

# A New Aged Care Act: the foundations Consultation Paper 1

Submission

8 September 2023



## About ACCPA

The Aged & Community Care Providers Association (ACCPA) is the national Industry Association for aged care providers offering retirement living, seniors housing, residential care, home care, community care and related services.

ACCPA exists to unite aged care providers under a shared vision to enhance the wellbeing of older Australians through a high performing, trusted and sustainable aged care sector. We support our members to provide high quality care and services while amplifying their views and opinions through an authoritative and comprehensive voice to the government, community, and media.

Our sector serves to make better lives for older Australians, and so do we.

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# 1. Background

The first recommendation of the Royal Commission into Aged Care Quality and Safety (Royal Commission) Final Report was to replace the current *Aged Care Act 1997* (Cth) with a new Act.<sup>1</sup>

In August 2023, the Department of Health and Aged Care (Department) released ‘A New Aged Care Act: the foundations – Consultation paper No. 1’ (Consultation Paper) for public consultation, as the first stage of public consultation on the new Aged Care Act (new Act) that is currently under development. This follows a consultation on the proposed details of a new model for regulating aged care earlier in 2023.

The Consultation Paper outlines the proposed foundation elements of the new Act, including a Statement of Rights, Statement of Principles, and new duty of care and compensation pathways, among other elements.

The Consultation Paper (on pages 6-7) notes that the new Act ‘will ensure that older people who need aged care are at the centre of the aged care system’ and will be an important vehicle to deliver the Government’s response to several Royal Commission recommendations that rely on primary legislation and key election commitments.

The second stage of consultation (on the exposure draft of the Bill for a new Act) is due to occur from December 2023 to February 2024.

ACCPA is pleased to submit our response to this consultation.

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<sup>1</sup> 1 Royal Commission into Aged Care Quality and Safety Final Report, Recommendation 1.

## 2. Executive summary

ACCPA supports a rights-based approach for the new Aged Care Act.

We also seek further consideration regarding several aspects of the proposed foundation elements to address member concerns in relation to:

- complexity and duplication.
- the need for stronger recognition of an efficient and sustainable sector that attracts and retains staff.
- the additional factors that must align with any inclusion of a definition of high-quality care in legislation.
- the need to address responsibilities of care recipients; and
- concerns about proposed penalties on registered providers, governing persons, and aged care workers.

In addition, ACCPA highlights the need for adequate implementation processes, including sufficient time for transition and an articulated sector implementation plan.

Based on member feedback, ACCPA supports the development of a new, rights-based Aged Care Act, provided the responsibilities for providers are clear, able to be implemented efficiently and effectively, and are funded.

## 3. List of recommendations

### Proposed structure, purpose and constitutional foundation for the new Act

- R1** The proposed Objects and purpose of the new Aged Care Act should be simplified and reworded to be achievable, accounting for the challenges and realities of the aged care system. Aged care providers must be sufficiently funded to deliver the outcomes expected in the Objects and purpose.
- R2** That an Object be added that references sector sustainability: *supports the sector to be efficient, sustainable, and resilient, with an ability to attract and retain staff.*
- R3** The structure of the legislation be positioned such that the primary legislation (new Aged Care Act) remains as constant as possible, and subordinate legislation be flexible and adaptable.
- R4** The Government and the Department align reform work of the new Aged Care Act and the Aged Care Taskforce, to ensure what is defined in the new Aged Care Act is also costed and funded.
- R5** The Department develops information tools, along with more detailed guidance, covering what is changing and what is remaining the same under the new Aged Care Act.

### Statement of Rights and a rights-based approach

- R6** That the Statement of Rights:
  - a. be streamlined to enhance simplicity and clarity and be able to be translated to responsibilities that can be implemented effectively by aged care providers; or
  - b. sets out the rights of care recipients, and a separate Statement of Responsibilities sets out responsibilities of registered providers.
- R7** That the Government be specified as having a responsibility in supporting the Statement of Rights to be enacted and delivered.
- R8** That the Statement of Rights should be balanced through the inclusion of a provision in the new Aged Care Act along the lines that ‘people receiving aged care should respect the rights and needs of other people living and working within their environment and respect the general interests of the community in which they live’.
- R9** A list of care recipients’ responsibilities be included in the new Aged Care Act or associated subordinate legislation.
- R10** The Department/Commission should, in consultation with providers, develop supporting resources (e.g., case studies and examples of best practice) to support implementation of the Statement of Rights and a rights-based approach. This should include resources to guide providers in balancing competing or conflicting rights.
- R11** That the Government be specified as having responsibility to ensure providers are sufficiently funded to operationalise a rights-based approach. IHACPA should account for this as part of their costing and pricing functions.

### Statement of Principles

- R12** The Department streamline the Statement of Principles into a smaller number of high-level principles which would include sector sustainability, that are simple, clear, and relevant to the aged care system.

- R13** The Department should create resources explaining what the Principles are, for care recipients and for registered providers, and including what their purpose is and how they operate in comparison to other aspects of the legislative framework.

### Definition of high-quality care

- R14** That the architecture of the aged care system, including the responsibilities of Government and agencies of government and concurrent reform initiatives, be aligned to ensure that any level/s of care identified in the new Aged Care Act are defined, costed and funded.
- R15** That detailed information be made available accompanying an Exposure Draft for any proposed legislation on how the Australian Government will fund the aged care system at the level/s identified and address to what extent the proposed legislation delivers on the Royal Commission's vision for high quality and safe aged care and ensuring the aged care system's sustainability, resilience and endurance.
- R16** That the aged care sector be supported to implement the level/s of care identified in legislation and ensure the components of high quality care, including workforce and sector transformation, are prioritised.

### A new duty of care and compensation pathways

- R17** An overarching statutory duty of care on registered providers should not be introduced, given the existing range of duties and obligations already in place.
- R18** Duties on responsible persons, governing persons, and aged care workers should not be introduced given the range of existing duties and obligations already in place.
- R19** Further detail and consultation is needed on the proposed civil penalties to be available to the Aged Care Quality and Safety Commission, including the process for asking for a review of the Commission's decision and appeal rights.
- R20** The new Aged Care Act should not include a new compensation pathway as there are other existing compensation pathways available.
- R21** The Department consults the insurance sector on the possible impact of the proposed model and new Aged Care Act on insurance premiums and insurance coverage.

### Disclosure protections for whistleblowers

- R22** The Department considers using existing legislative whistleblower protections instead of including protections in the new Aged Care Act.
- R23** People authorised to receive a disclosure on behalf of a registered provider be limited to people in positions identified by the registered provider.
- R24** The Department documents and consults on the process for responding to a disclosure including in multi-provider environments and to manage vexatious claims.

### Supported decision-making arrangements

- R25** Issues identified with the proposed approach are addressed before new supported decision-making arrangements start.
- R26** The Department ensures decisions are made and communicated to care recipients, nominees, and registered providers in a timely and efficient way.

### Eligibility for funded aged care services

- R27** That people seeking to access the aged care system have the option to make an application verbally or in writing.

## Concluding comments

- R28** The Department and the Commission should develop, in partnership with the sector, a detailed sector implementation plan with timeframes and required actions for providers. The plan should be communicated across the sector and include information on how the changes relate to other aged care reforms to ensure reforms are synchronised and structured to adapt to a changed and changing aged care sector.
- R29** Given the Royal Commission into Aged Care Quality and Safety Final Report was handed down on 1 March 2021, and the proposed reform is scheduled for 1 July 2024, the Department should undertake a comprehensive and thorough impact analysis regarding the new Aged Care Act (and new regulatory model). This analysis should take into account current and future financial sustainability, workforce issues, and ensure any findings are accounted for in the design of the reform.
- R30** The Government should ensure providers are sufficiently funded to implement the reforms to be included in the new Aged Care Act.
- R31** The commencement date of the new regulatory model and new Aged Care Act should be set with sufficient time following the passage of the relevant legislation and all subordinate legislation for the Department and the Commission to implement all the necessary resources and training for providers and care recipients, as well as their own staff.
- R32** Consideration should be given to how the new Aged Care Act can be future proofed to account for emerging issues associated with the digital age.



## 4. Proposed structure, purpose and constitutional foundation for the new Act

ACCPA supports the development of a new Aged Care Act, with the stated aim of creating a simplified, rights-based legislative framework that focuses on the needs of older people (Consultation Paper page 10).

We believe there is scope for strengthening of this approach, particularly further simplification that promotes a shared understanding of the goals, purpose, and function of the aged care system to provide better outcomes for older people, as well as other stakeholders.

It will also be important that responsibilities of providers are clear, able to be implemented efficiently and effectively, and funded.

Page 10 of the Consultation Paper notes that where possible, the new Aged Care Act will follow the journey of older people through the aged care system, rather than focusing primarily on aged care providers and how they are funded. A framework grounded in the needs of older people at the centre is important. Additionally, the new legislative framework should be balanced and promote synergy between all parts of the system.

### 4.1 Proposed Objects and purpose of the new Act

The Objects and purpose of the new Act need to be simple and achievable. Some of the proposed Objects are worded in absolute terms that are unlikely to be achievable in all cases e.g., the proposed third Object 'ensures equitable access to, and flexible delivery of, funded aged care services that takes into account the individual needs of older people ...' (emphasis added). This Object does not account for thin markets where services may not be available. This issue also applies to the proposed fifth Object – 'enables older people accessing available funded aged care services to choose who will deliver their services, and when and how they do so'.

It is also noted there is similar wording for the proposed second Object 'assists older people to live active, self-determined and meaningful lives' and the proposed third Object 'ensures equitable access to, and flexible delivery of, funded aged care services that takes into account the individual needs of older people ...' and the purpose statement.

Aged care providers must be adequately funded to deliver the outcomes sought in the Objects and purpose. For example, the final proposed Object – 'promotes innovation in aged care based on research and supports continuous improvement' – is important in-principle. However, for providers to achieve this, capacity for innovation must be accounted for in funding.

We recommend that the proposed Objects and purpose be further simplified to enhance simplicity and achievability, including (for example) consideration of merging the purpose with the Objects. To be achievable, providers must also be sufficiently funded to deliver the outcomes expected in the Objects and purpose.

**R1 The proposed Objects and purpose of the new Aged Care Act should be simplified and reworded to be achievable, accounting for the challenges and realities of the aged care system. Aged care providers must be sufficiently funded to deliver the outcomes expected in the Objects and purpose.**

ACCPA also notes there is no reference to sector sustainability in the Objects or purpose statement. While such concepts are reflected in proposed principles 11 and 15 of the Statement of Principles, a reference to sector sustainability should also be incorporated into the Objects, as an important principle for the benefit of all stakeholders in the aged care system.

**R2 That an Object be added that references sector sustainability: *supports the sector to be efficient, sustainable, and resilient, with an ability to attract and retain staff.***

If our recommendation to introduce the concept of sector sustainability into the Objects of the Act is accepted, it will be important that there are provisions flowing through the Act that enliven this Object.

## 4.2 Proposed constitutional foundation for the new Act

ACCPA notes the proposed constitutional basis for the new Aged Care Act. Further information about how the new Aged Care Act will give effect to international conventions would be useful.

## 4.3 Differences in the new Aged Care Act

Regarding the proposed structure of the new Aged Care Act, ACCPA notes it is proposed there will be one principal Act and one set of rules. We support a simplified legislative framework.

ACCPA recommends the structure be positioned so that the primary legislation remains as constant as possible, and for subordinate legislation to be flexible and adaptable. For example, eligibility (system entry) may be best placed in subordinate legislation to account for thresholds adjusting over time in accordance with population ageing.

**R3 The structure of the legislation be positioned such that the primary legislation (new Aged Care Act) remains as constant as possible, and subordinate legislation be flexible and adaptable.**

On funding, the Consultation Paper states on page 13: ‘including any contributions that older people need to make to the costs of funded aged care services that they access. This will be consulted on separately in the context of individual aged care programs where impacted’.

We note the work of the Aged Care Taskforce to consider sustainable future funding arrangements for the delivery of high quality care in Australia.<sup>2</sup> This work is highly relevant to the foundations proposed in this paper and we request that the Government and Department ensure alignment of deliberations across what might be proposed and defined in legislation for a new Aged Care Act, and how it might be costed and funded.

Overall ACCPA considers providers need more detailed information about the proposed changes. The high-level infographic on page 13 of the Consultation Paper is a starting point but does not provide sufficient detail for providers to map the proposed changes against their existing systems and processes to determine what they need to change.

**R4 The Government and the Department align reform work of the new Aged Care Act and the Aged Care Taskforce, to ensure what is defined in the new Aged Care Act is also costed and funded.**

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<sup>2</sup> Department of Prime Minister and Cabinet, [Aged Care Taskforce Terms of Reference](#), 7 June 2023

- R5 The Department develops information tools, along with more detailed guidance covering what is changing and what is remaining the same under the new Aged Care Act.**

## 5. Statement of Rights and a rights-based approach

ACCPA supports in-principle a rights-based legislative framework. To facilitate the best outcomes for older people – and the sector as a whole – it is imperative that providers are adequately funded and supported to deliver the desired outcomes. Without this, a rights-based approach cannot be effectively, and meaningfully, operationalised.

### 5.1 Statement of Rights

ACCPA is supportive in-principle of the concept of a Statement of Rights that sets out what people in the aged care system can expect when accessing, or seeking to access, funded aged care services. We note it will be an important feature of the proposed rights-based framework.

While older people should have the rights included in the proposed Statement, in order for the Statement of Rights to have practical value, there must be alignment between the proposed rights and the level of care providers are funded and able to deliver. Indeed, the responsibility for the right to aged care rests with the Government.

Further, how will sector challenges, such as workforce shortages as well as other challenges in delivering aged care services in regional, rural, and remote regions be accounted for?

Some of the rights are worded in absolute terms and will not be able to be delivered in all cases (e.g., rights #2, #3, and #11), or cannot be guaranteed at all times even when reasonable steps are taken (e.g., right #4).

The Statement of Rights as currently drafted contains a mix of rights that providers and governments are responsible for, which ACCPA considers as creating unnecessary convolution. For example, right #9 – equitable access to palliative and end-of life care when required – encompasses responsibilities of state and territory governments.

Some of the proposed Rights also have potential to create confusion, for example:

- Right #1 regarding the notion of “personal risk” – What are the implications for providers when personal risk decisions are made by substitute decision makers? What does this mean for clinical risk and accountability of the provider? Decisions should also not infringe upon the rights of other persons. Additionally, notwithstanding consumer choice, it should be recognised that providers play an important role in supporting and contributing to a care recipient’s care pathway.
- Right #10 – regarding complaints being dealt with fairly and promptly – What is meant by “fairly” and “promptly”? This will depend on the complexity of the complaint.

In relation to registered providers, the Statement of Rights should be simple, clear, and implementable. ACCPA recommends that the proposed Statement of Rights be streamlined to enhance simplicity and clarity and be able to be translated to responsibilities that can be implemented effectively by aged care providers. Alternatively, the Statement of Rights could set out rights for care recipients, and a separate Statement of Responsibilities could set out responsibilities of providers. Either way, it needs to be clear who is responsible and for what.

#### **R6 That the Statement of Rights:**

- a. **be streamlined to enhance simplicity and clarity and be able to be translated to responsibilities that can be implemented effectively by aged care providers; or**
  - b. **sets out the rights of care recipients, and a separate Statement of Responsibilities sets out responsibilities of registered providers.**
- R7 That the Government be specified as having a responsibility in supporting the Statement of Rights to be enacted and delivered.**

ACCPA notes there is no discussion in the Consultation Paper about the responsibilities of care recipients.

The Consultation Paper on page 17 states that ‘the new Act will specify that registered providers, responsible persons and aged care workers are expected to act consistently with the Statement of Rights, subject to law and any conflicting rights (for example, the rights of another person in the same room at a residential care home)’.

The rights of registered providers, aged care workers and other members of the community also need to be acknowledged and addressed.

Care recipients’ rights should sit alongside care recipient responsibilities, such as meeting contractual obligations and treating aged care workers and other care recipients with respect. Providers need to be able to provide a safe home and workplace.

Right #10 in the Statement of Rights proposes the right to be ‘supported to exercise their rights, voice opinions...’. This statement alone does not account for circumstances where one care recipient’s rights conflict with those of another care recipient, or where a care recipient’s opinion causes offence to another care recipient or aged care worker, for example.

The Royal Commission recommended the new Aged Care Act should specify that ‘people receiving aged care should respect the rights and needs of other people living and working within their environment, and respect the general interests of the community in which they live; the rights and freedoms of people receiving aged care should be only limited by the need to respect the rights of other members of their community’.<sup>3</sup>

It is also noted that prior to the introduction of the current Charter of Rights, the *User Rights Principles 2014* contained rights, as well as responsibilities, for care recipients provided with residential care, home care, and short-term restorative care.

ACCPA recommends that text along the lines of that proposed by the Royal Commission be incorporated into the new Aged Care Act to balance the Statement of Rights. A list of care recipients’ responsibilities should also be included in the new Aged Care Act or associated subordinated legislation.

- R8 That the Statement of Rights should be balanced through the inclusion of a provision in the new Aged Care Act along the lines that ‘people receiving aged care should respect the rights and needs of other people living and working within their environment and respect the general interests of the community in which they live’.**
- R9 A list of care recipients’ responsibilities be included in the new Aged Care Act or associated subordinate legislation.**

## 5.2 How rights will be upheld under the new Act

It is proposed that registered providers will be subject to a new obligation to have practices in place to ensure they act consistently with the Statement of Rights. ACCPA seeks more information on how this will work in practice. ACCPA recommends supporting resources be

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<sup>3</sup> Royal Commission into Aged Care Quality and Safety Final Report, Recommendation 3 xviii.

developed (in consultation with providers) by the Department and/or the Aged Care Quality and Safety Commission (Commission) on this matter and include case studies and examples of best practice. The Department/Commission should also work with providers to promote and support best practice.

As noted above in section 5.1, the Consultation Paper on page 17 states that ‘the new Act will specify that registered providers, responsible persons and aged care workers are expected to act consistently with the Statement of Rights, subject to law and any conflicting rights (for example, the rights of another person in the same room at a residential care home)’. We seek further information on how providers are to manage circumstances where rights between care recipients are conflicting. Resources should also be developed on this particular topic.

**R10 The Department/Commission should, in consultation with providers, develop supporting resources (e.g., case studies and examples of best practice) to support implementation of the Statement of Rights and a rights-based approach. This should include resources to guide providers in balancing competing or conflicting rights.**

Consideration should also be given to implementation in the multi-provider environment proposed under the Support at Home program, as identifying failures in care may be different to traditional single provider performance review/investigation.

### 5.3 Rights-based approach

ACCPA supports in-principle the notion that adopting a rights-based approach in the new Aged Care Act involves more than just including a Statement of Rights at the front of the Act (noting that ACCPA has concerns about some of the broader components, e.g., the proposed new statutory duty of care, which are explored in this submission).

It is imperative that funding for aged care services is sufficient to support effective operationalisation of the Statement of Rights and the broader rights-based approach. This should be considered by the Independent Health and Aged Care Pricing Authority (IHACPA) as part of their costing and pricing functions.

**R11 That the Government be specified as having responsibility to ensure providers are sufficiently funded to operationalise a rights-based approach. IHACPA should account for this as part of their costing and pricing functions.**

## 6. Statement of Principles

ACCPA notes that Recommendation 3 of the Royal Commission into Aged Care Quality and Safety identified the inclusion of a Statement of Principles in the new Aged Care Act, specifying nineteen elements. However, the manner in which a Statement of Principles interacts with other components of the proposed legislative foundations needs further consideration.

ACCPA has received feedback that indicates there is confusion about the interaction of the Statement of Principles and various other current and proposed statements/requirements outlining objects, purpose, rights, expectations, and responsibilities (including the Quality Standards and Code of Conduct, etc).

This is relevant to the Statement of Rights, with some stakeholders having raised concerns about possible duplication between the two (as acknowledged on page 21 of the Consultation Paper). It is also unclear how the Government including the Department and the Commission will be held accountable to meet the Principles.

Page 21 of the Consultation Paper states that the Principles ‘will guide the decisions, actions and behaviours of everyone operating in the aged care system’. How, in practice, will the Principles “guide” decisions of everyone operating in the aged care system (and, for registered providers, presumably not be a requirement)? The Principles should not be used as another tool to measure providers’ compliance (or influence the Commission’s decision-making in relation to compliance action), given this will already be done through the obligations framework under the new regulatory model.

ACCPA supports simplicity and streamlining wherever possible to ensure the key principles underpinning the aged care system are not obfuscated. Therefore, ACCPA recommends the Statement of Principles be streamlined into a smaller number of high-level principles which would include sector sustainability, that are simple, clear, and relevant to the aged care system.

**R12 The Department streamline the Statement of Principles into a smaller number of high-level principles which would include sector sustainability, that are simple, clear, and relevant to the aged care system.**

Noting the potential for confusion around the operation of the Principles, along with other explanatory materials under the new Aged Care Act, the Department should create resources explaining to care recipients, registered providers, and more broadly what the Principles are, what their purpose is, and how they operate in comparison to other aspects of the legislative framework (e.g., Objects, purpose, Statement of Rights).

**R13 The Department should create resources explaining what the Principles are, for care recipients and for registered providers, and including what their purpose is and how they operate in comparison to other aspects of the legislative framework.**



## 7. Definition of high-quality care

The Royal Commission into Aged Care Quality and Safety brought into sharp focus the community's expectation that Australia should be able to deliver high quality aged care to older people.

They also sought to articulate what should be considered as high-quality care saying, *'High quality' care puts older people first. It means a standard of care designed to meet the particular needs and aspirations of the people receiving aged care.*<sup>4</sup>

Recommendations 13 and 14 of the Final Report seek to ensure certain characteristics of high-quality care are included in legislation as a 'general, positive and non-delegable statutory duty.'

However, the Consultation Paper proposes an 'aspirational' approach to high quality care provision, to be distinguished from the requirement to deliver to the Aged Care Quality Standards (also under review and anticipated to be subject to the same legislative process).

Priorities for high quality care (subject to further consultation) are proposed as (Consultation Paper page 27):

- *'delivery of funded aged care services with compassion and respect for the individual, their life experiences, self-determination and dignity, and their quality of life,*
- *providing funded aged care services that are trauma aware and healing informed,*
- *providing funded aged care services that are responsive to the person's expressed personal needs, aspirations, and their preferences regarding the manner in which services are delivered to them,*
- *facilitating regular clinical and non-clinical reviews to ensure that the services and supports delivered continue to reflect their individual needs,*
- *supporting the person to enhance their physical and cognitive capacities and mental health, and*
- *supporting the person to participate in cultural, recreational, and social activities, and remain connected and able to contribute to their community.'*

ACCPA queries the proposed approach to the inclusion of a definition of high quality care in the new Aged Care Act to be 'aspirational'. The Royal Commission into Aged Care Quality and Safety were clear in their expectations for universal access to high quality care for older Australians. The development of a new Aged Care Act is the ideal time to work with the community and the aged care sector to find a way forward to sufficiently define high quality care in a manner that is achievable for the sector.

Proposing an 'aspirational' approach in legislation for 'high quality care', that introduces a distinction with **what is** set by the Aged Care Quality Standards as the 'standard' requirement, will effectively create a gap between expectations and what is delivered. It will cause confusion for consumers about what they can expect from Australia's aged care system and providers. It will also cause confusion for providers to understand at what point they are going beyond the 'standard' and into the 'aspirational' realm and how this is to be demonstrated or evidenced against such broadly stated priorities.

Further, aged care services will vary in relation to which of the proposed priorities are relevant to their service. This also calls into question how such an 'aspirational' provision is to be regulated.

The paper cites an interest in allowing for innovation and continuous improvement in the sector to achieve high quality care, however there are many alternative ways to support this other than the proposed approach (such as designing more nuanced policy settings that

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<sup>4</sup> Royal Commission into Aged Care Quality and Safety Final Report, Recommendation 13



account for local or provider circumstances, or ensuring a regulatory system that can allow for providers to explore innovation opportunities without risk of punitive action).

ACCPA considers that any inclusion of a definition of high-quality care in the new Aged Care Act– whether connected in legislation to a general duty of care or otherwise – must also require consideration by Government of the relationship between high quality care, pricing and costing, and ultimately funding and delivery.

As part of a key recommendation for a new Aged Care Act, the Royal Commissioners recommended that the Australian Government fund the aged care system at the level necessary to deliver high quality and safe aged care and ensure the aged care system’s sustainability, resilience, and endurance.

In relation to funding of high-quality care, the Royal Commissioners were emphatic, saying:

*‘Funding for aged care is insufficient, insecure, and subject to the fiscal priorities of the Australian Government of the day. For several decades, one of the priorities for governments dealing with the aged care system has been to restrain the growth in aged care expenditure in light of demographic changes. This priority has been pursued irrespective of the level of need for care, and without sufficient regard to whether the funding is adequate to deliver high quality and safe care. The consequence of these funding arrangements for older people is that they may not be able to access care when they need it due to rationing of services, and when they do access care, funding may not be sufficient to meet the cost of providing the high quality care they need. The current state of Australia’s aged care system is a predictable outcome of these measures to limit expenditure and ignore the actual cost of delivering aged care.’<sup>5</sup>*

Furthermore, it is critical that the legislative reform aligns with funding reform. The *Aged Care Taskforce Terms of Reference* state in regard to their three objectives, that advice should support ‘high quality care and an innovative and vibrant aged care sector that is driven to respond to the needs of older Australians.’<sup>6</sup>

ACCPA contends that the Aged Care Taskforce should explicitly consider and report on the distinction between high quality care and quality care, if any, as part of its deliberations. As part of the recent consultation on its six draft funding principles, ACCPA in its submission to the Taskforce, has noted it is vital the Taskforce aligns its principles with those to be incorporated into new Aged Care Act, to ensure funding is matched with high quality care provision as intended in the new Act.

The role of IHACPA is also pivotal. Since IHACPA took on its aged care function, ACCPA has consistently advocated that the pricing and costing approach should consider what we *want* to deliver, as compared to what we *have* delivered/or are delivering.<sup>7</sup>

IHACPA’s own vision is for Australians to have fair access to transparent, sustainable and high-quality health and aged care. Further, a 2023-24 IHACPA Key Performance Indicator includes recognition of designing pricing systems that promote sustainable and high-quality care.<sup>8</sup>

The challenge for IHACPA will be to develop a pricing framework and costing methodology around a legislative definition. The current proposal of several ‘priorities’, or the Royal Commission’s expression of ‘characteristics’ for high quality care bring into question what

<sup>5</sup> Royal Commission into Aged Care Quality and Safety, [Final Report – Executive Summary](#), p. 74

<sup>6</sup> Department of Prime Minister and Cabinet, [Aged Care Taskforce Terms of Reference](#), 7 June 2023

<sup>7</sup> Aged & Community Care Providers Association (ACCPA), [Submission - Towards an Aged Care Pricing Framework Consultation Paper](#), p.11

<sup>8</sup> Independent Health and Aged Care Pricing Authority (IHACPA), [Who we are](#) and [IHACPA Work Program and Corporate Plan 2023–24](#), p. 34

activity it takes to deliver such care. For example, what are reasonable activities that support an older person being ‘connected’ to one’s community? What does the future of more compassionate aged care look like for consumers? How does a pricing system reflect a definition that seeks to ensure tailored and individualised care?

A way forward may be for IHACPA to undertake specific costing studies of 4 and 5 star rated aged care providers, to ascertain what factors are differentiating them from an ‘acceptable’ standard of 3 stars. This would need to be done in conjunction with sector consultation and comparison with any legislated definitions and/or standards.

Finally, the sector must be supported to delivery high quality care. This will necessitate an understanding of the inter-relationship of the key factors in aged care such as workforce, regulation, innovation and quality measurement. How do they all come together to impact on a provider’s capacity to deliver high quality aged care? And to know it’s actually being delivered.

It is imperative that the Australian Government is able to clearly articulate the level(s) of care that the Australian community are to expect from a future funding system and, if high quality care is to be universal, that the architecture be established so that it can be defined, costed and funded. The legislative mechanisms under consideration as part of this consultation also must be understood in this context.

- R14 That the architecture of the aged care system, including the responsibilities of Government and agencies of government and concurrent reform initiatives, be aligned to ensure that any level/s of care identified in the new Aged Care Act are defined, costed and funded.**
- R15 That detailed information be made available accompanying an Exposure Draft for any proposed legislation on how the Australian Government will fund the aged care system at the level/s identified and address to what extent the proposed legislation delivers on the Royal Commission’s vision for high quality and safe aged care and ensuring the aged care system’s sustainability, resilience and endurance.**
- R16 That the aged care sector be supported to implement the level/s of care identified in legislation and ensure the components of high quality care, including workforce and sector transformation, are prioritised.**

## 8. A new duty of care and compensation pathways

ACCPA members have significant concerns with the proposed new duty of care obligations and compensation pathways, which go beyond the equivalent obligations in other parts of the health and care sectors.

### 8.1 A new statutory duty on registered providers

The Consultation Paper indicates that an overarching statutory duty of care on registered providers is being considered for inclusion in the new Aged Care Act. The new duty would be modelled on the work, health and safety duty outlined in subsection 19(1) of the *Work Health and Safety Act 2011* and would be focussed on ensuring registered providers take reasonable steps to avoid their actions adversely affecting the health and safety of persons in their care.

Registered providers are already subject to a range of duties and obligations including through aged care legislation, other legislation (e.g., work, health, and safety obligations) and common law.

This is acknowledged in the Consultation Paper (page 30) which says the proposed overarching statutory duty of care would complement, not displace, existing work health and safety and common law duties, as well as any existing duties under state and territory legislation. However, there is no discussion in the Consultation Paper about why these other obligations are considered to be insufficient.

Given the range of other duties and obligations on registered providers, ACCPA does not consider there is a need to introduce an overarching statutory duty of care in the new Aged Care Act. The introduction of new requirements is also likely to create confusion, duplication, the potential for jurisdictional issues to occur, as well as increased costs.

**R17 An overarching statutory duty of care on registered providers should not be introduced, given the existing range of duties and obligations already in place.**

### 8.2 Duties on responsible persons, governing persons, and aged care workers

The consultation paper also proposes that separate statutory obligations could be introduced on responsible persons, governing persons, and aged care workers. ACCPA notes such persons are already subject to a range of duties and obligations and considers that it isn't necessary for additional duties to be included in the new Aged Care Act (for example, work health and safety obligations, obligations under the Corporations Act, and obligations for entities regulated by the Australian Charities and Not-for-profits Commission).

ACCPA has received feedback that introducing such additional duties is likely to deter and even be a fundamental barrier for people to consider working in the aged care sector. This also extends to participation on governing bodies, not only, but particularly in regional, rural and remote regions. Such additional requirements are onerous and aren't required of people working in other similar sectors – including health and disability. Member feedback following 2022 legislative reforms to aged care note that it is already harder for providers to recruit

directors as they can work in other high risk human services environments with less burdensome levels of accountability.

**R18 Duties on responsible persons, governing persons, and aged care workers should not be introduced given the range of existing duties and obligations already in place.**

### 8.3 Organisations that facilitate access to aged care services

The Consultation Paper (page 31) indicates that the Department is considering whether a separate type of duty should be imposed on organisations that facilitate access to funded aged care services for example digital platforms.

As noted in section 3.4 of ACCPA's submission<sup>9</sup> on 'A new model for regulating aged care: Consultation Paper 2', ACCPA considers that either the online platform organisation will need to be a registered provider (where they are seeking to directly deliver Commonwealth subsidised aged care services although this is not expected to occur often if at all) and/or the workers on the online platform will need to be registered providers. Care recipients need to be confident that the care and services they are receiving are being delivered by a registered provider(s).

If this approach is adopted, there would appear to be no need for another and separate type of duty on organisations facilitating access to aged care services.

### 8.4 Civil penalties available to the Aged Care Quality and Safety Commission

The Consultation Paper (page 32) indicates it is intended that higher level civil penalties will be available to the Commission where a registered aged care provider repeatedly fails to comply with conditions of their registration, including by failing to demonstrate the capability for, and commitment to, continuous improvement aimed at achieving high quality care.

However, there are no details in the Consultation Paper about the extent of these civil penalties and the process for asking for a review of the Commission's decision and appeal rights.

**R19 Further detail and consultation is needed on the proposed civil penalties to be available to the Aged Care Quality and Safety Commission, including the process for asking for a review of the Commission's decision and appeal rights.**

### 8.5 Compensation

As noted in section 5.4 of ACCPA's previous submission<sup>10</sup> on 'A new model for regulating aged care: Consultation Paper 2', ACCPA considers it would be highly inappropriate for the Commission as Regulator to have any role in seeking compensation on behalf of older people as this would mean the Commission would be working outside their scope of independently monitoring compliance with governance obligations and imposing penalties for non-compliance. Instead, there are other well-established avenues including independent advocacy organisations that are better placed for care recipients to seek support and compensation.

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<sup>9</sup> [A new model for regulating aged care: Consultation Paper 2](#), ACCPA submission 23 June 2023

<sup>10</sup> [A new model for regulating aged care: Consultation Paper 2](#), ACCPA submission 23 June 2023

**R20 The new Aged Care Act should not include a new compensation pathway as there are other existing compensation pathways available.**

## 8.6 Insurance

As noted in section 5.6 of ACCPA's previous submission<sup>11</sup> on 'A new model for regulating aged care: Consultation Paper 2', ACCPA members are concerned that insurance premiums may increase under the proposed new model. There is also a concern that depending on the final penalty/compensation arrangements put in place, providers may not be able to obtain insurance as these will be uninsurable risks. ACCPA considers it is important for the Department to discuss possible insurance consequences with the insurance sector.

**R21 The Department consults the insurance sector on the possible impact of the proposed model and new Aged Care Act on insurance premiums and insurance coverage.**

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<sup>11</sup> [A new model for regulating aged care: Consultation Paper 2](#), ACCPA submission 23 June 2023

## 9. Disclosure protections for whistleblowers

The Consultation Paper (page 35) proposes the introduction of broader whistleblower protections similar to protections in the NDIS Act and under the Corporations Act.

ACCPA supports appropriate whistleblower protections but questions whether these need to be included in the new Aged Care Act, and instead recommends consideration be given to using existing legislative protections. Such an approach would simplify implementation, streamline regulation, and allow for the transfer of knowledge and understanding.

Other comments:

- the list of people authorised to receive a qualifying disclosure on behalf of a registered provider needs to be limited to people in positions identified by the registered provider (an eligible recipient). For example, it would not be appropriate for a volunteer to receive a disclosure on behalf of a registered provider. This is to ensure disclosures are dealt with appropriately by relevant senior management and to protect the privacy of the whistleblower and the person(s) the disclosure is about.
- the Consultation Paper is silent on what happens after a person makes a qualifying disclosure. There needs to be a formal process so the concern can be discussed on a privileged and confidential basis without prejudice.
- it is also unclear how the whistleblower arrangements will manage vexatious claims and mitigate the reputational risk such claims could have. It will be particularly important to address this issue in the proposed multi-provider environment for the support at home program. In addition, the person making the disclosure must be required to provide the reasonable grounds for making a disclosure and as noted in the Consultation Paper, the disclosure must be in good faith.
- in relation to obligations of registered providers to have an internal whistleblower policy (Consultation Paper page 38), ACCPA recommends the Department and/or the Aged Care Quality and Safety Commission publish resources and templates for providers to use ahead of the start date of any legislative change. Also, ACCPA has assumed that the Department and/or the Commission will consult other stakeholders such as police officers, to ensure they are aware they may receive a disclosure and the process for actioning such disclosures.

**R22 The Department considers using existing legislative whistleblower protections instead of including protections in the new Aged Care Act.**

**R23 People authorised to receive a disclosure on behalf of a registered provider be limited to people in positions identified by the registered provider.**

**R24 The Department documents and consults on the process for responding to a disclosure including in multi-provider environments and to manage vexatious claims.**

## 10. Supported decision-making arrangements

ACCPA supports in-principle the proposal for the new Aged Care Act to include representative arrangements that are clear and consistent across aged care law and aged care systems.

However, it will be important that representative arrangements under aged care arrangements are the same, wherever possible, and interact appropriately with arrangements under other Commonwealth laws, including the National Disability Insurance Scheme and social security law, as well as state and territory laws.

It will also be necessary for the Commonwealth to put in place arrangements so that care recipients can easily check who their current representative is and that there is an easy process for registered providers and care recipients to transition, if required, from existing arrangements to new arrangements.

### 10.1 Criteria for appointment

The practical impact of the criteria for appointment (pages 41 and 42 of the Consultation Paper) is unclear for the aged care recipient, the proposed supporter nominee or the proposed representative nominee, the registered provider, as well as for the Secretary of the Department of Health and Aged Care or their delegate. For example, how will the Secretary (or delegate) be satisfied that the proposed nominee would be able to fulfil the duties of a nominee; or how will the Secretary (or delegate) have regard to whether there is a person who has authority to make decisions on behalf of the older person under a law or under an appointment?

There are also a number of issues which need to be considered and addressed before new arrangements are put in place including:

- the interaction between the proposed approach and arrangements in place in the states and territories.
- the process for ensuring representative nominees fulfil their duties.
- the process for overturning a nominee arrangement including for example where it is considered family members are taking away rights from people with dementia.
- the arrangements for when an aged care recipient does not have a nominee and their registered provider considers they need one.
- the arrangements in a multi-provider environment as proposed for the support at home program.
- ensuring supported decision-making arrangements are supported and funded.

In addition, it will be essential that the Secretary (or delegate) makes decisions and communicates those decisions to care recipients, nominees, and registered providers in a timely and efficient way. What is being planned to ensure this occurs?

ACCPA supports the proposal (page 42) that the Secretary (or delegate) will notify registered providers of the appointed nominee including their contact details and any changes to these arrangements.

**R25 Issues identified with the proposed approach are addressed before new supported decision-making arrangements start.**

**R26 The Department ensures decisions are made and communicated to care recipients, nominees, and registered providers in a timely and efficient way.**

## 10.2 Supported decision-making principles and duties

The Consultation Paper (page 43) notes that the key change for representatives is that the new Aged Care Act will include a specific duty for a representative nominee to refrain from doing an act, or making a decision, on a person's behalf unless:

- they are satisfied that it is not possible for the person to do, or to be supported to do, that act or make that decision themselves, or
- it is possible for the person to do the act or make the decision, but they want the representative to make that decision on their behalf.

The Consultation Paper (page 43) also sets out decision-making principles for representative nominees.

ACCPA supports these requirements and decision-making principles.



# 11. Eligibility for funded aged care services

ACCPA supports in-principle the establishment of a new entry point into the aged care system, with common eligibility requirements and a single assessment framework for all funded aged care services.

## 11.1 Proposed access and eligibility arrangements

The information provided in the Consultation Paper on the proposed access and eligibility arrangements are high-level. More detail is sought on each of the components.

It is noted that the flow chart on page 49 of the Consultation Paper indicates a person can access aged care services prior to assessment in specified situations, including emergencies or where assessment may be delayed due to regional/remote location. ACCPA supports such provisions in-principle, but more information is needed on what 'specified situations' would be included e.g., recent hospitalisation.

It is also important that people seeking to access the aged care system get timely access to assessments, particularly given access to aged care is often sought following a crisis event. It should be considered how this will be achieved, particularly in regional, rural and remote regions. The Government must sufficiently fund and staff the single assessment workforce to ensure timely access to aged care services.

ACCPA notes that an application will be able to be made verbally (page 49 of the Consultation Paper). ACCPA assumes that written applications will also be an option as not everyone will be able to make a verbal application.

**R27 That people seeking to access the aged care system have the option to make an application verbally or in writing.**

## 11.2 Threshold eligibility test

ACCPA supports younger people being able to enter the aged care system in certain circumstances (First Nations people and people who are homeless or at risk of homelessness), provided they meet specified criteria including those outlined on page 50 of the Consultation Paper.

ACCPA asks whether the threshold ages are appropriate, noting the age pension age is now 67 (while acknowledging that age 65 is tied to access to the NDIS). Further, are the current threshold ages sustainable for population ageing demand and supply dynamics, and how will potential increases in threshold ages be considered in the future?

Page 51 of the Consultation Paper states that no other younger persons will be able to access funded aged care services. It is important that should this approach be progressed in this legislation, that the Government is confident of the timing of the commencement of these provisions and that the necessary accommodation and supports for younger people with care needs such as early onset dementia can be funded and delivered appropriately outside of the aged care system. In addition, it should also ensure that there are suitable delivery options for care of younger people accessing non-aged care funded services, which is particularly an issue in regional, rural and remote localities.

## 12. Concluding comments

ACCPA members are seeking more detailed information as well as sufficient lead time to ensure optimal planning and operationalisation of the significant reforms ahead.

The existing Aged Care Act has been in effect since 1997. The commencement of a new Aged Care Act will mark the most substantial reform to the aged care system since then. It is important this reform is done right, through a clear and coordinated path to implementation.

Aligned to recommendations made in our submission on 'A new model for regulating aged care: Consultation Paper 2', ACCPA reiterates the need for a detailed sector implementation plan and a comprehensive and thorough impact analysis regarding the new Aged Care Act (and new regulatory model).

**R28 The Department and the Commission should develop, in partnership with the sector, a detailed sector implementation plan with timeframes and required actions for providers. The plan should be communicated across the sector and include information on how the changes relate to other aged care reforms to ensure reforms are synchronised and structured to adapt to a changed and changing aged care sector.**

**R29 Given the Royal Commission into Aged Care Quality and Safety Final Report was handed down on 1 March 2021, and the proposed reform is scheduled for 1 July 2024, the Department should undertake a comprehensive and thorough impact analysis regarding the new Aged Care Act (and new regulatory model). This analysis should take into account current and future financial sustainability, workforce issues, and ensure any findings are accounted for in the design of the reform.**

It is important there is recognition that financial sustainability is critical to the capacity of providers to implement the reforms introduced through the new Aged Care Act. A robust and skilled aged care workforce that can deliver on the reforms is also key to successful implementation. Providers must be sufficiently funded to deliver on the reforms.

**R30 The Government should ensure providers are sufficiently funded to implement the reforms to be included in the new Aged Care Act.**

ACCPA remains concerned there is not enough time for all the necessary activities that need to be done before a commencement date of 1 July 2024, including consultation on the exposure draft of the new Aged Care Act, introduction and passage of the new Aged Care Act and subordinate legislation, and availability of training, education and support materials for providers/workers/care recipients. Providers need time to digest the proposed changes – it will take significant time and resources to plan and budget for the requisite changes, and adjust existing systems and processes (e.g., software upgrades, training staff, changes to policies, changes to financial systems).

**R31 The commencement date of the new regulatory model and new Aged Care Act should be set with sufficient time following the passage of the relevant legislation and all subordinate legislation for the Department and the Commission to implement all the necessary resources and training for providers and care recipients, as well as their own staff.**

Such an approach will also give the broader sector, including care recipients, sufficient lead time to be well informed about how the new legislative provisions may affect them.

ACCPA also recommends consideration be given to how the new Aged Care Act can be future proofed to account for emerging issues associated with the digital age (e.g., artificial intelligence, privacy, cyber-security).

**R32 Consideration should be given to how the new Aged Care Act can be future proofed to account for emerging issues associated with the digital age.**

## 12.1 Contact

If you have any further questions or would like to discuss, please contact us at [policy@accpa.asn.au](mailto:policy@accpa.asn.au) (attn: Deidre Gerathy and Keelie Bormann).