



**A New Aged Care Act: A  
Submission on the Foundations  
of the New Aged Care Act  
Consultation Paper No.1**

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# Contents

<b>1</b>	<b>Background</b>	<b>4</b>
<b>2</b>	<b>Constitutional Foundation of the New Act, Proposed Structure and Objects</b>	<b>5</b>
<b>3</b>	<b>Statement of Rights and Statement of Principles</b>	<b>10</b>
<b>4</b>	<b>Complaints Pathways</b>	<b>11</b>
<b>5</b>	<b>Defining Quality Care</b>	<b>14</b>
<b>6</b>	<b>Duty of Care Requirements</b>	<b>17</b>
<b>7</b>	<b>Whistleblower Protections</b>	<b>19</b>
<b>8</b>	<b>Nominee Framework</b>	<b>23</b>
<b>9</b>	<b>Eligibility for Funded Aged Care Services</b>	<b>26</b>
	<b>References</b>	<b>29</b>

# 1 Background

The 2021 Final Report of the Royal Commission into Quality and Safety in Aged Care (the Royal Commission) found that: 'The current Aged Care Act is focused on the financial relationship between the Australian Government and the providers, and, in particular, on restraining expenditure rather than on the rights of older people to the care that they need.' (The Royal Commission into Quality and Safety in Aged Care [The Royal Commission], 2021, p.13). In response to this finding and the recommendation for an entirely new Act, the Australian Government has stated that this change to the legislation 'will ensure that older people who need aged care are at the centre of the aged care system. It will provide the framework for fundamental change within the aged care sector.' (Department of Health and Aged Care [DoHAC], 2023, p.6).

The University of Technology Sydney Ageing Research Collaborative (UARC) is grateful for the opportunity to make the following submission to the Department of Health and Aged Care (the Department) in response to matters raised in its Consultation Paper No.1, A New Aged Care Act: the foundations.

## 2 Constitutional Foundation of the New Act, Proposed Structure and Objects

### Constitutional Basis for the New Act

The Consultation Paper states that the new Act will have a new constitutional basis to ensure a strong foundation for person-centred legislation.

UARC considers that the sector stakeholders would benefit from greater clarification from the Department on the practical definition of person-centred care and on the reasons for this approach, including evidenced based research to support the “what, how and why”, and whether there are any potential unintended consequences that need to be managed.

### Reliance on International Conventions and Covenants

The Department is proposing reliance on international instruments. Although not stated, presumably this is a reference to the Commonwealth’s external affairs power under section 51(xxix) of the Constitution. As discussed shortly, the Department puts forward two rationales for reliance on this constitutional power. (DoHAC A New Aged Care Act: the foundations Consultation Paper No. 1, p.12)

The first of the Department’s proposed objects of the new Act draws on this power by stating that it:

gives effect to Australia’s obligations under the Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social and Cultural Rights, and other relevant instruments (p.11)

UARC is concerned is that the current wording represents overreach of the purpose of the Act and of the aged care system. An examination of the scope of the two named instruments reveals the following:

The Convention on the Rights of Persons with Disabilities extends to all persons who have a range of impairments that may hinder their equal participation in society. (United Nations, 1966. Convention on the Rights of Persons with Disabilities.)

Specifically, Article 1 of the Convention includes the following definition:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Many people have one or more such disabilities, including a number of older people.

The Covenant on Economic, Social and Cultural Rights has similar characteristics. Indeed, while there are references in the Covenant to the rights of everyone to an adequate standard of living, to physical and mental health and to education, and there are specific references to women, children and young persons, there is no specific reference to older persons. (United Nations, 1966. Covenant on Economic Social and Cultural Rights.)

### Unintended Consequences as to the Scope of Funding

Given the scopes of these international instruments are very broad, UARC considers that the new Act should avoid any unintended consequences, such as an over-reading of the application of public funding to meeting the needs of older people. The sustainability of the aged care system will require aged care service subsidies to be directed to services that are targeted to older people in need, effective in meeting the objects of the aged care system, delivered efficiently, and are balanced by consumer contributions from those with significant means to reflect the personal benefits of the services they receive.

In this respect, the recently established Aged Care Taskforce is currently consulting on its guiding principles, and is not proposing a universal approach to older people receiving government funded services. Draft Principle 4 states:

Government is and will continue to be the major funder of aged care. Government funding should be focused on care costs. Personal contributions should be focused on accommodation and everyday living costs with a sufficient safety net.<sup>1</sup>

The Department is encouraged to ensure that there is an alignment of objectives and principles for the aged care system across the various government bodies which are developing parts of the suite of aged care reforms.

Accordingly, UARC considers that the first object of the new Act – that it ‘gives effect to Australia’s obligations’ – is inappropriate. At a minimum, the new Act should adopt wording along the lines of that contained in the *National Disability Insurance Scheme Act 2013* (Cth) (section 3), that the Act operates in conjunction with other laws to give effect to Australia’s obligations under the Convention, the Covenant and other relevant instruments.<sup>2</sup>

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<sup>1</sup> See <https://agedcareengagement.health.gov.au/taskforce/>.

<sup>2</sup> For example, the *Disability Discrimination Act 1992* (Cth).

## The Department's rationales

The Department does not appear to sufficiently justify its first rationale that the use of this power of the Constitution will ensure that:

the legislation will be focused on the needs of older people accessing or seeking to access aged care services. (p.12)

A reading of the two named international instruments above does not suggest that they provide a source of power which can be applied specifically to the needs of older people, or to provide any guidance on which of those needs should be prioritised, other than in the most general terms. Any further clarification from the Department would be helpful to the sector.

The Department's second rationale is that it aims to ensure that:

a wider range of businesses, not just those who are "constitutional corporations", will be able to deliver funded aged care services. (p.12)

A potential alternative approach is that the Department could add to the constitutional basis for Commonwealth aged care legislation by drawing on its powers to make laws in relation to trading corporations under section 51(xx) of the Constitution. These powers have been broadly interpreted by successive national governments and confirmed by the High Court, including in its 2006 judgement that dismissed challenges to the validity of the Work Choices legislation (*New South Wales v Commonwealth* [2006] HCA 52).

However, the Department is seeking to enable 'new aged care providers to enter markets where limited funded aged care services are currently available.' (p.12). UARC supports this aim in principle. Businesses which are not constitutional corporations include sole traders, partnerships or other unincorporated organisations, even though the members of those associations can enter into contracts, own land, employ people, and sue and be sued.

In the absence of the Commonwealth having a constitutional power over unincorporated associations, it would seem that in this instance, the reliance on international instruments is a work-around. UARC would find it helpful to understand whether the Government is considering a future approach such as seeking a referral of powers from the States under section 51(xxxvii) of the Constitution, or even some form of national uniform legislation?

## Structure and Scope of the Proposed Objects

In an earlier section of this Response, UARC sought clarification of the purpose of the first objective proposed by the Department, relating to reliance on international instruments. The following discussion addresses the remainder of the proposed objects.

A first consideration is that the structure of the proposed Objects should be reconsidered.

The current structure confuses the purpose of the legislation with the purpose of the aged care system. There would be greater clarity for all if the two purposes were separated and drafted according to their specific intention. An appropriate model structure which separates these two purposes is that contained in the Objects section (section 3) of the *Health Practitioner Regulation National Law Act 2009*.

Further, by separating the two, there would no longer be a need for a Purpose Statement at the beginning of the Act. In its current form, the proposed Purpose Statement reiterates sentiments already expressed in the draft Objects.

Second, the scope of several of the proposed Objects should also be reconsidered.

In particular, the system objectives should contain a statement which sets out the rationale for Commonwealth intervention (through subsidies and regulation) in the safety, quality and cost of a subset of care and support services received by older people (being those which the Commonwealth subsidises) compared to the care and support services obtained by people in the community more generally.

UARC also notes that, in a change from past practice, the Department's Consultation Paper makes frequent use of the term 'Commonwealth funded services'. This term has the potential to create an expectation that aged care services for older people are funded by the Commonwealth – possibly in their entirety.

And yet, the Consultation Paper defines 'funding' in the following terms:

funding – 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. (p.13)

In addition, elsewhere in the paper, there is reference to 'subsidised aged care services', (p.27). To avoid confusion, the Department may wish to be both clear and consistent and use the term 'Commonwealth subsidised aged care services'.

## Suggestions for Revised Structure and Wording of the Objects

On the basis of the above discussion, UARC suggests the structure and wording of the Objects contained in the Consultation Paper be restructured and revised along the following lines.

1. The object of the new Act is to
  - (a) establish the purpose of an aged care system in which older people who are assessed as needing care and support that is subsidised by the Commonwealth, receive services that are appropriate, available and affordable,



- (b) establish the requirements, accountabilities and obligations of providers who are approved to deliver appropriate services that are subsidised by the Commonwealth,
  - (c) establish the requirement that Commonwealth subsidies are directed to services that are targeted to older people in need, are effective in meeting the objects of the aged care system and are delivered efficiently.
  - (d) assist the courts and others to interpret the new legislative framework.
2. The objectives of the aged care system are to
- (a) assist older people to live active, self-determined and meaningful lives, and to participate in society on an equal basis with others,
  - (b) ensure equitable access to, and flexible delivery of, subsidised aged care services that take into account the individual and diverse needs of older people,
  - (c) ensure Commonwealth subsidies prioritise the affordability of health and personal care for all older people and the affordability of everyday living support and accommodation for older people with low means,
  - (d) enable older people who access subsidised aged care services to choose which available approved provider will deliver their services, and when and how they do so,
  - (e) ensure people who access subsidised aged care services are free from mistreatment and neglect, and harm from poor quality or unsafe care,
  - (f) provide and support education, advocacy and transparent information arrangements that can assist older people to access subsidised aged care services, understand their rights, make decisions, and provide feedback on the delivery of their services without reprisal, and
  - (g) promote innovation in aged care based on research and support continuous improvement.

In relation to the proposed objective 2(b), UARC recommends removing the following words proposed in the Consultation Paper: 'including people of diverse backgrounds and needs and vulnerable people' as such groups should be captured in the characteristics of 'individual and diverse needs' of older people.

UARC notes that a new Australian Centre for Evaluation has been announced to evaluate the practical impact of policy decisions and their outcomes.<sup>3</sup> In UARC's view, examining the operation of the Aged Care Act and how it upholds the rights and decisions of older people and supports the equity, effectiveness, efficiency and sustainability of the aged care system should be a priority focus area.

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<sup>3</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_departments/Parliamentary\\_Library/pubs/rp/rp2223/Quick\\_Guides/AustralianCentreforEvaluation](https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2223/Quick_Guides/AustralianCentreforEvaluation).

### 3 Statement of Rights and Statement of Principles

UARC is concerned that having a statement of the objectives of the new Act and the aged care system, a Statement of Rights, and a Statement of Principles, together with the detailed provisions in the Act itself, will cause confusion for older people, providers and regulators. Also, subtle and at times unintended variations in wording could well result in the appearance of conflicting rights and obligations when considered from the different perspectives of those stakeholders.

Setting aside for the moment the wording of the Statement of Rights, the Department may wish to not proceed with a Statement of Principles and instead:

- incorporate its higher-level messages into the statement of objectives of the aged care system (there are already overlaps); and
- rely on the detailed provisions of the Act to put into effect the remaining more detailed elements of the Principles (which the provisions will do in any case).

Turning to the Statement of Rights, UARC wishes to restate a point made above that older people should expect their rights to be clearly enunciated and upheld, AND that funders of subsidised aged care services can also have expectations which the system should uphold, such as the funding being targeted to those in need, effectively employed and used efficiently. As currently drafted, these expectations, which are central to the sustainability of the aged care system and therefore to the ongoing availability of services to older people in need, are not addressed.

Within the limitation of the scope of the current Statement, one proposed right in particular may prove problematic:

3. Exercise choice between available aged care services they have been assessed as needing, and how these services are delivered.

This proposed right may contradict the intent and design of the Support at Home Program, which may require older people who have been assessed as needing some form/s of health and personal care to not be able to substitute that form of care with services that provide everyday living support.

An alternative form of wording which avoids that contradiction could be:

3. Exercise choice within specified groupings of available aged care services they have been assessed as needing, and how these services are delivered.

## 4 Complaints Pathways

UARC recognises the importance of complaint pathways in the aged care system and supports the proposed new Act's approach of using complaint pathways to safeguard the rights of older Australians. UARC also notes that each older person's rights are to be: 'upheld in a risk based regulatory model'. (p.19)

UARC considers that there needs to be an appropriate balance between the following two considerations. First, the sufficiency of the proposed regulatory approach for the complaint pathways to uphold older persons' rights. Second, the effective and efficient allocation of regulatory resources to ensure those resources are directed to the areas of material risk. As the new Act will serve as the legal foundation upon which the forthcoming Complaint Commissioner will exercise oversight and enforcement powers, UARC recommends the following changes in the foundational elements of the new Act.

### Proposed Risk-based Approach to Manage Complaints

UARC has several reservations about the proposed risk-based approach to manage complaint pathways. The complaint regulator had adopted the risk-based approach to manage complaints prior to the Royal Commission, and it remains operative in the present system. Findings emergent from the qualitative study undertaken by UARC identify several issues in the current complaint system (Lin et al., 2022). As such, UARC seeks further clarification on how the proposed risk-based approach will differ from the current approach and how it intends to rectify existing issues.

Firstly, regulators have discretionary power over the complaint risk assessment processes under the current risk-based approach. This discretionary power has not always been used appropriately and consistently, leading to situations where the rights of the elderly are not upheld. One such situation which emerged from UARC's analysis of witness statements tendered to the Royal Commission is that the complaints regulator is unwilling to pursue concerns and grant formal investigations in situations where such action is warranted (Lin et al., 2022). A potential cause for this inaction is the absence of clear and well-defined guidelines for risk assessment. Without a standardised procedure, risk assessments are carried out at the discretion of the regulators, potentially leading to inconsistent decisions and thereby undermining the efficacy of the complaints systems.

Secondly, the current risk-based approach falls short in identifying service providers of concern. UARC's analysis finds that complaint issues are often assessed in isolation under the current system (Lin et al., 2022). For instance, there is insufficient information sharing among complaint officers, which in turn, results in patterns that indicate systemic issues of complained providers being overlooked. Consequently, even if certain providers repeatedly fail to meet standards, they often do not trigger a heightened level of risk assessment.

Despite these concerns, the current Consultation Paper offers limited information as to how the proposed risk-based approach differs from the existing regime. The method used to regulate complaint pathways will likely shape the policy agenda and performance priorities of the proposed Complaint Commissioner, and in turn, affect how complaints are handled by individual complaint officers. Accordingly, UARC suggests the new Act should introduce risk-assessment guidelines governing the risk assessment process. UARC also recommends such guidelines being published and shared with complainants, as prior research has demonstrated that transparent complaint management processes have positive impacts on fair and consistent outcomes (Canning & O'Dwyer, 2001).

## The Early Resolution Pathway

Alongside the risk-based approach to complaint management, UARC is also concerned about the system's emphasis on early resolution. The Consultation Paper suggests 'The initial step for anyone who believes their rights, or another's, have been breached should be to address the issue with the registered provider and seek early resolution' (p.17). This recommendation stems from the new Act's intention to improve relationships and trust between providers and care recipients using restorative justice.

However, UARC has concerns that care recipients and their families might still have little confidence in the early resolution framework, as research conducted by UARC reveals that users of the aged care system perceive the internal complaint system and early resolution pathway as being inadequate and poorly managed (Lin et al., 2022). Moreover, findings emergent from qualitative studies undertaken by UARC suggest that reliance on early resolution may drive complaint regulators to weigh the speed of complaint resolution over the satisfaction of complainants and service improvement.

Considering the previous Consultation Paper highlighted the new Act's intention to promote the use of restorative justice, UARC proposes that the Act could include clear pathways for complainants to escalate unresolved internal complaints and unsatisfied outcomes from early resolution. This could include, for example, mediation and reconciliation pathways, so that any unresolved matters are not channeled back to the early resolution process. Without alternative pathways, care recipients may retain a negative perception of the newly proposed system. This could foster feelings of rejection and discourage them from using the external complaint system administered by the proposed Complaint Commissioner.

## Responsibilities of the Proposed Complaints Commissioner

The current consultation lacks an overarching principle within the currently proposed Statement of Principles regarding the responsibilities of regulators in relation to complaint management. UARC holds concerns that merely a Statement of Rights for older Australians may not sufficiently ensure regulator accountability. If the new Act emerges as a single primary legislative piece, its objects and detailed provisions should also delineate the framework for how regulators exercise oversight and enforcement powers, aligning with the other intended objectives of the Act.

Specifically, UARC recommends that the provisions of the new Act specifically outline the methods and protocols regulators should adopt when exercising their power. Consequently, this might necessitate revising the existing *Complaint Principles* within the *Aged Care Quality and Safety Commission Act 2018* (Cth), as present provisions regarding a regulator's responsibilities are ambiguous, and grant front-line officers' ample room to exercise enforcement strategies with discretion (Lipsky, 2010). Well defined statements of methods and protocols may ensure that the regulators not only uphold the Statement of Rights but also adhere to defined standards and procedures. UARC emphasises that this level of clarity and consistency is necessary in bolstering confidence among care recipients and their families.

## 5 Defining Quality Care

UARC supports the importance of defining person-centred quality and safe care in the new Act. However, UARC proposes that normalising quality and safe care should not be dependent on the maturation of the system (p. 26) but be normalised now and required under the proposed Act.

Woods et al (2023) argue that ‘quality aged care is respectful, timely and responsive to older people’s preferences and needs and assists them to live a dignified life’. This fits with the more general definition of quality as, ‘fitness for use’ or ‘fitness for purpose’. This starts with the objects of the aged care system, to be defined in the new Act – what it is intended to do/deliver. Quality care is when what is delivered meets the standard associated with the purpose in an appropriate manner.

This then leads to a related issue of quality care being defined as ‘high’ introducing the notion of a scale of high to low. UARC takes the position that quality (appropriate) care should not be described as ‘high’ or ‘low’, but rather it is an absolute, i.e. care is either appropriate and meets the criteria of quality care, or it is not. Quality care must also be safe.

### Recognition of Factors that Directly Influence Quality of Care

While UARC supports the definition of quality care outlined in the Consultation Paper, UARC has outlined in other places (Woods et al., 2023) that quality care:

- is suitable in addressing an older person’s care needs,
- requires taking a person-centred approach that prioritises an individual’s distinct will, preferences, desires and needs, and recognises the dignity of risk,
- includes social inclusion, connection to community and engagement, of their choice, that helps maintain emotional and mental well-being,
- is delivered by suitably skilled and knowledgeable staff who have a shared understanding of their contribution to a culture and delivery of quality, safe and appropriate care and who themselves require nurture and support, and
- is delivered in suitable built environments and physical settings, in both aged care homes and domestic settings, that are safe for care recipients, staff and family caregivers.

## **The Built Environment and Quality Care**

The provision of quality care is influenced directly by the design, condition and quality of the built environments in which it is provided. There are a range of care settings that can be examined in relation to their direct influence on, and conceptualisation of, quality care. For example, the design of residential aged care developments, how bedrooms are clustered, the locations where services are delivered, what amenities are in a person's accommodation, and how private space and public space is separated or managed, all have a direct influence on how care models are implemented and how care is experienced (Carnemolla et al., 2021).

In the delivery of community care, the design of the home environment is also critical to influencing the quality, efficiency and appropriateness of aged care. Unlike residential aged care however, home environments are unregulated other than through high level regimes such as the National Construction Code. Aspects of the home care setting, including its location, accessibility, bathroom design, and its maintenance/condition all impact the efficiency, quality and safety of aged care being provided. There is established evidence that housing design is integral to the conceptualisation of quality home care, including home modifications (Carnemolla & Bridge, 2019; 2016) and assistive technology (Carnemolla 2018). For these reasons, UARC's position is that the design, quality and condition of a care setting, whether that is residential aged care, or a person's home, must be considered within a definition of quality of care.

## **Achieving person-centred, quality and safe care**

UARC agrees that a suite of integrated strategies and ongoing effective governance and stewardship arrangements are needed for the reformed aged care system.

The role of the new regulatory model in achieving quality and safe care has strengths. However, the implementation of person-centred, quality and safe care will require a systems approach that goes beyond 'ticking boxes'. It will require culture change and a balance between over-specification and unrestrained innovation. It will also require a workforce who have the knowledge, skills, professional attributes and commitment and who recognise how quality and safe care might differ in diverse settings and the appropriateness of care in an unregulated built environment (e.g. people's homes).

Enhancing staff practices and organisational cultures will also make an impact on the quality of care delivered. This concept can be realised through better digital processes that improve access to information and training initiatives that focus on attentiveness and embracing the concept of 'dignity of risk'. There is compelling evidence from the disability sector indicating that increased training in Active Support and operating under effective leadership can significantly contribute to improved quality of life outcomes (Bigby, 2022). These outcomes encompass aspects such as increased autonomy, better interpersonal connections, emotional wellbeing, and heightened social engagement.

Utilising digital technologies within homes and residential settings can enhance person-centred care approaches. This involves digital platforms that go beyond mere efficiency improvements and instead empower individuals to identify and communicate their needs and preferences, actively involving them in decision-making processes. Employing more inclusive methodologies in home and residential settings that amplify the voices of older Australians as they age will also support the implementation of quality and safe care.

Evaluation is key to identifying whether strategies to implement person-centred quality and safe care are successful and to inform improvement strategies. It is important to identify what success looks like from the perspectives of those receiving the care.

Therefore, where possible, evaluation measures and approaches should be co-designed with recipients of care and services. When co-design is not possible, input from recipients and their loved ones to inform evaluation measures should be considered. Given an estimated 11% of Australians provided informal care in Australia (ABS 2018), UARC proposes that the need for the support for informal carers is also recognised in the new Act.



# 6 Duty of Care Requirements

## Inclusion of a New Statutory Duty of Care

UARC supports the inclusion of a new statutory duty of care within the Act that is built on *the Work Health and Safety Act* as recommended by the Royal Commission. UARC agrees with the approach outlined in the Consultation Paper that takes into account concepts such as dignity of risk and the rights of the individual accessing Commonwealth subsidised aged care services. We express concern with the Department's view that 'high quality care would become a minimum standard' is a potential hindrance to sector innovation. UARC refers to its comments in the previous section on 'Defining Quality Care' for discussion and its submission in Response to the Aged Care Taskforce consultation about funding principles on the meaning of quality and appropriate care (Woods et al., 2023 p10,11).

## Dignity of Risk

The Aged Care Quality Standards outline requirements to be met by providers to ensure safe and quality care is delivered, that it is person-centred and that it understands the autonomy of the individual to exercise dignity of risk to make informed choices to achieve their goals, maintain independence and quality of life.

There needs to be clear articulation of the intersection between duty of care and dignity of risk and an understanding of this by Board Directors and all staff across the organisation. Providers need to enable staff to support recipients of services to make informed decisions while at the same time ensuring a duty of care is upheld for recipients of care, staff and other stakeholders.

## Potential Unintended Consequences

UARC recommends that the Department reconsider its stance that criminal penalties cannot be attached to a duty to deliver quality care because it cannot be defined with 'sufficient legal clarity'. In UARC's view, greater transparency is expected on a standard of care that is safe and able to be measured in order to produce the change in the aged care sector which the community expects. The system failures which allowed for the neglect and mistreatment of older people highlighted by the Royal Commission can be largely attributed to standards of care that were simply not met in any definition. In short, 'high quality care' is not something that needs to 'grow over time' – quality should be present from the outset and be a foundational element of the aged care system.

Further, it is proposed that a 'serious failure' to act in a manner consistent with the duty of care will amount to a breach, but this level of severity also warrants definition. If the actions of a registered provider adversely affect the health and safety of persons accessing Commonwealth subsidised aged care services, and this does not amount to a breach (as the Consultation Paper infers), further guidance is required on the steps consumers can take for redress.

## Duties Placed on Responsible and Governing Persons of Aged Care Providers

UARC supports a related duty for the responsible persons to comply with the statutory duty, similar to those responsibilities of officers in the *Work, Health and Safety Act*. It is agreed that this will influence a positive compliance culture and raise standards by encouraging the greater provision of resources to provide quality and safe care. However, UARC supports the Royal Commission recommendation of introducing accessorial liability as a construct to hold providers accountable who are negligent in mitigating the risk to residents' health and safety and that of their staff.

## Duties Placed on Aged Care Workers

UARC considers that there is a balance between shifting responsibility for the actions of individual workers to their employers, and holding individuals responsible for a breach of a duty of care where there has been negligence or reckless behaviour leading to injury of an older person. In relation to individual responsibility, existing avenues do exist in common law for redress, such as an action brought under a negligence claim. Registered nurses and other regulated persons in the subsidised aged care workforce are also held to standards which govern their registration eligibility requirements.

Broadening the scope of individual responsibility to other aged care workers may not be an appropriate reach for this piece of legislation. For example, would this cover agency staff and those who maintain the grounds of a facility, chefs in their kitchens or gardening staff? Having such matters ingrained in statute may dissuade these classes of employees from entering the aged care workforce at all.

On the other hand, requiring aged care providers to promote a culture of compliance and adequate training to employees can prevent instances of wrongdoing that amount to a breach of a duty of care. A defence for providers who are implicated in a case where there has been a breach of a duty of care by an employee could be raised that policies and procedures were in place to ensure that quality and safe care was delivered, alongside compulsory training. If the Department does include a specific duty to be placed on aged care workers in the Draft Bill, UARC welcomes the opportunity to provide further comment.

# 7 Whistleblower Protections

## Challenges and Proposed Solutions

An accessible and robust whistleblower framework is essential to ensuring that where a breach of standards is raised, there will not be fear of reprisal. UARC in-principle supports the introduction of the proposed framework which aims to broaden protections beyond the current serious incident response scheme (SIRS) and allow for protected disclosures to be made regarding any aspect of the new Act. However, UARC also suggests that the proposed regime be developed with consideration to the following issues.

### Existing legislation

Criticism has been made of whistleblowing regimes in Australia that ‘some out-of-date laws, such as those still applying to federal aged care and disability support, do not allow anonymous whistleblowing, impose an ambiguous ‘good faith’ test for protection, and only allow civil remedies if a criminal reprisal is shown.’ (Brown & Pender, 2022, p.9).

Additionally, there is concern that in situations where an allegation of elder abuse is reported and victimisation is difficult to prove, the problem could be exacerbated. As Bernoth et al. (2013) explain:

...the main tension involved in reporting elder abuse is fear bought about by the complexity of the environment that enables elder abuse to remain hidden. This fear is warranted for elders, their loved ones who participate in research, aged care facilities, professionals and researchers in relation to reporting elder abuse. Elders and their loved ones fear exacerbation of the abuse if it is reported. Their dependence and vulnerability are sources of fear. Staff working in facilities may fear allegations of elder abuse which may prove to be unfounded or actual and loss of employment if they report elder abuse.

The Consultation Paper states that a key objective of the proposed disclosure protection for whistleblowers is to ensure that ‘people feel empowered to disclose information... without fear of repercussions’ (p. 36). However, UARC research has identified several barriers within the current framework that may deter potential whistleblowers in aged care from coming forward.

First, a qualitative study conducted by UARC has revealed that aged care workers possess reservations about blowing the whistle internally. This reluctance largely stems from an organisational culture that views whistleblowing unfavorably. Moreover, previous negative experiences with the system have further dampened their willingness to report, leading to a subsequent decline in reporting intentions (Lin et al., 2022).

Second, the proposed changes offer whistleblower protection to older persons accessing subsidised aged care services and those who are close to the older people. UARC's research suggests that the unique cultural background of older Australians plays a critical role. A deeply ingrained social norm of gratitude discourages the current generation of aged care users from whistleblowing (Graham, 1986). Furthermore, the dependent nature of the relationship between care recipients, their carers, and providers renders them vulnerable. As such, the prevailing whistleblower provisions offer minimal motivation for care recipients to blow the whistle.

Third, current arrangements only offer whistleblower protection under specific scenarios, excluding other potential whistleblowers in the aged care system. UARC's findings reveal that many whistleblowers chose to tip off their concerns to the family and friends of the care recipients due to the fear of repercussions if they raised concerns directly.

The proposed arrangement does not specify whether protections extend to individuals who share their concerns with care recipients' family members, who then subsequently take on the role of whistleblowers. This oversight is particularly problematic given UARC's research, which has documented instances where the complaint regulator demanded that the initial informant come forward when complaints were lodged by care recipients and their families.

### **Clarifying and implementing the making and receiving of disclosures**

Providers will need to be educated about how their internal whistleblower policies should be developed to comply with the requirement to respond to a wider range of potential complaints.

The pathways for making whistleblower disclosures internally within a particular aged care provider should be clearly articulated, at the outset, to all older people receiving care, their families, carers and volunteers and advocates, as well as to aged care workers (whether directly employed or contracted, and paid or unpaid) and responsible and/or governing persons of registered aged care providers who may also make disclosures.

In terms of receiving a disclosure of a contravention of the new Act, the Consultation Paper proposes that disclosures can be made 'to officials' including staff of the Commission and the Department, or other authorised persons. UARC notes that one class of officials is 'aged care workers (whether directly employed or contracted, and paid or unpaid)'. This is a broad class and implies that every person who works within aged care will need to be prepared to potentially receive a disclosure. The same applies to responsible and/or governing persons. Given this, UARC suggests that compulsory training be undertaken to empower these classes of persons on how to respond in these situations, as well as to not fear reprisal themselves when raising suspected failings of a provider on the disclosing party's behalf.

It would be helpful for the Department to clarify this point and also distinguish between the term 'official' to describe all aged care workers and 'governing or responsible persons of registered providers.

### The 'good faith' requirement

In UARC's view, the 'good faith' requirement should be removed and replaced entirely with the 'reasonable grounds of suspicion' test that appears in the *Corporations Act*. The *Corporations Act* provides that protection is afforded to a whistleblower if the person 'has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances' (section 1317AA). Such a definition has been tested in the Courts and looks to the broader circumstances surrounding the disclosure.

UARC notes that, although the Consultation Paper has proposed a 'reasonable grounds to suspect' test, it has also retained the 'made in good faith' test. It has been found in other judgements that the 'in good faith' test is subjective, the requirement creates uncertainty and risk for whistleblowers, and that it is inconsistent with best practice legislative approaches in other countries including the United Kingdom. Accordingly, the 'in good faith' test should be deleted.<sup>4</sup>

It is noted that the proposed wording for this part of the new Act will form part of the Draft Bill and UARC welcomes the opportunity to make further comment.

### Making anonymous disclosures

There is ambiguity in the Consultation Paper on whether a person will be able to make a disclosure anonymously. The Consultation Paper suggests that *complaints* can be made anonymously 'through other avenues', however when making a *disclosure*, and in order to be protected, a person will need to provide their name to the official. The need for clarification on which aged care workers are an official and what complaints are afforded a 'protected status' is pertinent; especially as a complaint may also be a protected disclosure and the two concepts easily conflated.

UARC considers that removing the right to make an anonymous disclosure will dissuade some people from coming forward to speak out. The Human Rights Law Centre's report highlighted the power imbalance between employer and employee for instance, which made it difficult to prove that retaliation against an employee had taken place for making a disclosure (Pender, 2023, p.7). It is understood that there may be some difficulty in achieving effective investigations and protection of anonymity for whistleblowers.

While there is a proposed exception to confidentiality of the whistleblower's identity to

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<sup>4</sup> See also *Quinlan v ERM Power Ltd* [2021] QSC 035 at [27].

the 'responsible person of a registered provider', knowing the scope of this class of person is key to ensuring confidentiality will be maintained and not disclosed to other staff members.

### **Investigating disclosures**

Restoring confidence in the system around complaints handling and management will be achieved where there is protection from victimisation paired with a transparent investigations process. There is no specific reference in the Consultation Paper to the obligations of providers to investigate the disclosures that are made. It is anticipated that details on the 'appropriate processes for handling disclosed information, including escalation to the Department or Commission as appropriate' will be made available in the due course.

The current complaints handling processes of the Aged Care Quality and Safety Commission have come under scrutiny with allegations that thousands of 'second tier' notifications have been closed without due assessment (Morton, 2023). This draws from the findings of the recent Independent Capability Review of the Commission which identified that it:

urgently needs to fix significant problems in its complaints process and Serious Incident Response Scheme (SIRS). This is a huge workload, and the appointment of the new Aged Care Complaints Commissioner must proceed as a high priority (Tune, 2023).

UARC agrees that this step will be significant in determining the success of the new whistleblower protection regime.

## 8 Nominee Framework

UARC agrees that the existing nominee framework with its inconsistent terminology around the word 'representative' throughout the Act has created confusion for consumers. However, this new proposed framework may also have issues in its application in three main areas.

### Potential Conflict with Existing Legislation

UARC considers that the first major challenge with the proposed framework is its potential to conflict with existing State and Territory legislation. Although the Consultation Paper proposes that the framework will run in parallel with existing laws, in practice UARC has concerns that the mechanisms explained in the Paper will create greater confusion and uncertainty for older people making appointments of Enduring Power of Attorney and Enduring Guardian, and making advance care directives. Australia does not have a national uniform law covering these instruments, which in itself creates complexity for older people who move across States.

Notwithstanding this, lawyers often have older clients who wish to appoint trusted individuals to be involved in decision-making (including in relation to health care) in the event of a change in the older person's decision-making capacity. Even before the substitute decision maker steps in, appointed Guardians are encouraged to adopt the principles of supported decision making, as capacity is a decision-specific construct (Queensland Government, 2020).

Ultimately, a scheme under the Aged Care Act allowing for a separate person to make decisions within the Commonwealth subsidised aged care system could conflict with some of the standard provisions in state and territory legislation. For example, in NSW an Appointment of Enduring Guardian contains standard functions such as:

- (a) deciding the place (such as a specific nursing home, or the appointor's own home) in which the appointor is to live,
  - (b) deciding the health care that the appointor is to receive,
  - (c) deciding the other kinds of personal services that the appointor is to receive,
  - (d) giving consent under Part 5 to the carrying out of medical or dental treatment on the appointor,
  - (e) any other function relating to the appointor's person that is specified in the instrument.
- (*Guardianship Act 1987* (NSW) section 6E)

For older people who do not engage a lawyer to draft these documents for themselves, they are likely to be unprepared for, and confused by, the potential reality that it may not

actually be applicable in the circumstances it has been designed for. The proposed framework could lead to a conflict arising between a decision-maker appointed under a legal document and a 'supporter' or 'representative'.

Further, the proposal that an older person is only permitted to have a supporter OR a representative at any one time reflects a flawed characterisation of decision-making capacity. Since capacity is decision-specific, a person may benefit from a supporter nominee to assist them to make some decisions, but a representative may need to be involved for other, more complex decisions.

## Hierarchy of Powers: Appointments and Directives

UARC recognises the utility of allowing for a separate scheme of supported decision making that will cover those receiving aged care services who do not have an existing appointment or directive in place. However, precedence should be given to the legality of those appointments that do exist and to undermine this would be counterproductive in respecting an older person's wishes.

Where a different person is appointed to be a representative under the new aged care Act there is no guidance provided on a proposed hierarchy that aged care providers should give precedence to in interacting with the appointed persons. In the representative role on the diagram page of the Consultation Paper, it is stated that the Secretary appointing the representative 'may have regard to certain information to guide the decision e.g. any current guardianship arrangements'. This could cause uncertainty where older people who already have a legal Guardianship document in place may have their appointment overridden by an administrative decision, outside the already established avenues such as the NSW Civil and Administrative Tribunal, or the decision to revoke the document themselves.

Further, it is suggested that if there is concern about elder abuse in relation to a person operating under a Guardianship document, then a different person can be appointed to the role for making decisions around aged care. Importantly, this solution does not offer a holistic response to fixing the root problem of the elder abuse. UARC recommends that a framework be implemented for referral to the appropriate bodies to investigate any such case with the older person's consent. The older person should be supported through this process.

The arrangements put forward in the Consultation Paper could potentially increase the risk that elder abuse becomes easier to perpetuate. For example, a perpetrator of elder abuse could sidestep the safeguards built into the drafting and witnessing requirements for an Appointment of Enduring Guardian and take control through the Commonwealth's administrative process in relation to subsidised aged care, leaving the legally appointed Guardian without a clear path for recourse.



## Scope for Further Reforms and Supported Decision Making Models

UARC supports the broader principle of implementing supported decision making within laws that effect older people. There is an opportunity for these aged care issues to drive the implementation of nationally uniform Guardianship and Attorney legislation that is easy to understand and brings together the current fragmented approach. Victoria already has a 'supportive attorney' role and provides guidance on the types of scenarios where it would come into effect (Office of the Public Advocate, 2023). There is scope for more research into this space and whether its operation could be enacted through a nationally uniform framework.

# 9 Eligibility for Funded Aged Care Services

## The Assessment Arrangements

In general, UARC supports the reform of eligibility requirements for subsidised aged care services noting that eligibility criteria and (re-)assessment processes are critical policy levers in ensuring that older people receive care services appropriate to their needs in a timely, efficient fashion. Furthermore, these requirements should also aim to ensure that Government funding is directed towards subsidising aged care services that are effective in contributing towards aged care policy objectives, and in improving sustainability by targeting subsidies to those with limited capacity to pay.

As outlined in UARC's Sustainability Discussion Paper (2022), p.29:

Clearly defined eligibility criteria and associated assessment processes are critical to ensuring that subsidised aged care services are effective in addressing individuals' needs. They should be targeted in the scope of services that are subsidised, in the financial circumstances of the people who are eligible to receive the subsidies and in the level of subsidies attached to the various services. Transparency of the eligibility criteria ensures that people understand their rights to care, and that there is public accountability for the equitable nature of the criteria and service delivery.

Developing a single-entry point into the aged care system, with a common set of eligibility requirements and single assessment framework for all subsidised aged care services, has several potential merits worth noting. First, it may reduce inefficient duplication of processes and information gathering from older people by different organisations. It may reduce the challenges of accessing aged care by clients with varying abilities to navigate a complex, multi-organisational system. It may also improve the equity of access between people with different needs across diverse regions and over time, by ensuring that a person's essential care needs are assessed and addressed regardless of the setting in which the services are to be delivered.

However, the potential benefits of a simpler, unified assessment process need to be balanced alongside at least two important, potentially adverse, challenges of such a model.

The first challenge with a single assessment process is that it may create a misalignment between the intensity of assessment and the complexity of an older person's care needs. Currently, approximately 818,000 older people who access subsidised aged care services use basic home support services through the Commonwealth Home Support Program (equivalent to 67% of all residents and recipients of subsidised aged care

services) (DoHAC, 2023c). Many of these clients only receive one type of service. For example, in 2019-20 around 50% of clients received only one type of service, such as social support or domestic assistance. (Aged Care Financing Authority, 2020; 2021, p.35)

The current proposal, as put forward in the Consultation Paper, would see hundreds of thousands of older people be subject to the same application process and the same individual needs assessment as those requiring intensive, 24/7 care in a residential aged care home. In doing so, this could impose an unnecessarily complex and potentially time-intensive assessment process for people requiring basic entry-level services, which may not only be inefficient and costly, but also may act as a barrier to entry.

A second related challenge concerns how a single unified assessment and entry process would be adequately staffed with people with the right knowledge, skills and attributes to ensure that people's care needs are appropriately assessed, given the diversity of those needs. For example, the Consultation Paper does not make clear how a single assessment workforce would ensure that people with complex care needs are assessed by health professionals with suitable clinical expertise. Equally, it would likely be both prohibitively costly, unfeasible and inefficient, to expect that all older people be assessed by assessors with the same requisite level of clinical skills and expertise.

UARC proposes that both challenges may be addressed through a triage-like approach within the assessment process, by which older people are assessed through a tiered system that appropriately distinguishes between those requiring more basic, entry-level services and those requiring more intensive care and support. The process should be proportionate to the needs of clients who require only one or two entry-level services as well as for those clients with more complex and changing needs.

## Other Proposed Changes to Entry Arrangements for the Aged Care System

UARC supports the proposed age-related changes to the eligibility requirements, which have, as their underlying intent, the provision of more appropriate models of care and care settings for younger people, unless in very exceptional circumstances.

There are several elements within the entry arrangements that UARC considers require further specification or clarification.

First, there is currently no mention of reassessment processes besides a general observation that a key intended benefit of the simpler 'gateway to Aged Care' will be that there will be 'no need for eligibility to be re-assessed for different programs' (p.48). UARC agrees that both system efficiency and older people's experience may be improved by reducing unnecessary reassessment processes (e.g. prompted purely because of a change in program type). The assessment process also needs to be sufficiently robust so as to allow for minor changes in the condition or circumstances of participants without the need for intrusive and costly reassessments.

Nonetheless, reassessment processes may be both necessary and beneficial in improving the effectiveness and efficiency of aged care services. This would be achieved by ensuring that care and support, and the associated allocation of public and private funding, continue to match an older person's needs, as those needs change over time.

The importance of reassessment was noted in the Royal Commission, which recommended (Recommendation 28) that as part of the new single comprehensive assessment process:

Reasonable requests for reassessment of need can be made by a person receiving care (or their informal carer, close family or other representative), their care finder, or their approved provider (p.288). (The Royal Commission, 2021, p.228)

Thus, the new Act should clarify when and how necessary reassessment processes would occur. This should include clarity about the triggers and processes of reassessment including who can request a reassessment, the timing and responsiveness of reassessments, and how the risks and costs of unwarranted reassessments will be managed.

Second, it is not clear in the Consultation Paper when or how the assessment of an older person's financial circumstances occurs. UARC proposes that a financial assessment should occur parallel to the initial needs assessment, to provide clear information to an older person about what contributions and payments they would be expected to make towards the cost of the subsidised services that they were approved to access. When there is a change in the scope of services, particularly where they have different levels of subsidies (say from everyday living support to health or personal care) then the older person needs to be made aware of their different contribution requirements. Any significant change in their financial circumstances may also trigger the need for a reassessment of their capacity to make contributions.

Third, there appears to be some inconsistency about the role and purpose of the delegate as described in the Consultation Paper. On page 48, in the text, the Paper describes that the delegate would 'decide whether they [the older persons] are eligible for a needs assessment', i.e. in the initial stage of application and initial eligibility test. This does not align with the diagram on page 49, which shows the delegate as being part of the approval decision, whereby:

A delegate will consider the assessor's report. They will then decide which funded aged care services that the person is approved to access (as well as their funding level\*) and whether access should be prioritised based on their individual circumstances.

UARC suggests that the role and decision-making of the delegate be more clearly described. As a final comment, UARC notes that the assessment process brings with it a responsibility for ensuring older people receive the care and support they are entitled to under the prevailing criteria, for the national and temporal consistency and equity of those assessments, as well as for ensuring the allocation of resources that effectively and efficiently deliver that care and support. The Commonwealth will need to develop a strong and transparent accountability mechanism for the performance of assessors and the overall assessment regime.

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