

# Foundations of a New Aged Care Act

Submission to the Department of Health and Aged  
Care, Australian Government

7 September 2023



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal people of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input to the Department of Health and Aged Care ('the Department') on the proposed foundations of the Bill for a new Aged Care Act.
2. This submission responds to the Department's proposals contained in Consultation paper No. 1 ('Consultation Paper'),<sup>2</sup> as well as providing the ALA's additional recommendations for what should be included in the new Aged Care Act.
3. Our submission addresses the following matters:
  - The proposed structure, purpose and constitutional foundation for the new Aged Care Act;
  - The Statement of Rights;
  - A proposed new duty of care and related compensation pathways;
  - Disclosure protections for whistleblowers;
  - Supported decision-making arrangements;
  - Current immunity provisions regarding restrictive practices; and
  - Standardised annexures to aged care contracts.

## The proposed structure, purpose and constitutional foundation for the new Aged Care Act

4. The ALA notes that the new Aged Care Act will replace existing aged care legislation, including the current *Aged Care Act 1997* (Cth) and the *Aged Care Quality and Safety Commission Act 2018* (Cth).
5. The ALA submits that new legislation which results from consolidating original legislation and regulations into one Act can become unwieldy and inaccessible, including for those to whom the new legislation applies – in this case aged care residents, who are a very vulnerable cohort.

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<sup>2</sup> Department of Health and Aged Care, Australian Government, *A New Aged Care Act: the foundations* (Consultation Paper No. 1, 2023).

6. The ALA thus recommends that the Department ensures the new Aged Care Act is accessible to all, comprehensible to the general public, and that guides or aids to interpreting the new Aged Care Act are published with the new Aged Care Act.

## The Statement of Rights

7. The ALA supports the centrality of a Statement of Rights in the new Aged Care Act, and the rights detailed in the Consultation Paper which the Department intends to include in the Statement of Rights.<sup>3</sup>
8. The ALA wishes to emphasise that accessible enforcement of a Statement of Rights is key. The Statement of Rights will not be effective without proper enforceability of the rights contained therein, and remedies for breach of those rights.
  - a. We note that the Department will be conducting more consultation on the enforceability of the Statement of Rights,<sup>4</sup> and the ALA is very interested in contributing further on this matter as part of that consultation.
9. In the meantime, the ALA strongly recommends that section 53-2 of the current Aged Care Act, which has been used to remove legal enforcement of breaches of the Act, is not replicated in the new Aged Care Act.
10. Enforceability will also be compromised if aged care residents and their family members/support people do not feel safe making complaints. Currently, the Department envisages that registered aged care providers will “implement a complaints and feedback management system” for receiving and processing complaints about breaches of rights enshrined in the Statement of Rights.<sup>5</sup> The ALA is concerned about the obvious power imbalance between registered aged care providers and aged care residents, and believes a proposal whereby an aged care resident is assumed to feel safe approaching their aged care provider who has (or whose employee has) breached that resident’s rights about that breach of rights requires more consideration.

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<sup>3</sup> Consultation Paper, 16–17.

<sup>4</sup> Consultation Paper, 17.

<sup>5</sup> Ibid.

11. Further, the ALA recommends several means of redress be available to ensure access to justice. That includes restorative justice like rehabilitation, physiotherapy and other kinds of restorative therapies, as well as an acknowledgement of the breach of rights by the person or entity in breach of the aged care resident's rights, along with an apology.
12. Finally, the ALA submits that the Statement of Rights could also be included as part of the introduction of standardised annexures for aged care services contracts. This will ensure that aged care residents know about the Statement of Rights, what is contained in the Statement of Rights, and how they can report a breach of their rights. Our proposal regarding standardised annexures for aged care services contracts is detailed later in this submission.

## **A proposed new duty of care and related compensation pathways**

13. The ALA notes the Department's proposal to include an overarching statutory duty of care on registered care providers in the new Aged Care Act.<sup>6</sup>
14. The ALA submits the following regarding a proposed new duty of care and related compensation pathways:
  - a. The duty of care must be non-delegable, so that the option to make a claim against a registered aged care provider cannot be extinguished by the registered aged care provider placing the blame and legal responsibility on an employee or even a contractor. Further, any division of liability and responsibility should always be worked out between the registered aged care provider and an employee/contractor – that is, this should not fall on the aged care resident to determine or argue.
  - b. The duty and avenues for making a complaint/claim must be clear to aged care residents, especially those who don't have family, a support network and advocates. Every Australian has the right of access to the law and vulnerable people in the aged care system who have been harmed or injured must be supported by the aged care system to bring whatever claim is justiciable and fair. Support should be provided to those seeking to submit a claim and to ensure that they are heard with regard to any complaint.

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<sup>6</sup> Consultation Paper, 29.

- c. Activating a compensation pathway must be accessible in terms of expense and not requiring aged care residents to spend a lot of their own money (including on hiring legal representatives). The ALA submits that alternative dispute resolution (ADR) processes, including mediation and arbitration, should be promoted and should also be enshrined in aged care services contracts. The costs of legal representation to assist in the ADR process should be provided to ensure a fair and reasonable outcome can be achieved in the claim.
- d. The timeframe for determining a breach of the new duty and thus access to compensation must be quick, especially with regard to the age and vulnerabilities of aged care residents. The strict timelines and expectations on parties set during ADR processes would support this.

## **Disclosure protections for whistleblowers**

- 15. The ALA welcomes the Department's commitment to providing a whistleblower framework which "is intended to ensure that people feel empowered to disclose information where they think certain persons might have breached the aged care legislation, without fear of repercussions".<sup>7</sup>
- 16. The ALA strongly believes that the protection of whistleblowers is essential for promoting integrity, accountability and trust in both public and non-public institutions. Whistleblowers – whether they are in the public sector, private sector or not-for-profit sector – perform an important function for the community, ensuring that individuals can truly be held to account if they are not operating within the confines of the law. Despite that, the victimisation of whistleblowers – including but not limited to the termination of their employment, reputational damage and even prosecution – too often follows the disclosures those whistleblowers have made.
- 17. As such, the ALA supports the Department's intention to empower whistleblowers and ensure their safety throughout the disclosure process. In this section of our submission, we will outline the ALA's recommendations for strengthening the proposed whistleblower framework for the new Aged Care Act.

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<sup>7</sup> Consultation Paper, 36.

## Drawing from and interaction with other whistleblower frameworks

18. The ALA notes that the Department seeks “to broaden whistleblower protections to be similar to protections in the NDIS Act and under the Corporations Act”.<sup>8</sup>
19. We submit that other legislation may apply in some circumstances depending on who is making a disclosure and who/on what that disclosure centres. For example, the *Public Interest Disclosure Act 2013* (Cth) (‘the PID Act’) may be relevant. The ALA submits that this requires further consideration by the Department. The Department is no doubt aware that important amendments have been made to the PID Act this year to strengthen protections for public sector whistleblowers, and the Federal Government is committed to additional reforms.<sup>9</sup>
20. Broadly speaking, the ALA is supportive of the Department’s intention to replicate whistleblower protections under the *Corporations Act 2001* (Cth) (‘Corporations Act’), as those whistleblower protections have greatly improved since significant changes were made in 2019 to consolidate the processes for whistleblowing and to expand whistleblower protections in corporate settings.<sup>10</sup>
21. However, the ALA submits that the Department and the Federal Government should avoid developing new, hybrid frameworks for whistleblower protections (such as what is proposed in this Consultation Paper), which result in:
  - a. further fragmentation of whistleblower protections between schemes, industries and sectors; and
  - b. uncertainty and confusion as to what protections are afforded to whistleblowers and in what contexts those protections are activated.
22. Instead, the ALA recommends that the Federal Government ensure through further reforms that harmonise whistleblower protections between all legislative schemes and between public, private and not-for-profit sectors.

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<sup>8</sup> Consultation Paper, 35.

<sup>9</sup> Mark Dreyfus KC MP, Attorney-General, ‘Public Interest Disclosure Reform’ (Media Release, 15 June 2023) <<https://ministers.ag.gov.au/media-centre/public-interest-disclosure-reform-15-06-2023>>.

<sup>10</sup> Kieran Pender, Human Rights Law Centre, *Whistleblowers need protection* (Opinion, 23 March 2023) <<https://www.hrlc.org.au/reports-news-commentary/whistleblowers-protection>>.

23. In the meantime, where there are differences in definitions or processes between various pieces of legislation (namely, the NDIS Act, the PID Act and the Corporations Act), the ALA contends the Department should:
- a. opt to include in the New Aged Care Act whichever definition or process facilitates a broad range of disclosures and also offers the best protections for whistleblowers; and
  - b. ensure that it is clear in the New Aged Care Act exactly what definitions and processes are applicable to those subject to the New Aged Care Act.

### **Power imbalance between those making and those receiving disclosures**

24. The ALA is concerned about the clear power imbalance between prospective whistleblowers (examples include aged care residents, volunteers, family members) and those listed in the Consultation Paper and related materials as people or entities who would receive and process those disclosures (examples include a staff member of the aged care provider, a police officer).
25. We submit that this could be remedied with the establishment of a Whistleblower Protection Authority or a Whistleblower Protection Commissioner. Aged care disclosures could be made to that Whistleblower Protection Authority or Commissioner, which would function as an independent, objective source to whom whistleblowers can turn for support and protection.
26. The merits of establishing a Whistleblower Protection Authority have been discussed at parliamentary inquiries since the 1990s.<sup>11</sup> That includes in 2017, when the Parliamentary Joint Committee on Corporations and Financial Services made several recommendations regarding the establishment of a Whistleblower Protection Authority to cover both public and non-public arenas.<sup>12</sup> More recently, the proposal for a Whistleblower Protection Commissioner has been advanced.<sup>13</sup>

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<sup>11</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, 14 September 2017) 141.

<sup>12</sup> *Ibid* 158–163.

<sup>13</sup> Australian Federal Integrity Commission Bill 2021 (Cth) div 2, cl 17.

27. The Federal Government has committed to “consult widely on whether there is a need to establish a Whistleblower Protection Authority or Commissioner”.<sup>14</sup> The ALA welcomes this commitment from the Federal Government and contends this must be treated as a priority matter, especially if it would affect the finalisation of the new Aged Care Act.

## **Anonymous disclosures**

28. The Consultation Paper outlines the Department’s intention that when making a disclosure, “a person will have to provide their name to the official in order to be protected as a whistleblower”.<sup>15</sup>

29. The ALA notes that this is not a requirement under the Corporations Act, which permits anonymous disclosures.

30. With that in mind, the ALA contends that anonymous disclosures should be allowed in the interests of ensuring potential whistleblowers feel safe to make disclosures.

## **Disclosures being made on reasonable grounds and in good faith**

31. The Consultation Paper outlines the Department’s intention that disclosures must be made on reasonable grounds and in good faith.<sup>16</sup>

32. While this replicates the NDIS Act’s approach, this is a more restrictive approach than the Corporations Act – which is the most recent, best practice standard – and the PID Act, neither of which require disclosures to be “in good faith”.

33. The ALA recommends that the latter criterion be removed for the new Aged Care Act in the interests of removing a barrier for prospective whistleblowers and thus further empowering whistleblowers to make their important disclosures. The ALA agrees that those disclosures should be on reasonable grounds.

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<sup>14</sup> Mark Dreyfus KC MP, Attorney-General, ‘Public Interest Disclosure Reform’ (Media Release, 30 November 2022) <<https://ministers.ag.gov.au/media-centre/public-interest-disclosure-reform-30-11-2022>>.

<sup>15</sup> Consultation Paper, 36.

<sup>16</sup> Ibid.

## Supported decision-making arrangements

34. The ALA submits that in relation to supported decision-making arrangements, the Department must ensure there is a clear and accessible appeal mechanism. That includes appeal to the relevant civil and administrative tribunals. Otherwise, the new Act will prescribe something from which there can be no appeal.
35. The ALA also submits that it be clearly stated in the new Aged Care Act how to navigate existing nominee appointments, such as where someone has already been appointed as an aged care resident's enduring guardian. Clarity around those appointments is essential. In NSW, for example, an enduring guardian can make decisions once the older person is totally or partially incapable. However, "partially" is never defined, which has caused issues. These complications could arise in the new Aged Care Act if matters concerning competing nominee appointments are not clearly clarified in the new Aged Care Act.
36. The ALA contends that the current proposal in the Consultation Paper does not address the issue of existing appointments, including state/territory-based appointments and Centrelink nominees. The current system is not working, as there is the potential for conflict between a nominee and an appointed representative. Based on what is outlined in the Consultation Paper, there will still be that real potential for conflict. As such, further consideration by the Department of these dynamics is required, followed by additional public consultation.
37. The above, in the ALA's view, also underscores the importance for recourse and appeal to ensure that ultimately the interests of aged care residents are given priority and are met.

## Current immunity provisions regarding restrictive practices

38. Last year, Schedule 9 of the Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 added provisions to Part 4.1 of the *Aged Care Act 1997* (Cth), which henceforth offers registered aged care providers immunity against criminal charges and civil claims if the provider complies with the restrictive practices' obligations in the Quality of Care Principles.
39. The ALA proposes a compromise position for inclusion in the new Aged Care Act – that is, offering registered aged care providers an *indemnity* rather than immunity.

40. Such a solution is workable based on the low number of claims and recorded court cases arising from unlawful restrictive practices in aged care facilities. ALA members have been able to identify just eight such cases.<sup>17</sup>
41. The ALA notes that reform is also required to guardianship and consent laws in State and Territory jurisdictions to bring full effect to this reform.

## **Standardised annexures to aged care contracts**

42. ALA members have experience with clients whose rights have been compromised or extinguished by the way aged care contracts have been drafted.
43. The ALA is thus proposing that the new Aged Care Act requires a standardised annexure to accompany all contracts for aged care services. The standardised contract annexure should improve aged care services; rectify the imbalance of power between the registered aged care provider and the aged care resident; allow for ADR processes; clearly state existing rights for aged care residents under the Australian Consumer Law; and provide a clear description of what is unlawful about restrictive practices and when it is permitted by law.
44. The remainder of the ALA's submission will outline some proposed elements to be included in such a standardised contract annexure.

## **A requirement for mediation and arbitration in aged care contracts**

45. Access to justice is a right which every Australian should enjoy. In the case of disabled or injured aged care residents, however, the barriers to access to justice are high.
46. It is necessary to right the imbalance by ensuring access to ADR, including mediation and arbitration, where the circumstances permit. This is especially useful for people in regional, rural and remote areas. The advantages include lower costs, a more efficient procedure, a binding decision, and the focus remains on redress for individuals who are harmed or injured.

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<sup>17</sup> Examples include: *Re QFO* [2019] SACAT 43; *VZM* [2020] NSWCATGD 25; *BZL* [2020] NSWCATGD 2; *Nursing & Midwifery Board of Australia v Kiroff & Nyhan* [2016] SAHPT 9.

## **Empowering the consumer through the Australian Consumer Law**

47. ADR also provides an alternative to a complaints system which currently drives aged care residents to the Aged Care Quality and Safety Commission but which provides no redress at all, in the experience of ALA members and their clients.

48. Presently, complaints are used as inputs into regulating systemic failures. Persons harmed or injured receive no specialist medical attention to which other persons injured by carers outside of the aged care context have access, including rehabilitation and specialist restorative health care.

49. However, aged care residents should be empowered by their existing rights under the Australian Consumer Law, which would be outlined in the standardised contract annexure. Such basic information about the Australian Consumer Law as the following should be included:

- services must be fit for purpose [section 61];
- services must be delivered with due care and skill [section 60];
- services must be delivered in a reasonable time [section 62];
- the Provider must not act in an unconscionable way [sections 20, 21 and 22]; and
- no force must be used in the delivery of services [section 50].

## **Alternatives to complaints for experiencing harm and/or injury**

50. The alternatives to mere complaint for experiencing harm and/or injury should include that action can also be taken or initiated by the aged care resident through their advocate or representative by way of breach of contract and breach of the Australian Consumer Law at the nearest Local Court, or civil and administrative tribunal. Both are well distributed around the country, including in regional areas.

## **Waiver and assignment by the Secretary of the Department of Health and Aged Care of refundable fees for fully supported care receivers equal to any lawful order for redress**

51. When a claim against a registered aged care provider for refund of fees is successful, in the case of a fully- or partly-supported aged care resident, the fees – not having been paid by the claimant – would normally be repaid to the Department.
52. The Federal Government should adopt the policy that those fees are waived and assign them to the claimant/resident/receiver. This should be enshrined in the new Aged Care Act and clearly stated in the proposed standard contract annexure.

## **Remove the egregious conflict of interest in registered aged care providers advising aged care residents on the contract, including for aged care residents who lack capacity to enter agreements**

53. The ALA proposes that a standard contract annexure would include a requirement for a certificate of advice to be issued by an Australian legal practitioner to signify that an intended aged care resident has been advised about their aged care services contract.
54. It is not appropriate that the responsibility for this currently rests with registered aged care providers, who have a clear conflict of interest.
55. This is especially important for aged care residents who may lack capacity to enter agreements, and thus their nominee would be advised by an Australian legal practitioner about the contract.

## **The importance for all parties to the contract to understand unlawful restrictive practices**

56. It would contribute greatly to a reduction in the incidence of unlawful restraint, if the contract explanation annexure also set out:
  - a. what the common law requirements are for informed lawful consent;
  - b. that without consent, the common law requires as a defence or excuse imminent harm to the person or to others;

- c. what is the law (in addition to the Minimisation of Restraint Principles) which applies (criminal and civil); and
- d. what steps may be taken if there is doubt or concern about the restrictive practices used by the registered aged care provider and its employees.

## Conclusion

57. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input on the foundations of the Bill for the new Aged Care Act.

58. The ALA is available to provide further assistance to the Department of Health and Aged Care on the issues raised in this submission.

A handwritten signature in black ink, appearing to read 'Shaun Marcus', is positioned above the typed name and title.

**Shaun Marcus**  
**National President,**  
**Australian Lawyers Alliance**