Relationships Australia

1300 364 277
www.relationships.org.au

16 February 2024

By email: AgedCareLegislativeReform@health.gov.au

A NEW AGED CARE ACT: EXPOSURE DRAFT: AGED CARE BILL 2023, AND CONSULTATION PAPER NO. 2

Thank you for the opportunity to comment on the Exposure Draft of the Aged Care Bill 2023 ('the ED'). We have also appreciated the opportunities to attend information sessions and to consider Consultation paper No. 2. This submission is structured according to the Chapters of the ED.

The ED represents a significant, and very welcome, move towards an aged care system that recognises that our human rights do not in any way diminish as we age and that, as we age, we do not become somehow lesser, or homogenous in our aspirations, our joys and our sorrows. We continue to become more individuated, more complex, and continue to experience the fundamental need to connect with others, to express our inherent personhood through our choices and preferences. This includes choices and preferences about the most major and profound parts of our lives – our relationships, where we live, our spiritual practices, and who we love – and the most granular details – how we like our toast and when we like to shower. The prominence of a Statement of Rights, the emphasis on individuals and the recognition of intersectionality and its impacts, are clear examples of why this ED is such a welcome and important advance from the nearly 30 year old system currently operating.

Particular features which we welcome include:

- inclusion of a Statement of Rights and Statement of Principles
- emphasis on supported decision-making and moving beyond a binary approach to 'capacity'
- referring to users of services as 'individuals' rather than passive 'care recipients'
- focus on individuals rather than funding mechanisms for providers
- allocating places to individuals not providers
- whistleblower protections
- the proposal for an upcoming transition package to support providers, and
- relational regulation.

While acknowledging the extensive work already undertaken, there remain opportunities to significantly enhance and refine the ED, to maximise success in achieving the Government's reform objectives. We canvass them in this submission, which is structured as follows:

- a brief overview of the work of the Relationships Australia federation
- recommendations by Relationships Australia
- analysis of each Chapter, noting:
    - our comments, and relevant recommendations from our submission responding to Consultation Paper No. 1 (foundations of the new Act) ('the RA foundations submission'), and
    - responses to questions posed in the Government's Consultation Paper.

We have also had the benefit of considering the solutions proposed in the Key Issues Paper produced jointly by a range of national organisations, available at https://media.opan.org.au/uploads/2024/02/Aged-Care-Act-Exposure-Draft-Key-Issues-Paper_Jan-2024_FINAL_v1.pdf . Relationships Australia broadly supports these proposed solutions, and our responses are set out in Appendix 1 to this submission. In some instances, we have suggested enhancements and made substantive recommendations about the proposed solutions.

THE WORK OF RELATIONSHIPS AUSTRALIA

We are an Australian federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of age, religious belief, gender, sexual orientation, lifestyle choices, cultural background or economic circumstances. Relationships Australia provides a range of services, including counselling for people at all stages of life and through life transitions, dispute resolution, services for victims and perpetrators of domestic and family violence and abuse and neglect of older people, children's services, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others. Through our programs, we work with people to enhance relationships within families, whether or not the family is together, with friends and colleagues, and across communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable. We respect the rights of all people, in all their diversity, to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships. Relationships Australia is committed to:

- ensuring that social and financial disadvantage are not barriers to accessing services
- working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres
- collaborating with other local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with older people, men, women, young people and children. We recognise that a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling help services, and public housing) is often needed by people engaging with our services, and
- contributing our practice insights and skills to better inform research, policy development, and service provision.

RECOMMENDATIONS

CHAPTER 1, PART 1 INTRODUCTION

Recommendation 1 Commencement, Clause 2

That the Act commence on 1 July 2024.

Recommendation 2 Objects, Clause 6 (boxed note)

That:

- paragraph 2 of the boxed note be amended to insert 'upholding the rights of individuals, and' after 'aimed at', and
- subparagraph 5(b)(i) be clarified by inserting 'accessing funded aged care services' after 'individuals'.

Recommendation 3 Phased reforms and inclusion in primary legislation

That matters which we recommend be included in the Act rather than the Rules should be included in the Act at the earliest opportunity in the next phase of primary legislation, and before the first statutory review to be undertaken at the third anniversary of commencement (see Recommendation 42 for our recommendation of a three, not five, year review).

CHAPTER 1, PART 2 DEFINITIONS AND KEY CONCEPTS

Recommendation 4 Aged Care Quality Standards, Clause 14

That paragraph 14(2)(e) [delivery of food and drink] be amended to include reference to religious practices.

Recommendation 5 Reportable incident, Clause 15

That the Act be absolutely clear and precise about the circumstances in which Parliament is authorising a 'reasonable use of force' against individuals.

Recommendation 6 Restrictive practices, Clauses 16, 17, and 106

That:

- Government act urgently to implement reforms to reduce, with a view to eliminating, the use of restrictive practices in aged care services, and
- provisions authorising the use of restrictive practices (which would otherwise be unlawful as assault and/or false imprisonment):
    - be included in the Act, rather than subordinate legislative instruments, reflecting that use of restrictive practices is a grave impairment of human rights and may cause serious bodily harm
    - take human rights as a starting point, rather than assuming the necessity for the use of restrictive practices and normalising their use
    - omit all references to 'informed consent' to restrictive practices and substitute a term that more accurately reflects what is happening – statutory authorisation for otherwise unlawful conduct in respect of a person
    - clarify authorising pathways, and address the various roles of attorneys, donees of advance health care directives, supporters, representatives and guardians appointed under state or territory legislation, and

- clearly define the concept of 'emergency' used in subclause 17(3); a useful contemporary example can be found in the definition of 'urgent restricted medical treatment' in the Dictionary of the *Variation of Sex Characteristics (Restricted Medical Treatment) Act 2023* (ACT).

Recommendation 7 Restrictive practices: data collection

That Government undertake systematic national collection, publication and analysis of data about the use of all restrictive practices in funded aged care services, regardless of setting.

Recommendation 8 definition of 'high quality care', Clause 19 – use of subordinate legislation

That:

- the definition of 'high quality care' remain in the Act; the Act should only allow for the definition to be modified by subordinate instruments to the extent that it would expand on the definition in the Act
- the definition of 'high quality care' be cast more narrowly, to clearly (and consistently throughout the Act) differentiate between what all individuals should expect and receive from all registered providers from the kind of care characterised by indicia of 'excellence' above and beyond the universal standards
- where the defined term 'high quality care' is used, then it appear in bold and italicised text, like other defined terms, and
- all colloquial and generalist uses be removed, and an alternative expression be found.

CHAPTER 1, PART 3 AGED CARE RIGHTS AND PRINCIPLES

Recommendation 9 Statement of Rights, Clause 20

That:

- the Act should refer to the OpCAT, ICCPR, CEDAW, and UNDRIP, and also recognise the Yogyakarta+10 Principles
- the Act and the Explanatory Memorandum be explicit that the Objects, and the Statements of Rights and Principles, are to be interpreted in a rights-centred way and, in the event of uncertainty or conflict, an interpretation which gives maximum effect to individuals' rights is to be preferred over one that would restrict those rights
- the Act allow individuals or their agents to seek direct enforcement, through proceedings in courts or tribunals, of the rights described in clause 20
- subclause 21(3) of the ED, which excludes enforceability through proceedings in a court or tribunal, be omitted
- the Act explicitly provide that 'self-determination' includes 'choice and control', 'consumer directed care' and 'self-management' principles, and
- the Act and Explanatory Memorandum clearly explain the Act's intention and purpose for older people requiring disability supports.

Recommendation 10 Statement of Rights; throughout the Act

That the approach taken in subparagraph 5(b)(i) and (ii) (the Objects clause), which accords pre-eminence to rights, be adopted consistently throughout the Act. (Recommendation 2)

Recommendation 11 Statement of Principles: Note following subclause 22(4)

That the Act locates the phrase 'or other sexual orientation' to immediately follow 'bisexual', because 'trans/transgender or intersex' do not relate to sexual orientation but to gender identity and bodily diversity.

Recommendation 12 Carers

That, in paragraph 22(6)(c), 'carers and volunteers' (or 'unpaid carers' and volunteers') be substituted for 'volunteers'.

CHAPTER 1, PART 4 SUPPORTERS AND REPRESENTATIVES

Recommendation 13 Supporters and representatives: appointment

That:

- all provisions about representatives and supporters – definitions, appointment, actions and duties – be located in the same chapter
- the Act recognise that individuals can appoint supporters and representatives for the purposes of the Act
- the Act recognise that individuals can make concurrent appointments of supporters and representatives
- the Act allow the individual to appoint, as a supporter or representative under the Act, a person to whom they have also given a power of attorney, or appointed under an advance health care directive
- the Act allow the System Governor to make appointments only when:
    - an individual has not made an appointment under state/territory legislation to execute an enduring instrument, and
    - the System Governor is reasonably satisfied, in all the circumstances, that appointing a representative and/or supporter will help the individual to exercise their rights, and
- the notes following subclauses 374(6) and 376(8) be included in the substantive provisions, as a safeguard against abuse and exploitation of an individual
- the Act impose on the System Governor a requirement to report annually on the frequency and (de-identified) circumstances in which representatives are appointed
- the Commonwealth establish a cross-portfolio and cross-government taskforce to resource efforts to expedite reforms relating to harmonisation of laws relating to powers of attorney and a register of enduring instruments.

Recommendation 14 Supporters and representatives: information, education, training and support resources

That:

- Government develop information, education, training and support resources to assist supporters and representatives to understand their roles, their duties, and where they can seek help and advice
- the System Governor and providers be required to provide information about the availability of, and services that can be offered by, independent professional advocates, and
- the Act protect supporters and representatives who act honestly and reasonably.

Recommendation 15 Supporters and representatives: duties

That:

- the Act provide for tiered penalties to reflect culpability and gravity of consequences of a breach, by a supporter or representative, of the Act
- 'reasonably' be inserted before 'available' in paragraph 30(3)(c)
- 'honestly and' be inserted before each mention of 'reasonably' in clause 32
- 'and reasonably' be inserted after 'in good faith' in paragraph 34(b), and
- 'or ought to be known' be inserted before known in paragraph 36(6)(b).

CHAPTER 2 ENTRY TO THE COMMONWEALTH AGED CARE SYSTEM

Recommendation 16 Entry into aged care system

That:

- to enhance transparency and accountability, criteria for reassessment should be located in the Act, rather than the Rules,[1] given the importance of reassessment pathways to upholding individuals' rights to assessment
- the requirement for public reporting on quarterly wait times should also set out timeframes within which reports must be made public
- paragraph 130(1)(d) be amended to require that summary and explanation of the complaints management system and incident management system, and the Statement of Rights be displayed prominently (not simply 'displayed') on the platform, and be expressed in plain English.

[1] See ED, clause 46; Consultation Paper, p 41.

CHAPTER 3, PART 4 OBLIGATIONS ON REGISTERED PROVIDERS ETC AND CONDITIONS ON REGISTRATION

Recommendation 17 Condition on providers, Clause 92: Rights and principles

That:

- the condition imposed on providers by clause 92 be cast in positive terms, requiring providers (and responsible persons) to ensure that service delivery upholds the rights of individuals under the Statement of Rights
- clause 92 provide explicitly that quality of life is the primary consideration, and that health, safety and wellbeing are to be viewed from the perspective of the individual.

Recommendation 18 Whistleblower protection

That paragraph 96(c) be amended to prohibit victimisation and discrimination not only against someone who makes a complaint or gives feedback but also, where the person complaining or giving feedback is not the person to whom services are delivered, against that person.

CHAPTER 3, PART 5 STATUTORY DUTY AND COMPENSATION

Recommendation 19 Statutory duty, clauses 19, 120, 121, 127

That:

- the duty be broadened, and cast positively, to require registered providers to ensure that the conduct of the provider upholds the rights described in the Statement of Rights, and that the provider's conduct not cause adverse effects to the quality of life, health and safety of individuals, including by exacerbating pre-existing injuries or illnesses (clause 127 should also be expanded accordingly)
- the definition of 'serious failure' in clauses 120 and 121 be amended to include serious and systemic breaches, in the delivery of care, of individuals' human rights
- clause 19 (and elsewhere in the ED) be amended to ensure that a duty to afford individuals' kindness, compassion and respect is universal, imposed on all registered providers, and
- after each mention of strict liability, a note be inserted to explain strict liability and a cross-reference to the Commonwealth Criminal Code.

Recommendation 20 Compensation orders: standing to apply, clause 127

That clause 127 confer standing to apply for a compensation order on:

- a representative appointed under the Act
- any other person authorised by Commonwealth, State or Territory legislation to act for individuals, and
- the Complaints Commissioner (whether or not Government creates that role as an independent statutory officeholder, as recommended at Recommendation 26.)

Recommendation 21 Compensation orders: circumstances in which they can be made

That the circumstances in which a compensation order can be made should be broadened to correspond to the expanded scope of the statutory duty which we have recommended. (see Recommendation 19)

Recommendation 22 Compensation orders: legal assistance

That Government consider:

- in the context of the new National Legal Assistance Partnership, how to support individuals to seek legal advice and assistance to use the compensation pathway, and
- options to expedite these matters, given the circumstances of the individuals who will seek to use the pathway.

CHAPTER 3, PART 6 – AGED CARE DIGITAL PLATFORM OPERATORS

Recommendation 23 Aged care digital platform operators: definition, database

That:

- the definition of 'aged care digital platform' be clarified, including by:
    - explicitly stating whether, to be within scope of the Act, the platform needs to be actively engaging with individuals and aged care providers, or whether a platform will be within scope if it merely publishes information, and
    - omitting the requirement that, to be within scope, the platform needs to process payments itself, and
- Government establish a database providing aged care digital platform operators real time information about changes to the Provider Register (clause 87) and matters such as notices issued under Chapter 6, Part 10.

CHAPTER 5 GOVERNANCE OF THE AGED CARE SYSTEM

Recommendation 24 Governance: human rights protections

That the Act provide for:

- the creation of a Chief Human Rights Advisor, to complement the Chief Clinical Advisor provided for by clause 148, and
- the inclusion, in clause 172 (Appointment of Advisory Council members), of a person with substantial experience or knowledge in human rights and/or ethics, to complement members with clinical or biomedical knowledge or experience.

Recommendation 25 Governance: functions of the System Governor

That subparagraph 132(1)(d)(i) be amended to substitute 'publishing' for 'providing'.

Recommendation 26 Complaints Commissioner as an independent statutory office-holder

That:

- the Complaints Commissioner be a fully independent statutory officeholder appointed by, and directly accountable to, the Minister
- the Complaints Commission be supported by an office that is independent of the ACCSC and resourced through a separate Budget line item
- the First Nations Aged Care Commissioner also be an independent statutory officeholder, sitting outside the Commission.

Recommendation 27 Establishment of Community Visitor Scheme

That the Act provide for the establishment of a Community Visitor Scheme, with guaranteed rights of entry without notice, as well as by prior arrangement.

CHAPTER 5, PART 3 THE COMMISSION

Recommendation 28 Complaints: processes

That, rather than complaints processes be left to the Rules, the Act should provide core or minimum components, accompanied by the power to make rules to deal with more detailed operational matters. Core components include:

- one or more accessible channels by which complaints may be made (with the rules available to provide for additional options)
- minimum requirements by which complaints may be dealt with or resolved, including timeframes, and
- the matters described in paragraphs 183(c), (d), (e), (f) and (h).

Recommendation 29 Complaints: assistance and alternative dispute resolution

That:

- the Act confer on the Complaints Commissioner power to investigate and enforce compliance with the proposed positive duty on providers to uphold the rights enumerated in the Statement of Rights
- the Act provide for ADR and restorative pathways which are culturally safe and appropriate,
- the Act provide for ADR and restorative pathways that also expressly include mediation by elder mediators accredited by EMAN/EMIN and eldercaring coordination
- the Act confer on the Complaints Commissioner powers, and provide resourcing, to engage specialist elder mediators (accredited through EMAN/EMIN) and Eldercaring coordinators[2]

[2] The Eldercaring Coordination model works with high conflict families to ensure their focus remains directed to the needs and desires of the older person; effectively centring the voice of that older person in decision making that affects them. It has been developed in the USA as a solution for those high conflict families for whom mediation may not be an appropriate solution. A group of Australian practitioners, researchers and other stakeholders have been exploring the potential implementation of this model here in Australia, in the hopes that we can replicate the successes seen in the USA. Thanks to the combined efforts of the University of South Australia, the South Australian Adult Safeguarding Unit and Relationships

- the Act require the Complaints Commissioner to publish reports on complaints promptly
- the Act make clear that the ability of the Complaints Commissioner to publish and report on these matters can be, but does not have to be, in conjunction with the ACQS Commissioner, and
- in relation to the Key Issues Paper reference to security of tenure provisions – also provide elder mediation, restorative practices and Eldercaring coordination.

Recommendation 30 Delegations under clause 159

That clause 159 be amended to require the Commissioner to publish, in a timely way, the details of all consultants retained pursuant to this provision, and clear and comprehensive information about:

- which functions have been delegated under clause 159
- to whom (including information about any affiliations and interests that amount to actual or perceived conflicts of interest)
- why the Commissioner has chosen to make a delegation under clause 159
- the duration of the delegation and
- brief descriptions of the circumstances in which the delegation has been exercised (in relation to this aspect, the Commissioner should be required to provide detailed reports to the Minister – not the System Governor – on request).

CHAPTER 6 REGULATORY MECHANISMS

Recommendation 31 Geographic equity, rights, risk and harm

That Chapter 6 be amended to:

- define harm as including:
  - breaches of rights that infringe the interests, long and well understood in Australian jurisprudence, in bodily integrity and the dignity interest
  - non-medicalised harms as well as harms relating to illness, injury and impairment
  - breach of the right to make decisions
- frame regulatory powers, functions and duties around rights, rather than risk of medicalised harms; such a re-framing would allow the regulatory scheme to encompass all types of harm, not just medicalised harms, and
- use mechanisms to address non-compliance in ways that are 'rights' not 'risks' proportionate.[3]

Australia South Australia, a pilot of the model is being implemented and evaluated over the coming year. The findings of this pilot will then be used to inform the future direction of Eldercaring Coordination in Australia.

[3] See Consultation Paper, p 79.

CHAPTER 6, PART 3 – INVESTIGATING UNDER PART 3 OF THE REGULATORY POWERS ACT

Recommendation 32 Clarity and 'bespoke' regulatory powers

That, rather than 'modified deeming', Chapter 6 be re-cast so as to be self-contained, albeit using the Regulatory Powers Act as a guide, and including notes that indicate that the approach in aged care aligns with the Regulatory Powers Act).

Recommendation 33 Coercive powers

That:

- the Commissioner and staff of the Commission should receive initial and ongoing training in the use of powers of entry, search and seizure, for their own protection, as well as the wellbeing of individuals receiving care and aged care workers
- the Commissioner should be required to publish annual reports on the use of powers to enter without consent or a warrant, and
- the Inspector-General of Aged Care should be required to undertake, at reasonable intervals (perhaps every three years) a review of the use of these powers from a system-wide perspective, to identify opportunities to minimise the need to use these powers and, where they are used, to minimise impact on individuals receiving care and aged care workers.

CHAPTER 6, PART 4 MONITORING AND INVESTIGATING UNDER AUTHORISATION FROM THE COMMISSIONER

Recommendation 34 Immunity of officers and persons assisting: Chapter 6, Part 4, Division 5

That immunity extend only if a person exercising powers or functions under the Act (including, for the avoidance of doubt, community visitors and advocates) has acted reasonably, as well as in good faith (subclause 222).

CHAPTER 6, PART 6 CIVIL PENALTIES UNDER PART 4 OF THE REGULATORY POWERS ACT

Recommendation 35 Penalties

That all prescribed maximum penalties provided for in the ED be reviewed holistically to ensure that they properly reflect the relative gravity of conduct and consequences.

CHAPTER 6, PART 12 BANNING ORDERS

Recommendation 36 Banning orders on individuals as aged care workers and responsible persons

That:

- subclause 286(2) be clarified as to its intended scope of operation
- in subclause 287(3) - 'suitability matters' be in bold and italics to alert readers to the fact that this is a defined term, and
- after subclause 287(3) – include a note referring to the definition in clause 12.

CHAPTER 6, PART 14 RECOVERABLE AMOUNTS

Recommendation 37 Actions in respect of written off amounts

That subclause 308(6) be omitted. If it is not omitted, then it should be limited to apply only to amounts in respect of which the debtors have not acted honestly and reasonably in relying on previous advice that they have been written off.

CHAPTER 7, PART 2 CONFIDENTIALITY OF INFORMATION

Recommendation 38 Disclosure of protected information

That:

- clause 340 be amended to allow the System Governor or Commissioner also to disclose protected information to a person appointed under the law of a state or territory to exercise:
    - a power of attorney, or
    - a power conferred on the person by an advance health care directive
- the second limb of the definition of protected information be confined to information that could reasonably be expected to *significantly* prejudice the financial interests of a provider if it is disclosed other than in accordance with the Act
- whether or not Government accepts Recommendation 26 of this submission (to make the Complaints Commissioner a statutory officeholder independent of the Commissioner) - paragraph 355(a) be amended to include:
    - the Complaints Commissioner, a legal practitioner, and an officer of the Australian Health Practitioner Regulation Agency, and
    - all other persons and officeholders referred to in subclause 357(2).

CHAPTER 8 MISCELLANEOUS

Recommendation 39 Delegations and subdelegations: Chapter 8, Part 3

That all delegations and subdelegations, as in force from time to time, be published in a single, well-publicised and prominent location on the Department's website.

Recommendation 40 Use of computer programs: Chapter 8, Part 7

That:

- Government publish, as soon as practicable, detail on how algorithmic and artificial intelligence systems will be used to make decisions about entry into, and classification and prioritisation within, the aged care system; information must be regularly updated to reflect refinement and progress in the use of computer programs to make and inform decisions under the Act
- Part 7 of Chapter 8 be amended to require the System Governor and Commissioner (as the case may be) to provide clear and accessible information to individuals (and their supporters and representatives) about the use of algorithms and artificial intelligence in making decisions, and about how to seek human re-consideration of decisions that are made using algorithms and artificial intelligence.

Recommendation 41 Statutory review

That the Act provide:

- for a three year statutory review, to be then followed by reviews every five years, and
- that the terms of reference for each statutory review require the reviewer to consider how the Act could be improved to better articulate and uphold users' human rights.

Recommendation 42 National consistency

That the Commonwealth enter into appropriate agreements with state and territory governments:

- enabling the Commission, the (independent) Complaints Commissioner and System Governor to exercise the full suite of powers in relation to State and Territory government providers operating 'under certain specialist programs', as mentioned at p 78 of the Consultation Paper, and
- providing for nationally consistent worker screening processes.

RECOMMENDATIONS RELATING TO THE PROPOSED SOLUTIONS IN THE KEY ISSUES PAPER (see Appendix 1 for more detail)

Proposed solution from Key Issues Paper	**Relationships Australia recommendation**
The Explanatory Memorandum must clearly articulate that, the objectives of the legislation are to be read in a 'positive' not deficit approach. Particular emphasis that services should enhance reablement, wellness and quality of life should be included in the explanation. (p 7)	We **recommend** that the Act and the EM are explicit that the Objects, and the Statements of Rights and Principles, are to be interpreted in a rights-centred way. In the event of uncertainty or conflict, an interpretation which gives maximum effect to individuals' rights is to be preferred over one that would restrict those rights. (Recommendation 9)
Include the Code of Conduct in the primary legislation. Ensure via drafting note or explanatory memorandum that 'self-determination' is inclusive of 'choice and control', 'consumer directed care' and 'self-management' principles. (p 9)	Agree. Relationships Australia further **recommends** that the Act, rather than a note or the EM, provides that 'self-determination' includes 'choice and control', 'consumer directed care' and 'self-management' principles. (Recommendation 9)
Embed a legislative requirement that the System Governor must publicly report on quarterly wait times from application through to the assessment, and from assessment to when the services start. (p 15)	Agree. Relationships Australia further **recommends** that the requirement for public reporting also set out timeframes within which reports must be made public. (Recommendation 16)
Explanatory memorandum should clearly explain the Act's intention and purpose for	Agree, but **recommend** this should also be made explicit in the Act. (Recommendation 9)

older people requiring disability supports. (p 19)	
Include as a protection for older people that access to an advocate is provided when requested within Chapter 1, Part 4, Division 1 and create a new subdivision on protections for older people. (p 12)	Agree. Relationships Australia **recommends** that the System Governor and providers should be required to provide information about the availability of, and services that can be offered by, independent professional advocates. (Recommendation 14)
Ensure Independent Professional Advocates are specifically named and recognised in the Act. (Key Issues Paper, p 17)	Agree. Further, Relationships Australia **recommends** that the Act should provide for the establishment of a Community Visitor Scheme, with guaranteed rights of entry without notice, as well as by prior arrangement. The Scheme should be part of safeguards around the use of restrictive practices. (Recommendation 27)
The Royal Commission identified that 'The inclusion of entitlements for informal carers in the new Act is consistent with the principles expressed in the *Carer Recognition Act 2010* (Cth). However, unlike the Carer Recognition Act, the new Act should provide means of enforcing those entitlements.' (Key Issues Paper, p 20)	Agree. We **recommend** that 'carers and volunteers' (or 'unpaid carers' and volunteers') be substituted for 'volunteers', given that 'carer' is defined in the Act, and the Statement of Rights refers to carers. (Recommendation 12)
A clear complaints mechanism for older people to raise standalone breaches of rights must be included. (p 9)	Agree. Relationships Australia **recommends** that the Act provide for core components, accompanied by the power to make rules to deal with more detailed operational matters. Core components include: • minimum channels by which complaints may be made (with the rules be available to provide for additional options) • minimum requirements by which complaints may be dealt with or resolved, including maximum timeframes, and • the matters described in paragraphs 183(c), (d), (e), (f) and (h). (Recommendation 28)
Amend the powers of the new Independent Statutory Complaints Commissioner so that they can investigate and conciliate complaints about breaches of rights and	Agree. Further, we **recommend** that Act confer on the Complaints Commissioner powers to engage specialist elder mediators (accredited through EMAN/EMIN)

refer to the ACQSC matters requiring enforcement of compliance. (p 9)	and Eldercaring coordinators, backed by appropriate resourcing. (Recommendation 29)
A new provision should be included that allows a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative housing solution before suspending the security of tenure of any individual accessing aged care services. (p 27)	Agree; Relationships Australia also **recommends** including elder mediation, restorative practices and Eldercaring coordination as available mechanisms to assist in addressing security of tenure disputes. (Recommendation 29)
The functions of the commissioner section of the Act is separated to provide specific functions and statutory authority to an independently-appointed Complaints Commissioner, with the authority to compel information, participate in the complaints process and certify enforceable undertakings, answerable only to the minister and Parliament. The Complaints Commissioner would continue to be part of the ACQSC, supported by ACQSC staff and with the ability to share information with the ACQSC across both statutory office holder functions. (p 13)	Agree. We **recommend** that the Complaints Commissioner be a fully independent statutory officeholder appointed by and accountable to the Minister, and not an APS employee who is accountable to the System Governor, as well as the Commissioner.[4] (Recommendation 26) We **recommend** that the Complaints Commission be supported by an office that is independent of the ACCSC and resourced through a separate Budget line item. (Recommendation 26)
A system that largely relies on individuals to raise a complaint is inherently problematic, as a result of the power differentials ….even more pronounced where the individual is from a diverse or marginalised group and/or has experienced life trauma (p 8 of Key Issues Paper)	Agree. Relationships Australia also **recommends** that the Act should also provide for a specific funding mechanism to support users to access mediation, Eldercaring, alternative dispute resolution and legal advice and representation. Government should consider: • in the context of the new National Legal Assistance Partnership - how to support

[4] Relationships Australia notes that, in 2024, a First Nations Aged Care Commissioner will be established (Consultation Paper, p 102). We **recommend** that this Commissioner should also be an independent statutory officeholder, sitting outside the Commission. (Recommendation 26)

	individuals to seek legal advice and assistance to use the compensation pathway, and • options to expedite these matters, given the circumstances of the individuals who will seek to use the pathway. (Recommendation 22)
All aspects of the Complaints Framework to be reflected in the Act in the relevant sections including Chapter 5, Part 3 and Part 5. This includes: • transparency of the complaints process – reports are to be made publicly available • legislate restorative justice pathways (including arbitration, conciliation and open disclosure) • annual report on the Complaints Commissioner functions ability to publish and report about continuous improvement and emerging insights and intelligence (including in conjunction with the ACQS Commissioner) (p 14)	Agree. We **recommend** that the Act: • require reports to be published promptly • provide for ADR and restorative pathways that also expressly includes mediation by elder mediators accredited by EMAN/EMIN and eldercaring coordination • require ADR and restorative pathways to be culturally safe and appropriate, and • make clear that the ability of the Complaints Commissioner to publish and report on these matters can be, but does not have to be, in conjunction with the ACQS Commissioner. (Recommendations 28 and 29)
Ensure all uses of a computer decisions are monitored and audited, with the findings of the audit included in annual reports on the operations of the system. (p 11)	Before decisions are made using algorithms or artificial intelligence, Relationships Australia **recommends** that the Act require the System Governor to publish the algorithms and an explanation of how artificial intelligence will be applied (and also before any changes to these taking effect). Individuals (and their supporters and representatives) should be clearly and accessibly informed about the use of algorithms and artificial intelligence in making decisions, and about how to seek human re-consideration of decisions that are made using algorithms and artificial intelligence. See also Recommendation 40.

ANALYSIS

CHAPTER 1 - INTRODUCTION

PARTS 1-3: PRELIMINARY, DEFINITIONS AND KEY CONCEPTS

Commencement (clause 2) and the reform timeline (Consultation Paper, p 97)

> **Recommendation 6 of the RA foundations submission** Consistent with Article 12 of the CRPD, aged care legislation (including the Act and subordinate instruments), policies, programmes and services should be developed using authentic co-design, with sufficient time and support for service users to be contacted, engaged, to reflect and to contribute.
>
> **Consultation Paper, p 6** The Government remains committed to delivering these once-in-a-generation reforms and taking the time to do it properly.

The ED was released in the week before Christmas and required community members and community organisations and advocates to get across voluminous and complex materials before mid February. This attenuated timeframe, and the festive period it spanned, significantly inhibited genuine co-design. Announcing a three week extension three days before the original deadline does not retrospectively create more time for measured discussion. While we agree with other stakeholders that it is imperative that this tranche of reform commence, as planned, on 1 July 2024, the rushed timeframe for this important phase of consultation represents a failure by Government to meet its commitments to hear community voices and take the proper time to deliver this reform package.

The lack of proper time to enable co-design means that a five year statutory review, as provided for in clause 412, is not acceptable. This is one of the reasons why Relationships Australia recommends[5] a three year statutory review, to be then followed by reviews every five years, and that the terms of reference for statutory reviews must include consideration of how the Act could be improved to better articulate and uphold users' human rights. (Recommendation 41)

Objects (clause 5)

> **Recommendation 1 in RA foundations submission** The new Aged Care Act ('the Act') should expressly state that the purpose of the Act is to centre the human rights of users of aged care services, including by progressing towards de-institutionalisation and the elimination of restrictive practices, regardless of the settings in which services are provided.

Relationships Australia welcomes the prominence given in clause 5 to:

- rights, choice and control
- the importance of living 'active, self-determined and meaningful lives' and having opportunities to 'effectively participate in society on an equal basis…thereby promoting positive community attitudes to ageing'

[5] See Recommendation 41.

- equitable access
- accessible complaint mechanisms, and
- the importance of fostering (and justifying) public confidence and trust.

Regrettably, however, the boxed note in clause 6 undermines clause 5, by confining the Objects, Statement of Rights and Statement of Principles to the narrow, medicalised purpose of 'ensuring quality and safe care for individuals'. It should be expanded to give priority to rights, in accordance with the policy underlying the reforms. While this boxed note may not have the interpretative status of substantive provisions, when taken with the language and hierarchies used throughout the Act, there is a clear risk that the Objects and Statement of Rights, in particular, will be deprived of their potential to achieve a genuinely rights-centred aged care system, and read down to perpetuate medicalised, ageist and ableist values and aims.

Relationships Australia **recommends** that paragraph 2 of the boxed note be amended to insert 'upholding the rights of individuals, and' after 'aimed at'.

We also **recommend** amending subparagraph 5(b)(i) by inserting 'accessing funded aged care services' after 'individuals'. This would align that provision with paragraph 5(c) and more precisely define the individuals to whom the Statement of Rights is intended to apply. (Recommendation 2)

Aged Care Quality Standards (clause 14)

Relationships Australia **recommends** that paragraph 14(2)(e) [delivery of food and drink] be amended to include reference to religious practices. (Recommendation 4)

Meaning of reportable incident (clause 15)

Relationships Australia is concerned about assumptions that may underlie paragraph 15(1)(a), which includes as a kind of reportable incident the 'unreasonable use of force'. This suggests that some uses of force against individuals will be 'reasonable'.

The right to bodily integrity is well-established in Australia jurisprudence,[6] and infringement of it (without lawful excuse) can be vindicated through the criminal laws relating to assault and civil laws relating to assault and battery. The rationale for this legal rule is that, subject to the exigencies of daily life, a person is protected from unwanted physical contact by others. This is because a person has a right

[6] *Rogers v Whitaker* (1992) 175 CLR 479; *Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218. In *Re Marion*, several different terms are apparently used to describe this: right to bodily integrity (joint judgment, 223, 254; McHugh J, 311), principle of bodily inviolability (joint judgment, 223, 235, 249), principle of personal inviolability (joint judgment, 224), right to personal inviolability (joint judgment, 253, 254), right to bodily and personal integrity (joint judgment, 254), the law's protection of physical integrity (Brennan J, 265), the law's protection of physical integrity required to protect a person's unique dignity (Brennan J, 266, 267), personal integrity (Brennan J, 267, 273, 274, 284), physical integrity (Brennan J, 267, 274, 277), right to physical integrity (Brennan J, 268), human integrity (Deane J, 303), autonomy with respect to one's body (McHugh J, 309), right to control and self-determination in respect of one's body (McHugh J, 309).

to decide what will be done to his or her body.[7] For example, individuals may seek a legal remedy if medical treatment that involves physical contact is inflicted upon them without their consent, even if the treatment is intended to be, and indeed is, beneficial.[8]

In view of these established principles, the Act needs to be explicit in defining the circumstances in which the right to bodily integrity is displaced, by defining what is meant by 'reasonable force'. Is it force authorised by the restrictive practices arrangements? Is it broader than this, and would the provision allow force to be used against an individual to, for example, move them out of the way physically if they are blocking a corridor and refuse to move? If this is the kind of instance intended, then this does need to be made explicit. For example, if a person spends too much time in front of the milk fridge at the supermarket, does a supermarket worker, loading the refrigerator, have the right to physically shift them? If not, why would such physical contact be permissible in an aged care home?

The implicit authorisation of so-called 'reasonable force' is also at odds with the Statement of Rights (see paragraph 20(4)(a)). Read together with the provisions sanctioning the use of restrictive practices, it carries archaic and infantilising echoes of the rule of reasonable chastisement (also known as the rule of reasonable correction) that once applied to allow husbands to 'correct' errant wives and that, in some circles, is still used to discipline children, although the former is now condemned as family violence, and the efficacy of corporal punishment has been disproven and the community tolerance it is waning.[9] At the very least, we **recommend** that the Act be absolutely clear and precise about the circumstances in which Parliament is authorising a 'reasonable use of force' against individuals. (Recommendation 5)

Paragraph 15(1)(b) refers to unlawful sexual contact or inappropriate sexual conduct. It would be helpful to clarify what is meant by inappropriate sexual conduct that is not unlawful sexual contact?

High quality care (clause 19)

In Relationships Australia's foundations submission, we recommended that

> **Recommendation 12** The Act should make clear the intended function and purposes of the various concepts which it is using to establish norms and prescribe conduct, and the relationships between these concepts.

---

[7] *Collins v Wilcock* [1984] 1 WLR 1172, 1177; approved in *Secretary, Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218, 233 (joint judgment), 265 (Brennan J), 310-11 (McHugh J). See also *Wilson v Pringle* [1987] 1 QB 237, 252 (Croom-Johnson LJ); *Slater v Baker & Stapleton* (1767) 95 ER 860.

[8] See, for example, *Schloendorff v Society of New York Hospital* 105 NE 92 (1914), 92, approved in *Secretary, Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218, 234 (joint judgment), 310 (McHugh J). See also *Canterbury v Spence* 464 F.2d 772 (1972), 780.

[9] CFCA, 2021. We acknowledge the restraints on the use of force in executing monitoring warrants: see ED, clauses 191, 206, 217.

> **Recommendation 15** The Act should establish specific, measurable, nuanced and informative metrics to demonstrate high quality care, developed through authentic co-design with service users.

The Key Issues Paper proposes that Government

> amend the legislation to keep the existing definition [of high quality care[10]] in the Act and allow for new emerging definitions of high quality care to be enhanced via the Rules (to future proof emerging standards of high quality care). (p 21)

Broadly, Relationships Australia agrees with this proposal. We **recommend** that the definition should remain in the Act and the Act should allow for the definition to be modified by subordinate instruments only to the extent that it would expand on the definition in the Act. (Recommendation 8)

However, we have grave concerns about how 'high quality care' is defined, its relationship with the Statement of Rights, and how the term is used in various provisions in the ED. First, this definition could be read as implying that *only* those providers who hold themselves out as providing high quality care within the meaning of the Act – and no other providers - are required to deliver care that, for example:

- puts the individual first
- upholds the rights of the individual as set out in the Statement of Rights
- prioritises kindness, compassion and respect for the life, self-determination, dignity, quality of life, mental health and wellbeing
- supports individuals to participate in meaningful and respectful activities and remain connected to the community, where individuals choose to, and
- is culturally and appropriate.

Characterising these (and many other elements included in clause 19) as matters of 'high quality care' only, rather than *all* care negates the Statement of Rights and the claims of the reforms generally to be transformative and human rights-centred. The Consultation Paper says that 'high quality is about excellence' (p 21); this reinforces the impression that Government considers kindness, compassion and respect not as basic requirements, but as optional extras; indicia of excellence, rather than as a 'floor' for the nature of care which everyone should expect and receive.

In other areas of service delivery funded by the Commonwealth, provision of person-centred, kind, compassionate and respectful services, and services that are culturally safe and appropriate, are expected as the baseline. So they should be. At p 12 of the Consultation Paper, submitters are asked whether we consider that the revised definition of high quality care will encourage providers to aim higher. We do not.

We are astounded by any suggestion that kindness, compassion and respect do not form the most basic obligations of those who would call themselves care providers.

[10] Defined in clause 19 of the ED.

At p 21, the Consultation Paper states that:

> Embedding the concept of high quality care in the new Act sends a strong message that we want providers and workers to aim higher and not just comply with minimum requirements. We want them to innovate, continuously improve and strive towards delivery of high quality care at all times, with the support of the Aged Care Quality and Safety Commission.

Accordingly, Relationships Australia **recommends** that the definition of 'high quality care' be cast more narrowly, to clearly (and consistently throughout the Act) differentiate between what all individuals should expect and receive from the kind of care characterised by indicia of 'excellence' above and beyond the universal standards. (Recommendation 8)

Second, the defined term 'high quality care' is used across the ED and the Consultation Paper in both the defined (ie clause 19) sense, but also more colloquially. Other defined terms appear in bold italics wherever they appear throughout the Act; for example: service type, service group, funded age care service, registered provider, engagement and education functions, serious failure, systematic pattern of conduct, clearance decision, and compliance notice. However, 'high quality care' often appears without such signposting, raising the question of whether the defined term or the more colloquial term is intended in each instance.

For example, subparagraph 19(c)(vii) identifies supporting connections with animals and pets as an indicator of high quality care. However, this kind of offering is also mentioned in the Statement of Rights (paragraph 20(12)(a)). The Consultation Paper, too, evidences a conflation between universally applicable rights and indicia of high quality care: for instance, pp 49 (second complete paragraph), 71 (third dot point), and 73 (third paragraph).

Relationships Australia **recommends** that where the defined term 'high quality care' is intended to be use, then it appear in bold and italicised text, like other defined terms. We further **recommend** that all colloquial and generalist uses be removed, and an alternative expression be found. (Recommendation 8)

Consultation paper questions 39, 40, 43

39. Do you support a phased approach to reform?

Yes.

Further, this submission identifies a range of matters that should be dealt with in the Act, rather than in subordinate legislation or by way of notes to substantive provisions. Inclusion in the Act supports a degree of Parliamentary and public scrutiny that is proportionate to the gravity of the subject matter and, especially, to the risk they pose to the rights of individuals. These are:

- provisions that provide for authorisation of the use of restrictive practices (locate in the Act)
- the Code of Conduct, clause 18 (locate in the Act)
- the proposed diversity population list (locate in the Act)
- provisions relating to disability supports (locate in the Act)
- notes following subclauses 374(6) and 376(8) (elevate to operative provisions)

- criteria for reassessment (locate in the Act)[11]
- the intended scope of clause 92 (locate in the Act, rather than prescribing in the Rules, the registered providers who fall within the scope)
- complaints processes (see clause 96; Chapter 5, especially Parts 3 and 5)
- security of tenure provisions (see Key Issues Paper, p 27), and
- consumer protections for services delivered by associated providers and other privately delivered services with a relationship to the registered aged care provider (Key Issues Paper, p 22).

We acknowledge that time constraints mean that at least some of these will not be able to be included in a Bill to be introduced in March this year. We therefore **recommend** that they be included in the Rules in the first instance, but then included in the Act at the earliest opportunity in the next phase of primary legislation, and before the first statutory review to be undertaken at the third anniversary of commencement. (Recommendation 3; see also Recommendation 41)

40. Do you consider this will allow for staged implementation and more time for consultation on key changes? Or do you consider that it will add complexity and prove challenging for the aged care sector?

Relationships Australia is committed to supporting authentic co-design. A phased approach will be more likely to support this (although it is not a guarantee, as demonstrated by the attenuated consultation period on the ED). A phased approach may also better support providers to prepare for successful implementation of each phase.

43. Are there any particular reform initiatives that you consider must be prioritised for commencement? Alternatively, are there any initiatives that you think would benefit from delayed commencement?

Priority must be given to:

- consultation on key elements of the Rules
- reforms to minimise the use of restrictive practices.

Further, we **recommend** that Government undertake systematic national collection, publication and analysis of data about the use of all restrictive practices in funded aged care services, regardless of setting. (Recommendation 7)

Statement of Rights (clause 20)

We refer to the following recommendations made by Relationships Australia in our foundations submission:

> **Recommendation 2** The Act should specify the human rights engaged by the Act, and subordinate legislation made pursuant to the Act, and clearly enumerate the relevant international conventions.

[11] See ED, clause 46; Consultation Paper, p 41.

Recommendation 3 The Statement of Rights must expressly apply:

- the Convention Against Torture and other Cruel, Degrading and Inhuman Treatment or Punishment, as well as the Optional Protocol to that Convention
- the United Nations Declaration on the Rights of Indigenous Persons, and
- the International Convention on the Elimination of all Forms of Racial Discrimination.

Recommendation 4 The Act must expressly recognise the human rights of older people to:

- make decisions about matters affecting them and, where required, to receive support to make and communicate those decisions
- live and participate in mainstream community life, including recreational, cultural, spiritual, educational, employment and political activities and to access health services, and
- take risks, in accordance with their wishes and preferences.

Recommendation 5 To bolster the Constitutional validity of the Act, and further strengthen it over the medium to long term in the interests of future generations of older people, the Government should prioritise the development of a new treaty to protect our rights as we age and to actively engage with the United Nations processes working to achieve that goal.[12]

Recommendation 7 To give effect to rights to participate in family, social, cultural and community life, and the right to health, the Act should prioritise universal access to services which promote social connection, through:

- individual, family and group counselling and psycho-social supports
- culturally safe and appropriate services (including complaints pathways)[13]
- support to build service user's capacity, and capacity within families, for effective problem solving and communication to help older people to:
  - prepare for, manage and move beyond the transitions into residential care and transitions between levels of intensity of assistance, and
  - maintain connections to family, friends, neighbourhood and community.

The Consultation Paper says that the Statement of Rights

> …outlines rights specifically relevant to the aged care sector and delivery of funded aged care services under the Act, not the rights of older people more generally. (p 23)

This approach represents an overly narrow understanding of the array of rights that are, in fact, 'specifically relevant to the aged care sector and delivery of funded aged care services'. For example:

- data indicates that the majority of people to whom aged care services are delivered are women, and that the workforce, too, is gendered;[14] this underscores the relevance of CEDAW
- the ED and Consultation Paper emphasise culturally safe and appropriate care – UNDRIP and the International Convention on the Elimination of all Forms of Racial Discrimination are specifically relevant

[12] See ROPA call to action at https://www.rightsofolderpersons.org.au/
[13] See, for example, the testimony of Professor Flicker to the Royal Commission: 17 June 2019, pp 2024-2025.
[14] See, eg, AIHW, 2023; Department of Health, 2020.

- the Act continues to allow restrictive practices – OpCAT is specifically relevant (as well as CRPD)
- the ED and Consultation paper recognise the importance of supporting social inclusion and community participation – bringing ICCPR to bear (of crucial practical importance, for example, to guarantee individuals' rights to come and go at will and to receive visitors), and
- increasing numbers to people to whom aged care services are delivered will be members of LGBTIQ+ communities – Yogyakarta+10[15] should be considered.

The ED only refers to CRPD[16] and ICESCR.[17] Relationships Australia **recommends** that the Act should also look to the OpCAT, ICCPR, CEDAW, and UNDRIP, and recognise the Yogyakarta+10 Principles. This will deliver a robust foundation and ensure that those interpreting the Act (including courts) are required to have regard to them. If the Act does not enumerate these instruments, then those interpreting the Act would necessarily infer that Parliament had intentionally excluded them. (Recommendation 9)

The Constitutional heads of power being relied on in the ED frame us, as we age, using language of sickness, deficit, disability, reducing us to patients, with sickness as an innate and inescapable characteristic. These heads of power deliver an Act which:

- perpetuates biomedical, pathologising and reductionist lens on ageing
- perpetuates ageism and ableism
- puts older people without disability in a (relatively) invidious and vulnerable position
- puts older people who are not women in a (relatively) invidious and vulnerable position, and
- distorts the reality of who are, and will become, users of aged care services.

This emphasises the urgency of a Convention on the Rights of Older People. The calls for reforms to be grounded in human rights that are directly enforceable through a timely and proportionate mechanism (rather than relying on complaints to the UN), and for a CROP are not new; this and previous Governments have long been on notice of what is required to protect our rights as we age. This will not be cured by the Key Issues Paper proposal (p 19) of a re-definition of disability for the purpose of aged care legislation, which we expect will increase the complexity of the Act without delivering a robust rights basis.

The inadequacy of the heads of power compounds other aspects of the ED which (perhaps inadvertently) undermine the intent to embed human rights. This happens in several ways.

First, the ED and Consultation Paper[18] consistently order safety and health before quality of life. This matters. This ordering of language reflects and perpetuates benevolent ageism and paternalism while

---

[15] Available at https://yogyakartaprinciples.org/principles-en/yp10/

[16] Unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services and family allowances within the meaning of paragraph 51(xxiiiA) of the Constitution.

[17] Placitum 51(xxix) of the Constitution.

[18] See, eg, the language and structure of ED, clauses 92, 120, paragraph 142(a). See also Consultation paper, p 6, paragraph 3, where older people's needs and preferences are mentioned after safety and health and wellbeing, and our rights under the Act are not mentioned at all. A key indicator that individuals' rights have truly pervaded the new Act will be a pervasive change in how language is used to describe what happens under that Act. The same issue appears at p 10 of the Consultation Paper (last paragraph); p 29, first dot point; p 82, first paragraph.

relatively de-prioritising autonomy, self-determination and dignity of risk. Further, given the reliance on the hospitals power, there is a real risk that provisions according or recognising rights will be 'read down' through biomedical, ableist and ageist lenses. Biomedical models have proven disastrously reductionist and dismissive of individuals' moral and legal personhood. Relationships Australia agrees that 'The new Act must also be framed around reablement, rehabilitation, wellness [as that means to each individual] and quality of life.'[19] This framing should be reflected throughout the Act, Explanatory Memorandum and other relevant instruments, in which autonomy, self-determination, and quality of life should be explicitly and consistently prioritised above safety, health and quality of life. This is especially important in the Statement of Principles. Relationships Australia **recommends** that the approach taken in subparagraph 5(b)(i) and (ii) (the Objects clause), which accords pre-eminence to rights, be adopted consistently throughout the Act. (Recommendation 10)

Second, the ED continues to treat restrictive practices as something which should be permissible and made unobjectionable from a human rights perspective by regulating it through delegated legislation. This continued tolerance is enabled by biomedical lenses and the misuse of 'rights language' such as 'informed consent' to obscure the inherently non-consensual application of restrictive practices. The use of delegated legislation further obscures the egregious human rights violations involved.

Third, we share the deep disappointment of many that the rights set out in the Statement of Rights are not directly enforceable by, or for the benefit of, users. Indeed, the ED goes to the trouble of including an ouster clause to prevent users from directly enforcing their rights in a court or tribunal (subclause 21(3)).

This privative clause indicates a deep fracture running throughout the ED. On the one hand, it is claimed that these reforms are intended to 'create a simplified, rights-based legislative framework' (Consultation Paper, p 10), and the obligations it seeks to impose are grounded in human rights instruments (see clause 5). Yet clause 21 precludes the assertion of rights in a court or tribunal. This is a grave denial of a right that is fundamental to a society which claims to adhere to the rule of law.

Further, it is no substitute for recourse to an independent court or tribunal to offer recourse to a Complaints Commissioner who, as envisaged by the ED, is not independent of the regulator, but who is instead an APS SES employee and thus accountable to the System Governor and the Commissioner. The combination of a lack of independence and of direct enforceability will seriously inhibit the transformation from a provider-focused Act to a user focused and rights based Act, as promised by Government in response to the findings and recommendations of the Royal Commission. We **recommend** that the Act allow individuals or their agents to seek direct enforcement, through proceedings in courts or tribunals, of the rights described in clause 20. As a consequence, we also **recommend** that subclause 21(3) be omitted. (Recommendation 9)

Fourth, the statutory duty that merely requires providers not to do anything 'incompatible' with the enumerated rights, and to provide information on rights, is inadequate.

[19] Key Issues Paper, pp 7, 19.

Finally, we have canvassed above in our consideration of the clause 19 definition of 'high quality care' and the lack of clarity about how that definition sits with the Statement of Rights. Paragraph 19(b) of the definition refers to high quality care as being care that upholds individuals' rights under the Statement of Rights. This suggests that the Government intends that an individual's enjoyment of the rights enumerated in the Statement of Rights is contingent on whether a provider holds itself out as delivering high quality care, rather than being a guarantee for all individuals who receive care under the new Act. If this is Government's intention, then the proposed Act clearly does not centre rights as understood under the Conventions on which it seeks to rely.

Consultation paper questions about Statement of Rights (Questions 1-4)

1. Are the revised Objects, Statement of Rights and/or Statement of Principles clear and do they achieve their intent? If not, what changes are required?

No. See our earlier responses in respect of clauses 5 and 20.

Further, the Act must provide for consequences of a failure, by the Minister, System Governor, Commissioner or other persons and bodies to which subclause 23(1) applies, to act in accordance with, or accord sufficient weight to, the Principles. This may be through the Code of Conduct or other means, but such a mechanism needs to exist. Without consequences, we will see another Royal Commission in 20 years asking why the Statement of Rights failed to improve the conditions in aged care; the answer will be that the rights were not directly enforceable. The lack of mechanisms to directly enforce, vindicate and remediate the breach of, rights exacerbates the risk, following the first flush of enthusiasm and energy, that under-resourced policy-makers, decision-makers and regulators will become quiescent and inactive, and that 'ritualistic' tick a box regulation will reassert itself as the default.

On a more detailed matter, Relationships Australia **recommends** re-phrasing of paragraph (i) of the Note following subclause 22(4). The phrase 'or other sexual orientation' should be re-located to follow 'bisexual', because 'trans/transgender or intersex' do not relate to sexual orientation but to gender identity and bodily diversity. (Recommendation 11)

2. Some First Nations stakeholders indicated that they would also like to see a right to remain connected to Island Home (in addition to 'Country') included in the Statement of Rights? Do you agree? We would appreciate feedback from First Nations persons regarding their views on whether Island Home should be included here and in other relevant places in the new Act.

Yes.

3. Do you consider the revised definition of high quality care will encourage providers to aim higher? Does it align with your future vision for aged care?

No. See the earlier discussion about clause 19.

4. Do you think a single service list will increase clarity of the services that the Commonwealth aged care system provides to older people?

Yes.

Supported decision-making framework

Recommendation 9 from RA's foundations submission The Act should:

- embed supported decision-making, as envisaged in OPAN's position statement on supported decision-making[20]
- mandate that substitute decision-making occurs only to the extent permitted by the Act itself (*not* subordinate legislation), and in accordance with the best possible interpretation of the person's wishes and preferences
- be very clear about the relationship between nominees and representatives appointed pursuant to the Act and nominees, representatives and advocates appointed pursuant to other legislation (eg people exercising powers of attorney) or in respect of other systems (eg Centrelink nominees) (implementation would be facilitated by progressing Recommendation 10)….
- mandate a community visitor programmes,[21] with a legislative mandate for those visitors to monitor and report on the use of restrictive practices
- require systematic national collection, publication and analysis of data about the use of all restrictive processes in aged care services, regardless of setting.

Recommendation 10 from RA's foundations submission That the Commonwealth urgently progress harmonisation of laws relating to enduring instruments and establishment of a register.

Consultation paper questions (Questions 5, 6, 8 and 9)

5. Are the proposed roles of supporters and representatives clear and distinctive? Please tell us why or why not.

<u>Location of various provisions about supporters and representatives</u>

While Part 4 of Chapter 1 provides for the actions, duties and protections of supporters and representatives, provisions about their appointment are included in Chapter 8. To enhance accessibility and clarity of the Act, we **recommend** that all provisions about representatives and supporters – definitions, appointment, actions and duties – be located in the same chapter. This would enhance its clarity and accessibility. (Recommendation 13)

---

[20] See https://media.accessiblecms.com.au/uploads/opan/2023/02/OPAN-Position-Statement-Supported-decision-making-must-be-embedded-across-aged-care.pdf . See also Recommendation 27 of this submission.

[21] This should be accompanied by a report on findings of visitors, tabled in Parliament; for a precedent, see the volunteer-based Community Visitor programme run by the Office of the Public Advocate (Victoria): https://www.publicadvocate.vic.gov.au/our-services/community-visitors. In this regard, we note also the observations by the Queensland Office of the Public Guardian, identifying community visitors, with a legislated mandate, as essential to human rights compliant regulation of restrictive practices: see Office of the Public Guardian, Queensland, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 – Submission to the Parliamentary Joint Committee on Human Rights, 2019, pp 10, 13-14.

Relationships Australia **recommends** that the notes following subclauses 374(6) and 376(8) be included in the substantive provision, as a safeguard against abuse and exploitation of an individual. (Recommendation 13)

If the power to appoint representatives is retained, contrary to our other recommendations, Relationships Australia **recommends** that the Bill impose on the System Governor a requirement to report annually on the frequency and (de-identified) circumstances in which representatives are appointed. This would be helpful to inform consideration of whether supported decision-making is, in practice, being used and that the use of substituted decision-making is confined to the rarest of instances, consistent with the Statement of Rights. (Recommendation 13)

System Governor's role in approving supporters and representatives

Relationships Australia queries why the ED confers on the System Governor the power to approve such appointments. The choice of supporters and representatives should be seen, within the terms used by the ED, as an exercise of choice and control by individuals, making conferral of such a function on the System Governor incongruous and at odds with the Objects of the proposed legislation. It would be useful and appropriate for the System Governor to have the responsibility of maintaining a register of appointments, but an approval role seems intrusive and paternalistic, except in circumstances where an individual has not appointed a person under an enduring instrument and is not in a position to make an appointment. Even in these circumstances, this is a task which is already undertaken by guardians appointed under State and Territory legislation.

Relationships Australia **recommends** that:

- the Act recognise that individuals can appoint supporters and representatives for the purposes of the Act
- the Act allow the individual to appoint, as a supporter or representative, a person to whom they have also given a power of attorney, or appointed under an advance health care directive
- the Act allow the System Governor to make such appointments only when:
    - an individual has not made an appointment under state/territory legislation to execute an enduring instrument, and
    - the System Governor is reasonably satisfied that, in all the circumstances, appointing a representative and/or supporter will help the individual to exercise their rights. (Recommendation 13)

It is also unclear, on the face of the ED, how representatives and supporters are expected to, allowed to, or precluded from, working collaboratively with:

- people appointed by individuals to exercise powers of attorney, or powers under advance health care directives, and
- guardians (whether appointed by a tribunal or a Public Guardian), especially having regard to the note following subclause 376(4).

The confusion and inconsistency surrounding powers of attorney and advance health care directions has long been a source of stress, expense and concern for principals, donees of powers, and third parties. Solutions to these issues are available and have long been in the public domain, but potential progress is repeatedly thwarted by an apparent lack of political will. Reforms have been on and off the agenda of

the Standing Committee of Attorneys-General for over 20 years now. Relationships Australia suggests that this glacial progress is indicative of political and bureaucratic ageism, which permits these issues to be constantly de-prioritised. Perhaps this work should be located within a portfolio that has the capacity and will to achieve outcomes, because justice portfolios and ministers over have, over two decades, failed the community in this critical area. We suspect this may be at least partly attributable to resourcing issues. Relationships Australia **recommends** that the Commonwealth establish a cross-portfolio and cross-government taskforce to resource efforts to expedite these reforms. (Recommendation 13)

Relationships Australia **recommends** that 'reasonably' be inserted before 'available' in paragraph 30(3)(c). (Recommendation 15)

Relationships Australia notes the extensive obligations imposed on supporters and representatives to inform the System Governor of certain matters. We query whether this will be practicable for supporters and representatives, and whether the System Governor will have the resources to effectively act on the information received from supporters and representatives. Our concern is that, as resources (inevitably) tighten, the information will be provided essentially to a black hole. As a general principle, information should only be collected for a purpose that is actively implemented. If Government cannot or does not use information collected from individuals (or entities), then it should not impose an obligation to provide it.

Relationships Australia **recommends** that 'honestly and' be inserted before each mention of 'reasonably' in clause 32. Complementary to this, we **recommend** that 'and reasonably' be inserted after 'in good faith' in paragraph 34(b), and that 'or ought to be known' be inserted before known in paragraph 36(6)(b). (Recommendation 15)

6. Are you comfortable that an older person is only able to have representatives or supporters? Are there situations where an older person, or their families and support networks, might want both a representative and a supporter?

No. It is unclear why the ED precludes an individual from having concurrent appointments of supporters and representatives. Such a prohibition undermines individuals' rights to autonomy and self-determination and the Consultation Paper does not appear to explain why such an infringement is justifiable, proportionate or necessary. Further, there are circumstances where individuals, families and supporters may wish to have access to both supporters and representatives, particularly given the diverse family formation and composition characteristic of our contemporary and multi-cultural society, and the Government's intent that aged care be culturally safe and appropriate.

Relationships Australia notes that the Consultation Paper suggests that allowing 'multiple supporters or representatives, but not both at one time' achieves several purposes, the first-mentioned of which is to 'make it clear what kind of support network someone has' (p 31). We suggest, however, that this prohibition goes beyond that purpose, to in fact prescribe what kinds of support networks people may have, while obscuring the support networks that they actually do have.

Relationships Australia **recommends** that the Act confer on individuals the right to make concurrent appointments of supporters and representatives. (Recommendation 13)

8. What sort of penalty should apply to supporters and representatives who do not comply with their duties, if any?

Supporters and representatives who act honestly and reasonably should be protected from civil and criminal liability. Where they have not, guidance for penalties can be gauged from other legislative frameworks in which persons in positions of trust vis-à-vis persons who are relying on them act contrary to the instruments creating their responsibilities. There should be a tiered approach and the emphasis should be on education and informing supporters and representatives.

Relationships Australia **recommends**:

- that Government develop information, education, training and support resources to assist supporters and representatives to understand their role, their duties and where they can seek help and advice
- that the Act protect supporters and representatives who act honestly and reasonably, and
- that the Act provide for tiered penalties to reflect culpability and gravity of consequences of breach. (Recommendation 14)

9. Noting that representatives must always try to help a person to make their own decisions, should an older person be able to appoint a representative when they have decision-making capability but would prefer someone else to make decisions about their aged care? Please tell us why or why not.

Yes. To do so is itself an exercise of autonomy and self-determination, and we support the inclusion of subparagraph 30(2)(b)(ii) in the Act.

CHAPTER 2 – ENTRY TO THE COMMONWEALTH AGED CARE SYSTEM

Relationships Australia welcomes the introduction of clear eligibility criteria and a streamlined assessment system (including provision for reassessment 'on the papers'),[22] and supports the lower age threshold for Aboriginal and Torres Strait Islander persons. We would also support the conferral of a discretion to enable access for other younger people, as suggested at p 36 of the Consultation Paper. Relationships Australia welcomes the 'places to people' approach adopted in the ED. This is a practical means by which the ED realises the policy promise of a person-centred aged care system.

We would, however, welcome further detail about why it is intended that a delegate exercising such a discretion would be external to the Department (Consultation Paper, p 36). Relationships Australia **recommends** that, to enhance transparency and accountability, criteria for reassessment should be located in the Act,[23] given the importance of reassessment pathways to upholding individuals' rights to assessment. (Recommendation 16)

We look forward to the publication of proposed 'alternative entry arrangements'.

[22] See Consultation Paper, p 41.
[23] See ED, clause 46; Consultation Paper, p 41.

CHAPTER 3 – REGISTERED PROVIDERS, AGED CARE WORKERS AND AGED CARE DIGITAL PLATFORM OPERATORS

> **Recommendation 11 from the RA foundations submission** The Act must provide meaningful and accessible remedies for breaches of *all* rights (including, for the avoidance of doubt, decision-making rights), not only those resulting in physical harm or quantifiable loss/damage (or risks of these); a right that cannot be vindicated through a remedy is of questionable value.[24]

Restrictive practices (clause 106; see also clauses 16, 17)

It is unacceptable that that 'restrictive practice requirements will mirror the current legislation' (Consultation Paper, p 20). The current requirements fail to uphold the human rights of those subjected to them, as well as being confusing and unworkable. Mirroring current arrangements is fundamentally at odds with the Statement of Rights.

In our 2023 submission, Relationships Australia proposed that the Act must unambiguously declare the elimination of restrictive practices to be a key objective. We are deeply disappointed that this has not occurred, and that the Government is not taking this opportunity to make substantive progress in protecting individuals from conduct that, in other contexts (including disability services), would be self-evidently unlawful. The approach taken in the ED is unacceptable. It leaves substantively unchallenged the *status quo* which normalises violations of human rights, and:

- continues to relegate restrictive practices to be dealt with through subordinate legislation, thus minimising Parliamentary and public scrutiny. The note following subclause 27(2) provides that rules may provide for the 'giving of consent' in relation to restrictive practices. Authorisation of restrictive practices is in such disarray that including these provisions, so critical to the bodily integrity and dignity of individuals, in subordinate legislation will worsen the chaos and undermine transparency and accountability in relation to these practices. Governments need to resolve this and, reflecting the gravity of rights infringement and the damage caused, include the relevant arrangements in primary legislation
- continues to focus on how to facilitate the use of restrictive practices through purported 'informed consent' and protect from consequences those who use them; Relationships Australia **recommends** that provisions about restrictive practices take human rights as a starting point, rather than assuming their necessity and normalising their use (Recommendation 6)
- fails to address the lack of alignment between the various roles of supporter and representative in the ED and existing and future arrangements made under state and territory laws relating to guardians, powers of attorney and advance health care directives; Relationships Australia **recommends** that this be clarified in the Act. (Recommendation 6)

Relationships Australia **recommends** that provisions authorising the use of restrictive practices (which would otherwise be unlawful as assault and false imprisonment) be included in the Act (Recommendation 6). Actions by governments to authorise conduct that so seriously infringes

[24] This is consistent with Recommendation 2 in our submission to the inquiry of the Parliamentary Joint Committee on Human Rights into Australia's Human Rights Framework.

individuals' fundamental rights to dignity and bodily integrity must be included in primary, not subordinate, legislation. Further, the use of the term 'informed consent' in connection with restrictive practices is egregiously Orwellian in misstating what is involved. In no way do the interim arrangements under the *Quality of Care Amendment (Restrictive Practices) Principles 2022* (in place until December 2024) support anything that can properly be described as consent or that aligns with Australian jurisprudence on consent to medical treatment. At the very least, Relationships Australia **recommends** that reference to 'informed consent' to restrictive practices be abandoned for a term that more accurately reflects what happens – legislated authorisation for applying practices that would otherwise be assault or false imprisonment. That would at least have the merits of accuracy and transparency. (Recommendation 6)

While the Consultation Paper suggests that the Rules impose 'strict requirements' to employ these practices as 'a last resort to prevent harm', this is not how the Rules have ever worked in the past, and it is disingenuous to suggest that this will change in the absence of primary legislation that moves towards abolition of restrictive practices, complemented by meaningful safeguards and consequences for breaches.

The use of restrictive practices as behavioural controls is abhorrent, and flagrantly violates long-established common law principles and our international obligations. Specifically, diagnosis of dementia or other cognitive impairment does not in any way diminish the entitlement of a person to enjoy all the human rights that attend on personhood. This was recognised nearly 30 years ago in the Burdekin Report : '...dementia, like other mental illnesses, can be managed successfully without compromising protection of human rights.'[25]

The absence of therapeutic benefit (and, indeed, the experience of harm) for those subjected to restrictive practices has been plainly demonstrated, including in evidence to the Royal Commission, as has the use of restrictive practices to benefit persons other than the individual subjected to them. Common law jurisdictions, including Australia, have long accepted that stricter criteria apply to establishing consent to interventions that are to benefit a third party, rather than the person subjected to them.[26] It is important to recognise, too, that the rights violations and harms inflicted by the use of restrictive practices are not ameliorated by lack of malice. Benevolent intent does not cure infringement of bodily integrity, which is why medical treatment is, with limited exceptions, subject to a precondition of consent by the person receiving the treatment.[27]

Relationships Australia further **recommends** that the concept of 'emergency', used in subclause 17(3), be defined (Recommendation 6). A useful contemporary precedent can be found in the definition of 'urgent restricted medical treatment' in the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* (ACT). The rationales for the kinds of practices restricted in that Act have

---

[25] Cited in Carnell-Paterson, 2016, p 111, citing AHRC, 1993.

[26] See, eg, McLean and Petersen, 1996, 332; Oberman, 2000, 468. See also *Re A (children) (conjoined twins: surgical separation)* [2000] 4 All ER 961; *State of Queensland v Nolan and Anor* [2001] QSC 174 (31 May 2001); *McFall v Shimp* 10 Pa.D&C.3d 90 (1978), accepted in *In re AC* 573 A.2d 1235 (1990), 1244; *St George's NHS Trust v S* [1998] 3 All ER 673; *GWW and CMW* (1997) FLC 92-748.

[27] *Rogers v Whitaker* (1992) 175 CLR 479. See also Williams, Chesterman & Laufer, 2014, at 647.

similarities with the rationales for restricted practice; most notably, that individuals are subjected to practices to which they do not consent and which may be intended to benefit another person.

Compounding this situation is ongoing reliance on the well-documented disarray among state and territory guardianship and substitute decision-maker arrangements.[28] The protections of older people in respect of restrictive practices is markedly inferior to that of people with disability[29] which, given the prominence of the CRPD in the ED, is – to say the least – incongruous. It is (or should be) self-evidently invidious that the protection of fundamental rights is weaker simply if one has attained an (arbitrarily determined) age. It is structural ageism and it is state-sanctioned elder abuse.

As explained in our previous submission, we have particular concerns about the use of restrictive practices against older people who are survivors of violence and trauma. Many of our clients have suffered previous trauma and abuse, including in institutional settings. This includes people who are Forgotten Australians, Child Migrants, members of the Stolen Generations, people affected by forced adoption, and survivors of institutional child sexual abuse – and who, too often, belong to a combination of these groups. Relationships Australia clients who have had these experiences have told us of plans to kill themselves rather than enter institutional aged care, or anything that resembles the institutions where they were preyed upon. As a provider of services to members of these groups (although not a provider of RACF, homecare or past out of home care), Relationships Australia is deeply mindful that, for people who have experienced perpetually compounding, life-long suffering as a result of institutional abuse, the prospect of being re-institutionalised is terrifying.[30]

We **recommend** that the Government should urgently act to implement reforms to reduce, with a view to eliminating, the use of restrictive practices in aged care services (Recommendation 6). These reforms should be included in an Act, rather than in subordinate legislation. We commend to the Government's urgent attention the proposals made by the Queensland Public Advocate,[31] which centre on an authorisation process, undertaken by an appointed 'senior practitioner' and 'authorised program officers,' as well as Recommendations 4-10 and 4-11 of ALRC Report 131, with which the Queensland proposals are consistent. We support the comments recently made by the Queensland Public Advocate in relation to the ED and its treatment of restrictive practices.

Relationships Australia acknowledges that a human rights-based approach to restrictive practices would have a substantial impact on the cost of providing aged care. Yet if Australia takes seriously its human rights obligations to our older community members, then this is what is required.

---

[28] We agree with the comments made by the Law Council of Australia in its submission at https://lawcouncil.au/resources/submissions/a-new-model-for-regulating-aged-care-consultation-paper-no-2 .

[29] Office of the Public Guardian, Queensland, Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 – Submission to the Parliamentary Joint Committee on Human Rights, 2019, 3. See also recommendation 2 of that submission, at 4, 13. We note that this disparity has been remarked upon by other participants in this discussion: see, for example, the statement to the inquiry from Older Persons Advocacy Network, the response from the Australian College of Nurse Practitioners.

[30] See O'Neil, 2019.

[31] See, eg, Office of the Public Advocate, 2021.

We further emphasise that restrictive practices can only be eradicated if caregivers are properly supported within a safe work environment. We have canvassed these considerations in more detail in our submissions to the inquiry about the Carer Recognition Act and the draft National Strategy for the care and support economy.

Provider Registration process

Clause 74 of the ED provides for a default 3 year registration process, and confers on the Commissioner power to extend or shorten this period. To prevent this becoming a 'ritualistic' tick and flick exercise, it is imperative that the Commissioner be sufficiently resourced to be able to critically interrogate the wealth of data, insights and evidence that will be available under the new Act.

Consultation Paper questions (17, 18, 19)

17.Do you consider that the proposed draft statutory duties on registered providers and responsible persons achieve the proposed policy intent?

No, assuming the policy intent is to centre human rights.

> **Recommendation 8 of RA's foundations submission** To mitigate imbalances of power when users (or their representatives) wish to take action to assert users' human rights - the Act should require that:
> - advocacy services, as well as legal advice and representation, are made available to support users and their representatives to engage with remedial processes, including complaints, conciliation, and matters involving alleged breaches of the statutory duty of care), and
> - case management, counselling, mediation services and psycho-social supports are made available to support users and their representatives to engage with remedial processes, including complaints, conciliation, and matters involving alleged breaches of the statutory duty of care).

In considering this question, we have read clause 92 (condition of registration) together with clause 120 (registered provider duty)). The result seems to be narrow in scope, and sets too low a bar to be a credible driver of a human rights-centred aged care system, for the following reasons.

First, the Consultation Paper suggests that the condition defined in clause 92 will apply to all registered providers.[32] However, the language of the ED limits the condition to registered providers that are 'registered in a provider register category prescribed by the rules'. Leaving to subordinate legislation the question of which providers will be subject to the condition makes it difficult for stakeholders to form a view about its likely effectiveness, either in isolation or read in combination with clause 120. The condition merely requires the prescribed providers to:

- demonstrate understanding of individuals' rights under the Statement of Rights, which could perhaps be satisfied, in theory, by a pass on a multiple choice questionnaire, and
- have in place practices to ensure that service delivery 'is not incompatible with the rights of individuals under the Statement of Rights' (subclause 92(1)).

[32] See pp 29, 53.

Relationships Australia **recommends** the condition be cast in positive terms, requiring providers and responsible persons to ensure that service delivery upholds the rights of individuals under the Statement of Rights. We further **recommend** that clause 92 provide explicitly that quality of life is the primary consideration, and that health, safety and wellbeing are to be viewed from the perspective of the individual. (Recommendation 17)

Relationships Australia is also concerned that framing 'safety, health, wellbeing and quality of life of individuals' as 'the primary consideration' in service delivery will perpetuate a long-standing and well-recognised tension in health care contexts between safety and health on the one hand (defined through a biomedical lens) and quality of life (defined by individuals' exercising their autonomy, choice and control) on the other. The pre-eminent focus of the duty on adverse effects on healthy and safety, to the exclusion of rights and the relative de-prioritisation quality of life:

- continues to entrench a reductionist biomedical and pathologising lens in both the scope of duty and the kind of harm that is compensable, rather than supporting reablement and rehabilitation, and recognising the effects of injuries to autonomy, choice and control, will and preferences, and to the dignity interest which, under Australian law, is inherent and inalienable[33]
- continues to entrench ageism and ableism
- undermines Government's commitment to a human-rights based aged care system, and
- undermines dignity of risk, reducing it – according to the Consultation Paper - to a matter to take into account when having regard to the 'reasonably practicable' requirement, positioned after 'the likelihood of the adverse effect…and the harm it could cause' (p 60).[34]

Further, the clause 19 definition of 'high quality care' (see our earlier comments about clause 19), means that there is no duty to treat *all* individuals with kindness, compassion and respect. As noted previously, kindness, compassion and respect should be the minimum level of care extended to all individuals, by all registered providers.

We **recommend** that the condition described in clause 92 require providers to understand that quality of life is the primary consideration, and that health, safety and wellbeing are to be viewed from the perspective of the individual. This approach is consistent with longstanding jurisprudence[35] and will better support a person-centred, rights-based approach that accords practical respect to autonomy, self-determination and dignity of risk. (See Recommendations 2, 17 and 19)

---

[33] *Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218.

[34] Similarly, we note that the regulatory powers focus on risk to safety, health and wellbeing (see eg clause 276 (Commissioner may give adverse action warning notice)), further underscoring the focus on medicalised values, rather than on the Statement of Rights. For the Act to be genuinely human rights-centred, the regulatory powers should be activated by risks of infringements of all rights, including those relating to autonomy, self-determination, choice and control.

[35] *F v R* (1983) 33 SASR 189; *Rogers v Whitaker* (1992) 175 CLR 479; *Department of Health and Community Services (NT) v JWB and SMB* ('*Re Marion*') (1992) 175 CLR 218.

Second, we have significant concerns about the framing of the statutory duty on registered providers, and the corresponding availability of compensation. Subclause 120(1) provides that

> A registered provider must ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services while the provider is delivering those services.

Again, this is a narrow, medicalised understanding of harm and is reinforced by the medicalised definition of serious failure.[36] Relationships Australia **recommends** that the duty be cast more positively, and more broadly, to require:

- registered providers to ensure that their conduct upholds the rights described in the Statement of Rights, and
- that the provider's conduct not cause adverse effects to the quality of life, health and safety of individuals, including by exacerbating pre-existing injuries or illnesses. (Recommendation 19)

Clause 127 identifies who can apply for a compensation order and defines the circumstances in which a compensation order can be made. It is similarly medicalised. In relation to standing, it is unclear from paragraph 127(2)(a) whether only the Commissioner and individuals have standing to apply for an order, or whether standing is also conferred on a representative appointed under the Act, or another person authorised by other legislation to act for individuals. We **recommend** standing ought to be conferred on the Complaints Commissioner (whether or not Government makes that role an independent statutory officeholder, as recommended by us).[37] (Recommendation 20) We also **recommend** that the circumstances in which a compensation order can be made should be broadened to correspond to the expanded scope of the statutory duty which we have recommended. (Recommendations 19, 21)

Our concerns with the exclusively biomedical definition of 'serious failure' also apply to the offence provisions of clause 120. Again, there is no vindication and remediation mechanism available to an individual whose human rights (including decisional rights) have been breached, in the absence of risks of death or serious injury or illness. Further, it is unclear to Relationships Australia how it is possible to be reckless with reasonable excuse (see Consultation Paper, p 60); these concepts are mutually exclusive in their ordinary meaning. Finally, and consistent with the concerns we raised in our previous submission, we are concerned that attempts to use clause 120 (and 121, in respect of responsible persons) will be stymied by a need to prove causation, potentially requiring proof that the serious failure was the sole (or at least predominant) cause of death, serious injury or illness. In aged care contexts, this will be very difficult, and could foreseeably render the offence provisions void of practical value. We have similar concerns about the proposed defence of reasonable excuse (subclause 120(7)).

We support:

- the imposition of a duty on responsible persons, for the reasons outlined in the Consultation Paper and the use of a non-exhaustive list in subclause 121(2) (p 61)
- the penalties included in subclauses 121(6) and (7)

---

[36] See also paragraph 287(2)(d) (grounds for banning order).
[37] See Recommendation 26.

- making the duties on registered providers and responsible persons non-delegable (clause 122), and
- imposing the duty on each duty holder (Chapter 3, Part 5,Division 2)

Relationships Australia **recommends** amending:

- amending clause 120 to also impose a duty to uphold individuals' rights under the Statement of Rights
- amending the definition of 'serious failure' in clauses 120 and 121 to include serious and systemic breaches, in the delivery of care, of individuals' human rights, including decisional rights
- amending paragraph 127(2)(a) to confer standing to apply for a compensation order upon a representative or another person otherwise authorised to act for an individual (including by a law of a State or Territory), and
- amending clause 19 (and elsewhere in the ED) to ensure that a duty to afford individuals' kindness, compassion and respect is universal, imposed on all registered providers in respect of all individuals to whom services are delivered, and
- including, after each mention, a note explaining strict liability and the appropriate cross reference to the Commonwealth Criminal Code. (Recommendations 19, 20)

18.Does the proposed definition of aged care digital platform appropriately identify the kinds of online platforms that should be regulated?

The intended application of these provisions is unclear to us. The references, in clause 128, to facilitation and acting as an intermediary would, in their respective ordinary meanings, suggest active engagement with the individual (or their representatives, attorneys etc) and with aged care services, for which the platform operator receives payment. Other aspects of the Part suggest that there is an intention also to capture more 'passive' services, such as a website that merely publishes information and data about registered providers and does not undertake any positive act to connect individuals with registered providers. Further, it is foreseeable that platform operators will outsource any payment processing to another entity or system; it is arguable that such operators would be excluded from the operation of Part 6.

Relationships Australia **recommends** that the definition of 'aged care digital platform' be clarified, including by:

- explicitly stating whether, to be within scope of the Act, the platform needs to be actively engaging with individuals and aged care providers, or whether a platform will be within scope if it merely publishes information, and
- omitting the requirement that, to be within scope, the platform needs to process payments itself. (Recommendation 23)

Relationships Australia **recommends** that paragraph 130(1)(d) be amended to require that summary and explanation of the complaints management system and incident management system, and the Statement of Rights, be displayed prominently (not simply 'displayed') on the platform, and be expressed in plain English. (Recommendation 16)

We are concerned that the rationale underlying the setting of maximum penalties seems unclear. It seems anomalous, for example, that a failure to put the complaints process online can attract a

maximum penalty of 500 penalty units. This is the same maximum penalty that applies to a failure by a registered provider that is an individual which results in death, serious injury or serious illness (subclause 120(5)). Relationships Australia **recommends** that all maximum penalties prescribed in the ED be reviewed holistically to ensure that they properly reflect the gravity of conduct and its consequences. (Recommendation 35)

19.What information should be displayed on aged care digital platforms to help protect people receiving services within the Commonwealth aged care system? What obligations should operators of digital platforms have to check information provided by aged care workers and registered providers? Can you identify any practical issues with operators validating the proposed information?

We are concerned that the breadth of the duties described in clause 129 is impractical. The Act confers a range of powers on the System Governor and the Commissioner to take actions about which reasonable individuals (and their support network) would reasonably expect to be informed when using a platform operator.

Notice of these actions will need to be made available to platform operators in real time and presumably accompanied by some kind of alert system that platform operators are required to subscribe to (for example). It is unfair to impose duties on operators if they do not have reasonable access to current information about matters such as star ratings and regulatory or enforcement actions. Relationships Australia **recommends** that Government establish a database, similar to the aged care worker screening database provided for in Division 7 of Part 3 of Chapter 5), that will provide platform operators real time information about changes to the Provider Register (clause 87) and matters such as notices issued under Chapter 6, Part 10. If such a database were established, then Government could reasonably impose on operators an obligation to keep their platforms up to date. (Recommendation 23)

CHAPTER 4 – FEES, PAYMENTS AND SUBSIDIES

We note that the ED does not include provisions concerning fees, payments and subsidies. We do, however, have some views on policy approaches to these matters.

Consultation questions 21, 22 and 24

21.How does the proposed structure of Chapter 4 read to you?

Acceptable.

22.Do you think categorising the subsidies into person-centred and provider-based reflects the person-centred approach to the new Act?

Yes.

24.Do you support registered providers being given access to specific additional Commonwealth funding which must be used for a particular purpose, rather than to deliver specific aged care services?

Yes.

Further, it will be very important for the new Act not to replicate the disincentives for reablement, rehabilitation and ablement that exist in the current legislation where keeping individuals within classifications of need is reflected in additional payments. This is a difficult challenge, but it will be necessary for the Government to consider how this can be achieved, if the Objects and Principles set out in the ED are to be effectively operationalised.

Relationships Australia supports allowing registered providers the option of seeking specific additional Commonwealth funding to use for a particular purpose, as outlined at p 68 of the Consultation Paper.

CHAPTER 5 – GOVERNANCE OF THE AGED CARE SYSTEM

Relationships Australia welcomes efforts to align workforce requirements across the aged care, NDIS and care and support sector. This will help to reduce fragmentation and compliance costs on providers. We hope that the Commonwealth, state and territory governments are able to work expeditiously to develop the necessary legislative reforms to support the proposed new worker screening model (Consultation Paper, p 53).

We support new protections for whistleblowers (see paragraph 96(d)).

We note that only providers registered in certain registration categories will be required to commit to continuous improvement (ED, clause 99; Consultation Paper, p 56). We would welcome clarification on why only some registered providers will be subject to these requirements.

Appropriate resourcing of the System Governor, the Commissioner, the Complaints Commissioner and the Inspector-General will be a necessary (albeit not sufficient) precondition of successfully operationalising the Act.

Relationships Australia **recommends** that the Act confer on the Complaints Commissioner power to investigate and enforce compliance with the proposed positive duty on providers to uphold the rights enumerated in the Statement of Rights.[38] (Recommendation 29)

Consultation Paper Questions 25-28

25. Do you think there are any additional functions missing from the role of the Commissioner?

Decades of common law jurisprudence show us that when safety and health are juxtaposed with autonomy (as is the case in the ED), a medicalised approach will be privileged.[39] To maximise the significance and weight that autonomy, self-determination, choice and control should be accorded by the Commissioner in the performance of their functions, Relationships Australia **recommends** that the Act provide for:

- the creation of a Chief Human Rights Advisor, to complement the Chief Clinical Advisor provided for by clause 148, and

[38] See Key Issues Paper, p 9.
[39] Concerns: clause 144 (complaints functions)

- the inclusion, in clause 172 (Appointment of Advisory Council members), of a person with substantial experience or knowledge in human rights and/or ethics, to complement members with clinical or biomedical knowledge or experience. (Recommendation 24)

For the avoidance of doubt, Relationships Australia **recommends** that subparagraph 132(1)(d)(i) be amended to substitute 'publishing' for 'providing'. This will enhance transparency and accountability. (Recommendation 25)

26.Is it clear how the roles of the System Governor and Commissioner differ, but also fit together, as regulators of the aged care system?

Yes.

27.Do you think the proposed arrangements for the Complaints Commissioner clearly demonstrate their role in the aged care system?

No.

Most importantly, the Complaints Commissioner should be an independent statutory officeholder, and not an APS SES employee who is accountable to the System Governor and the Commissioner. (Recommendation 26)

Several important matters about the proposed complaints process are unclear at this point. These are:

- whether and how providers and workers, as well as APS officers working on complaints, will receive training to ensure that complaints processes are restorative and trauma-informed
- whether individuals will have ready access to therapeutic support and advocacy services, as well as legal advice[40] to support their engagement with complaint, ADR and restorative processes and practices, noting that older people currently experience significant barriers in accessing legal advice and representation? This is particularly important if apologies, legally-binding agreements or compensation are being considered (for example, in the absence of legal advice, a user may be coerced into signing a non-disclosure agreement even in instances of serious misconduct)
- whether there will be a process to deal with frivolous or vexatious complaints; who will administer it and the criteria on which decisions will be made
- what sanctions will the Complaints Commissioner be able to apply, and whether these will be legally binding? If a user or their representative is not satisfied with the outcome of the Commissioner's intervention, what remedies are then available?

[40] It is important for people to have a choice of services to engage.

28.Do you think there would be a benefit to requirements regarding liquidity and capital adequacy extending to home services providers, to protect continuity of care and monitor financial viability and sustainability in the home services sector?

Yes. The risks to individuals from 'transfer trauma' underscore how vitally important it is to support continuity of care where a registered provider may be providing rights-supportive and safe care, but is encountering financial difficulties. This is particularly important in a thin market like Australia.

CHAPTER 6 – REGULATORY MECHANISMS

Relationships Australia supports enabling the Commissioner and System Governor to take a nuanced and proactive approach to their regulatory functions, including through conferring on them flexible and graduated powers, as well as coercive powers of entry, search and seizure. Whether or not Government accepts the recommendation to create the Complaints Commissioner as an independent statutory officeholder,[41] it should expressly and directly confer similar powers on the Complaints Commissioner (rather than, for example, relying on a delegated power from the Commissioner or System Governor).

However, to ensure a regulatory model that is truly 'centred on the protection of the rights of older Australians as a key feature of the new Act' (Consultation Paper, p 77), the conceptual premise of Chapter 6 must be re-framed. It currently focuses on risks of a specific kind (risks of injury, illness and death) and on harms of a specific kind (injury, illness and death). This emerges from the biomedical and pathologising lens that is applied to older people. That lens is ageist and ableist, and profoundly reductive. For the assertion that the Act will be person-centred and rights-based, Chapter 6 must recognise the risks to autonomy, dignity, and self-determination, and it must recognise that when those risks materialise, real harm and damage is done. Harm and damage do not always look like broken bones and ulcerated skin. Harm and damage can also look like indignity, fear, humiliation, shame, the sense of being invisible and negated. The law recognises such intangible risks, harms and damage in myriad contexts (for example, through copyright law, through understanding the mechanics of coercive control in family violence, privacy and reputational rights, and through the right to refuse medical treatment).

Accordingly, Relationships Australia **recommends** that:

- harm be defined to:
    - include breaches of rights that infringe the interests, long and well understood in Australian jurisprudence, in bodily integrity and the dignity interest
    - include non-medicalised and intangible harms (which courts regularly vindicate and quantify) as well as harms relating to illness, injury and impairment
- regulatory powers, functions and duties be framed around rights, rather than risk of medicalised harms; such a re-framing would allow the regulatory scheme to encompass all types of harm, not just medicalised harms, and

[41] Recommendation 26.

- mechanisms to address non-compliance be used in a way that is 'rights' not 'risks' proportionate;[42] the latter will perpetuate a regulatory culture based in ageism and ableism; the former will safeguard individuals as a necessary incident of focusing on their rights. (Recommendation 31)

Relationships Australia is concerned by the remarks by the Commissioner, during the Q &A webinar on 18 January 2024, that providers would notice little change, between the old and new Acts, in the approach to monitoring performance. This seems significantly at odds with Government assurances that the ED will usher in transformative change, to prevent the recurrence of abuses traversed by the Royal Commission. For example:

> None of this is different under the new Act….So, the familiarity that providers have with the current way of working with the Commission should continue through into the new Act.

The Commissioner emphasised the risk-focused approach that the Commission would continue to take under the new Act. A risk-focused approach does not inevitably exclude, but is most certainly in tension with, a rights-based approach. A risk lens is inadequate to ensure that individuals' rights are upheld, and is likely to perpetuate biomedical perspectives to the detriment of autonomy, self-determination, choice and control and, importantly, dignity of risk.

Relationships Australia supports conferring on the Commissioner new critical failures powers, as suggested in the Consultation Paper (pp 77, 81).

Relationships Australia continues to be concerned by the focus on 'serious' failures giving rise to (ie causing) risk to, or actual, serious illness, injury or death.[43] Given the threshold of 'seriousness', what standard of proof will be required? We remain concerned that causation and proof of harm may both prove to be very high hurdles for plaintiffs to clear. Defendants may well seek to contest liability by claiming that any harm alleged has been caused by pre-existing conditions. Finally, the ED has not assuaged our concerns that the scope given to defendants to contest liability (eg claiming the breach was not serious, disputing causation, and/or disputing harm) will allow proceedings to be so protracted as to effectively deny a remedy.

Nationally consistent protections for individuals

Relationships Australia is committed to geographic equity. In this context, that requires that individuals receiving Commonwealth-funded aged care receive the same protections, including through the exercise of regulatory power, regardless of the ownership structure of the provider (over which they have no control). Accordingly, we **recommend** that state and territory governments enter into appropriate agreements with the Commonwealth which allow for the Commission, the (independent) Complaints Commissioner and System Governor to exercise the full suite of powers in relation to State and Territory government providers operating 'under certain specialist programs', as mentioned at p 78 of the Consultation Paper. We have similar concerns in relation to the definition, in clause 7, of 'aged

[42] See Consultation Paper, p 79.
[43] Consultation Paper, p 30.

care worker screening law'. In the absence of harmonised, nationally consistent approaches, it is foreseeable that individuals in some states may be placed at greater risk than others, if workers are not consistently screened. (Recommendation 42)

Clarity of regulatory powers provisions: interaction between ED and the *Regulatory Powers (Standard Provisions) Act 2014*

Chapter 6 contains provisions that are critical to understand to properly form a view on their likely effectiveness. However, the numerous cross-references to the *Regulatory Powers (Standard Provisions) Act 2014*, coupled with the use of deeming provisions to produce a 'bespoke' regulatory approach, impairs the accessibility and transparency of the ED.[44] Relationships Australia **recommends** that, rather than 'modified deeming', Chapter 6 be re-cast so as to be self-contained (albeit using the Regulatory Powers Act as a guide, and including notes that indicate that the approach in aged care aligns with the Regulatory Powers Act). (Recommendation 32)

Occupier's rights and responsibilities (Chapter 6, Part 4, Division 3)

Occupier is not defined in either the ED or the Regulatory Powers Act. Would it include, for example, an individual residing in the home?

Immunity of officers and persons assisting (Chapter 6, Part 4, Division 5)

That immunity extend only if the officer has acted reasonably, as well as in good faith (subclause 222). (Recommendation 34)

Clause 286 (Banning orders on current and former registered providers)

That subclause 286(2) be amended to clarify its intended operation. (Recommendation 36)

Clause 287 (Banning orders on individuals as aged care workers and responsible persons)

That, in subclause 287(3) 'suitability matters' be in bold and italics to alert readers to the fact that this is a defined term. Further, we **recommend** including after subclause 287(3) a note referring to the definition in clause 12. (Recommendation 36)

Clause 308 (Write-off of recoverable amounts)

Subclause 308(6) allows the System Governor to recover – at any time – a recoverable amount that has previously been written off. However, individuals and entities are entitled to rely on information and advice given to them, by Government, that a debt has been written off. To retain this power, with an open-ended time frame and no qualification as to the circumstances in which the System Governor may exercise it, is unfair and potentially oppressive as it does not allow payers to rely on actions undertaken by the System Governor. Payers ought to be able to rely on advice that a debt has been written off, if they are acting honestly and reasonably, and do not have actual or constructive knowledge of any fact,

[44] See especially clauses 196 ,197, 201-203, 208, 210, 212, 215.

matter or circumstance which means that the debt should not have been written off. As it stands, subclause 308(6) exploits the substantial imbalance of power between the System Governor and debtors.

We **recommend** that subclause 308(6) be omitted. If it is not omitted, then it should be limited to apply only to debts in respect of which the debtors have not acted honestly and reasonably in relying on previous advice that they have been written off. (Recommendation 37)

Consultation Paper questions (29, 30, 32)

29. Do you consider the expanded powers made available to the Commissioner will ensure they can take a pro-active and risk-proportionate approach to the regulation of the sector?

Only if they are backed with adequate resourcing. Inadequate resourcing will guarantee incurious and passive regulatory culture.

30.Do you have any concerns about the new powers for the Commissioner to enter a residential care home without consent or a warrant? Are there any additional safeguards you think should be put in place?

Relationships Australia **recommends** that:

- the Commissioner and staff of the Commission receive initial and ongoing training in the use of these powers, for their own protection, as well as the wellbeing of individuals receiving care and for aged care workers
- the Commissioner should be required to publish annual reports on the use of powers to enter without consent or a warrant, and
- the Inspector-General of Aged Care should be required to undertake, at reasonable intervals (perhaps every three years) a review of the use of these powers from a system-wide perspective, to identify opportunities to minimise the need to use these powers and, where they are used, to minimise impact on individuals receiving care and aged care workers. (Recommendation 33)

32.What are the advantages and disadvantages of the proposed new critical failures powers? Are these powers necessary to ensure urgent and decisive action can be taken to protect older persons in residential care and maintain service continuity?

These powers are necessary. Relationships Australia would support conferring on the Commissioner new critical failures powers, as suggested in the Consultation Paper (pp 77, 81). It appears that the mechanism will afford procedural fairness while enabling rapid response to crises while minimising risks to continuity of care.

CHAPTER 7 – INFORMATION MANAGEMENT

Relationships Australia **recommends** that clause 340 be amended to allow the System Governor or Commissioner also to disclosed protected information to a person appointed under the law of a state or

territory to exercise a power of attorney or a power conferred on the person by an advance health care directive. (Recommendation 38)

Consultation Paper questions 34-36

34. Do you agree with the proposed scope of protected information under the new Act? What information do you think should be protected under the new Act?

Relationships Australia **recommends** that the second limb of protected information be confined to information that could reasonably be expected to *significantly* prejudice the financial interests of a provider if it is disclosed *other than in accordance with the Act*. (Recommendation 38)

35.What challenges could there be with the proposed whistleblower framework, and do you have any proposed solutions?

Whether or not Government accepts the recommendation to make the Complaints Commissioner an statutory officeholder independent of the Commissioner, Relationships Australia **recommends** that, for the avoidance of doubt, paragraph 355(a) be amended to explicitly include the Complaints Commissioner. We further **recommend**:

- inclusion of the following in paragraph 355:
  - a legal practitioner, and
  - an officer of the Australian Health Practitioner Regulation Agency, and
- expansion of the list in clause 355 to be consistent with the list in subclause 357(2). (Recommendation 38)

36.What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

The fear of reprisal, including through violence, is very real, and is held not only by individuals receiving services, but also by their families, carers and other supporters on behalf of their loved ones. Relationships Australia **recommends** that paragraph 96(c) (Complaints and whistleblowers) be clarified to enhance alignment with clause 358 (Victimisation prohibited); in particular, that paragraph 96(c) make it clear that victimisation and discrimination is prohibited not only against someone who makes a complaint or gives feedback but also, where the person complaining or giving feedback is not the person to whom services are delivered, against that person. (Recommendation 18)

CHAPTER 8 - MISCELLANEOUS

Delegations

38. Are there any decisions that should only be delegated to staff of senior levels by the System Governor and the Commissioner?

Relationships Australia is concerned about the breadth of clause 159, which allows the Commissioner to engage consultants to assist in their performance of their functions. The breadth of this power seems contrary to the intent, expressed elsewhere, to ensure strong accountability; indeed, this is the

argument relied on to have the Complaints Commissioner appointed by and accountable to the Commissioner, rather than be an independent statutory office holder. Further, as is public knowledge, there are significant reasons to be concerned about the integrity and accountability of consultants. In an area such as aged care, undeclared and poorly managed conflicts of interest can have extremely serious consequences. Transparency and accountability is further undermined by the partnership structure within which many consultants operate. We are concerned that delegations to persons who are not subject to the APS Values and Code of Conduct, and who operate within opaque structures, may come to compromise system integrity, especially if delegations to consultants are used because of insufficient resourcing within the Government structures that do afford accountability and transparency through a range of mechanisms.

The ED allows the Commissioner to engage a consultant to carry out sensitive functions including, for example:

- exercising discretions in relation to entrance into the aged care system, allocation and prioritisation, and security of tenure
- reviewing decisions
- receiving and addressing complaints
- exercising regulatory powers including the issue of various notices and banning orders, and
- exercising coercive powers of entry, search and seizure.

It would appear that consultants can also be engaged by the System Governor (clause 300), and we have similar concerns about that provision, and how it may be applied to limit scrutiny and accountability under the Act.

The provision is so broad as to potentially, in practice, substantially dilute the Commissioner's accountability to the Minister, and undermine public transparency of the Commission's activities.

Relationships Australia **recommends** that the delegation powers in the ED be tightened and clarified to ensure accountability, transparency and scrutiny by Parliament and by the public of functions carried out by consultants under this provision. The provision should require the Commissioner to publish, in a timely way, the details of all consultants retained pursuant to this provision, and clear and comprehensive information about:

- which functions have been delegated under clause 159
- to whom (including information about any affiliations and interests that amount to actual or perceived conflicts of interest)
- the reasons why an APS employee could not undertake the function delegated under clause 159
- the reasons why the Commissioner has chosen to make a delegation under clause 159
- the duration of the delegation, and
- brief descriptions of the circumstances in which the delegation has been exercised (in relation to this aspect, the Commissioner should be required to provide detailed reports to the Minister – not the System Governor – on request). (Recommendation 30)

To enhance accountability and transparency, Relationships Australia **recommends** that the ED be amended to require that all delegations (including delegations under clause 159, delegations under Divisions 1 and 2 of Part 3, Chapter 8 and subdelegations under Division 3 of Part 3, Chapter 8), as in

force from time to time, be published in a single, well-publicised and prominent location on the Department's website. (Recommendation 39)

Use of computer programs

Relationships Australia looks forward to considering provisions that will allow the System Governor and the Commissioner to use computer programs to undertake decision-making pursuant to the Act. We are concerned by the apparent breadth of subclause 398(3), and consider it should operate only insofar as it does not operate to the detriment of individuals or entities acting honestly and reasonably. As noted in our previous discussion of about clause 308 (power to recover a previously written-off debt), the Government's power and command of resources has implications for how it should conduct itself in leading individuals and entities to take a certain course of conduct. These considerations underlie the Model Litigant Rule, a longstanding principle of common law[45] which is reflected in the *Legal Services Directions 2017*. Circumstances in which Government conducted itself without regard to the imbalance of power, or to the necessity that individuals be able to rely on Government advice and actions, were most recently traversed in the Robodebt Royal Commission, and should be fresh within the minds of policymakers.

Relationships Australia **recommends** that Government publish, as soon as practicable, detail on how algorithmic and artificial intelligence systems will be used to make decisions about entry into, and classification and prioritisation within, the aged care system. We further **recommend** that this information be regularly updated to reflect refinement and progress in the use of computer programs to make and inform decisions under the Act.[46] Of particular interest will be:

- what kind of information applicants and their support networks are given about such decision-making approaches
- what are the 'diversion points' triggering human intervention, oversight, and adjustment of decisions
- in relation to assignment of classifications - how weightings of compounding factors will be developed,[47] and
- what review mechanisms are available (noting that provisions relating to review of decisions are yet to be drafted. (Recommendation 40)

Policy-makers need to bear in mind the impact that scandals involving government misuse of technology have had on public trust and confidence, and the lack of confidence in technology itself. This became chillingly evident in the distrust of government and scientific information during the initial stages of the COVID-19 pandemic.

Statutory review period

As proposed in our foundations submission (see Recommendation 16 of that submission), Relationships Australia **recommends** that subclause 412(1) be amended to provide for a statutory review after the

[45] See *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333.
[46] See Commonwealth Ombudsman, 2019; Bell et al, 2022.
[47] See Consultation Paper, p 43.

third anniversary of the commencement of the Act, and that clause 412 also provide for a statutory review every five years thereafter, with a report to be tabled in compliance with subclause 412(3). The terms of reference for statutory reviews must include consideration of how the Act could be improved to better articulate and uphold users' human rights. (Recommendation 41).

CONCLUSION

Thank you again for the opportunity to make this submission. Australia has a generational opportunity to transform how we think of ageing, our rights as we age, and how we enable older people to participate fully in society. We welcome the progress evidenced in the ED, and hope that the reform process reduces the many barriers that clients face in accessing services they need to achieve these outcomes.

Please do not hesitate to contact me at ntebbey@relationships.org.au, or our National Policy Manager, Dr Susan Cochrane, at scochrane@relationships.org.au to discuss any aspect of this submission, and the services we can offer to individuals who use aged care services. We can also be contacted at 02 6162 9300.

Thank you again for the opportunity to provide this submission.

Kind regards

Nick Tebbey
National Executive Officer

APPENDIX 1 RELATIONSHIPS AUSTRALIA RESPONSES TO KEY ISSUES PAPER PROPOSALS

Proposed solution from Key Issues Paper	**Relationships Australia comments and recommendations**
Bill to be introduced into Parliament in March 2024 to enable a 3-month review by Parliament (p 6)	Agree
The new Rules proposed to accompany the Act to be tabled in Parliament no later than 3 weeks before submissions to a Parliamentary Inquiry close. (p 6)	Agree
The Act to commence on 1 July 2024 (or as soon as possible thereafter if parliamentary processes cause delays) with some consideration to transition/implementation timelines for new enforcement activities and CHSP (p 6)	Agree (Recommendation 1)
A 3-year review of the Act to be embedded within the Act (p 6)	Agree
Equitable access in the Act is expanded to include equitable access to aged care services regardless of geographic location or need as per Object b(3).[48] (p 15)	Agree. A right to equitable access to assessment only is inadequate and at odds with community values and expectations. A right to access aged care service should be on the same footing as rights to universal health care, education and social security, as well as the guaranteed equitable access to palliative and end-of-life care (paragraph 20(2)(b)), which we welcome. A financially stable and needs based aged care system can be delivered, albeit by relative de-prioritisation of other matters. Not doing so is a political choice which should be acknowledged.

[48] See Consultation Paper, p 24.

Relevant sections of the Act be amended, such as in the section on the System Governor, to ensure Object b(3) is embedded in the Act. (p 15)	Agree
The definition of high-quality care be reviewed every 3 years, regardless of the timeframe for the legislated review of the Act. (p 21)	Agree.
Any provider that wants to promote themselves as delivering high quality care (or any similar words) must voluntarily consent to be measured against, and meet, the requirements within the definition of high quality care. (p 21)	Agree, subject to our concerns with the scope of section 19.
The ACQSC to assess providers who opt-in above to determine whether the provider is meeting the requirements in the definition of high-quality care. Complaints about high quality care not occurring to be managed by the Complaints Commissioner. (p 21)	Agree, subject to our concerns with the scope of section 19.
The definition should prioritise and include references to 'culturally safe and appropriate' services and ensuring staff are 'culturally competent' to deliver quality outcomes for people with diverse backgrounds and life experiences. (p 21)	Disagree. Cultural safety should be a floor, not an aspiration to excellence.
Aged care providers must have a requirement or positive duty to uphold rights. (p 7)	Agree
The Explanatory Memorandum must clearly articulate that, the objectives of the legislation are to be read in a 'positive' not deficit approach. Particular emphasis that services should enhance reablement, wellness and quality of life should be included in the explanation. (p 7)	We would go further; we **recommend** that the Act and the EM are explicit that the Objects, and the Statements of Rights and Principles, are to be interpreted in a rights-centred way. In the event of uncertainty or conflict, an interpretation which gives maximum effect to individuals' rights is to be preferred over one that would restrict those rights. (Recommendation 9)

The right to aged care services to be included in the Statement of Rights. There is an obligation on the aged care system to provide services to all older people. (p 7)	Agree. A mere right to an assessment of eligibility for aged care, as is included in the ED, is insufficient.
Include in the Code of Conduct an obligation to uphold the Statement of Rights, regardless of care setting (p 8)	Agree.
Include the Code of Conduct in the primary legislation. Ensure via drafting note or explanatory memorandum that 'self-determination' is inclusive of 'choice and control', 'consumer directed care' and 'self-management' principles. (p 9)	Agree. This is necessary to give practical effect to the Statement of Rights. Relationships Australia further **recommends** that the Act, rather than a note or the EM, provides that 'self-determination' includes 'choice and control', 'consumer directed care' and 'self-management' principles. (Recommendation 9)
Upgrade section 44 (2) from a discussion to require assessors to co-design the service plan outlining the services that an individual will receive. (p 10)	Agree. This is necessary to support autonomy, self-determination, choice and control.
Amend section 47 to ensure the System Governor must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services. (p 11)	Agree. This is necessary to support autonomy, self-determination, choice and control**.**
Ensure that breaches of rights do not require another type of action (e.g. breach of standards) to make rights enforceable or be raised as a complaint. There must be an option to directly enforce denial of consumer-directed care, choice and control and self-management approaches to the delivery of care in the areas of assessment, care plan agreement and service delivery. (p 11)	Agree.
Amend the Act so that a 'named visitor' chosen by the older person, or their carer or representative where the person is unable to make a decision or has not left directions on	Agree. Relationships Australia is further concerned that the reference to 'safe visitation' in paragraph 20(1)(a) is vulnerable to misuse by providers wishing to minimise risk at the expense of the mental and

who can visit them, can see them even when outbreaks occur. (p 17)	emotional health of individuals, as occurred in the earlier stages of the COVID-19 pandemic.
Include in the amendment that where a person is palliative or at end-of-life family and close friends can visit and remain at the person's side. (p 17)	Agree.
That a 'diversity population list' is raised into the Act itself as a clause rather than a note and that new clause is referenced both within the Statement of Rights and the Principles. (p 18)	Agree.
Stronger positive language around supporting diverse needs during the assessment process within the relevant sections. (p 18)	Agree.
The Act be reviewed to ensure that diversity, equity and equitable access are reflected in the relevant sections. (p 18)	Agree.
The Act needs to clearly outline a guaranteed timeframe, so the government can work towards funding a system where care and supports are delivered within 30 days of application for aged care. (p 15)	Agree.
Ensure equitable access is a key criterion in public reporting undertaken by the System Governor. (p 15)	Agree.
Embed a legislative requirement that the System Governor must publicly report on quarterly wait times from application through to the assessment, and from assessment to when the services start. (p 15)	Agree. Relationships Australia further **recommends** that the requirement for public reporting also set out timeframes within which reports must be made public. (Recommendation 16)
The section on eligibility be amended so that the Act outlines a clear pathway to approve exceptional cases for anyone who experiences the early onset of aging-related chronic conditions that fall outside the arbitrary age rules. (p 16)	Agree.

Make supports for people with disability over 65 years an explicit reason to access aged care under Chapter 2 – Entry to the Commonwealth aged care system. Changes will also need to be made to relevant key concepts and definitions in Chapter 1. (p 19)	Agree.
Section 392 be amended to ensure grant purposes may be funded for specific populations outlined in the proposed diversity population list clause. (p 18)	Agree.
That a definition is inserted into the Act to override the ordinary meaning of the words illness or sickness by defining them to include someone who identifies they have or had a disability, regardless of any medical condition. While it is far from ideal to equate disability to illness this may prove a practical workaround. (p 19)	Agree, subject to our earlier comments on the heads of power.
Explanatory memorandum should clearly explain the Act's intention and purpose for older people requiring disability supports. (p 19)	Agree, but **recommend** this should also be made explicit in the Act. (Recommendation 9)
Amend Chapter 1, Part 4, Division 1 to enable an older person to have both a Supporter and a Representative if they so wish (p 12)	Agree.
Include as a protection for older people that access to an advocate is provided when requested within Chapter 1, Part 4, Division 1 and create a new subdivision on protections for older people. (p 12)	Agree. Relationships Australia **recommends** that the System Governor and providers should be required to provide information about the availability of, and services that can be offered by, independent professional advocates. (Recommendation 14)
Ensure Independent Professional Advocates are specifically named and recognised in the Act. (Key Issues Paper, p 17)	Agree. Further, Relationships Australia **recommends** that the Act should provide for the establishment of a Community Visitor Scheme, with guaranteed rights of entry without notice, as well as by prior arrangement. The Scheme should be part of safeguards around the use of restrictive practices. (Recommendation 27)

Ensure System Governor, ACQS Commissioner, Complaints Commissioner must have regard for professional advocates in executing their functions. (Key Issues Paper, p 17)	Agree.
Ensure the new Act has specific mechanism to fund the National Aged Care Advocacy Program (not simply via a generic grant outlined in the Rules). (Key Issues Paper, p 18)	Agree.
Ensure advocates have the same right of entry as ACQSC staff and that providers have an obligation to educate older people on their rights through facilitating professional advocates to provide education and advocacy support. (Key Issues Paper, p 18)	Agree.
Amend the relevant sections of the Bill, so that supported decision-making principles must be used by those working in aged care when working with older people. For example, Chapter 1, Part 4; Chapter 2, Part 2 Division 3; Chapter 3, Part 4, Divisions 1 & 2 (p 12)	Agree.
Workers, and others, must be trained in how to know when and how to use supported decision-making, including understanding the impact of ageism on their attitudes to older people. (p 12)	Agree.
Ensure that terminology and responsibilities of Supporters and Representatives is used consistently throughout the Act. (p 12)	Agree.
Amend Sections 374 and 376 to include that the System Governor must consider the strength and currency of the relationship of that individual to the older person when appointing a Supporter or Representative on behalf of an older person. Include that consultation with the older person's carer must be undertaken by the Representative	Agree, if this function remains with the System Governor, noting our concerns about this, canvassed above in our response to Question 5 in the Consultation Paper.

where there is an existing relationship between the older person and a carer. (p 12)	
The rights of carers as stipulated in the Royal Commission[49] be included within the Act. (Key Issues Paper, p 20)	Agree. Relationships Australia is concerned that, because this Act has been developed through the Health and Aged Care portfolio, it does not sufficiently reflect broader government policies in relation to recognising and valuing carers (see, for example, the work being undertaken by the Social Services portfolio to develop a National Carer Strategy, and the work of the taskforce within the Department of the Prime Minister and Cabinet on the care and support economy). At p 24, the Consultation paper asserts that carers' rights 'are covered by other legislation'. Relationships Australia is unaware of any other such legislation at the Commonwealth level. If the Department had the Carer Recognition Act in mind, that Act does not impose binding obligations on the (government) entities to which it applies and does not confer enforceable rights on carers.
The Royal Commission identified that 'The inclusion of entitlements for informal carers in the new Act is consistent with the principles expressed in the *Carer Recognition Act 2010* (Cth). However, unlike the Carer Recognition Act, the new Act should provide means of enforcing those entitlements.' (Key Issues Paper, p 20)	Agree. We refer to Relationships Australia's 2023 submission to the inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs into the *Carer Recognition Act 2010* (Cth), available at https://www.relationships.org.au/research/#advocacy The language used in the Consultation Paper to describe the nature and effect of the Carer Recognition Act suggests a worrying failure by policy-makers to appreciate the limitations of that Act. The Carer Recognition Act is limited in its scope, imposes no binding obligations, and confers no enforceable rights. While it might recognise, it does not value, the contribution made to our economic, political and cultural life by unpaid carers subsidising

[49] See Recommendations 2 and 3.

	the disability, child care, health and aged care systems. The Commonwealth is yet to show that it values carers. The Carer Recognition Act provides a clear illustration that the lack of a meaningful and direct enforcement mechanism renders positive impact unlikely. Bootstrapping the Statement of Principles by reference to the Act will not achieve the aims described in the Consultation Paper. In any event, a mere reference in the Statement of Principles (see subclause 22(7)) to carers' 'valuable' contribution, and encouragement to treat carers as partners with registered providers, is inadequate. We **recommend** that 'carers and volunteers' (or 'unpaid carers' and volunteers') be substituted for 'volunteers', given that 'carer' is defined in the Act, and the Statement of Rights refers to carers. (Recommendation 12)
The role of carers and their importance to older people, as well as their needs, should be reflected in the relevant sections of the Act (e.g. assessment should also ***consider*** the needs of the carer, including equitable and timely access to respite and other available supports.) (Key Issues Paper, p 20)	Agree.
Carers be legally recognised within the Act. (Key Issues Paper, p 20)	Agree.
Section 392 be amended to ensure grant purposes includes grants to provide timely, equitable support for carers. (Key Issues Paper, p 20)	Agree.
Ensure the legislation has an obligation on providers to give plain English, accessible information about their rights, in formats that are appropriate to older people from diverse backgrounds and with visual and hearing impairments. We note section 105 (b) provides a generic requirement to explain	Agree

information as outlined in the yet-to-be published Rules. (p 9)	
Section 92 of the Act is amended to require a positive duty on providers to uphold the rights of older people and deliver rights-based care. The amendment should be modelled on recent changes to the Sex Discrimination Act to require a positive duty on employers to eliminate discriminatory conduct. (p 9)	Agree.
A clear complaints mechanism for older people to raise standalone breaches of rights must be included. (p 9)	Agree. Failure to include such a mechanism will nullify the practical impact of the Statement of Rights and its potential to improve quality of life. Further, it is inadequate that processes for dealing with complaints be left to subordinate instruments (see cl 183). Relationships Australia **recommends** that the Act provide for core components, accompanied by the power to make rules to deal with more detailed operational matters. Core components include: • minimum channels by which complaints may be made (with the rules be available to provide for additional options) • minimum requirements by which complaints may be dealt with or resolved, including maximum timeframes, and • the matters described in paragraphs 183(c), (d), (e), (f) and (h). (Recommendation 28)
The Act to include or identify appropriate penalties for breaches of rights resulting from poor and neglectful practice and behaviour by providers, government, or regulators. (p 9)	Agree
Amend the powers of the new Independent Statutory Complaints Commissioner so that they can investigate and conciliate complaints about breaches of rights and refer to the ACQSC matters requiring enforcement of compliance. (p 9)	Agree. Further, we **recommend** that Act confer on the Complaints Commissioner powers to engage specialist elder mediators (accredited through EMAN/EMIN) and Eldercaring coordinators, backed by appropriate resourcing. (Recommendation 29)

Elevate the Code of Conduct into primary legislation (section 13) to increase prominence and ensure changes are rare. (p 9)	Agree. In addition to increasing prominence and ensuring that changes are rare, inclusion in primary legislation affords a greater degree of transparency, Parliamentary and public scrutiny, and accountability. Relationships Australia considers that deficiencies in transparency, scrutiny and accountability have contributed materially to the abuses and deficiencies identified in the Royal Commission.
Amend section 17 restrictive practice requirements so that: • review requirements and timeframes are included • the requirement for a behaviour support plan is explicitly stated • representatives are included in discussions and decisions around the use of restrictive practices. (p 26)	Agree, subject to preceding comments at the beginning of our comments in response to Chapter 3.
Ensure the Rules provide clear guidance that some people with cognitive impairment can benefit from access to pharmaceutical interventions that could be deemed a restrictive practice with appropriate protections and reviews in place. (p 26)	Agree, subject to preceding comments.
Security of tenure provisions be included in the Act with the Rules outlining the detail of the processes modelled on the current laws. (p 27)	Agree
A new provision should be included that allows a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative housing solution before suspending the security of tenure of any individual accessing aged care services. (p 27)	Agree; Relationships Australia also **recommends** including elder mediation, restorative practices and Eldercaring coordination as available mechanisms to assist in addressing security of tenure disputes (Recommendation 29)

Review government decisions related to Aged Care Taskforce recommendations in the Bill as part of the Senate inquiry. (Key Issues Paper, p 25)	Agree
Maintain current measures of transparency and enhance these in the Bill so that it is clear where funding goes to and what it is expended on. (Key Issues Paper, p 25)	Agree
The Act must state that funding and any co-contributions and/or fees are used for the purpose they are given and are linked to the delivery of high quality care and that must be publicly reported on. (Key Issues Paper, p 25)	Agree
The functions of the commissioner section of the Act is separated to provide specific functions and statutory authority to an independently-appointed Complaints Commissioner, with the authority to compel information, participate in the complaints process and certify enforceable undertakings, answerable only to the minister and Parliament. The Complaints Commissioner would continue to be part of the ACQSC, supported by ACQSC staff and with the ability to share information with the ACQSC across both statutory office holder functions. (p 13)	Agree that the functions of the commissioner section of the Act must be separated to provide specific functions and statutory authority to an independently-appointed Complaints Commissioner, with the authority to compel information, participate in the complaints process and certify enforceable undertakings, answerable only to the minister and Parliament. However, we further **recommend** that the Complaints Commissioner be a fully independent statutory officeholder appointed by and accountable to the Minister, and not an APS employee who is accountable to the System Governor, as well as the Commissioner.[50] (Recommendation 26) This independence is critical to achievement of the Objects of the Act to uphold individuals' rights. Independence of the Complaints Commissioner is qualitatively different from that of the Commissioner, whose work centres on *risk*.[51] The work of the Complaints Commissioner, however, must be centred

[50] Relationships Australia notes that, in 2024, a First Nations Aged Care Commissioner will be established (Consultation Paper, p 102). We **recommend** that this Commissioner should also be an independent statutory officeholder, sitting outside the Commission. (Recommendation 26)

[51] See, for example, remarks by the Commissioner in the Q & A webinar on 18 January 2024: https://www.health.gov.au/resources/webinars/draft-new-aged-care-act-consultation-qa-panel-discussion

	around *rights*. Risk and rights exist in tension within the ED. Accordingly, we further **recommend** that the Complaints Commission be supported by an office that is independent of the ACCSC and resourced through a separate Budget line item (Recommendation 26). This will limit the risk that the Commissioner's functions come to be cross-subsidised by the complaints function. A well-resourced, fully independent Complaints Commissioner is essential to upholding individuals' rights – particularly in the absence of directly enforceable rights. We acknowledge the findings of the Capability Review and the assertion in the Consultation Paper (p 76) that making the Complaints Commissioner a 'single point of accountability [to] enable clear attribution of responsibility.' Contrary to the Department's suggestion, the Act could ensure a proper flow of information between the Commissioner and an independent Complaints Commissioner.[52] Conversely, however, to genuinely transform governance arrangements and to truly centre the rights of users, it is vital that the Complaints Commissioner be completely independent of the entity with responsibility for accreditation and performance monitoring. The imperative for the Complaints Commissioner to be independent of the Commissioner is, we consider, as compelling as the imperative, acknowledged in the Consultation Paper, for the IGAC to be independent of the complaints process for individuals.
The complaints section of the Act be re-written to provide more detail on the responsibilities and authority of the Complaints Commissioner, including annual reporting. (p 13)	Agree.
The Act includes a requirement for the ACQSC's budget to include a dedicated line	As noted above, Relationships Australia considers that the Complaints Commissioner should be independent

[52] Q & A Webinar, 18 January 2024.

of funding for the new Complaints Commissioner to directly support their functions. (p 13)	of the ACQSC and have separate budget appropriations. (Recommendation 26)
The Act must make clear the operation of the ACQSC will continue to support and share information between the functions of the ACQS Commissioner and the Complaints Commissioner. (p 14)	Agree. Independence does not preclude information-sharing. Independent entities within and across Governments can share information efficiently and effectively.
A system that largely relies on individuals to raise a complaint is inherently problematic, as a result of the power differentials ….even more pronounced where the individual is from a diverse or marginalised group and/or has experienced life trauma (p 8 of Key Issues Paper)	Agree. Relationships Australia also **recommends** that the Act should also provide for a specific funding mechanism to support users to access mediation, Eldercaring, alternative dispute resolution and legal advice and representation. Government should consider: • in the context of the new National Legal Assistance Partnership - how to support individuals to seek legal advice and assistance to use the compensation pathway, and • options to expedite these matters, given the circumstances of the individuals who will seek to use the pathway. (Recommendation 22)
All aspects of the Complaints Framework to be reflected in the Act in the relevant sections including Chapter 5, Part 3 and Part 5. This includes: • transparency of the complaints process – reports are to be made publicly available • legislate restorative justice pathways (including arbitration, conciliation and open disclosure) • annual report on the Complaints Commissioner functions • ability to publish and report about continuous improvement and emerging insights and intelligence (including in conjunction with the ACQS Commissioner) (p 14)	Agree. Inclusion in the Act is a strong assurance of transparency and accountability and a key enabler of clearly necessary Parliamentary and public scrutiny. We **recommend** that the Act: • require reports to be published promptly • provide for ADR and restorative pathways that also expressly includes mediation by elder mediators accredited by EMAN/EMIN and eldercaring coordination • require ADR and restorative pathways to be culturally safe and appropriate, and • make clear that the ability of the Complaints Commissioner to publish and report on these matters can be, but does not have to be, in conjunction with the ACQS Commissioner. (Recommendation 29)
Service-level agreements are published and reported on. (p 14)	Agree.

Amend sections 143 through to 149 so there is a focus on continuous improvement as well as compliance. (p 21)	Agree.
Consumer protections in the Aged Care Act need to apply to all government-funded aged care service programs, including any 'top up' services, when delivered by a registered provider to a recipient of funded aged care services. (p 22)	Agree.
The new Act to provide a mechanism to develop and approve standardised contract templates, with required content, so older people have a consistent format and information and protections under the Act, such as the right to complain to the Complaints Commissioner, and an agreement by the provider to ensure services comply with the same quality and standards that apply to a government-funded aged care service and with the same consumer protections. (p 22)	Agree.
The new Act to provide clear details, in all clauses, on consumer protections for services delivered by associated providers and other privately delivered services with a relationship to the registered aged care provider. (p 22)	Agree.
The relevant clauses in the Act be clarified so that all relevant decisions 'registers' (which record relevant decisions) in the Act must be consistently made public. (p 23)	Agree.
Two registers are established – one about workers and one about providers. All other relevant documents (e.g. coroner's reports) and relevant decisions (e.g. conditions of registration on a specific registered provider) must be included in these two public-facing documents. Historical information must	Agree.

continue to be preserved and published. (p 23)	
Raise the bar for protected information [clause 322] from 'prejudice' to 'significantly prejudice', and incorporate in the definition public interest test (e.g. insert at the end 'and for which it is not in the public interest to disclose'. (p 23)	Agree. See also Recommendation 38.
Ensure the Act has a right for the individual to have access to all their own information. (e.g. 'even if something is deemed to be protected information, it must be disclosed to the individual to whom it relates or their representatives upon request'.) (p 23)	Agree.
A standardised contract template is essential to assist older people to make informed choices. The Act should require the creation of an industry template, approved by the Aged Care Quality and Safety Commission, which will include those items as stipulated in the Rules including Statement of Rights, Terms and Conditions etc. (p 23)	Agree.
A public commitment by the Australian Government to implement a Home Care Star Ratings Program no later than the introduction of Support at Home. This commitment should be made in or prior to the May 2024 budget to provide time for its development. (p 23)	Agree.
Ensure star rating systems and their calculations evolve and mature to build confidence in their reported outcomes. (p 24)	Agree.
The System Governor, Complaints Commissioner and Commissioner should have clear timeframes within which they must make their respective decisions under the Act. These service-level agreements (SLA) should be required in the Act and allow the	Agree.

Rules to outline the specific SLA timeframes. Currently the Act only includes timeframes for when a response will be sent once a decision has been made. Reporting how often the decision met the SLA timeframe should be reported as part of the System Governor, Commissioner and Complaints Commissioner's annual reports. (p 24)	
Ensure all uses of a computer decisions are monitored and audited, with the findings of the audit included in annual reports on the operations of the system. (p 11)	Before decisions are made using algorithms or artificial intelligence, Relationships Australia **recommends** that the Act require the System Governor to publish the algorithms and an explanation of how artificial intelligence will be applied (and also before any changes to these taking effect). Individuals (and their supporters and representatives) should be clearly and accessibly informed about the use of algorithms and artificial intelligence in making decisions, and about how to seek human re-consideration of decisions that are made using algorithms and artificial intelligence. See also Recommendation 40.

REFERENCES

Administrative Arrangements Order. (2022, as amended 2023). https://www.pmc.gov.au/resources/administrative-arrangements-order-13-october-2022

Australian Government. (2023) A new Aged Care Act: exposure draft. Consultation paper No. 2

Australian Human Rights Commission (1993). Report of the National Inquiry into the Human Rights of People with Mental Illness. ('Burdekin Report'). Related resources at https://humanrights.gov.au/our-work/disability-rights/publications/report-national-inquiry-human-rights-people-mental-illness?_ga=2.20294648.1148282061.1693036470-1458171076.1673477202 [accessed 26 August 2023]

Australian Institute of Health and Welfare (2023). GEN: Aged care data. People using aged care. https://www.gen-agedcaredata.gov.au/topics/people-using-aged-care [accessed 12 February 2024]

Bell, F., Bennett Moses, L., Silove, J., Zalnierlute, M., (2022). AI Decision-Making and the Courts. https://aija.org.au/wp-content/uploads/woocommerce_uploads/2022/06/AI-DECISION-MAKING-AND-THE-COURTS_Report_V5-2022-06-20-1lzkls.pdf [accessed 5 February 2024]

Carnell, K & Paterson, R. (2017) Review of National Aged Care Quality Regulatory Processes Report. https://www.health.gov.au/resources/publications/review-of-national-aged-care-quality-regulatory-processes-report?language=en [accessed 26 August 2023]

Child Family Community Australia. (2021) Physical punishment legislation – CFCA Resource Sheet. Australian Institute of Family Studies. https://aifs.gov.au/sites/default/files/publication-documents/2107_physical_punishment_resource_sheet_0.pdf

Collins v Wilcock [1984] 1 WLR 1172

Commonwealth Ombudsman. (2019) Automated Decision-making Better Practice Guide https://www.ombudsman.gov.au/__data/assets/pdf_file/0029/288236/OMB1188-Automated-Decision-Making-Report_Final-A1898885.pdf [accessed 5 February 2024]

Department of Health and Community Services (NT) v JWB and SMB ('Re Marion') (1992) 175 CLR 218

Department of Health 2020 Aged Care Workforce Census. https://www.gen-agedcaredata.gov.au/resources/dashboards/department-of-health-2020-aged-care-workforce-census [accessed 12 February 2024]

Evaluate (for Carers Australia) (2022) Caring Costs Us: The Economic Impact on Lifetime Income and Retirement Savings of Informal Carers. https://www.carersaustralia.com.au/wp-content/uploads/2022/04/Final-Economic-impact-income-and-retirement-Evaluate-Report-March-2022.pdf [accessed 15 January 2023]

F v R (1983) 33 SASR 189

GWW and CMW (1997) FLC 92-748

In re AC 573 A.2d 1235 (1990) 1244

Law Council of Australia. (2023) A new model for regulating Aged Care – Consultation Paper No. 2. https://lawcouncil.au/resources/submissions/a-new-model-for-regulating-aged-care-consultation-paper-no-2 [accessed 23 August 2023]

McLean, Sheila A M and Kerry Petersen, 'Patient Status: The Foetus and the Pregnant Woman' (1996) 2 *Australian Journal of Human Rights* 229

McFall v Shimp 10 Pa.D&C.3d 90 (1978)

Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333

Oberman, Michelle, 'Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts' (2000) 94 *NwULRev* 451

Office of the Public Advocate (Qld). (2021) Improving the regulation of restrictive practices in Queensland: a way forward.

Re A (children) (conjoined twins: surgical separation) [2000] 4 All ER 961

Rogers v Whitaker (1992) 175 CLR 479

Royal Commission into Aged Care Quality and Safety. (2021) Final Report: Care, Dignity and Respect.

Schloendorff v Society of New York Hospital 105 NE 92 (1914) 92

Senate Select Committee on Work and Care. (2023) Final Report.

Slater v Baker & Stapleton (1767) 95 ER 860

State of Queensland v Nolan and Anor [2001] QSC 174 (31 May 2001)

St George's NHS Trust v S [1998] 3 All ER 673

Tune D (2023) Report of the Independent Capability Review of the Aged Care Quality and Safety Commission.

Wilson v Pringle [1987] 1 QB 237