified risk)
- the Commissioner must also be satisfied that it is not practicable to obtain a warrant under the Regulatory Powers Act, including an urgent investigation warrant by telephone or other electronic means in accordance with section 71 of the Regulatory Powers Act
- the Commissioner must authorise access only for the purposes of the Commissioner's safeguarding functions to uphold the Statement of Rights and to ensure registered providers, and their responsible persons and aged care workers, comply with their obligations.

The changes to the Bill provide a comprehensive framework, which more clearly sets out the basis upon which the Commissioner can exercise the power, and more explicitly ties this to the Commissioner's safeguarding functions.

The changes also provide further limitations and safeguards such as requirements that:

- a warrant be sought to seize evidential material
- a post-entry warrant be sought from a Court or senior Administrative Review Tribunal member reviewing the justification for the entry.

Notice and announcement of entry

When exercising this power an authorised officer does not need give prior notice to any person before entering the residential care home. A notice requirement would defeat the purpose of an urgent power to enter a residential care home in exigent circumstances. Although there is no notice requirement, before entering the residential care home the authorised officer must:

- announce that the authorised Commission officer is authorised to enter the residential care home under this clause
- show the authorised Commission officer's identity card to the occupier of the residential care home, or a person apparently representing the occupier, if the occupier or other person is present at the residential care home
- give any person at the residential care home an opportunity to allow entry to the residential care home.

This requirement is aligned with other statutory frameworks for entry to premises, for example, the Regulatory Powers Act.

Powers in residential care home

While remaining in the residential care home, an authorised Commission officer may give directions to the occupier, or a person apparently representing them, that are necessary to address the identified risk. Such directions might include directions to provide a resident's medical records or to establish arrangements for managing the outbreak of an infectious disease.

An authorised Commission officer may also secure a thing that they suspect, on reasonable grounds, may be relevant to a criminal offence or civil penalty provision, until a warrant is obtained for its seizure.

Extension of powers of the Complaints Commissioner

Amendments have been made to the Bill to allow the Complaints Commissioner to use the necessary regulatory powers to perform their functions.

Changes to the notice framework

The exposure draft provided for an 'adverse action warning notice' to be issued by the Commissioner in certain circumstances. This notice has been removed from the Bill as its functions sit under the Commissioner's power to impose conditions

on a provider's registration. It requires the provider's agreement to take certain actions if the Commissioner is considering cancelling the provider's registration.

The 'required action' notice (under Division 1 of Part 10) has changed and now requires a provider to investigate a matter and report back. This change provides an additional regulatory tool to the Commissioner, the Complaints Commissioner and the System Governor.

The Commissioner or Complaints Commissioner may give a registered provider a required action notice, in relation to:

- a matter relating to the registered provider that is raised in a complaint, notification or other information received or held by the Commission
- a matter relating to the rights of an individual, under the Statement of Rights, to whom the registered provider is delivering aged care services
- a matter relating to the registered provider's conditions of registration or obligations under Part 4 of Chapter 3.

The System Governor may give a registered provider a required action notice on a matter that relates to the System Governor's functions if the System Governor reasonably suspects that the registered provider is not complying with this Bill.

Notices of this type provide an intermediate option in the regulatory framework for use where the Commissioner, Complaints Commissioner or System Governor assess that a provider needs to be compelled to respond to a concern, but where the nature of concern and risk of harm do not warrant the use of more substantial monitoring and enforcement powers. This power could also be used in relation to complaints or matters relating to the rights of an individual that require further investigation but where it is not yet known whether there has been non-compliance with a provider's obligations under this Bill.

Chapter 7 – Information management

Chapter 7 overview

Chapter 7 of the Bill includes a revised information management framework to improve system transparency. Arrangements for the protection of information obtained, or generated, under the Bill and the use or disclosure of that information are included in this Chapter.

Provisions in Chapter 7 protect certain information (protected information) such as personal information or confidential information that is obtained or generated for the purposes of the Bill. Unauthorised use and disclosure of this information is subject to criminal penalties.

Under the Bill a more limited category of information about providers will be protected. That is, only information the disclosure of which could reasonably found an action by an entity (other than the Commonwealth) for breach of a duty of confidence will be protected. Commercially sensitive information is an example that may be included in this category, which is consistent with other Commonwealth laws.

In some circumstances, using and disclosing protected information will be necessary to administer the Bill, the aged care system or related legislation. It may also be necessary to use or disclose protected information for other legitimate purposes. Chapter 7 sets out those circumstances and authorises the use and disclosure of a broader class of information known as relevant information.

This is intended to achieve the objective of a transparent aged care system – where people can access the information they need to make informed decisions about their care.

Authorisations for using and disclosing information differ depending on whether the use or disclosure is by persons generally, entrusted persons like public servants, the System Governor, the Aged Care Quality and Safety Commissioner (the Commissioner) or the Complaints Commissioner.

The System Governor and Commissioners have more extensive authorisations within the aged care system and need to make decisions that balance appropriate protection of privacy and other interests (such as commercial interests) against matters like transparency.

Feedback

Feedback from stakeholders on Chapter 7 suggested that the definition of protected information in the exposure draft was too broad and may stop providers from being transparent.

There was a general endorsement of the whistleblower protections with some apprehension about removing the 'act in good faith' requirement, fearing it might

encourage malicious reporting. More clarity between a whistleblower disclosure and complaints was emphasised, alongside a call for enhanced training across the sector to ensure proper understanding and implementation of the protection.

Stakeholders were concerned that anonymity of whistleblowers would be difficult to uphold and that increased protections should be included.

Changes

Protected information

One of the changes to this Chapter since the exposure draft relates to refining and narrowing the definition of protected information.

Refinements have been made to the Bill to narrow the definition of protected information to include the protection of personal information and commercially sensitive information, for consistency with other Commonwealth laws.

Whistleblower protections

Another change since the exposure draft is to whistleblower provisions. The provisions in Part 5 of Chapter 7 have been refined to ensure people making disclosures are protected.

Whistleblower protections ensure that people who disclose contraventions or suspected contraventions of the Bill are protected from victimisation and will not be subject to civil, criminal or administrative liability. This protection is important because whistleblowing plays a key role in combating poor compliance cultures.

The Bill sets out the circumstances that must be met for a disclosure to qualify for protection. The circumstances are that the disclosure is made to an entity identified in the provisions, the disclosure is made orally or in writing (and whether the disclosure is made anonymously or not) and the discloser has reasonable grounds to suspect that the information indicates that an entity may have contravened a provision of the Bill.

Entities to whom disclosures can be made are the Commissioner, the Complaints Commissioner, staff of the Commission, the System Governor or an official of the department, a registered provider, a responsible person or aged care worker of a registered provider, a police officer, and an independent aged care advocate.

Chapter 8 – Miscellaneous

Chapter 8 overview

Chapter 8 deals with miscellaneous matters. This includes providing pathways for the reconsideration of reviewable decisions by the Aged Care Quality and Safety Commissioner (the Commissioner), Complaints Commissioner, System Governor and Pricing Authority and external review by the Administrative Review Tribunal. It also provides for the System Governor, Commissioner and Complaints Commissioner to delegate their powers and functions and gives the Minister the power to make rules.

This chapter also outlines the application of the Bill to certain entities, including partnerships and unincorporated associations, and authorises the System Governor and the Commissioner to approve forms, request information, charge fees and use computer programs to make certain decisions.

Appropriation of money from the Consolidated Revenue Fund is also provided for under Chapter 8.

Feedback

Stakeholders expressed some apprehension about computer-aided decision-making, particularly that it would result in the use of Artificial Intelligence (AI) without human oversight and public accountability.

Stakeholder feedback suggested that greater transparency is needed, and that maximum timeframes for decisions, including appeal rights, must be legislated.

Changes

Automation of administrative action

The Bill clarifies the oversight and safeguards for automation of administrative action.

Clause 582⁴ sets out that the System Governor may make written arrangements for computer programs to be used, with oversight, to take relevant administrative action regarding:

- decisions on the classification of individuals
- decisions on the priority of individuals
- decisions on the allocation of places to individuals
- decisions on the order of allocation of places to individuals
- giving of notices
- doing or refusing to do anything related to making a decision.

⁴ The *Aged Care Bill 2023* exposure draft contained provisions for the 'use of computer programs to make decisions', under Chapter 8, Part 7 (clauses 398 and 399).

The Bill provides that where a computer program is used to take a relevant administrative action, it is treated as an action taken by the System Governor.

Computer decision making will support the implementation of streamlined processes. For example, it will enable immediate classification of an individual for a service group when the System Governor's receives a classification report (or other relevant information) for the purposes of that decision.

The System Governor may substitute a decision made by the operation of the computer program if the System Governor is satisfied that the computer-made decision is incorrect. This provides a safeguard to ensure that if a computer program is not operating correctly or makes a decision that the System Governor considers is wrong, the decision can be substituted by the System Governor without the need for formal review.

These provisions do not limit any other provision of the Bill that provides for the review or reconsideration of a decision.

Reconsideration of reviewable decisions

Provisions relating to the reconsideration and review of decisions which sit within Chapter 8 of the Bill, were not included in the exposure draft. These provisions include pathways for reconsideration of reviewable decisions by the Commissioner, Complaints Commissioner, System Governor, Pricing Authority and Administrative Review Tribunal. It should be noted that review under the *Administrative Decisions (Judicial Review) Act 1977* will also be available.

Older people and others who have review rights under the Bill are referred to as an affected entity. The person who reconsiders the decision is referred to as the internal decision reviewer. The decision made by the internal decision reviewer is referred to as the reconsideration decision.

If an affected entity is not satisfied with an internal review, they may choose to make an application to the Administrative Review Tribunal for an independent merits review of a reconsideration decision made by an internal decision reviewer.

An affected entity may request reconsideration of a reviewable decision. This request must be made in writing and set out the reasons for the request.

Requests for review must be given to the decision-maker (the Commissioner, Complaints Commissioner, System Governor or Pricing Authority) within:

- 90 days for decisions which involve a determination of an individual's total assessable income, or a longer period as allowed by the System Governor or the Commissioner
- for all other reviewable decisions, 28 days of notification of the decision, or a longer period as allowed by the System Governor, Complaints Commissioner or the Commissioner.

The provisions also allow for the initiation of reconsideration by a decision-maker.

Timeframes for decisions

The Bill enables the timeframes for certain decisions to be specified in the Rules.



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