

Consultation Draft: Aged Care Rules 2025

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

14 May 2025

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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 access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Department of Health and Aged Care ('Department') on the Consultation Draft of Aged Care Rules 2025 ('Rules').
2. As lawyers whose mandate is to represent and advise people upon their rights (whether at law or arising from contract), ALA members have raised concerns about a shortfall in the rights for aged care residents in residential aged care homes.
3. Our members are particularly concerned that people who are receiving aged care should be offered the same rights as other Australians, including having proper recourse for harm and compensation for injury.
4. The ALA's submission addresses features of the Rules which have been included in the recent Release 4b by the Department, including with reference to broader aged care legislative reform. We have not attempted to raise issues relating to at-home care except to the extent there may be common issues which overlap with issues that arise in residential aged care.

Obligations on registered providers and the rights provided for aged care residents

5. This section of the ALA's submission addresses matters in and related to Chapter 4, Part 4 of the Rules, regarding the obligations on registered providers and the conditions on the registration of registered providers.

Recourse for an aged care resident

6. The principles for recourse for a resident in the *Aged Care Act 2024* (Cth) ('ACA 2024') – as well as the *Aged Care Act 1997* (Cth) – are that disputes or claims which are included as complaints are directed to the Aged Care Quality and Safety Commission (ACQSC). The staff of the ACQSC have protocols and binding rules which require a range of actions in response to a complaint. However, it is unlikely that the resident who may have suffered injury through poor care will be able to manage their complaint. As such, that resident will rely upon a family member or supporter to advocate for them.

7. A written complaint, when made, is usually followed by an ACQSC acknowledgment, discussion with the resident's advocate, an inquiry (including an inspection of records and discussions with management and staff), as well as a discussion with the complainant. In due course the response will be made in writing and will refer to some findings, and most significantly, that steps have been communicated to the aged care provider in relation to staff training – perhaps requiring, in serious cases, additional staff or even a temporary management person.
8. What will be missing is likely an admission of responsibility for staff error and any guarantee that the registered aged care provider has undertaken to ensure that the error is not repeated in the future.
9. The signal failure of this approach is the omission to assess, inquire, or impose any obligation on the registered aged care provider (including its management and staff) to develop and execute a recovery plan which may improve the disability, pain and harm that has occurred to the vulnerable aged care resident. The registered aged care provider should accept within a short time after the incident the responsibility for recovery, where that is feasible and necessary. The registered aged care provider should acknowledge the common law obligation of non-delegable liability, where an incident has occurred involving staff, as well as the need for a speedy pathway to medical (including specialist) assessment and therapies for the aged care resident. **The ALA, therefore, contends that the agreement for services should clearly state all of these obligations on the registered aged care provider.**

Rights of aged care residents

10. Sections 142 and 143 of the *ACA 2024* provide an obvious pathway for the registered aged care provider to be liable for any injuries to aged care residents, and to also have obligations to an injured resident arising from registration conditions imposed by the Commissioner.
11. However, this must not be a complete substitute for contractual obligations negotiated upon entry to the aged care home. The right to negotiate is an essential right for service consumers and must apply to our most vulnerable, including through their advocate/s.
12. Similarly, it must be ensured that quick attention is paid to the injury of an older person in the interests of their recovery (whether wholly or partially) and to ameliorate pain and suffering.

13. The *ACA 2024* has been described again and again as being focused upon the individual person who is receiving aged care.²
14. **We are concerned, however, that the provisions of the *ACA 2024* (including section 144) and the associated Rules do not provide sufficient protection for the rights of aged care residents.** It appears that the intended focus of the legislative framework on aged care residents only requires that the registered aged care provider has the “understanding” needed to keep the individual safe. The ALA notes that the law must require action, rather than mere understanding, especially when there is a non-delegable duty owed by the registered aged care provider to a person in their care.
15. We remain concerned that the attempt at balancing the needs of the aged care resident with the interests of the more powerful registered aged care provider has resulted in outcomes that fall far short of community expectations.

The Statement of Rights

16. The ALA remains concerned that the Statement of Rights set out in section 23 of the *ACA 2024* is unenforceable at law, and yet that reality is not presented at all relevant points in the *ACA 2024* and the associated Rules. Any enforcement of the Statement of Rights depends on the ACQS officers who deal with complaints to respond to the complainant.
17. Meanwhile, in serious cases of harm or injury, the aged care resident is enduring pain and suffering from wounds and trauma without any special ‘person-focused’ medical assessment and without a plan for recovery, where that is possible. In the experience of ALA members and their clients, those kinds of situations do occur with frequency and, especially in those instances, the ALA submits that rehabilitation should be at the cost of the aged care provider when staff have been negligent.
18. It should not be necessary to bring legal proceedings to enforce such an obvious liability. **The ALA submits that, at the very least, mediation and arbitration should be available and should have been included in the *ACA 2024* and the associated Rules as a recourse to individuals who have been harmed.**

² See, eg, *Aged Care Act 2024* (Cth) s 144(2).

19. **The ALA contends that any fair attempt to assist an aged care resident’s understanding of the Statement of Rights, and to provide information about broader contractual consumer rights, should include the following:**
- a. That without a clause expressly stating the Statement of Rights is enforceable by the consumer, the only recourse is complaint; and
 - b. That the consumer rights they will have in any event are those included in the *Australian Consumer Law (ACL)*:
 - i. services must be fit for purpose;
 - ii. services must be delivered with due care and skill;
 - iii. services must be delivered in a reasonable time;
 - iv. the Provider must not act in an unconscionable way; and
 - v. no force must be used in the delivery of services.
20. Those references should be accompanied by an elaboration of each of the protections.

Compliance with the Aged Care Quality Standards

21. The ALA notes that section 146 of the *ACA 2024* requires registered aged care providers, as a condition of registration, to “conform with the Aged Care Quality Standards”.
22. We are concerned, however, that breach of this condition does not mean registration or renewal of registration will be refused – despite a provider breaching the *ACA 2024* and the associated Rules. There are opportunities for aged care providers to appeal decisions of this kind. The decision is left with the Regulator, as is only proper.
23. **ALA members are very concerned – and seek Department action to address this issue – that the individual who has been harmed has no place in the decision-making and the various compliance obligations arising from an incident, and their voice will not be heard, despite all the claims to the contrary about being at the centre of the legislation.**

Delivery of funded aged care services, the requirement for service agreements, and care and services plans

24. This section of the ALA's submission addresses matters in and related to Chapter 4, Part 4 of the Rules, with regards to the delivery of funded aged care services and the requirement for service agreements.

25. The ALA notes that section 148 of the *ACA 2024* outlines the following:

Delivery of funded aged care services

It is a condition of registration that a registered provider of a kind prescribed by the rules must:

- (a) deliver funded aged care services in accordance with any applicable requirements prescribed by the rules; and
- (b) maintain and manage any residential care homes in accordance with any applicable requirements prescribed by the rules; and
- (c) have an agreement with each individual accessing funded aged care services (a **service agreement**) in accordance with any applicable requirements prescribed by the rules; and
- (d) deliver funded aged care services to each individual in accordance with that agreement; and
- (e) have a plan about the delivery of funded aged care services to an individual (a **care and services plan**) for each individual accessing funded aged care services in accordance with any applicable requirements prescribed by the rules...

26. The definition of "service agreement" can be found in section 7 of the *ACA 2024*.

27. **We submit for the Department's consideration the following additions (in red) and amendments to rule 148-65 regarding the general requirements for service agreements:**

a. Variation of service agreement in rule 148-65(6):

(6) A service agreement must provide that the agreement may be varied: ...

(b) by mutual consent of the individual and the registered provider if: ...

(ii) ~~the provider has obtained~~ **there is mutual consent in writing** ~~written consent~~ from the individual **and from the provider for the provider** to make the variation;

b. Review of service agreement in rule 148-65(8):

(8) Without limiting the nature of the review, the provider must:

(a) give the individual **or their appointed advocate** an opportunity to participate in the review;

28. Further, we submit the following additions (in red) to rule 148-80 regarding the care and services plan:

a. Care and services plan to be accessible to individual in rule 148-80(6):

(6) This subsection applies to a registered provider that is delivering funded aged care services to an individual under any of the following registration categories or in the event referred to in subsection (d):

(a) home and community services;

(b) assistive technology and home modifications;

(c) advisory and support services-;

(d) if the individual has been injured as a result of negligence and the registered provider has accepted responsibility for the incident as part of the provider's duty of care.

Complaints and resolution of complaints

29. The residential aged care contract must refer to the complaints system by which complaints are to be resolved by the provider. There is most often in contracts information about how a complaint may be made to the complaints scheme. The aged care resident can easily be misled into believing that this is the only means by which a complaint is managed. There is typically nothing in the contract or any accompanying documents that indicates that there are any other alternatives. The *ACL* is not mentioned at all.

30. The ALA proposes that the implied guarantees of service in the *ACL* and the other protections referred to earlier in our submission, should be referenced in aged care contracts in order to draw attention to them.³

31. We also note for the Department's consideration that another pathway, in addition to the *ACL*'s consumer protections, is the *Contracts Review Act 1980* (NSW). A court in NSW may set aside a contract and the court's mandate to review the contract brought by the plaintiff includes a range of issues which might be the subject of evidence, including:⁴

(a) whether or not there was any material inequality in bargaining power between the parties to the contract,

³ *Competition and Consumer Act 2010* (Cth) sch 2.

⁴ See: *Contracts Review Act 1980* (NSW) s 9.

- (b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation,
- (c) whether or not it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract,
- (d) whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract,
- (e) whether or not—
 - (i) any party to the contract (other than a corporation) was not reasonably able to protect his or her interests, or
 - (ii) any person who represented any of the parties to the contract was not reasonably able to protect the interests of any party whom he or she represented,
 because of his or her age or the state of his or her physical or mental capacity,
- (f) the relative economic circumstances, educational background and literacy of—
 - (i) the parties to the contract (other than a corporation), and
 - (ii) any person who represented any of the parties to the contract,
- (g) where the contract is wholly or partly in writing, the physical form of the contract, and the intelligibility of the language in which it is expressed,
- (h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act,
- (i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect,
- (j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act—
 - (i) by any other party to the contract,
 - (ii) by any person acting or appearing or purporting to act for or on behalf of any other party to the contract, or
 - (iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract,
- (k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party, and
- (l) the commercial or other setting, purpose and effect of the contract.

Proposed additional mandatory clauses to the residential aged care contract

32. Having regard to the Rules made public by the Department through Release 4b, the ALA Submits that there are not sufficient provisions prescribed for the services agreement to offer

reasonable accessible and speedy resolution to incidents involving harm and injury and other matters which are reportable incidents to the ACQSC involving an individual.

33. **We, therefore, submit that the following draft contract annexure be adopted and added to the Rules, which will truly empower individuals receiving aged care in a residential setting and which may be adapted for other service delivery modes:**

A. Notwithstanding the provisions of the *Aged Care Act 1997* (Cth), the parties to this contract agree that the following matters which are to be found in the *Aged Care Act 2024* (Cth) are incorporated into this agreement and form warranties on the part of the Provider promised to the Consumer:

1. Statement of Rights; and
2. Quality of Care standards as prescribed for the individual in the *Aged Care Act 2024* (Cth) and the *Aged Care Rules 2025* (Cth).

B. The parties agree that at the option of and by request in writing by the Consumer, all issues matters incidents and events which occur during the term of this agreement and upon which the Consumer and the Provider disagree may at the Consumer's option be referred for conciliation and/ or mediation and /or binding arbitration.

In the event the parties are unable to agree upon rules for the processes or procedures, the following Australian Disputes Centre rules shall apply:

Conciliation

- (a) The parties shall endeavour to settle any dispute arising out of or relating to this agreement, including with regard to its existence, validity or termination, by conciliation administered by the Australian Disputes Centre (ADC) before having recourse to arbitration or litigation.
- (b) The conciliation shall be conducted in accordance with the ADC Guidelines for Commercial Conciliation operating at the time the matter is referred to ADC ('the Guidelines').
- (c) The terms of the Guidelines are hereby deemed incorporated into this agreement.
- (d) This clause shall survive termination of this agreement.

Mediation followed by Arbitration (Australian-only Contract)


The parties shall endeavour to settle any dispute arising out of or relating to this agreement, including with regard to its existence, validity or termination, by mediation administered by the Australian Disputes Centre (ADC).

- (a) The mediation shall be conducted in accordance with the ADC Guidelines for Commercial Mediation operating at the time the dispute is referred to ADC (the Guidelines).
- (b) The terms of the Guidelines are hereby deemed incorporated into this agreement. In the event that the dispute has not settled within twenty-eight (28) days following referral to ADC, or such other period as agreed to in writing between the parties, the parties shall submit the dispute to arbitration in Sydney.
- (c) The arbitration shall be administered by ADC and conducted in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to arbitration ('the Rules').
- (d) The terms of the Rules are hereby deemed incorporated into this agreement.
- (e) The arbitrator shall not be the same person as the mediator unless the parties each consent in writing to the arbitrator so acting.

This clause shall survive termination of this agreement. Costs shall be at the discretion of the mediator/arbitrator.

Conclusion

- 34. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Department of Health and Aged Care on the Consultation Draft of Aged Care Rules 2025.
- 35. The ALA is available to provide further assistance to the Department on the issues raised in this submission.



Michelle James
National President,
Australian Lawyers Alliance