

# Exposure Draft: Aged Care Bill 2023 (Cth)

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

16 February 2024



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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 provisions and proposals contained in the Exposure Draft of the Aged Care Bill 2023 (Cth) ('Exposure Draft of the Bill'), as well as on additional issues for the Department's consideration regarding this legislative reform.
2. We also note the Department's consultation paper for this stage of stakeholder consultation, *A New Aged Care Act: Exposure Draft ('Consultation Paper')*.<sup>2</sup>
3. The Exposure Draft of the Bill, which is 347 pages in length and divided into 413 sections, attempts to address the complexities of the aged care system in Australia.
4. The following analysis from ALA members on the Exposure Draft of the Bill has been developed by looking at the proposed legislation through the prism of legal rights.
5. The ALA's submission addresses the following matters, which the ALA submits require further attention from the Department:
  - the terminology used in the Exposure Draft of the Bill;
  - ensuring a rights-based system of aged care;
  - our analysis of the proposed Statement of Rights and the proposed Statement of Principles;
  - the importance of a contract for aged care services;
  - the proposed and new compensation pathway;
  - current immunity provisions regarding restrictive practices;
  - how the Exposure Draft of the Bill addresses delegation of authority; and
  - the whistleblower protections framework proposed in the Exposure Draft of the Bill.

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

## A note on terminology

6. The ALA notes that the Exposure Draft of the Bill proposes that the phrase “residential care home” is used henceforth,<sup>3</sup> instead of the commonly-used phrase “residential aged care facility”.
7. The ALA welcomes this change as a much better and a more respectful way to describe a place into which older and vulnerable Australians, needing support, enter to spend their final months and years.

## A rights-based aged care system

8. The Exposure Draft of the Bill comes with a claim, not just the aim, by the Department that the Bill will put the rights of older people “at the centre of the new system”.<sup>4</sup>
9. **The ALA submits, however, that there are no rights – and there is no value in them – unless there is also recourse to justice for a breach of those rights.** The rights signalled by the Exposure Draft of the Bill risk becoming meaningless unless the people to whom those rights belong (older Australians in aged care) can access remedies to enforce them as other Australians, who are not in aged care, would be able and are entitled to do in similar circumstances. In this case, that means having a variety of choice for recourse to legal redress, in the event of harm and injury.

## Aged care rights and principles

10. The Exposure Draft of the Bill also contains provisions arising from the Royal Commission into Aged Care Quality and Safety’s recommendations, including a code of conduct for the registered aged care provider and its employees, as well as statements of the rights and principles of the aged care resident.
11. **The ALA submits, however, that there are insufficient pathways for the aged care resident to enforce the code of conduct, including through the proposed complaints system.**

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<sup>3</sup> See, Exposure Draft: Aged Care Bill 2023 (Cth) cl 9(2)–(5)

<sup>4</sup> See, eg, Department of Health and Aged Care, Australian Government, *A rights-based new Aged Care Act* (Web Page, 14 December 2023) <[www.health.gov.au/our-work/aged-care-act/rights](http://www.health.gov.au/our-work/aged-care-act/rights)>.

## Statement of Rights

12. The ALA notes that, under the current legislation, the Charter of Aged Care Rights is presented by the registered aged care provider upfront and drawn to the attention of intending residents and their supporters upon entry into aged care. These are the currently applicable “rights”:<sup>5</sup>

As a person using aged care, I have the right to:

1. safe and high-quality care and services
2. be treated with dignity and respect
3. have my identity, culture and diversity valued and supported
4. live without abuse and neglect
5. be informed about my care and services in a way I understand
6. access all information about myself, including information about my rights, care and services
7. have control over and make choices about my care and personal and social life, including where the choices involve personal risk
8. have control over, and make decisions about, the personal aspects of my daily life, financial affairs and possessions
9. my independence
10. be listened to and understood
11. have a person of my choice, including an aged care advocate, support me or speak on my behalf
12. complain free from reprisal and have my complaints dealt with fairly and promptly
13. personal privacy and to have my personal information protected
14. exercise my rights without it adversely affecting the way I am treated.

13. These “rights” are only designed for use in complaints by the aged care resident and that is made clear by the current legislation.<sup>6</sup>

14. The ALA notes that the new “Statement of Rights”, as described in the Exposure Draft of the Bill,<sup>7</sup> will not be enforceable when enacted.<sup>8</sup> The rights contained in the “Statement of Rights” will have the status of points to raise with aged care providers in the event of a dispute, and points to raise with the Aged Care Quality and Safety Commission by way of complaint – but nothing more than that. **The proposed legislation thus explicitly prevents any enforcement procedure at law of the new “Statement of Rights”, which is greatly concerning to ALA members.**

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<sup>5</sup> Aged Care Quality and Safety Commission, Australian Government, *Charter of Aged Care Rights* (Web Page) <[www.agedcarequality.gov.au/older-australians/your-rights/charter-aged-care-rights](http://www.agedcarequality.gov.au/older-australians/your-rights/charter-aged-care-rights)>.

<sup>6</sup> *Aged Care Act 1997* (Cth) s 53.2.

<sup>7</sup> Exposure Draft: Aged Care Bill 2023 (Cth) cl 20.

<sup>8</sup> *Ibid* cl 21(3).

## Statement of Principles

15. The Aged Care Bill 2023 sets out aged care principles which are described as a “Statement of Principles”.<sup>9</sup> The essential elements of the Statement of Principles are set out below:

- a person-centred aged care system;
- an aged care system that values workers and carers;
- a transparent and sustainable aged care system that represents value for money;  
and
- an aged care system that continues to improve.

16. The Exposure Draft of the Bill indicates that it is the intention of the Parliament that the Minister and every other person who administers the new Aged Care Act or who exercises any powers under that legislation must have regard to the Statement of Principles.<sup>10</sup>

17. Concerningly to ALA members, however, clause 23 of the Exposure Draft of the Bill makes it clear that “[n]othing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal”.<sup>11</sup> **The ALA submits that the Statement of Principles will not be effective or helpful unless aged care residents can fully challenge whether they are being adhered to by registered aged care providers.**

## Contract for services

18. Absent from the Exposure Draft of the Bill – but which was something of a centrepiece to the *Aged Care Act 1997* (Cth) – is what was called “User Rights”.<sup>12</sup> There is currently an obligation on aged care providers to ensure that their new clients are offered a contract for services, setting out matters such as: the obligation for payments, security of tenure, and a long list of items included in the various levels of care and accommodation details.

19. It has been clear that these requirements were always balanced in favour of the registered aged care providers and there has been little comment or debate on what matters should be

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<sup>9</sup> Ibid cl 22.

<sup>10</sup> Ibid cl 23(1).

<sup>11</sup> Ibid cl 23(3).

<sup>12</sup> *Aged Care Act 1997* (Cth) Part 4.2.

included in the contract for the protection of aged care residents and the recourse available, aside from mere complaint, for seeking redress for adverse outcomes to them.

20. Regardless of that, it is not presently apparent from Exposure Draft of the Bill whether there will be the same requirement for an aged care provider to offer the detailed terms of service and accommodation, which is a feature of the rights of aged care residents under the current legislation. The contract for services has been a key document, not just for aged care residents but also for their close family and friends – often the ones reviewing and negotiating contracts for service for their aging loved ones, who will remain in aged care for the rest of their lives.

**21. The ALA is thus seeking clarification from the Department on what is intended by the omission of any mention of a contract for services in the Exposure Draft of the Bill.**

## **Allocation of a place**

22. The Exposure Draft of the Bill also makes reference to place allocation, but this part of the Bill has not yet been drafted.<sup>13</sup>

23. The ALA notes that from time-to-time difficulties and conflict arise over whether or not a person has security of tenure in relation to a particular room and its facilities. The safety of that aged care resident's 'place' may be jeopardised by incidents of resident-on-resident assault, including sexual assault, and other unwelcome or troubling conduct of residents.

24. The right to remain in their room or place and the consequent right to require the removal or relocation of another resident who may be intimidating or harassing a resident is just one of the matters which should be clarified in any contract for services when addressing security of tenure.

**25. The ALA submits that a contract for services must include the Statement about Rights of the aged care resident to remain in the home, and in a particular room if they choose, with its amenities (including views) until termination of the contract, any agreed variation and/or death intervene.**

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<sup>13</sup> Exposure Draft: Aged Care Bill 2023 (Cth) Chapter 2, Part 3.

## Service guarantees under the Australian Consumer Law

26. The relevant service guarantees implied in contracts defined in the Australian Consumer Law are found in the Second Schedule to the *Competition and Consumer Act 2010* (Cth).
27. The ALA notes that there are four guarantees and two prohibitions on certain conduct which are of particular relevance in aged care, and they can be shortly summarised as follows:
- Section 60: Guarantee as to due care and skill;
  - Section 61: Guarantees as to fitness for a particular purpose etc;
  - Section 61: Service to achieve reasonably expected result;
  - Section 62: Guarantee as to reasonable time for supply;
  - Section 21: Unconscionable conduct in connection with goods or services; and
  - Section 50: A person must not use physical force ...or coercion in connection with... the supply of services.
28. A fundamental part of an agreement for services in most commercial settings in Australia is a written contract. Whether or not there is a contract, there is at least the Australian Consumer Law. It is fair to assume that few providers and only a handful of intending residents, are aware of these overarching rights.
29. However, to right the unfair imbalance of power in the case of proposed measures for regulating the system, and relying entirely upon the regulator/s – and the unenforceable “rights” of aged care residents – is to simply return to a system which is doomed to fail.
30. **The ALA contends that all of the promises in Exposure Draft of the Bill, which are made to the regulator by the registered aged care providers and which are relevant to the aged care client, should be appropriated – where relevant to the aged care setting for service delivery – to each contract for aged care services (whether residential or home care) and regenerated into direct promises to the consumer.**
31. The ALA submits that the Exposure Draft of the Bill (and the subsequent versions of this proposed legislation) could usefully make it clear that jurisdiction in relation to legal disputes over an aged care contract may be litigated in State and Territory Tribunals and lower courts. The effect of doing so will bring disputes arising from the contract into the jurisdiction of the various Civil and Administrative Tribunals in their Consumer divisions.

32. Moreover, Local Courts around the country will also have jurisdiction in their various civil claims divisions, thus opening up for the aged care client the choices which have been sadly lacking for so many years. Tribunals and the lower common law courts are well distributed throughout the country in rural, regional and offer easier access to people in remote areas.
33. The following are parts of the Exposure Draft of the Bill which should be legally incorporated into the care services contract as promises by the registered aged care provider – this commitment by the registered aged care provider would be considered a term of the contract. That will enable and empower the aged care resident, who will have recourse to legal redress in a manner of their choosing:
- Clause 20 – Statement of Rights;
  - Clause 22 – Statement of Principles; and
  - Clause 14 – Aged Care Quality Standards (which will be included in the aged care Rules, the updated version of which are yet to be published).

## **The new compensation pathway**

34. The ALA notes that clause 127 of the Exposure Draft of the Bill refers to pathways for compensation for “serious injury or illness” arising from negligence but that there appears to be no allowance for compensation for the intentional torts of unlawful restrictive practices, assault or battery.
35. This is a double penalty upon those who might seek compensation for unlawful restraint in the same manner as those Australians who are not in aged care may do. The ALA submits that this amounts to discrimination against those who are care recipients within Australia’s aged care system.
36. The compensation pathway proposed in the Exposure Draft of the Bill requires that the criminal proceedings which are brought against the provider or their personnel must first be completed. Only then is the aged care client permitted to seek compensation.
37. Much has been made of the promise of access to justice, which will accompany proceedings for breach of obligations by providers and their employees. However, we now have the details and those details make it absolutely clear that there would be no claim for damages for harm

or injury suffered as a result of either intentional (common law assault, battery or unlawful restrictive practices) or negligent outcomes of harm or injury, arising from poor care until other legal proceedings are completed.

38. The Exposure Draft of the Bill makes it clear that no pathway to compensation is available, unless and until a criminal proceeding has been successful.<sup>14</sup> As a result, only upon completion of those processes, sentencing for breach and civil penalties will the aged care resident be in a position to ask for compensation for harm or injury.
39. In effect, for somebody of advanced age to have to wait until criminal proceedings are completed and only then to be entitled to seek some compensation for their injury, only in the court in which the criminal proceedings have been brought, is – in the ALA’s view – unacceptable.
40. It becomes obvious that recourse under this provision for compensation orders, requires that the issues first be tested against the criminal standard of proof (that is, beyond reasonable doubt) which we submit is an unfair standard of proof for this context. Only if a conviction is achieved does the Exposure Draft of the Bill allow for a claim to be made.
41. This is a situation in which an alternative dispute resolution (ADR) may assist the aged care resident and resolve the issues promptly, since the parties employ mediators and/or arbitrators, the focus is on the proceedings, and there is no waiting list which might extend a case hearing into a wait of many months to years.
42. **The ALA contends that time to wait (typically, from many months to years) upon the completion of criminal proceedings in our legal system is not something that can be tolerated by a person of advanced age.** Their right to claim for compensation for breach of the requirements of federal aged care legislation should be a matter which is the subject of a claim just as any other civil claim brought by others in Australia are available – where the standard of proof is upon the balance of probability.
43. Moreover, and perhaps, even more importantly, the provision illustrates the requirement by making it a precondition to their claim for damages, brought in accordance with the civil law, unavailable, until the criminal case is resolved.

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<sup>14</sup> See Exposure Draft: Aged Care Bill 2023 (Cth) cl 127.

- a. To put it another way, by reversal of the onus of proof for liability and civil and criminal trials, the Exposure Draft of the Bill requires that the civil claims pathway is unavailable until, and unless, the claim is proved beyond a reasonable doubt. If the claim brought in the criminal court is not successful, and the defendant is found not guilty, it appears there will be no pathway to compensation under this legislation.
44. It is possible to argue in certain circumstances that there may be no prejudice to the trial prospects of an accused under the criminal proceedings, but that is just another roadblock requiring resources and – importantly in the context of aging aged care residents – time.
  45. **The ALA opposes such deliberate barriers, as detailed above, being placed in front of possible claims brought by such vulnerable people.**

## Current immunity provisions regarding restrictive practices

46. In 2022, Schedule 9 of the Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 (Cth) added provisions to Part 4.1 of the *Aged Care Act 1997* (Cth).<sup>15</sup> Those additions to the *Aged Care Act 1997* (Cth) offer 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.
47. The provision for immunity of registered aged care providers from those legal claims has not been repeated in this Exposure Draft of the Bill. The ALA notes that immunity has been offered to certain officers of the Commission,<sup>16</sup> but there is no repeat of the immunity offered to registered aged care providers.
48. The Federal Government had given an assurance at the time of its introduction that the immunity provision was short-term only and was part of “interim arrangements” that would expire at the end of two years in 2024.<sup>17</sup> **The ALA is therefore seeking clarification from the Department as to whether the immunity provision will be continued or whether that provision will be allowed to lapse.**

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<sup>15</sup> *Aged Care Act 1997* (Cth) s 54.11, entitled ‘Immunity from civil or criminal liability in relation to the use of a restrictive practice in certain circumstances’.

<sup>16</sup> See Exposure Draft: Aged Care Bill 2023 (Cth) cl 222.

<sup>17</sup> See, eg, Explanatory Memorandum, Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022 (Cth) 3.

## Delegation of authority

49. The ALA agrees that there needs to be an accessible person or authority to exercise the authority to make decisions as a delegate for the older person in aged care. Experience demonstrates, though, that disputes and conflict, including disagreements within families, will inevitably arise. However, the format for delegation proposed in the Exposure Draft of the Bill would conflict with well understood, existing arrangements – such as, enduring guardianships and/or State or Territory Tribunal-appointed guardians and attorneys and/or financial managers.
50. **The ALA recommends that this function, if it is required under the new aged care legislation, should be delegated to the guardianship division of the various State and Territory Civil and Administrative Tribunals to identify the person who should be the delegate – noting some reform may be needed to the mandate of some of those bodies relating to the aged care system.**
51. The laws of the States and Territories throughout the Commonwealth allow for the delegation of special authority by persons who, for example, because of a disability are apprehending a time when they may be unable to make decisions. The instruments which are described in the various legislation of the States and Territories are generally known as enduring guardianship appointments, which apply in relation to the management of personal affairs, and enduring powers of attorney which delegate authority from one person to another for the management of their financial affairs.
52. There is additional legislation which has established, throughout the Commonwealth in each of the States and Territories, a civil and administrative tribunal which has a mandate to deal with conflict and dispute arising out of the making of the guardianship and power of attorney instruments as well as the management of the authority after the documents or delegation orders have commenced.
53. The case list of the tribunals is often populated by conflict within the family or others who might have been delegated to assume responsibility. Those conflicts can be serious for the protection of the older person or parent and may introduce enmity and division and can end sibling relationships. Hearings take place and decisions are made in accordance with the duties of the tribunal as expressed in the legislation under which they operate. Some of those conflicts may well arise in relation to decisions required to be made in the aged care setting.

54. In the proposal contained within the Exposure Draft of the Bill for the System Governor to be in a position to nominate delegates whose decision-making responsibility involves matters of aged care,<sup>18</sup> there appears to be no legal mechanisms for dispute resolution including appeals from decisions. The failure to offer those pathways will inevitably raise the level of conflict, especially between family members. Sometimes these issues become urgent, especially when the older person is nearing death.
55. We suggest that further consideration be given to the mechanisms established when this new aged care legislation is enacted for decision-making, to enable resolution of conflicts which may not be susceptible to informal discussion but which may require an independent party to hear from both sides and then provide a decision which is enforceable. The obvious authority for reviewing conflict should be delegated to the various civil and administrative tribunals throughout the country, which are well-established and their mandate well understood.

## Whistleblower protections

56. The ALA appreciates that the Department has taken on feedback from the ALA and other stakeholders and made amendments to the proposed aged care whistleblower framework, including:
- a. not requiring whistleblowers to provide their name as a prerequisite for making a disclosure and attracting whistleblower protections – that is, allowing anonymous disclosures;<sup>19</sup> and
  - b. removing the requirement that whistleblowers make disclosures “in good faith”.<sup>20</sup>
57. However, the ALA submits that fundamentally there are still issues with creating this framework. We have expanded on the following in previous submissions, to which we refer the Department:<sup>21</sup>

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<sup>18</sup> See Exposure Draft: Aged Care Bill 2023 (Cth) Chapter 1, Part 4.

<sup>19</sup> Department of Health and Aged Care, Australian Government, *A New Aged Care Act: Exposure Draft* (Consultation Paper No. 2, December 2023) 87.

<sup>20</sup> *Ibid.*

<sup>21</sup> See, eg, Australian Lawyers Alliance, Submission to the Attorney-General’s Department, *Public sector whistleblowing: Stage 2 reforms* (20 December 2023) <[www.lawyersalliance.com.au/documents/item/2613](http://www.lawyersalliance.com.au/documents/item/2613)>.

- a. Whistleblower rights should be harmonised into one legislative framework, instead of creating new whistleblower frameworks within different pieces of legislation and for different government programs or for different industries; and
- b. Further, a Whistleblower Protection Authority or a Whistleblower Protection Commissioner must be established to remedy the power imbalances between whistleblowers and those who are the subject of whistleblower disclosures.

**58. As such, the ALA recommends that the Department reconsiders creating this new whistleblower framework, and we recommend that the Federal Government instead develops one legislative framework to harmonise all existing whistleblower frameworks and to also cover those in the aged care space.**

## Conclusion

59. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Department of Health and Aged Care on the Exposure Draft of the Aged Care Bill 2023 (Cth).

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



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