Law Council
OF AUSTRALIA

Aged Care Quality and Safety

Royal Commission into Aged Care Quality and Safety

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
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- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Elder Law and Succession Committee, its National Human Rights Committee, its Indigenous Legal Issues Committee, Access to Justice Committee, the Law Institute of Victoria, the Queensland Law Society, and the Law Society Northern Territory, in the development of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make this submission to the Royal Commission into Aged Care Quality and Safety (**Royal Commission**). Recent public reports and inquiries have identified serious concerns about the quality of care provided, including to some of the Australian community's most vulnerable people.[1] These concerns have intensified amid the COVID-19 pandemic which has emphasised the vulnerabilities of older persons and posed additional challenges for the delivery of care.
2. As an overarching comment, the Law Council notes that recent aged care reforms have promoted a 'more consumer-driven, market-based system' in line with the Aged Care Sector Committee's Aged Care Roadmap.[2] It is of the view that a framework based on an informed recognition of inherent human rights is more appropriate for a system that seeks to ensure the right of older persons to long-term care and support, rather than a consumer-focused system with some checks and balances. It submits that a federal charter of human rights would be one overarching tool in facilitating such an approach.
3. The Law Council considers that in addition to a federal human rights act, much can be done to strengthen Australia's aged care system. Despite new laws to minimise the use of restrictive practices, the Law Council is concerned that these practices continue to be used as a first-line response by aged care providers to manage challenging behaviours. In this submission, it calls for stronger and more consistent regulation in line with the strict rules implemented in the disability services sector. Consideration should also be given to addressing the underlying factors which lead to the overuse of physical and chemical restraints, such as staffing pressures and funding constraints.
4. Independent oversight of aged care services is essential to ensure transparency and accountability in the provision of quality care. The Law Council submits that Australia's ratification of the Optional Protocol to the Convention against Torture (**OPCAT**)[3] presents a critical opportunity to improve the oversight system of aged care facilities.
5. This submission highlights issues with the existing scheme for reporting assaults in respect of residential aged care recipients. The Law Council supports the Australian Law Reform Commission's (**ALRC**) recommendation for a new serious incident response scheme which would extend to flexible and in-home care, as well as residential care. It considers that this scheme should be mandatory and should require appropriately detailed reporting of incidents. The Law Council welcomes the Australian Government's progress on this issue, while raising some key issues for consideration, and encourages an exposure draft of proposed legislation on this model to be released.
6. The Law Council acknowledges the Australian Government's recent funding injection for legal assistance services to uphold the rights of older people experiencing elder abuse, including for health-justice partnerships. However, the Law Council remains concerned that this is inadequate in light of the acute and widespread nature of elder abuse within the community and calls for substantial additional funds for legal assistance services to provide specialist advice, representation and education for

[1] See eg, Kate Carnell AO and Rob Paterson ONZM, 'Review of National Aged Care Quality Regulatory Processes' (October 2017) 73.
[2] Commonwealth Government, Aged Care Sector Committee, *Aged care reform roadmap*, 2016.
[3] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

older persons. These services play a fundamental, often unrecognised, role in ensuring transparency and scrutiny of aged care facilities. However, the underfunding of civil legal assistance services means that, for example, just over one per cent of legal aid grants go to persons aged 65 years and over, despite this group constituting 16 per cent of the population.

7. The Royal Commission has already highlighted the issue of malnutrition and dehydration as a major quality and safety issue linked to consequential adverse outcomes. The Law Council notes with concern the lack of comprehensive national nutrition and menu planning standards that hold aged care providers to account.

8. The Law Council is concerned that quality of care is compromised by the aged care system's poor interface with health care services. Greater facilitation of residents' access to their usual medical practitioner is needed. It also calls on the Australian Government to continue to review the Medicare Benefits Schedule relating to general practitioner visits to residential aged care facilities to incentivise continuity of care. More generally, the Law Council supports improved information sharing frameworks to streamline care, while incorporating confidentiality and privacy safeguards.

9. Recognising that older persons are not a homogenous group, the Law Council highlights specific concerns surrounding the delivery of care to people with disabilities and First Nations people. It calls on the Royal Commission to strengthen its emphasis on addressing needs in ways that are accessible, flexible, and culturally safe. It stresses the need for services which are not only First Nations-specific, but First Nations-led and provided in locations where First Nations people need them.

10. The ability for aged care providers to effectively respond to diverse needs is underpinned by sustainable staffing, training and procedures. The Aged Care Workforce Strategy Taskforce concluded in 2018 that there are significant gaps in the basic care skills of the workforce. The Australian Government should consider mandatory minimum qualifications and training for personal care workers providing residential aged care services, as well as a requirement for all aged care staff to undertake ongoing education and training programs. In addition, the Law Council submits that new provisions should be introduced to mandate minimum staffing ratios with regard to appropriate skill mix, as well as a mandatory national employment screening process for Commonwealth Government funded aged care providers.

11. Having regard to the increased use of technology for the purpose of monitoring health and safety, the Law Council calls on the Australian Government to develop practical guidance for aged care service providers to ensure technology is used in a way that complies with Australia's obligations to protect, respect and fulfil the human rights of older persons. It also considers that to reduce the risk of elder abuse, residential aged care facilities should ensure that all staff have a sufficient understanding of the role, responsibilities and limitations of attorneys under power of attorney arrangements. It also supports moves towards supported decision-making across Australian jurisdictions, subject to careful consideration of how this will work in practice.

12. Finally, the Law Council suggests that in the interests of greater transparency, all aged care providers who receive funding under the Aged Care Funding Instrument should be required to provide the Commonwealth Department of Health with regular and detailed accounts as to how the funds are spent at the site level.

13. The Law Council hopes that the Royal Commission's final report will build on existing recommendations to drive practical outcomes to strengthen Australia's aged care system. All aged care recipients deserve high quality care in a safe environment that protects their health and wellbeing.

Recommendations

Recommendation 1

- The Royal Commission incorporate a more explicit examination of Australia's international human rights obligations and their particular relevance to older persons and their adequacy in its final report and recommendations.

Recommendation 2

- The Australian Government adopt a federal human rights act.

Recommendation 3

- The principles and core strategies of the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector should form the basis of implementing a national approach to the regulation of restrictive practices in the aged care sector. In particular, the standards set for restrictive practices set by the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 should form a yardstick for reform.

Recommendation 4

- The provisions in the Quality Principles for physical and chemical restraint should be reviewed both against the above standards, and outstanding concerns raised by the Parliamentary Joint Committee on Human Rights, including with respect to:
    - the need for explicit requirements to exhaust alternatives to the use of restraint, including preventative measures;
    - obligations to obtain or confirm informed consent prior to the administration of chemical restraint;
    - improved oversight of the use of restraints in aged care facilities; and
    - mandatory reporting requirements for the use of all types of restraint.

Recommendation 5

- Ongoing consideration should be given to addressing the underlying factors which lead to the overuse of physical and chemical restraints in aged care, including limited numbers and pressures on staff, funding constraints, and the extent to which these impede the implementation of alternative means of management.

Recommendation 6

- Australia's National Preventative Mechanisms should include aged care facilities as a 'place of detention' for the purposes of OPCAT monitoring.

Recommendation 7

- Australia should act quickly to implement OPCAT:
    - under compliance frameworks with clear accountability and transparency mechanisms;
    - documenting core elements of OPCAT implementation in legislation or, at a minimum, in a formal agreement;

- ensuring adequate resourcing, including for the Commonwealth Ombudsman as central NPM and federal NPM; and
- improving links and communication with civil society representatives as part of this process.

Recommendation 8

- The Department should release an exposure draft of legislation aimed at implementing the proposed serious incident response scheme for consultation in the near future, given the fundamental importance of the scheme to identifying and addressing elder abuse in aged care.

Recommendation 9

- The serious incident response scheme should:
  - apply to flexible and in-home care as well as residential care;
  - apply in residential care to incidents involving persons beyond staff, such as visitors and family;
  - include appropriate provisions for non-victimisation, privacy and confidentiality;
  - apply to all serious incidents rather than permitting exemptions for certain categories or providers; and
  - when enacted, be subject to regular, independent review.

Recommendation 10

- Health-justice partnerships should be expanded for older persons in aged care, including in rural, regional and remote areas, and through long-term, secure funding arrangements.

Recommendation 11

- The Australian and state and territory governments should provide substantial additional funds for legal assistance services to provide specialist advice, representation and education for older persons to ensure accountability in the provision of aged care, and to uphold their rights. This should include tailored support for diverse groups and First Nations' community-controlled services.

Recommendation 12

- The Quality Standards should include more prescriptive nutrition provisions, having regard to the specific guidelines for older people in the National Health and Medical Research Council's *Australian Dietary Guidelines*, to hold aged care providers accountable for the nutrition standards they provide. The provisions should also impose minimum standards for hydration.

Recommendation 13

- The Australian Government should continue to review the Medicare Benefits Schedule relating to general practitioner visits to residential aged care facilities to incentivise continuity of care.

Recommendation 14

- The Australian Government should implement improved information sharing frameworks to streamline care, subject to privacy and confidentiality considerations.

Recommendation 15

- That greater emphasis be given to recognising and addressing the diverse needs of people with disability in aged care service delivery, with any measures underpinned by sustainable staffing, training and procedures.

Recommendation 16

- The Royal Commission strengthen its emphasis on addressing First Nations people's needs in aged care in ways that are flexible, adaptable and culturally safe, as well as First Nations-led. This should extend to services which uphold individuals' rights and ensure accountability of service delivery, such as First Nations' legal services and advocacy networks.

Recommendation 17

- The Australian Government should work with the aged care industry to implement the *Aged Care Workforce Strategy Taskforce Report* recommendations.

Recommendation 18

- New provisions should be incorporated within the Act to mandate minimum staffing ratios with regard to appropriate skill mix.

Recommendation 19

- Residential aged care providers should be required to display in a public common area the staff to resident ratios at that facility across each shift, for the information of residents, prospective residents and their representatives. Consideration should also be given to including staff to resident ratios in the Schedule to the 'My Aged Care' website.

Recommendation 20

- The Law Council supports the following proposals made by the ALRC, subject to the careful development of appropriate safeguards:
    - there should be a national employment screening process for Commonwealth Government funded aged care providers; and
    - a national database should be established to record the outcome and status of employment clearances.

Recommendation 21

- The Australian Government should consider mandatory minimum qualifications and training for personal care workers providing residential aged care services.

Recommendation 22

- The Australian Government should mandate that accredited dementia care training is undertaken by all aged care workers.

Recommendation 23

- The Australian Government should consider requiring all aged care staff to undertake ongoing education and training programs. This should encompass appropriate training in cultural competency, identifying and acting on elder abuse, and human rights.

Recommendation 24

- The Australian Government should develop practical guidance for aged care service providers to ensure technology is used, eg for the purposes of monitoring health and safety, in a way that complies with Australia's obligations to protect, respect and fulfil the human rights of older persons.

Recommendation 25

- Residential aged care facilities should ensure that all staff have a sufficient understanding of the role, responsibilities and limitations of attorneys and/or other substitute decision-makers.

Recommendation 26

- Consideration should also be given to requiring aged care facilities to provide information and encourage residents to complete an advance care planning document as soon as possible after entering an aged care facility.

Recommendation 27

- All aged care providers, who receive Aged Care Funding Instrument funds, should be required to provide the Commonwealth Department of Health with regular and detailed accounts as to how the funds are spent at the site level. This data should be audited.

Introduction

14. Aged care is an enormous industry in Australia[4] and demand is growing. In 2018-19 over 1.3 million people received some form of aged care across Australia.[5]

15. The proportion of older people in Australia's population has increased considerably in recent years, with projections indicating that this trend is set to continue.[6] Further, an increasing number of older Australians are classified as having a profound or severe disability.[7] These factors are putting pressure on aged care services, challenging their ability to deliver a high standard of care for residents with wide-ranging needs.

16. The Royal Commission's inquiry comes at a time of intense public interest and community concern regarding the failings of aged care services.[8] Most recently, the

[4] The aged care industry in Australia is worth over AU$22 billion dollars a year. See, Australian Aged Care Financing Authority, 'Funding and financing of the aged care sector' (Sixth report, 2018) 2.
[5] Commonwealth Government, Department of Health, 2018–19 Report on the Operation of the Aged Care Act 1997, 11.
[6] Joseph Ibrahim, 'Recommendations for Prevention of Injury-Related Deaths in Residential Aged Care Services' (Victorian Institute of Forensic Medicine, 2017) 196.
[7] Australian Institute of Health and Welfare, 'Disability and Ageing Australian Population Patterns and Implications' (2000) xviii.
[8] See eg, Sheradyn Holderhead, 'Oakden scandal: Documents released by Aged Care Quality Agency into Oakden nursing home reveal more horrors', *The Advertiser* (Online, 26 May 2017)

Queensland Parliamentary Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee presented the final report of its major inquiry into the delivery of aged care, end-of-life care and palliative care, and community and health practitioners' views on voluntary assisted dying (**Qld Parliamentary Inquiry**).[9] The Law Council has had regard to the Qld Parliamentary Inquiry's findings and recommendations in this submission.

17. The Royal Commission has already received evidence of serious failings in assuring older people their dignity and rights in aged care settings.[10] Summarising the findings of its Interim Report, the Royal Commission characterised the aged care system in Australia as 'a shocking tale of neglect'.[11] It found that:

> *… the aged care system fails to meet the needs of its older, vulnerable, citizens. It does not deliver uniformly safe and quality care, is unkind and uncaring towards older people and, in too many instances, it neglects them*.[12]

18. Among other failings, the Royal Commission has revealed instances where the use of restrictive practices has been inhumane, abusive and unjustified; often without permission and as a first-line response to manage challenging behaviours.[13] This point echoes earlier concerns raised in the ALRC's Inquiry into Elder Abuse – *A National Legal Response*.[14]

19. The Law Council acknowledges the Australian Government's broader recent efforts to improve outcomes for older people. This includes responding to recommendations made by the following inquiries:

    - *ALRC Inquiry into Elder Abuse* (2017)[15] – through launching of the National Elder Abuse Action Plan,[16] as well as new regulations to prevent excessive use of physical and chemical restraints in aged care;[17] and
    - *Carnell-Paterson Review of National Aged Care Quality Regulatory Processes* (2017)[18] – through establishing an integrated and independent single agency that regulates safety and quality in aged care (the Aged Care Quality and Safety Commission (**ACQSC**)).

20. The Law Council also welcomes moves by the Attorney-General to enhance protections relating to the use of enduring power of attorney instruments, including consideration of

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<https://www.adelaidenow.com.au/news/south-australia/oakden-scandal-documents-released-by-aged-care-quality-agency-into-oakden-nursing-home-reveal-more-horrors/news-story/5dfbd01f9b0349a7e9802abaad293e69> 'Sydney aged-care worker arrested for allegedly assaulting elderly man' *The Guardian* (Online, 6 Sep 2018) <https://www.theguardian.com/australia-news/2018/sep/06/sydney-aged-care-worker-arrested-for-allegedly-assaulting-elderly-man>; 'Families wrongly denied access to loved ones in aged care, advocate says' *Mornings with Virginia Trioli* (ABC Radio, 28 April 2020) <https://www.abc.net.au/radio/melbourne/programs/mornings/council-of-the-ageing-says-homes-must-allow-families-to-see-dyin/12192382>.

[9] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020).

[10] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019).

[11] Ibid vol 1.

[12] Ibid 1.

[13] Ibid.

[14] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 199.

[15] Ibid.

[16] Council of Attorney-Generals, National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023.

[17] The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (Cth).

[18] Kate Carnell AO and Rob Paterson ONZM, 'Review of National Aged Care Quality Regulatory Processes' (October 2017).

a national register.[19] While several of these reforms are not targeted specifically at persons in aged care, they are nevertheless designed to benefit this group.

21. At the same time, the Law Council remains concerned that many recommendations from successive government inquiries have been made but not fully implemented. A number of these recommendations are highlighted in this submission.

22. The Law Council's submission concentrates on the following issues identified as part of the Royal Commission's Terms of Reference:

    - the extent to which aged care services meet the needs of the people accessing them;
    - mistreatment and abuse;
    - the causes of any systemic failures, and any actions that should be taken in response;
    - investment in the aged care workforce; and
    - the use of technology.

    In addition, the submission considers a number of matters incidental to those outlined above.

23. The focus of this submission is the effectiveness and adequacy of regulatory protections for the quality and safety of residents in aged care facilities. The submission is presented in two main parts, 'Current Legal Framework' and 'Major Quality and Safety Issues'. The first section, while not comprehensive, provides context for the later discussion.

24. Although the Law Council notes with concern the issue of younger people with disability residing in aged care facilities and anticipates that these will be addressed, this submission has a particular focus on the rights of older Australians and their interaction with the aged care system.

25. In preparing its submission, the Law Council has had regard to its previous submissions, including the:

    - 2018 submission to the Department of Health regarding its consultation on the Terms of Reference for the Royal Commission;
    - 2018 submission to the Department of Health regarding the draft Charter of Aged Care Rights;
    - 2018 submission to the House of Representatives Standing Committee on Health, Aged Care and Sport's Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia;
    - 2017 submission to the Senate Community Affairs References Committee's Inquiry into the Effectiveness of the Aged Care Quality Assessment and Accreditation Framework;
    - 2017 submission to the ALRC's Elder Abuse Discussion Paper; and

[19] Law Council, Submission to the Attorney-General's Department, *Consultation on Enhancing Protections relating to the use of Enduring Power of Attorney Instruments*, 19 March 2020 <https://www.lawcouncil.asn.au/docs/f07feb01-cb7e-ea11-9404-005056be13b5/3789%20-%20EPOA%20RIS.pdf>.

- 2016 submission to the ALRC's Elder Abuse Issues Paper.

26. The Law Council has also considered its Justice Project's Final Report,[20] in particular the chapter on Older Persons.

Part 1: The Current Legal Framework

Australia

27. Australia's aged care legislative framework regulates a multi-billion-dollar industry and its interaction with some of our community's most vulnerable people. The Australian Government has the primary responsibility for the funding and regulation of aged care services in Australia.

28. The *Aged Care Act 1997* (Cth) (**the Act**) is the overarching legislation for the regulation of approved providers[21] of residential care,[22] home care (under a Home Care Package)[23] and flexible care (including short-term restorative care).[24] The Act is supported by a range of principles that contain further detail about the operation and regulation of the aged care system.[25]

29. It is important to note that although several of the Law Council's recommendations specifically concern residential care facilities, only a small proportion of older Australians access this form of care, with most aged care recipients relying on home care.[26] In this regard, the Royal Commission's Interim Report has already highlighted concerns surrounding the shortfall and delays in access for home care packages.[27]

30. To receive subsidies from the Australian Government under the Act, an aged care service must be an approved provider.[28] Applications for approval as a provider of aged care are made to the the ACQSC.[29]

31. The Act sets out responsibilities of approved providers with respect to:

    - quality of care[30] – this includes compliance with the Quality of Care Principles 2014 (**Quality Principles**)[31] and the Aged Care Quality Standards framework (**Quality Standards**) contained therein;
    - user rights[32] – this includes compliance with the User Rights Principles 2014 and the 2019 Charter of Aged Care Rights (**the Charter**) contained therein;[33] and

[20] Law Council, Justice Project (Final Report, August 2018).
[21] See the *Aged Care Quality and Safety Commission Act 2018* s 7.
[22] 'Residential care' is defined in the Act s 41-3.
[23] 'Home care' is defined in the Act s 45-3.
[24] Flexible care includes multi-purpose services, innovative care services, transition care and short-term restorative care: Subsidy Principles 2014 s 103 made under the Act s 96-1.
[25] The range of principles are made under the Act s 96-1. See eg, the Accountability Principles 2014, Quality of Care Principles 2014 and the User Rights Principles 2014.
[26] The Commonwealth Government, Australian Institute of Health and Welfare 'Aged Care' (Webpage, 2017) <https://www.aihw.gov.au/reports-data/health-welfare-services/aged-care/about>.
[27] Commonwealth, Royal Commission into Aged Care Quality and Safety, Interim Report (2019) 13.
[28] The Act Part 2.1.
[29] *Aged Care Quality and Safety Commission Act 2018* (Cth) Part 7A.
[30] The Act Part 4.1.
[31] *The Quality of Care Principles 2014* (Cth) **(Quality Principles**).
[32] The Act Part 4.2.
[33] Commonwealth Government, Department of Health, *Charter of Aged Care Rights* (2019).

- accountability[34] – this includes compliance with the Accountability Principles 2014.

32. Other aged care programs such as the Commonwealth Home Support Program (**CHSP**) and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program, are grant-funded and are not covered by the Act. These programs are governed by their respective manuals.[35]

33. The ACQSC was established under the *Aged Care Quality and Safety Commission Act 2018* (Cth) (**ACQSC Act**). The ACQSC Act is supported by the Aged Care Quality and Safety Commission Rules 2018 (**ACQSC Rules**) which provides detail relating to the functions and operation of the ACQSC. The ACQSC is led by an independent Commissioner who reports directly to the Minister for Senior Australians and Aged Care.

34. The ACQSC's regulatory functions include:

    - the accreditation of residential care services;
    - quality reviews of home care services (including short-term restorative care) and services provided under the National Aboriginal and Torres Strait Islander Flexible Aged Care Program and CHSP; and
    - monitoring of residential care services, home care services, short-term restorative services in a home or residential setting, CHSP and National Aboriginal and Torres Strait Islander Flexible Aged Care Program services.[36]

35. For residential care services, the ACQSC may undertake a review audit at the provider's premises if there has been a specified change in the provider's circumstances or the Commissioner believes on reasonable grounds that the provider might not be complying with the Quality Standards.[37] A review may be arranged without notice.[38]

36. The ACQSC is also responsible for handling of complaints in relation to the responsibilities of an approved provider of an aged care service, as well as the responsibilities of service providers under the CHSP or National Aboriginal and Torres Strait Islander Flexible Aged Care Program.[39]

37. The ACQSC may impose sanctions on an approved provider that has not complied, or is not complying, with one or more of the aged care responsibilities of the provider.[40] Sanctions are discussed further below.

38. There is a strong interaction between the aged care system and the health system. While the Australian Government has primary responsibility for the funding and regulation of aged care services, both the Commonwealth and state and territory governments are involved in the provision of health care.[41] Recipients of aged care often have complex health needs and rely on services provided by the health sector.

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[34] The Act Part 4.3.
[35] Department of Health, *Commonwealth Home Support Program* (Program Manual, 2018); Department of Health, *National Aboriginal and Torres Strait Islander Flexible Aged Care Program* (Program Manual, 2019).
[36] The ACQSC Act s 19.
[37] The ACQSC Rules r 70(1).
[38] Ibid r 70(3).
[39] The ACQSC Act s 18.
[40] The Act s 3-4 and the ACQSC Act Pt 7B.
[41] See, Council of Australian Governments, the *National Health Reform Agreement*.

Accordingly, it is important that there is a strong interface between the aged care system and public health systems to enable coordination of care.

39. The aged care system outlined above also interacts with a broad range of other regulatory bodies and frameworks. For example, consumer protection issues are regulated by the Australian Competition and Consumer Commission.[42] Anti-discrimination, privacy, tort laws, as well as contractual arrangements are also relevant.

40. At a state and territory level, each jurisdiction has its own work health and safety regulator.[43] Criminal laws across various jurisdictions also include offences that respond to some forms of elder abuse. Offences relevant to elder abuse include common assault, assault occasioning actual bodily harm, wounding with intent to cause grievous bodily harm, false imprisonment, choking, suffocation and strangulation, sexual assault, larceny, robbery or stealing from the person, demanding property with intent to steal and fraud.[44] In some jurisdictions the age of the victim is specifically mentioned as an aggravating feature of the offence.[45]

41. More generally, all states and territories, except the Australian Capital Territory, have 'neglect' offences that may apply in the aged care context.[46] These are generally framed as 'fail to provide necessaries or necessities of life', including adequate food, clothing, shelter and medical care.[47]

42. A recent development is the introduction of legislation in the Australian Capital Territory's Legislative Assembly to criminalise the abuse or neglect of vulnerable persons, including those aged 60 years or older who have a vulnerability as defined under the bill.[48] The reforms mean that the Australian Capital Territory would be the first jurisdiction to introduce specific criminal offences for abusive conduct of 'vulnerable people'.[49]

43. While it is important to keep in mind the practical operation of aged care legislation in its interaction with a wide range of other laws, the focus of this submission is the legislative framework specific to the sector.

International law

44. Australia's aged care regulatory framework should also be understood in the context of Australia's international obligations to protect, respect and fulfil the human rights of older persons.[50]

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[42] See *Competition and Consumer Act 2010* (Cth).
[43] These are Safe Work NSW, Workplace Health and Safety Queensland, WorkSafe Victoria, WorkSafe ACT, SafeWork SA, NT WorkSafe, WorkSafe WA and WorkSafe Tasmania.
[44] ALRC, 'Elder Abuse' (Issues Paper,15 June 2016) 42. See eg, for statutory offences, *Crimes Act 1900* (NSW), *Crimes Act 1958* (Vic), *Criminal Code 1899* (Qld), *Criminal Law Consolidation Act 1935* (SA), *Criminal Code Act* 1924 (Tas), *Criminal Code Compilation Act 1913* (WA), *Criminal Code Act 1983* (NT), *Crimes Act 1900* (ACT) and *Criminal Code Act 2002* (ACT).
[45] See eg, *Sentencing Act 2017* (SA) s 11(1)(f).
[46] *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1983* (NT) s 149; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Law Consolidation Act 1935* (SA) s 14; *Criminal Code Act 1924* (Tas) s 144; *Criminal Code Act Compilation Act 1913* (WA) s 262. In Victoria, while section 24 does not explicitly state this requirement, the prosecution must establish a duty of care as an element of the offence: *Nydam v R* [1977] VR 430; *R v Shields* [1981] VR 717.
[47] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 367.
[48] Crimes (Offences Against Vulnerable People) Amendment Bill 2020 (ACT).
[49] The Law Council notes concerns surrounding the definition of 'vulnerable people' and its explicit link to chronological age.
[50] Law Council, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (2017) [18] <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>.

45. Under international law, Australia has agreed to take all necessary measures to provide effective protection against the violation of rights by private, non-State actors, as well as measures to ensure the rights of older persons to participate in the community. This involves the institution of appropriate laws, regulatory systems that are properly resourced, and sanctions in case of failures to comply with applicable laws and regulations.[51]

46. At its outset, the Royal Commission's Interim Report states that:

> *Many people receiving aged care services have their basic human rights denied*.[52]

While only Chapter 10 of the Interim Report, addressing the situation of younger persons with disability in residential aged care facilities, is explicitly titled 'A Human Rights Issue', references to human rights are otherwise scarce.[53] The Law Council calls for a broader examination of Australia's international human rights obligations and their particular relevance with respect to older persons in the Royal Commission's final report.[54]

Relevant international instruments

47. There are numerous obligations relevant to older persons implicit in most core human rights treaties.[55] Under international law, Australia is bound to comply with the provisions of the treaties to which it has ratified and to implement them domestically.

48. The International Covenant on Economic, Social and Cultural Rights (**ICESCR**)[56] and the International Covenant on Civil and Political Rights (**ICCPR**),[57] both of which Australia has signed and ratified, offer protection of cultural, economic, social, civil and political rights for all human beings, including older persons. A number of these rights are of particular relevance to older persons, such as:

ICESCR

- the right to social security (article 9);
- the right to adequate standard of living, including food, clothing and housing (article 11); and
- the right to the enjoyment of the highest attainable standard of physical and mental health (article 12).

ICCPR

- the prohibition of torture or cruel, inhuman or degrading treatment or punishment (article 7);
- the right to security of the person and freedom from arbitrary detention (article 9);
- the right to humane treatment in detention (article 10);

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[51] Andrew Byrnes, 'Human rights unbound: An unrepentant call for a more complete application of human rights in relation to older persons—And beyond' (2020) *Australasian Journal on Ageing.*
[52] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 12.
[53] Ibid. Note however brief reference to 'human rights' page 11 (conclusion) and page 193 (restrictive practices).
[54] See discussion in Andrew Byrnes, 'Human rights unbound: An unrepentant call for a more complete application of human rights in relation to older persons—And beyond' (2020) *Australasian Journal on Ageing.*
[55] *Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General,* UN Doc A/66/173 (22 July 2011).
[56] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICCPR**).
[57] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICESCR**).

- the right to freedom of movement (articles 12);
- the prohibition on unlawful or arbitrary interference with family (article 17(1)); and
- the right to protection from exploitation, violence and abuse (article 20(2)).

49. While age is not listed as a prohibited ground of discrimination in most human rights treaties, it generally falls within the non-exhaustive category of 'other status'.[58]

50. A number of treaty bodies have further applied existing provisions to protect the rights of older persons by providing interpretative guidance on existing norms.[59] Examples include General Comment No. 6 on the economic, social and cultural rights of older persons, provided by the Committee on Economic, Social and Cultural Rights[60] and General Recommendation No. 27 on older women and the protection of their human rights provided by the Committee on the Elimination of Discrimination against Women.[61]

51. Appreciating the contributions that older persons make to their societies and re-affirming the dignity and worth of the person, the United Nations General Assembly also adopted the Principles for Older Persons (**UN Principles**) in 1991.[62] Relevantly, the UN Principles provide that older persons 'should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility'.[63] The UN Principles are non-binding but governments are encouraged to incorporate them into national policies.[64]

52. The obligations in the Convention on the Rights of Persons with Disabilities (**CRPD**)[65] are particularly relevant to older persons, given that rates of disability increase with age. In 2018, the Australian Bureau of Statistics reported that 49.6 per cent of people aged 65 years and over were living with disability.[66] The need for disability-related support increases with age.[67] For instance, the need for assistance with cognitive and emotional tasks is around four times greater for Australians aged 85 and over than for those aged 65–84.[68]

53. Relevant articles of the CRPD include:

    - article 9 on accessibility;
    - article 12 on equal recognition before the law, including in relation to appropriate measures to support the enjoyment and exercise of legal capacity;
    - article 19 on living independently and being included in the community, including choice of place of residence on equal basis with others and access to

[58] *Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General,* UN Doc A/66/173 (22 July 2011) 8.
[59] Ibid 9.
[60] UN Doc. E/1996/22 (8 December 1995).
[61] UN Doc. CEDAW/C/GC/27 (16 December 2010).
[62] GA Res 46/91, UN Doc A/Res/46/91 (16 December 1991).
[63] Ibid art 14.
[64] Although members of the Law Council's expert committees indicate that the UN Principles are seen as problematic in some respects according to current international understandings of equality and non-discrimination in the enjoyment of rights by older persons.
[65] Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).
[66] Australian Bureau of Statistics (**ABS**), *Disability, Ageing and Carers, Australia: Summary of Findings* (Catalogue No. 4430.0, 24 October 2019).< https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4430.0Main%20Features62018?opendocument&tabname=Summary&prodno=4430.0&issue=2018&num=&view=>.
[67] Sarah Ellison et al, *Access to Justice and Legal Needs*, 179.
[68] Australian Institute of Health and Welfare, *Australia's Welfare 2015* (2015), 234 quoted in Australian Law Reform Commission, *Elder Abuse Report*, 33.

a range of in-home, residential and other community support services;

- article 20 on personal mobility; and
- article 26 on habitation and rehabilitation to maintain maximum independence.[69]

54. Despite its relevance to older persons, the Law Council notes that the Royal Commission's discussion of the CRPD in its Interim Report is limited to Chapter 10 concerning the rights of younger people with disability, and that the Report does not adopt a detailed and explicit human rights framework in its approach to the issues it is considering.

55. Although there are numerous obligations relevant to older persons implicit in most core human rights treaties, explicit references to age are scarce.[70] Accordingly, the international community, led principally by the United Nations General Assembly Open Ended Working Group on Ageing, is currently considering proposals for a new international legal instrument to promote and protect the rights and dignity of older persons.[71] Subject to its drafting, the Law Council supports in-principle a proposed convention to provide more comprehensive protection of rights for older persons.

56. The Law Council is particularly concerned that the lack of awareness and understanding among many Australians of their human rights,[72] leaves a vacuum in which these rights are not respected and upheld. This may in turn facilitate an environment in which breaches can occur, particularly concerning the most vulnerable members of the community, including older people.[73]

57. As discussed further below, First Nations older people have distinctive needs which must be carefully considered. In accordance with the United Nations Declaration on the Rights of Indigenous Peoples, First Nations peoples' right to self-determination and participation in decision-making is critical.[74]

Recommendation

- **The Royal Commission incorporate a more explicit examination of Australia's international human rights obligations and their particular relevance to older persons and their adequacy in its final report and recommendations.**

Human rights framework

58. Australia is the only Western democracy and the only common law country in the world not to have adopted some form of bill or charter of rights.[75] As a foundational matter, the

[69] See discussion in *Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General,* UN Doc A/66/173 (22 July 2011) 11.
[70] *Towards a comprehensive and integral international legal instrument to promote and protect the rights and dignity of older persons,* GA Res 67/139, UN Doc A/RES/67/139 (13 February 2013, adopted 20 December 2012), preamble.
[71] Ibid.
[72] See discussion in Law Council, Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human right*, 13 November 2019, 28 [85].
[73] Ibid 28.
[74] GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) arts 3 and 18.
[75] Law Council, Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human right*, 13 November 2019, 32-33 citing Gillian Triggs, 'A Charter of Rights for Australia' (Speech, Amnesty International and the Australian National University Law School, 18 April 2018).

Law Council recommends the adoption of a federal human rights act to enhance the human rights protections of older Australians.

59. A well-drafted federal human rights act would embed a general and fundamental understanding across the Australian community, that older persons are persons of equal dignity and worth, whose rights must be respected, protected and fulfilled.

60. In practice, it would provide a benchmark for the development of laws concerning persons in aged care, and include explicit duties on public authorities to act in accordance with human rights in the conduct of their duties.

61. A federal human rights act would also provide a much-needed framework to resolve tensions which arise when rights conflict.

62. Under international human rights law, most rights are not absolute and can be subjected to permissible limits in certain circumstances. In general, the approach taken under international human rights law is that limitations on rights should be: prescribed by law; pursue a legitimate aim; and be necessary to pursue that aim, which requires an assessment of their proportionality. Proportionality must be considered in the particular circumstances of a case, and regard be given to the alternative, less restrictive means of achieving a legitimate aim.[76] Against this established framework for decision-making, appropriate solutions can be found when specific issues arise.

63. For example, the right to private and family life[77] may be limited through restrictions on visits to aged care facilities implemented in response to the health risks posed by COVID-19. However, in accordance with international human rights law, such limitations must be reasonable and proportionate – limitations on rights must only go as far as necessary to achieve a legitimate aim. In this context, a proportionate response might involve limiting visitor access to certain areas of aged care facilities, or enabling the use of email and Skype for contact between residents and their families.

64. While proposals for human rights legislation at the federal level have, to date, largely failed to gain traction, there has been an increasing acceptance of human rights protections at the state and territory level. In January 2020, Queensland's *Human Rights Act 2019* (QLD) fully commenced. This follows the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Reviews of the ACT[78] and Victorian Charter[79] indicate that rather than opening litigation floodgates, their benefits are often experienced in an improved parliamentary and bureaucratic culture of respect for human rights – in a preventative sense. The five year review of the ACT Act found that:

> '*One of the clearest effects of the [ACT Act] has been to improve the quality of law making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy... These improved laws are likely to have tangible benefits over the longer term, particularly in the form of*

[76] See, eg, Parliamentary Joint Committee on Human Rights (**PJCHR**), Parliament of Australia, *Human Rights Scrutiny Report* (Report No 2 of 2018, 13 February 2018) iv; Human Rights Committee, *General comment No 34: Article 19 of the ICCPR on Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [21]-[36]; Human Rights Committee, *General comment No 27: Article 12 of the ICCPR on Freedom of Movement*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11].
[77] ICCPR art 17.
[78] The Human Rights Act 2004 (ACT): *The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety*, ACT Human Rights ACT Research Project, Australian National University, May 2009.
[79] Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).

additional safeguards for vulnerable individuals in the community.'[80]

65. In 2012, the Human Rights Law Centre (**HRLC**) published a report into the Victorian Charter's first five years of operation, highlighting case studies from that period.[81] It found that the Charter played a crucial preventative role in stopping human rights abuses (and the associated social and economic costs) before they occur and provided a number of practical examples, including for older persons.

66. Other relevant examples of improvements in the way that older people's rights are upheld in practice arise from the operation of the *Human Rights Act 1998* (UK). Case studies regarding beneficial operation of the UK Act include:

    - helping an older couple married for 59 years live in the same care home, when local authorities had determined to move one spouse into a permanent aged care facility that was too far away for her husband and children to visit – the authority agreed to allow the wife to remain in her aged care facility close by; and
    - challenging the use of restraint on an older woman in hospital, who was strapped into her wheelchair against her wishes and was 'crying in distress' – staff agreed to unstrap the woman and after she was assessed by a physiotherapist, were encouraged to support her to improve her mobility.[82]

67. While not a panacea, these examples underline the potential of a federal human rights act in driving a government-wide culture of respect for human rights. The Law Council has also received feedback that it has been a 'game changer' for some groups dealing with state departments, in that there is now an onus to act.

68. The Law Council has observed with concern in recent years a crisis-driven, resource-intensive approach to addressing systemic breaches of the rights of vulnerable individuals in Australia, including through the establishment of multiple Royal Commissions.[83]

69. The Royal Commission has found that a consumer-based framework is ineffective for aged care, but does not articulate a clear alternative framework. In this regard, the Law Council strongly recommends a human rights based framework which avoids widespread personal and economic costs. This would provide a sounder foundation for the future.

Recommendation

- **The Australian Government adopt a federal human rights act.**

[80] Law Council, Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human right*, 13 November 2019, 39 citing *The Human Rights Act 2004 (ACT): The First Five Years of Operation, A Report to the ACT Department of Justice and Community Safety*, ACT Human Rights ACT Research Project, Australian National University, May 2009, 6.
[81] Ibid citing HRLC, *Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012) 39.
[82] Law Council, Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human right*, 13 November 2019, 28 citing British Institute of Human Rights website (https://www.bihr.org.uk/Pages/FAQs/).
[83] Law Council, Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human right*, 13 November 2019, 10.

Part 2: Quality and Safety Issues

Restrictive Practices

70. This section will consider the use of restrictive practices in residential aged care facilities. The use of restrictive practices will, in some circumstances, be elder abuse.[84] Any form of abuse in the aged care sector is unacceptable.

Restrictive practices

71. The term 'restrictive practices' generally refers to activities or interventions, either physical or pharmacological, that have the effect of restricting a person's free movement or ability to make decisions.[85] They are commonly referred to in the context of aged care as practices to control the behaviour of a resident, which may occur with the objective of protecting the person from harming themselves, staff or fellow residents around them.[86]

72. For the purposes of the Quality Principles, which now regulate the use of restrictive practices, restraints are categorised as:

    a) chemical – a restraint that is, or that involves, the use of medication or a chemical substance for the purpose of influencing a person's behaviour (other than medication prescribed for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition); or

    b) physical – any restraint other than a chemical restraint; or the use of medication prescribed for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.[87]

73. Common forms of physical restraints include:

    - clasping a person's hands or feet to stop them from moving;
    - applying lap belts, leg, wrist, ankle, or vest restraints;
    - attaching bed rails, locking over bed or chair tray tables; and
    - seating residents in chairs with deep seats, or rockers and recliners, that the resident cannot stand up from, or removing their mobility aids.[88]

    Restrictive practices may also include confining a person in a residential facility or specialised unit.[89]

74. The most common type of chemical restraints are psychotropic medications.[90]

[84] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017).
[85] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 194.
[86] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 2.
[87] The Quality Principles s 4.
[88] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 2. Also see, ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 143.
[89] Ibid.
[90] Ibid.

75. These practices that interfere with a person's ability to make decisions or restrict their free movement engage a number of Australia's obligations under international human rights law.[91]

76. For the person being restrained, the inappropriate use of these practices can result in significant physical and psychological harm.[92] There are also fundamental questions about their effectiveness.[93]

77. Successive inquiries into aged care have identified restrictive practices as a problem in Australia.[94] Many recommendations have been made, but not fully implemented.[95] As a result, the use of restrictive practices in Australia remains widespread;[96] in many instances being used as a first-line response to manage challenging behaviours.[97]

78. The Law Council is of the view that:

    - aged care legislation should regulate the use of restrictive practices in residential aged care facilities;
    - any restrictive practice should be used only as a last resort, after the resident and their family is fully consulted;
    - it should be adapted to the circumstances, that is, it should be the optimal restraint appropriate for the relevant conduct; and
    - the restraint mechanism employed should be proportionate to the risk and should only be applied to the extent necessary to prevent the harm. That is, it should be the minimal restraint that is appropriate, and it should be imposed for the shortest time that is foreseeably needed.

    This reflects a recommendation made by the ALRC in its Elder Abuse Inquiry.[98] It emphasises that in determining proportionality, specific consideration must be had to alternative, less restrictive means of achieving any legitimate objectives sought.

Reporting

79. Since 1 July 2019, the National Aged Care Mandatory Quality Indicator Program has required residential aged care services to compile data on the use of physical restraints and provide it to the Department of Health.[99] Approved providers must compile the following information:

    - the total number of intents to restrain a care recipient; and

[91] See in particular, the prohibition against torture and other cruel, inhuman or degrading treatment or punishment – *Convention Against Torture*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), the right to security of the person and freedom from arbitrary detention – ICCPR, art 9, the right to freedom of movement – ICCPR, art 12, the right to the enjoyment of the highest attainable standard of physical and mental health – ICESCR, art 12.
[92] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019).
[93] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 201.
[94] Ibid 194. See eg, ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) and Kate Carnell AO and Rob Paterson ONZM, 'Review of National Aged Care Quality Regulatory Processes' (October 2017).
[95] Ibid.
[96] Ibid 198.
[97] Ibid 193.
[98] (Report No 131, 14 June 2017) recommendation 4-10.
[99] Accountability Principles 2014 s 26(b) and *National Aged Care Mandatory Quality Indicator Program* (Manual 1.0, 2019) [6].

- the number of restraint devices used.[100]

80. In capturing statistical data regarding the use of restrictive practices, the Law Council submits that the following should be required to be clearly documented by residential aged care facilities (as soon as reasonably practicable after the restraint occurs):
    - the form of restraint applied;
    - the reasons for use, in light of alternative, less restrictive means of achieving the same objectives;
    - the duration of use;
    - the outcome of the restraint; and
    - any adverse events that occurred.
81. The Law Council submits that residential aged care facilities which report multiple instances of restraint in any reporting year should be required to provide compulsory staff training in procedures for managing challenging resident behaviours. This training should be supported by Commonwealth funding so as not to discourage reporting, and should be followed by an independent audit of facilities.
82. In terms of chemical restraints, the Law Council understands that the Australian Government has engaged PricewaterhouseCoopers to develop a quality indicator relating to the use of chemical restraints.[101] It is important that appropriate indicators are developed to enable effective monitoring of compliance with human rights standards.
83. Current variations in definitions of restraint in legislation, guidance, research papers and reports[102] creates challenges for identifying restraint in practice. Consideration should be given to developing a uniform definition of 'restraint'.

Regulation

84. Restrictive practices in a residential aged care context are regulated by a mix of federal, state and territory laws, as well as non-statutory policies and guidelines.
85. The Quality Standards include the following relevant responsibilities of approved providers:
    - each consumer is supported to exercise choice and independence;[103] and
    - where clinical care is provided, a clinical governance framework that includes minimising the use of restraint.[104]
86. Health professionals who administer medication to residents in residential aged care, are subject to accreditation and regulation by the *Health Practitioner Regulation National Law Act 2009* (Qld) (**national law**) as applied in each state and territory.[105] As highlighted in the Quality Principles, codes of appropriate professional practice for

[100] Ibid.
[101] Australian Government response to the Parliamentary Joint Committee on Human Rights report on the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (March 2020) 11 <https://www.health.gov.au/sites/default/files/documents/2020/03/regulations-restricting-the-use-of-restraints-in-residential-aged-care-services.pdf> .
[102] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 3-5, 11.
[103] Quality Principles sch 2, standard 2(b).
[104] Ibid, standard 8(3)(e)(i).
[105] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 15.

medical practitioners and nurse practitioners, approved under the national law, provide for practitioners to obtain informed consent before prescribing medications.[106]

87. State and territory laws provide a framework for determining when a person has impaired capacity affecting their ability to consent or make decisions about their care or medical treatment.[107] The legislation provides for the authorisation of substitute decision makers for people with impaired capacity.[108]

88. Since 1 July 2019, residential aged care providers have specific obligations under the Quality Principles in relation to the use of chemical and physical restraints.[109] The Quality Principles now require providers to satisfy a number of conditions before a restraint can be used, including informed consent of the consumer or the consumer's representative (for physical restraint) or assessment by a medical practitioner or nurse practitioner who has prescribed the medication (for chemical restraint).[110]

89. Following concerns raised in a report delivered by the Parliamentary Joint Standing Committee on Human Rights (**PJCHR**),[111] the Quality Principles were further amended in November 2019. That is, the *Quality of Care Amendment (Reviewing Restraints Principles) Principles 2019* (Cth) (**Reviewing Restraints Principles**). Amendments were made to:

    - include headings that physical and chemical restraints must always be used as a last resort;[112] and
    - refer to state and territory legislation which regulates the responsibility for prescribers to gain informed consent for chemical restraint, in order to clarify that normal principles as to who can provide consent for the use of restraint apply.[113]

90. However, the Law Council remains concerned that some key issues identified by the PJCHR have not been addressed.[114] In this regard, it is concerned that the new principles will not minimise the use of restrictive practices. Rather, it may in fact lend legitimacy to existing practices that fail to adequately protect older Australians and appear to violate human rights. The Law Council urges the Royal Commission to consider the PJCHR's detailed human rights analysis regarding restrictive practices in its final report.

91. Specific issues in this area include:

    - the breadth of the definition of 'representative' under the Quality Principles.[115] Subsection 15F(1) of the Quality Principles states that consent can be given for

[106] Quality Principles s 15G, note 1.
[107] See eg, *Medical Treatment Planning and Decisions Act 2016* (Vic) s 4 and *Advance Care Directives Act 2013* (SA) s 7.
[108] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 26; *Advance Care Directives Act 2013* (SA) s 23; *Powers of Attorney Act 1998* (Qld) s 35; *Advance Personal Planning Act 2013* (NT) s 8; *Medical Treatment (Health Directions) Act 2006* (ACT) s 7 and *Guardianship and Management of Property Act 1991* (ACT) s 7; *Guardianship Act 1987* (NSW) ss 6, 6G.
[109] The Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 (Cth).
[110] See Quality Principles Part 4A – Minimising the use of physical and chemical restraint.
[111] PJCHR, Parliament of Australia, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (Report, November 2019).
[112] See Quality Principles Part 4A heading.
[113] Quality Principles s 15G, note 1.
[114] PJCHR, Parliament of Australia, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (Report, November 2019).
[115] Quality Principles s 5.

physical restraint by a 'representative' acting for the aged care recipient, whether or not they are formally appointed.[116] The definition of a 'representative' means (inter alia) a person who nominates themselves and the provider is satisfied has a 'connection' with the consumer and a concern for their health, safety and wellbeing.[117] The definition further provides that a person with such a 'connection' includes in subsection 5(2)(b) a person that holds an enduring power of attorney given by the care recipient,[118] or in subsection 5(2)(c) a person appointed by a State or Territory guardianship board (however described) to deal with the care recipient's affairs.[119] These do not distinguish between substitute decision-maker empowered to make decisions about financial matters, and personal, lifestyle and medical matters. The Law Council notes that while these persons described may have the authority to decide legal and financial affairs, they may not have authority to decide issues concerning the care recipient's person, such as consent to physical restraint. For clarity, the Law Council recommends that subsections 2(b) and (c) are replaced with new subclause 2(b) 'the person has been appointed by a State or Territory guardianship board (however described) as an enduring guardian or a guardian to make decisions about the care recipient's personal issues'.

Further, in terms of existing subsection 5(2)(b), the Law Council highlights that simply holding an enduring power should not be sufficient eg, the requirement for operation of the attorney's authority may not have occurred. The attorney must have active authority;

- the lack of an explicit requirement in the instrument that alternative approaches be exhausted for chemical restraint (compared to physical restraint).[120] The Law Council is cognisant of the fact that states and territories are responsible for administration of legislation relating to the supply and administration of medicines. Codes of professional conduct also apply to doctors and nurses with respect to a range of relevant matters, including communication with patients and/or their carers, gaining informed consent, and the use of scheduled medicines. However, for clarity, the Law Council recommends that all regulation in this area, including the Quality Principles, should reflect a clear understanding that alternative options must be exhausted prior to the use of chemical (and other) restraints;
- the requirement in section 15G of the Quality Principles for an assessment by a medical practitioner or nurse practitioner, prior to use of a chemical restraint. In accordance with the values of 'dignity and choice' entrenched in the Quality Principles, the Law Council considers that this provision could be strengthened by requiring the consent of a medical practitioner 'as nominated by the resident' (or where the resident lacks capacity, nominated by the resident's medical treatment decision maker). Where such nominated medical practitioner is unable to be contacted or no prior nomination by the resident is provided, an independent medical practitioner not employed by the aged care

[116] Quality Principles s 15F(1).
[117] Quality Principles s 5.
[118] Quality Principles s 5(2)(b).
[119] Quality Principles s 5(2)(c).
[120] Quality Principles s 15G.

facility should be engaged to carry out the assessment;

- the lack of a requirement on providers to take all reasonable steps to reduce and eliminate the need for the use of restrictive practices;[121] and
- the lack of a requirement that aged care facilities develop positive behaviour support plans.[122]

92. More generally, however, the PJCHR has also noted that:

> *… there is disparity between the instrument and the regulatory framework established under the National Disability Insurance Scheme, representing an unjustifiably lower level of protection which may amount to discrimination against older Australians.*[123]

93. The Royal Commission's Interim Report also states that while the disability sector has implemented strict rules around the use of restrictive practices, the aged care sector has not followed suit.[124]

94. The Law Council has previously recommended that the principles and core strategies of the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector (**National Disability Framework**) should form the basis of implementing a national approach to the regulation of restrictive practices in the aged care sector.[125]

95. The National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (**the NDIS Rules**), based on the National Disability Framework, sets out specific rules for the use of restrictive practices (including seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint) by particular providers under the National Disability Insurance Scheme. As noted by the PJCHR, the NDIS Rules prescribe different conditions of registration of NDIS providers depending on the regulation of restrictive practices in a state or territory. As a condition of their registration, NDIS providers must not use restrictive practices. However, where the practice is not prohibited by state or territory laws, it is regulated by an authorisation process.[126]

96. As also noted by the PJCHR, the NDIS Rules provide for the development and lodgement of a behaviour support plan to reduce and eliminate restrictive practices. The registration of specialist behaviour support providers requires that they take all reasonable steps to reduce and eliminate the need for the use of regulated restrictive practices. Any regulated restrictive practice must:

- be clearly identified in the behaviour support plan;
- be used only as a last resort after evidence-based, person-centred and proactive strategies have been explored and applied;
- be the least restrictive response possible in the circumstances to ensure the safety of the person and others;

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[121] PJCHR, Parliament of Australia, *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (Report, November 2019), 28.
[122] Ibid, 54.
[123] Ibid.
[124] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 215.
[125] See eg, Law Council, Submission to the ALRC, *Elder Abuse Discussion Paper* (6 March 2017) 40 and Law Council, Submission to the ALRC*, Elder Abuse Issues Paper* (17 August 2016) 12.
[126] Ibid, 14-15.

- reduce the risk of harm to the person with disability or others;
- be proportionate to the potential negative consequence or risk of harm; and
- used for the shortest possible time to ensure the safety of the person with disability or others.[127]

97. The Law Council agrees with the PJCHR's concerns that the standards applied to the use of restraints in aged care fall short of those which apply in the NDIS context. It supports the PJCHR's recommendation that the Minister should undertake extensive consultation with relevant stakeholders to work towards better regulating the use of restraints in residential aged care facilities, in particular including:
    - an explicit requirement to exhaust alternatives to the use of restraint, including preventative measures and that restraint be used as a last resort (noting the approach taken by the NDIS Rules);
    - obligations to obtain or confirm informed consent prior to the administration of chemical restraint;
    - improved oversight of the use of restraints in aged care facilities; and
    - mandatory reporting requirements for the use of all types of restraint.[128]
98. Relevantly, the Quality Principles require that the effectiveness of Part 4A in minimising the use of physical and chemical restraints by approved providers must be reviewed by 31 December 2020.[129] This provides an important opportunity to assess and improve the current regulatory model in light of the amendments made since the PJCHR report. However, the Quality Principles must also work coherently alongside the broader regulatory framework of state and territory legislation and professional codes of conduct. The Law Council considers that a National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Aged Care Sector should be developed, based on the National Disability Framework and the standards set out in the NDIS Rules. This should include flow-on amendments to ensure national coherence in this area, including in the Quality Principles.

Recommendations:

- **The principles and core strategies of the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector should form the basis of implementing a national approach to the regulation of restrictive practices in the aged care sector. In particular, the standards set for restrictive practices set by the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 should form a yardstick for reform.**
- **The provisions in the Quality Principles for physical and chemical restraint should be reviewed both against the above standards, and outstanding concerns raised by the Parliamentary Joint Committee on Human Rights, including with respect to:**
    - **the need for explicit requirements to exhaust alternatives to the use**

[127] Ibid.
[128] Ibid, 54.
[129] Quality Principles s 15H.

of restraint, including preventative measures;

- **obligations to obtain or confirm informed consent prior to the administration of chemical restraint;**
- **improved oversight of the use of restraints in aged care facilities; and**
- **mandatory reporting requirements for the use of all types of restraint.**

Avoiding restrictive practices

99. The Law Council encourages ongoing policy attention towards ensuring that the underlying causes of the overuse of chemical and physical restraints are addressed. It understands that the Australian Government has committed AU$35 million for initiatives aimed at minimising the use of restraints in residential aged care.[130] Its response includes:
    - establishing additional Pharmaceutical Benefits Scheme requirements for repeat prescription of the antipsychotic risperidone;[131]
    - awareness and educational messaging about the appropriate use of antipsychotic medications and benzodizepines in residential aged care;
    - workforce training initiatives continuing professional development for doctors, nurses and other prescribers;
    - funding a dementia behaviour advisory service and severe behaviour response team, as well as a dementia training programs; and
    - funding to improve medication management programs to reduce the use of medication as a chemical restraint on aged care residents and at home.[132]
100. At the same time, however, some of the significant systemic issues leading to the overuse of chemical restraints are yet to be addressed, such as limited numbers of and pressures on staff, and funding constraints which may impede the implementation of alternative means of management. Ultimately, a response which deals with these broader issues is required to avoid the need to resort to the use of restraints.
101. There is an emerging body of evidence and guidance on strategies and non-pharmacological interventions to remove or mitigate the need for restraint by managing the underlying causes of challenging behaviour.[133] People with Disability Australia has previously argued that there should be a focus on the 'environmental or service factors' that cause problematic behaviour.[134] Instead of using restraints, care workers and

[130] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Human Rights report on the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019,* 2.
[131] Ibid 5.
[132] Ibid 5-6.
[133] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 8.
[134] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 144 quoting *People with Disability Australia*, Submission 167.

informal carers 'need to be supported and given adequate time to provide responsive and flexible and individualised care'.[135]

102. The Law Council remains concerned that restraints are being overused on residents as a substitute for adequate staffing levels and supervision by staff in facilities. Similar concerns have been raised by the Qld Parliamentary Inquiry.[136]

Recommendation

- **Ongoing consideration should be given to addressing the underlying factors which lead to the overuse of physical and chemical restraints in aged care, including limited numbers and pressures on staff, funding constraints, and the extent to which these impede the implementation of alternative means of management.**

Oversight

Optional Protocol to the Convention against Torture

103. The Law Council has previously expressed the view that Australia's 2017 ratification of the Optional Protocol to the Convention against Torture (**OPCAT**)[137] presents a unique opportunity to develop a cohesive oversight system where people are subjected to the authority of others, including aged care facilities where people may be prevented from leaving at will.[138]

104. OPCAT is designed to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. It requires the Australian Government to establish a system of regular visits to places of detention in Australia by independent national bodies known as National Preventive Mechanisms (**NPMs**). In addition, the Australian Government must accept visits from the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**SPT**). It notes that OPCAT's purpose is preventative, rather than remedial.

105. With this in mind, the Law Council is concerned by recent statements by the Australian Government that there is no proposal to include residential aged care facilities within its initial list of primary places of detention for inspection.[139] More significantly, it is also concerned that the Australian Government has stated that it does not consider residential aged care facilities to fall within the concept of 'places of detention' as defined under article 4 of OPCAT.[140] These concerns are reflected in the Australian Human Rights Commission's final paper in its OPCAT consultation, 'Implementing OPCAT in Australia'.[141]

106. OPCAT's definition of 'places of detention' is very broad. Article 4(1) provides that:

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[135] Ibid.
[136] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) 166.
[137] Opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
[138] Law Council, Submission to the Australian Human Rights Commission, *Response to Consultation Paper: OPCAT in Australia: Stage 2*, 24 September 2018.
[139] Written response from Attorney-General's Department to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Supplementary Budget Estimates 2019-20,* 4 February 2020 (Nick McKim).
[140] Ibid.
[141] AHRC, 'Implementing OPCAT in Australia' (Final paper, June 2020).

> *each State Party shall allow visits…to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention).*[142]

107. 'Deprivation of liberty' is further defined in article 4(2) as:

> *any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority*.[143]

108. Aged care facilities are an example of a place where people may be deprived of their liberty, by virtue of their health and/or capacity, or the type of care, treatment or restrictive practices to which they are subjected.[144] As government funded residential aged care facilities are subject to government regulation, the Law Council submits that they fall within the ambit of the OPCAT monitoring framework. The Subcommittee for the Prevention of Torture has expressed a similar view.[145]

109. This interpretation is consistent with the underlying purpose of OPCAT. According to the United Nations:

> *…the preventative approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximise the preventive impact of the work of the [NPM]*.[146]

110. The Royal Commission has already considered the relevance of the OPCAT in the context of restraints in residential aged care. It notes that 'a residential care home where people may not be free to leave could fall within the scope of a 'place of detention' under OPCAT.[147]

111. This reflects the approach taken by several of other States that have ratified OPCAT. For example, in New Zealand, the Ombudsman, designated as a NPM for the purposes of OPCAT, is to monitor privately-run as well as public aged care facilities.[148] Similarly, in the United Kingdom, the Care Quality Commission, a NPM body, inspects and rates residential aged care homes.[149]

112. The Law Council submits that monitoring of aged care facilities by NPM teams with expertise in human rights, as well as geriatric care and mental health care, provides 'important additional oversight of human rights standards'.[150]

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[142] OPCAT, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
[143] Ibid.
[144] Law Council, Submission to the Australian Human Rights Commission, *Response to Consultation Paper: OPCAT in Australia: Stage 2*, 24 September 2018, 16-17.
[145] *Sixth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Un Doc. CAT/C/50/2 (23 April 2013) [67] (the phrase includes 'civil and military prisons, police stations, pretrial detention centres, psychiatric institutions and mental health centres, migrant detention centres, juvenile detention centres and social care institutions').
[146] United Nations, Office of the High Commissioner, *Preventing Torture: The Role of National Preventive Mechanisms*: *A Practical Guide* (2018) 22.
[147] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 20.
[148] The New Zealand Government, Designation of National Preventive Mechanisms (6 June 2018) <https://gazette.govt.nz/notice/id/2018-go2603>.
[149] UK Care Quality Commission, 'Services we regulate' (Webpage) <https://www.cqc.org.uk/what-we-do/services-we-regulate/find-care-home>.
[150] Laura Grenfell, *Aged Care, Detention and OPCAT* (2019) 25(2) *Australian Journal of Human Rights* 256 citing ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 156.

113. It further considers that the COVID-19 pandemic reinforces the need for comprehensive, transparent and independent oversight of places in which people are deprived of their liberty. While the pandemic poses real challenges, including that visitors may carry the virus into such places, the SPT has issued COVID-19 advice to State parties and NPMs emphasising that:

> *While the manner in which preventative visiting is conducted will almost certainly be affected by necessary measures taken in the interests of public health, this does not mean that preventative visiting should cease. On the contrary, the potential exposure to the risk of ill-treatment faced by those in places of detention may be heightened as a consequence of such public health measures taken. The Subcommittee considers that NPMs should continue to undertake visits of a preventative nature, respecting necessary limitations on the manner in which their visits are undertaken. It is particularly important at this time that NPMs ensure that effective measures are taken to reduce the possibility of detainees suffering forms of inhuman and degrading treatment as a result of the very real pressures that detention systems and those responsible for them face.*[151]

114. In the current environment, the New Zealand Ombudsman is continuing targeted and face-to-face independent inspections of aged care facilities to assess their response to COVID-19.[152] He has also issued a statement of principles to guide facilities and their staff to manage the pandemic crisis, while meeting New Zealand's international human rights obligations.[153]

115. In contrast, the ACQSC has indicated that it is no longer doing unannounced inspections of aged care facilities during the COVID-19 pandemic, and that facilities due for a scheduled visit are having their accreditation continued without an onsite visit.[154] The ACQSC indicates that it is conducting a 'proportionate risk-based regulatory response to COVID-19', based on self-assessment by providers in the first instance, and site visits based on assessed risk and circumstances of the provider.[155] This is an issue because mistreatment, neglect and abuse of aged care residents is more likely to occur in closed communities.

Recommendations

- **Australia's National Preventative Mechanisms should include aged care facilities as a 'place of detention' for the purposes of OPCAT monitoring.**
- **Australia should act quickly to implement OPCAT:**
  - **under compliance frameworks with clear accountability and transparency mechanisms;**
  - **documenting core elements of OPCAT implementation in legislation or, at a minimum, in a formal agreement;**

[151] SPT, *Advice of the Subcommittee to States parties and national preventative mechanisms relating to the coronavirus disease (COVID-19) pandemic*, UN Doc CAT/OP/10 (7 April 2020).
[152] NZ Human Rights Commission, 'Inspection of secure aged care facilities welcomed by Chief Commissioner' (Webpage, 16 April 2020) <https://www.hrc.co.nz/news/inspection-secure-aged-care-facilities-welcomed-chief-commissioner/>.
[153] Peter Boshier, NZ Ombudsman, 'OPCAT inspections and visits during COVID-19 pandemic – update and Statement of Principles' (9 April 2020) < https://www.ombudsman.parliament.nz/sites/default/files/2020-04/OPCAT%20inspections%20and%20visits%20during%20COVID-19%20pandemic%20–%20update%20and%20Statement%20of%20Principles_0.pdf>.
[154] Anne Connolly and John Stewart, 'With no visitors or unannounced inspections, who knows what is happening in nursing homes during the coronavirus lockdown?', ABC Investigations, 2 April 2020.
[155] Aged Care Quality and Safety Commission, 'Proportionate risk-based regulatory response to COVID-19' (online).

- **ensuring adequate resourcing, including for the Commonwealth Ombudsman as central NPM and federal NPM; and**
- **improving links and communication with civil society representatives as part of this process.**

Serious incident response scheme

116. Currently under the Act, approved providers of residential care are required to report incidents of alleged or suspected reportable assaults, including unreasonable use of force or unlawful sexual contact inflicted on a resident that would constitute an offence against a law of the Commonwealth, or a State or Territory.[156] Providers are required to report these incidents to the police and the ACQSC within 24 hours.[157]

117. Significantly, the requirement to report alleged and suspected assaults does not apply in so-called 'resident-on-resident' incidents, where the resident alleged to have committed the offending conduct had previously been assessed as suffering from a cognitive or mental impairment and in respect of whom the approved provider has since put in place and made a record of arrangements for management of their behaviour.[158]

118. A strong theme that emerged from the ALRC's Elder Abuse Inquiry was that the emphasis should change from requiring providers to report the occurrence of an alleged or suspected assault, to requiring them to more proactively investigate and respond to incidents. The investigation and response should be monitored by an independent oversight body.[159]

119. Accordingly, the ALRC recommended that the Act provide for a new serious incident response scheme (**SIRS**).[160] This scheme, which it proposed would replace the current responsibilities in relation to reportable assaults under section 63-1AA of the Act, would require approved providers to notify to an independent oversight body an allegation or suspicion on reasonable grounds of a serious incident, and the outcome of an investigation into a serious incident, including findings and actions taken.[161] The independent oversight body should monitor and oversee the approved provider's investigation and response, and be empowered to conduct investigations of such incidents.[162]

120. A further theme arising from the ALRC was that the existing reporting scheme, which focused on 'reportable assaults', captured a more narrow range of conduct than what may be described as elder abuse which may include emotional harm and neglect.[163] It recommended broader definitions as follows:

    - in residential care, a 'serious incident' should mean, when committed against a care recipient: physical, sexual or financial abuse, seriously inappropriate, improper, inhumane or cruel treatment, unexplained serious injury or neglect. However, if it was committed by another care recipient, it proposed a more limited definition of sexual abuse, physical abuse causing serious injury or an

[156] The Act s 63-1AA (2) and (9).
[157] Ibid.
[158] The Act s 63-1AA(3) and Accountability Principles s 53(1).
[159] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 211.
[160] Ibid recommendation 4-1.
[161] Ibid.
[162] Ibid, recommendation 4-2.
[163] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 119.

incident that is part of a pattern of abuse;[164]

- in home care or flexible care, 'serious incident' should mean physical sexual or financial abuse committed by a staff member against a care recipient;[165] and
- an act or omission that causes harm that is trivial or negligible should not be considered a serious incident.[166]

121. In response to this recommendation, in 2019 the Department of Health released a consultation paper seeking public comment on the details of a proposed SIRS for Commonwealth funded residential care overseen by the ACQSC.[167]

122. The Law Council has expressed support for the development of a SIRS to increase accountability and transparency of approved providers in reporting, investigating and adequately responding to incidents.[168] It welcomes progress on this issue.

123. While the Law Council's ability to consider the Department's proposal in depth has been constrained, it notes that there are some significant differences proposed by the Department compared to the ALRC proposed model. These include the following.

- Unlike the ALRC, the Department does not propose that the SIRS should cover in-home or flexible care. Instead it only concerns residential aged care.[169] The Law Council is concerned that this overlooks the likelihood of serious harm occurring in these broader areas of aged care and queries the rationale for this more limited approach. Care recipients experience serious abuse in the same way regardless of the location in which it occurs. There may also be reduced transparency in in-home care compared to residential facilities, underlining the need for an expanded SIRS.
- The Department proposes that the SIRS should sit alongside the existing reporting scheme of reportable assaults under section 63-1AA of the Act.[170] This would mean two sets of reporting obligations by providers: to the ACQSC and the police. The Law Council does not oppose this proposal but notes that there may be some confusion amongst providers in determining which set of requirements apply in a given situation, and likely overlap in reporting. Definitions are proposed for the SIRS which overlap with those under the existing reportable assaults scheme. For example, the proposed definition of 'physical abuse' includes unlawful contact with or assault of, an aged care consumer, including the unreasonable use of physical force, injury, or physical coercion of an aged care consumer.[171] The paper is also not clear on whether it proposes that ACQSC would be itself obliged to refer matters to the police.[172]

[164] Ibid, recommendation 4-3.
[165] Ibid, recommendation 4-4.
[166] Ibid, recommendation 4-5.
[167] Australian Government Department of Health, *Serious Incident Response Scheme for Commonwealth funded residential aged care: Finer details of operation - Consultation Paper*, August 2019.
[168] Law Council, Submission to the ALRC, *Elder Abuse Discussion Paper* (6 March 2017) 36.
[169] Australian Government Department of Health, *Serious Incident Response Scheme for Commonwealth funded residential aged care: Finer details of operation - Consultation Paper*, August 2019, 8.
[170] Ibid.
[171] Ibid, 12. The definition of 'reportable assault' means unlawful sexual contact, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory: the Act, s 63.1AA(9).
[172] Under paragraph 61(1)(h) of the existing *ACQSC Act 2018* (Cth), the Commissioner may disclose protected information if he or she believes, on reasonable grounds, that disclosure of the information is necessary for: the enforcement of the criminal law, to an agency whose functions include that enforcement or protection, for the purposes of that enforcement or protection. However, this is not an obligation to report.

There may be a risk that some providers only report incidents under the SIRS to the AQCSC which should also have been reported under section 63-1AA, but that these are not in turn passed onto police by the AQCSC.

- The Department proposes that reportable incidents under the SIRS should be made by 'staff members' against recipients of residential care.[173] The ALRC did not restrict its proposed definition in this way[174] and instead referred to particular conduct against a care recipient in residential care. The Law Council considers that all serious incidents should be reportable, including those committed by other persons such as visitors and family.
- The Department proposes that the ACQSC would apply 'proportionate reporting'[175] which enables it to exempt certain matters from being reported, by agreement with providers if it is satisfied the exemption will not increase the risk of harm. This will allow providers that have demonstrated a satisfactory level of competence in responding to serious incidents to carry out investigations into exempted matters without having to report to the ACQSC. It is intended to allow the ACQSC to focus its efforts on serious matters and providers which have not demonstrated a satisfactory level of competence in handling serious incidents.[176] The Law Council is concerned that this approach may undermine the purpose of the scheme, which is specifically intended to identify and improve responses to 'serious incidents'. By the proposed definition, those acts or omissions which are 'trivial or negligible' are not proposed to be considered serious incidents. It is unclear why providers should not have ongoing obligations to report all matters which involve physical, sexual, financial abuse, seriously inappropriate, improper, inhumane or cruel treatment, inappropriate physical and chemical restraint, neglect, incidents which are a pattern of abuse, or unexplained death or serious injury.
- The Department's definition proposes that unexplained death as well as serious injury should be reportable. The Law Council, while noting the role of coroners in investigating such deaths, supports this expansion, as the intention is to prompt early responses by providers and coroners' inquiries can be protracted.
- The Department's definition proposes 'inappropriate physical and chemical restraint', which was not included in the ALRC proposal. While the Law Council supports the expansion, consideration could be given to tightening the word 'inappropriate', which is vague and open-ended, to 'physical and chemical restraint which breaches legislative requirements'. The Law Council submits that appropriateness should be measured against the proposed criteria outlined above in paragraph 78. That is, any restrictive practice should be used only as a last resort, after the resident and their family is fully consulted; it should be adapted to the circumstances; and the restraint mechanism employed should be proportionate to the risk and should only be applied to the extent necessary to prevent the harm.

[173] Australian Government Department of Health, *Serious Incident Response Scheme for Commonwealth funded residential aged care: Finer details of operation* - Consultation Paper, August 2019, 11.
[174] Although for in-home and flexible care, it recommended that reporting of serious incidents should be on those of staff.
[175] Ibid 20.
[176] Ibid.

124. The Department of Health has now released its Report on the Outcome of Public Consultation on the serious incident response scheme (**SIRS Consultation Report**).[177] Feedback from this consultation (and, the Law Council expects, the Royal Commission), is being considered by the Department of Health in consultation with key stakeholders to develop the final version of its proposed SIRS model, before legislation is introduced.

125. One of the issues flagged in the SIRS Consultation Report is privacy.[178] In this regard, the Law Council acknowledges that there are complex dynamics that surround the reporting of resident mistreatment. Shame, embarrassment, and fear of reprisal from residential aged care facility staff and management are relevant. This is compounded by the dependency (to varying degrees) of the resident on the provider to meet their care needs. An older person may be reluctant to disclose mistreatment if it was perpetrated by someone on whom they depend for care. This reluctance comes from fear of further neglect or mistreatment.

126. In addition, the Law Council highlights that employees in the aged care sector may not report abuse for a number of further reasons, such as fear of contravening Commonwealth, state or territory privacy laws; fear of dismissal or adverse action by employers; fear of breaching their patients' trust; and a lack of education around what constitutes abuse.

127. As per the ALRC's recommendation, the Law Council submits that the requirements of the current reportable assaults scheme, which obliges the approved provider to take reasonable measures to require staff members to report serious incidents,[179] to ensure staff members are not victimised,[180] and to protect informants' identities,[181] should be a feature of the serious incident response scheme.

128. Another significant point raised by respondents to the Department's consultation paper was that serious incidents should not be distinguished on the basis of who the perpetrator is (for instance, other aged care recipients).[182] There was also support for removing the existing exception to reporting 'reportable assaults' to the police and ACQSC for assaults committed by other residents assessed as having a cognitive or mental impairment.[183] As highlighted above, there is a reporting exemption in subsection 53(1) of the Accountability Principles 2014, for so-called 'resident-on-resident' incidents, where the resident alleged to have committed the offending conduct has a pre-diagnosed cognitive impairment, and within 24 hours the provider puts in place arrangements to manage their behaviour.

129. The Law Council notes that the ALRC recommended that serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment against another care recipient should not be exempted.[184] However, if committed by another care recipient, it proposed a more limited definition of serious incidents. This makes sense: a care recipient, for example, cannot be responsible for serious 'neglect' of another recipient. The ALRC's proposed SIRS was intended to replace the existing reportable assaults

[177] Ibid.
[178] Ibid 26.
[179] The Act s 63-1AA(5).
[180] The Act ss 63-1AA(6), 96-8.
[181] The Act s 63-1AA(7).
[182] Australian Government Department of Health, 'Report on the outcome of public consultation on the serious incident response scheme for commonwealth funded residential aged care' (November 2019), 8.
[183] Ibid.
[184] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017), 125, Rec 4-6.

scheme, with reports made to an independent oversight body rather than the police. The ALRC also found that:

> *The response to resident-on-resident incidents where the person using violence has cognitive impairment may be different from, for example, incidents involving staff members. Reporting to police would generally not be warranted.*[185]

130. The Law Council considers that caution is needed regarding appropriate responses to serious incidents committed by care recipients who have cognitive or mental health impairment. It is essential to know of, and respond, to such serious incidents promptly and effectively. In this regard, detailed data from reporting of incidents is critical. However, it also agrees with views expressed by respondents that 'the SIRS [should] not be used as a mechanism to criminalise, remove or discriminate against residents who exhibit challenging behaviours due to dementia, disability, previous trauma and/or medical conditions'.[186] Often the 'challenging behaviour' can be a result of the failure of others to understand and respond appropriately initially.

131. Noting that there are still significant issues to be resolved with respect to the development of the SIRS, and the fundamental importance of this scheme to identifying and addressing elder abuse in aged care, the Law Council recommends that the Department release an exposure draft of any legislative amendments proposed. This would ensure that community perspectives are fully understood, practical concerns are remedied, and any unintended consequences identified addressed before the legislation progresses to Parliament. The SIRS, when enacted, should be the subject of regular and independent review.

Recommendations

- **The Department should release an exposure draft of legislation aimed at implementing the proposed serious incident response scheme for consultation in the near future, given the fundamental importance of the scheme to identifying and addressing elder abuse in aged care.**
- **The serious incident response scheme should:**
  - **apply to flexible and in-home care as well as residential care;**
  - **apply in residential care to incidents involving persons beyond staff, such as visitors and family;**
  - **include appropriate provisions for non-victimisation, privacy and confidentiality;**
  - **apply to all serious incidents rather than permitting exemptions for certain categories or providers; and**
  - **when enacted, be subject to regular, independent review.**

Reporting deaths

132. Proper monitoring and investigation of deaths in aged care has the potential to expose instances of abuse, as well as systemic problems in the residential aged care system.

[185] Ibid, 125.
[186] Australian Government Department of Health, 'Report on the outcome of public consultation on the serious incident response scheme for commonwealth funded residential aged care' (November 2019), 8.

Unfortunately, deaths in residential aged care settings are infrequently investigated due to gaps in the coronial and other death review systems.[187]

133. The term 'death in care' is a common class of reportable death to coroners but each jurisdiction has a narrow or constrained definition that excludes residential aged care facilities.[188] The increased scrutiny of deaths in aged care would allow for the identification of circumstances causing premature deaths of older Australians, including low quality care.

134. Mr Bill Mitchell OAM, Townsville Community Legal Service Principal Solicitor, and recent co-recipient of the Law Council's 2019 Presidential Award, suggests that a deaths in residential aged care facilities be included as new class of reportable death to the Coroners Act of each relevant jurisdiction.[189]

135. While the Law Council supports this concept in principle, subject to the views of its constituent bodies, which hold responsibility for state and territory laws, it notes that the detail about the circumstances for when such a death is reportable should be closely considered. This could include for example, where a Public Guardian or Public Advocate had been investigating quality of care at the residential aged care facilities where a resident was involved in a critical, serious or reportable incident, and where the decedent had a restrictive practices history. The Queensland Law Society has expressed the view that deaths in care must be reported in every instance.

Community visitor program

136. The Australian Government funded Community Visitor Scheme (**CVS**) provides companionship through one-on-one volunteer visits to recipients of residential aged care, home care packages and groups in residential aged care.[190]

137. The CVS plays an important role in reducing social isolation, which may itself be protective against abuse. In this regard, the Law Council welcomes the Department of Health's new national guidelines for the community visitor scheme.[191] This follows a recommendation from the ALRC's Elder Abuse Inquiry.[192] The new guidelines set out the roles and responsibilities of CVS volunteers, including a procedure for visitors to follow if they have concerns about abuse or neglect of care recipients.[193]

138. The Law Council also welcomes the Australian Government's recent funding commitment of AU$10 million for the CVS.[194] The funding is intended to support extra

[187] For a detailed discussion of death review processes and the link to elder abuse, see Bill Mitchell, 'Identifying institutional elder abuse in Australia thought coronial and other death review processes' (2018) 18 *Macquarie Law Journal* 35.
[188] *Coroners Act 2003* (Qld) section 8. *Coroners Act 2017* (NT) s 18; *Coroners Act 1997* (ACT) s 3C; *Coroners Act 1993* (SA) s 3; *Coroners Act 1995* (Tas) s 3; *Coroners Act 2008* (Vic) ss 3, 4, 11, *Coroners Act 1996* (WA) ss 3, 17.
[189] Bill Mitchell, 'Identifying institutional elder abuse in Australia thought coronial and other death review processes' (2018) 18 *Macquarie Law Journal* 35.
[190] Commonwealth Government, Department of Health, 'Community Visitor Scheme' (Webpage, 14 May 2020) <https://www.health.gov.au/initiatives-and-programs/community-visitors-scheme-cvs>.
[191] Commonwealth Government, Department of Health, 'Community Visitor Scheme National Guidelines' (November 2019) <https://www.health.gov.au/sites/default/files/documents/2020/01/community-visitors-scheme-cvs-national-guidelines.pdf>.
[192] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,8 June 2017) recommendation 4-14.
[193] Commonwealth Government, Department of Health, 'Community Visitor Scheme National Guidelines' (November 2019) <https://www.health.gov.au/sites/default/files/documents/2020/01/community-visitors-scheme-cvs-national-guidelines.pdf>.
[194] Senator the Hon. Richard Colbeck, 'Support to keep people active and healthy as COVID-19 restrictions continue' (Media Release, 30 March 2020) <https://www.health.gov.au/ministers/senator-the-hon-richard-colbeck/media/support-to-keep-people-active-and-healthy-as-covid-19-restrictions-continue>.

staff to train volunteer visitors, who will connect with older people in aged care both online and by phone during the COVID-19 pandemic.[195]

Action to be taken in response to substandard care

Assessment

139. The Royal Commission's Interim Report highlights that the current regulatory model for residential aged care is centred on an accreditation system.[196] The ACQSC assesses the performance of providers against the Quality Standards on a pass/fail basis.[197]

140. Subsequent to the release of the Interim Report, the Australian Government Department of Health announced that it will introduce a service compliance rating system for residential aged care services.[198]

141. From July 2020, every Commonwealth subsidised residential aged care service will have a Service Compliance Rating in the 'Find a Provider' section of the My Aged Care website to allow for the comparison of providers in a chosen area.[199] The performance of each service will be categorised as a dot rating out of four, using the following criteria:

- one dot means a current sanction has been applied due to inadequate performance;
- two dots mean a current notice of non-compliance has been applied due to the need for significant improvements;
- three dots mean areas for improvement have been identified in the most recent quality assessment; and
- four dots mean that there are no areas for improvement identified in the most recent quality assessment.[200]

142. A ratings system is not a new idea. It was recommended by the 2017 *Carnell-Paterson Review of National Aged Care Quality Regulatory Processes*, which referred to the ratings system embedded in England's accreditation system.[201] The Law Council submits that careful consideration must be had to the experience of other jurisdictions that have adopted some sort of scale to describe facility compliance.[202]

Sanctions

143. On 1 January 2020, the aged care regulatory functions of the Secretary of the Department of Health were transferred to the ACQSC.[203] The ACQSC's role includes oversight of aged care compliance and enforcement actions. If an approved provider

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[195] Ibid. See The Act s 42-4, the ACQSC Act s 19(a) and The ACQSC Rules Part 3.
[196] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 61.
[197] Ibid 62.
[198] Australian Government Department of Health, 'Service Compliance Ratings: Information for residential aged care service providers' , https://www.health.gov.au/sites/default/files/documents/2020/05/service-compliance-ratings-information-for-residential-aged-care-service-providers.pdf>.
[199] Ibid.
[200] Ibid.
[201] Kate Carnell AO and Rob Paterson ONZM, 'Review of National Aged Care Quality Regulatory Processes' (October 2017) 73.
[202] See discussion of England, US and New Zealand in Kate Carnell AO and Rob Paterson ONZM, 'Review of National Aged Care Quality Regulatory Processes' (October 2017) 73.
[203] The Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019 was passed on 5 December 2019.

of aged care services fails to meet its responsibilities under the Act, including the Quality Standards, the ACQSC may impose sanctions.[204]

144. In deciding whether it is appropriate to impose sanctions on an approved provider, the ACQSC will give paramount consideration to whether the non-compliance threatens the health, welfare or interests of the care recipients to whom the provider is providing care.[205] Consideration is also given to the likelihood of managing harm, for example whether the non-compliance has occurred previously and, if so, how many times.[206]

145. Where there is no immediate and severe risk to the safety, health and well-being of care recipients, the ACQSC must give the provider a notice of non-compliance, setting out why the ACQSC is considering imposing one or more sanctions on the provider and what action the ACQSC requires the provider to take to remedy the non-compliance.[207] An approved provider may be required to give an undertaking about remedying non-compliance.[208] Failure to comply with this undertaking may result in a sanction being imposed.

146. In cases where it has been determined that a provider's non-compliance poses an immediate and severe risk to recipients of aged care, the Commission will respond by issuing a sanction.[209]

147. The kinds of sanctions that may be imposed are outlined in section 63R of the ACQSC Act and include revoking or suspending the approval of the provider, restricting the payment of subsidies under the Act, prohibiting the charging of an accommodation bond, or an accommodation charge, for the entry of care recipients to a residential care service by the provider, restricting the use by the provider of a refundable deposit, or an accommodation bond. In addition to existing sanctions, the Law Council submits that consideration should be given to issuing of fines.

148. The My Aged Care Non-compliance Checker publishes information about provider sanctions and notices of non-compliance.[210] The Law Council welcomes this transparency measure and encourages further promotion of this online tool.

149. While acknowledging the ACQSC's recently expanded powers for monitoring and enforcing compliance under the ACQSC Act, the Law Council notes concerns regarding the ACQSC's record of responding to complaints. For example, some of the Law Council's constituent bodies highlight that the ACQSC can be slow to act and unresponsive to the concerns of the complainant. These concerns reflect those raised in the Royal Commission's Interim Report.[211] The Law Council stresses that the ACQSC must be adequately resourced so that it can effectively utilise its new powers to respond to complaints.

150. At present, some members of constituent bodies have also observed that in their experience, the ACQSC focuses on process improvements. This means that it can fail

[204] ACQSC Act s 63N. See also ACQSC, 'Regulatory Strategy' (1 January 2020) <https://www.agedcarequality.gov.au/sites/default/files/media/regulatory_strategy_1_jan_2020.pdf>.
[205] ACQSC Act s 63N(4).
[206] ACQSC Act s 63N(3)(b).
[207] ACQSC Act s 63S.
[208] ACQSC Act s 63T.
[209] ACQSC Act s 63N. See also ACQSC, 'Regulatory Strategy' (1 January 2020) <https://www.agedcarequality.gov.au/sites/default/files/media/regulatory_strategy_1_jan_2020.pdf>.
[210] Australian Government, 'MyAged Care – Non-Compliance Checker' < https://www.myagedcare.gov.au/non-compliance-checker>.
[211] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 8.

to impose appropriate sanctions for instances of non-compliance where providers can demonstrate ongoing improvement.

151. Having regard to these entrenched issues, the Law Council highlights the significance of an independent oversight mechanism with the power to conduct a review of the ACQSC's complaints process.

152. The Law Council recognises that the Commonwealth Ombudsman (the **Ombudsman**) currently has the power to investigate action by a prescribed authority (including the ACQSC), being action that relates to a matter of administration, which is either the subject of a complaint or on the Ombudsman's own motion.[212] Anyone, both individuals and service providers, who are not satisfied with the ACQSC can make a complaint. The concept of administrative action has been broadly characterised to include a decision, act, recommendation, proposal to act, or refusal or failure to act.[213]

153. The Ombudsman has the discretion not to investigate certain complaints, including where they are frivolous or vexatious or the complainant does not have a sufficient interest in the subject matter of the complaint.[214] The Ombudsman shall make a report if the Ombudsman is of the opinion that an ACQSC action was concerning on a number of grounds, such as if it was unlawful, reasonable, unjust oppressive, improperly discriminatory, was based on a mistake of law or of fact, or otherwise wrong.[215]

154. The Ombudsman may recommend that the ACQSC reconsider or change its action or decision; that a law, rule or procedure should be changed; and/or that the ACQSC should take any other action that is appropriate in the circumstances.[216] A report by the Ombudsman is forwarded to the ACQSC and the Minister for Aged Care and Senior Australians.[217] The Ombudsman may request the ACQSC to respond by advising of any action that it proposes to take with respect to matters in the report.[218] However, there is no requirement for the ACQSC to respond to the Ombudsman's report. If the Ombudsman's recommendations are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.[219]

155. The Law Council considers that there may be some confusion as to the Ombudsman's oversight role of the ACQSC's actions, and there is little information available as to whether it is being utilised in this respect, by either residents or providers. It suggests that this mechanism should be better known as an independent avenue of redress, and resourced appropriately for this purpose. Should the Ombudsman's NPM functions be extended to cover aged care, additional resources will be particularly pertinent. In addition, consideration should be given to requiring the Ombudsman to report to Parliament, at least annually, on the comprehensiveness and adequacy of the ACQSC's complaint handling and the Minister should be required to respond to recommendations publicly.

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[212] *Ombudsman Act 1976* (Cth) ss 5(1)(a) and 15(1).
[213] Robin Creyke, John McMillan, Mark Smyth, *Control of Government Action: Text, Cases & Commentary* (2015), 4th ed, 252.
[214] *Ombudsman Act 1976* (Cth), s 6.
[215] Ibid ss 15(1) and 15(2).
[216] Ibid s 15(2).
[217] Ibid ss 15(2) and (6).
[218] Ibid s 15(4).
[219] Ibid ss 16 and 17.

156. Given the limitations of the Ombudsman's existing powers, the Law Institute of Victoria supports the creation of a dedicated and separate Aged Care Ombudsman to oversee the performance of the ACQSC.

Notices of non-compliance

157. Section 63S of the ACQSC Act highlights that notice is given of the Commissioner's intention to apply sanctions where the Commissioner is satisfied that the provider is not complying with their responsibilities. As an important element of procedural fairness, the Commissioner has an obligation to consider any submissions made by the approved provider in accordance with the notice.[220] The Commissioner's decisions to apply sanctions can be challenged through internal and merits review.[221]

158. As a preliminary step, however, concerns have been raised regarding the publication of notices of non-compliance on the My Aged Care website. The Commission has authority, under subsections 59(1)(h) and 59A(1)(g) of the ACQSC Act, to publish information about the approved provider's performance in relation to responsibilities and standards under the ACQSC Act or the Act. This would seem to be the legislative basis on which notices of non-compliance are published on the My Aged Care website. According to the ACQSC Regulatory Bulletin:

- information about a provider's non-compliance in relation to a service will remain published in the Non-compliance register for four weeks, before it moves to an archive; and
- a non-compliance notice will appear on the 'Current Non-Compliance Notice' page on the My Aged Care website until the provider has addressed the non-compliance.[222]

159. There is no ability to challenge such a publication being made under subsections 59(1)(h) and 59A(1)(g), as it is not a reviewable decision.[223] This suggests that should an initial decision by the Commissioner that there is non-compliance be wrong, the provider may be able to ultimately challenge the imposition of any sanctions, but not to challenge the publication of a four week (or longer) notice which may be prejudicial to their business. Consideration should be given to addressing this issue.

Access to justice

160. The Older Persons chapter in the Law Council's Justice Project[224] highlights that older persons may experience a wide range of legal problems related to aged care services, such as contractual and consumer law issues, negligence and elder abuse.[225] Older persons also have lower levels of finalising legal problems.[226] The Justice Project Older Persons Chapter also highlights that older persons experience significant barriers – such as poverty, disability, discrimination, family pressures, disempowerment and shame – in attempting to resolve their legal problems, which often means that they suffer in stoic

[220] ACQSC Act, s 63S(4).
[221] Ibid, Pt 8B.
[222] ACQSC, Publication of provider performance information (Regulatory Bulletin 2020-11, July 2020).
[223] ACQSC Act, s 74J.
[224] The Law Council's Justice Project, which began in early 2017, was overseen by a Steering Committee of eminent lawyers, jurists and academics, and chaired by former High Court Chief Justice, the Hon. Robert French AC.
[225] Law Council, Older Persons Chapter (Final Report, August 2018) 14-15.
[226] Ibid, 16, citing Christine Coumarelos et al, Law and Justice Foundation of New South Wales, Legal Australia-Wide Survey Legal Need in Australia (2012), xxiii.

silence. This may leave aged care recipients in situations which are unsafe, dangerous, or otherwise substandard, with their needs unmet. Legal advice and representation plays an important role in increasing provider accountability for their actions.

161. Despite these challenges, there is limited funding of legal assistance services[227] for older people.[228] In the 2018/2019 financial year, just over one per cent (1,862 out of 149,814) of approved legal aid grants were for persons aged 65 years and over,[229] despite this group making up 16 per cent of the population.[230]

162. In this regard, the Law Council notes that funding constraints place significant limits on the amount of legal aid resources that can be allocated to civil law matters – which is the primary area of legal need for older persons. As highlighted by the Law Council's Justice Project, there is a significant disparity between the number of legal aid grants allocated for civil matters, compared to criminal and family matters.[231] Fewer than three per cent of legal aid grants are made for civil legal matters.[232] While lower level legal aid (eg advice) can be available more freely for such matters, legal aid grants provide for full legal representation before the courts. Such representation is vital to ensuring that precedents are obtained through the justice system which are binding on all aged care providers.

163. Community legal centres, which tend to have a greater focus on civil law issues, are similarly constrained by funding and resources; in 2016-17 community legal centres reported turning away over 112,700 people.[233] It has been emphasised that 'without increased investment in access to justice, older people are under threat of losing their right to be free from abuse as they age'.[234]

164. The Justice Project Older Persons chapter highlights how in recent years, an increased national emphasis on elder abuse awareness has substantially driven up demand amongst legal assistance services, but that these have not been sufficiently funded to meet this demand. For instance, in its submission, Seniors Rights Victoria indicated that in the previous three years, there had been a 64 per cent increase in calls to its helpline and a 48 per cent increase in the number of advices provided, but its funding had remained largely static.[235]

165. The Law Council is further concerned that while many Fist Nations people prefer community-controlled service delivery, the overwhelming pressures on these services to meet criminal and family law needs means that civil law needs frequently come last.[236] For older First Nations people, this substantially reduces their access to justice concerning issues experienced in aged care, even though this group's identified legal

[227] Legal assistance services include legal aid commissions, community legal centres, and Aboriginal community controlled legal services.
[228] Law Council, Justice Project (Older Persons Chapter, Final Report, August 2018) 24-29.
[229] National Legal Aid Statistics Report, 'Age' (for Financial Year 2019-2020 as at May 2020) <https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=AgeIndicator>.
[230] ABS, *Australian Demographic Statistics* (Catalogue No. 3101.0, June 2019).
[231] Law Council, Justice Project (Older Persons Chapter, Final Report, August 2018) 25.
[232] National Legal Aid Statistics Report, 'Practitioner Type' (for Financial Year 2019-2020 as at May 2020) < https://nla.legalaid.nsw.gov.au/nlareports/reportviewer.aspx?reportname=PractitionerType>.
[233] Law Council, Submission to Treasury, *2020-21 Pre-Budget Submission* (20 December 2019) <https://www.lawcouncil.asn.au/docs/cd726d84-2459-ea11-9403-005056be13b5/3727%20-%20Pre%20Budget%20submission%202020-21.pdf> 17 [54].
[234] Law Council, Justice Project (Older Persons Chapter, Final Report, August 2018) 25 citing Seniors Rights Victoria, *Submission No 44*.
[235] Ibid, 25.
[236] Law Council, Justice Project (Aboriginal and Torres Strait Islander Chapter, Final Report, August 2018), 12-13.

needs relevantly include guardianship, power of attorney, wills and victims compensation issues.[237]

166. During the Justice Project, the Law Council received many case studies highlighting the value of lawyers in helping older people to live safely and with dignity. These included the following story of 'Barbara':

> *Barbara was incorrectly diagnosed with dementia and housed in a locked ward of a private aged care facility. Her enduring power of attorney was being misused by her daughter Sharon who refused to help her to find alternative accommodation and withdrew a significant amount of money from her bank account. Barbara was in despair living amongst people who were too unwell to communicate with her and her requests to change her colostomy bag were often overlooked by staff, resulting in leakage from the bag.*
>
> *Caxton Legal Centre's Seniors Legal and Support Service stepped in and assisted Barbara to have her enduring power of attorney revoked and moved out the dementia ward. Barbara's quality of life has been turned around – she reports 'feeling like a human again… I feel treated with respect. I am so thankful to have my freedom again.[238]*

167. There has been some movement towards funding additional legal assistance services for elder abuse. The Australian Government has committed AU$18.3 million over four years (2018-19 to 2021-22) to support the delivery of front-line services to older people experiencing elder abuse.[239] This includes service trials of specialist elder abuse units at some legal aid commissions and community legal centres, health-justice partnerships and case management and mediation services.[240] The Law Council submits that particular regard should be had to funding such services in rural, regional and remote areas where there are significant concerns regarding levels of unmet legal need.[241]

168. The Law Council highlights that health-justice partnerships are particularly beneficial for older persons, as health professionals often develop ongoing relationships with older clients and can identify legal problems early on and refer older clients to legal help. These solutions require cross-portfolio backing to succeed.[242] The Law Council welcomes the Government's funding for health-justice partnership trials and encourages this to move to longer-term secure funding.

169. However, the Law Council remains concerned that this is inadequate in light of the acute and widespread nature of elder abuse within the community, including in aged care facilities. Key recommendations made by the Productivity Commission for substantial urgent funding injections (AU$200 million per annum) required for civil legal assistance services remain largely unrealised.[243] It does, however, welcome the Australian Government's recent specific injection for frontline legal assistance services to support

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[237] Ibid.
[238] Law Council, Justice Project (Overarching Themes Chapter, Final Report, August 2018) 33.
[239] Australian Government Attorney-General's Department 'Protecting the rights of older Australians' (Webpage) <https://www.ag.gov.au/RightsAndProtections/protecting-the-rights-of-older-australians/Pages/default.aspx>.
[240] Ibid.
[241] Law Council, Justice Project (Rural, regional and remote Australians Chapter, Final Report, August 2018).
[242] Law Council, Justice Project (Legal Services Chapter, Final Report, August 2018), 73-81
[243] Productivity Commission, *Access to Justice Arrangements*, Inquiry report (2014), 703.

people impacted by COVID-19, although it is unclear on the extent to which this will reach aged care recipients.[244]

170. In addition to funding legal assistance services with elder law expertise, the Law Council submits that community legal education that focuses on elder law issues should be considered as part of an overall strategy to improve access to justice. While online legal information can be effective for some older persons, face to face services remain important given digital divide and other barriers. Emerging strategies include the use of peer-to-peer networks to educate and empower older persons.[245]

Recommendations

- **Health-justice partnerships should be expanded for older persons in aged care, including in rural, regional and remote areas, and through long-term, secure funding arrangements.**
- **The Australian and state and territory governments should provide substantial additional funds for legal assistance services to provide specialist advice, representation and education for older persons to ensure accountability in the provision of aged care, and to uphold their rights. This should include tailored support for diverse groups and First Nations' community-controlled services.**

Research

171. The Law Council has been concerned by the lack of research into elder abuse. The Law Council considers the lack of information to be a significant problem with the current system.

172. The absence of a precise, agreed definition is also considered problematic for measuring elder abuse.[246] The Law Council considers a nationally consistent approach to defining elder abuse to be vital for systematic research. Due to the sector's cross-disciplinary nature, it is essential that a definition incorporates understandings of elder abuse from different perspectives.

173. As part of its Elder Abuse Inquiry, the ALRC recommended a national prevalence study of elder abuse be conducted, to improve the evidence base and inform policy responses.[247] To implement this recommendation, the Australian Institute of Family Studies has been commissioned by the Australian Government Attorney-General's Department to conduct a study of the nature and prevalence of elder abuse in Australia.[248] The national prevalence study has been identified as a priority for 2019-2020 in the Council of Attorney-General's *National Plan to Respond to the Abuse of Older Australians*.[249] The Law Council anticipates that the Royal Commission has been

[244] The Australian Government announced in early May 2020 that it was providing AU$63.3 million for frontline legal services to support people impacted by COVID-19. This includes AU$20 million earmarked for domestic violence, AU$29.9 million towards tenancy disputes, insurance, credit and debt related problems, work-related claims and remaining AU$13.5 million on IT upgrades: Law Council, 'Funding boost will help frontline legal services' (Media release, 8 May 2020).
[245] Law Council, Justice Project (People – Building Legal Awareness and Capability, Final Report, August 2018), 15-16, 22-23.
[246] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 41.
[247] Ibid recommendation 3-5.
[248] ALRC, 'Reform round-up' (22 January 2018).
[249] Council of Attorney-Generals, National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023.

inquiring into its progress in this regard, and any remaining research gaps which should be addressed.

Meeting the needs of aged care recipients

Consumer choice

174. While the Law Council welcomes the introduction of 'consumer choice' as a new principle guiding the delivery of aged care services in Australia,[250] it is concerned that in reality an overly standardised approach may be applied which can fail at times to recognise the needs, experiences and intersectional identities of older persons.

175. The Law Council has previously identified that the Department of Health's Charter of Aged Care Rights should be underpinned by a 'human rights' rather than 'consumer rights' approach.[251] It has also recommended that greater recognition is needed of the fact that not all recipients of aged care are equally able to understand and exercise their rights, both in the Charter and the underlying service delivery framework.[252]

176. Other members of the legal profession also distinguish between the Government's commitment to 'consumer choice' and the need for tailored service delivery.[253] As highlighted by the Royal Commission, 'it is a myth that aged care is an effective consumer-driven market'.[254] This is because 'many older people are not in a position to meaningfully negotiate prices, services or care standards with aged care providers'.[255]

177. The Royal Commission's Interim Report identifies the need for improved advocacy to support older persons and help them access the right services.[256] The Law Council notes that the Australian Government's National Aged Care Advocacy Program (**NACAP**) currently provides free and independent advocacy support to older people receiving or looking to access government funded aged care services.

178. NACAP was recently identified by the Qld Parliamentary Inquiry as a valuable program to assist people protect their rights and interests in aged care.[257] Given the shift to a consumer directed model of care, advocacy services play an important role in enabling individuals to access services which meet their individual needs.

179. The Older Person's Advocacy Network was awarded AU$25.7 million to deliver services under the NACAP from 1 July 2017 to 30 June 2020.[258] While the Law Council supports this initiative it considers that additional consideration can be given to increasing its accessibility, including to regional and rural areas.[259]

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[250] The Quality of Care Principles 2014 Sch 2, Standard 1.
[251] Law Council, *Draft Charter of Aged Care Rights*, Submission to the Department of Health, 18 October 2018.
[252] Ibid.
[253] Darwin Community Legal Service, Submission to the Royal Commission on Aged Care Quality and Safety (undated) 17.
[254] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 10.
[255] Ibid 9.
[256] Ibid 68.
[257] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) 180.
[258] COTA for older Australians, 'COTA welcomes new National Aged Care Advocacy Program' (Media Release, 11 July 2017).
[259] Older Person's Advocacy Network, Submission to Royal Commission into Aged Care Quality and Safety, *Special Needs in Aged Care and Advocacy* (20 September 2019).

Diet and nutrition

180. Malnutrition and dehydration is prevalent amongst older Australians and is highlighted as a major quality and safety issue by the Royal Commission.[260] The issue is linked to consequential adverse outcomes, including increased risk of falls and pressure injuries,[261] as well as poorer resident quality of life and increased healthcare costs.[262]

181. Pursuant to article 11 of ICESCR, everyone has the right to an adequate standard of living including adequate food.[263] The Committee on Economic, Social and Cultural Rights considers 'adequacy' to mean the 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'.[264]

182. The Committee has further stated that, as part of the realisation of the right to adequate food, States should take appropriate steps to ensure that activities of the private business sector are in conformity with this right.[265] This may involve the adoption of legislation and administrative measures.

183. Despite this, there are currently no comprehensive national nutrition and menu planning standards that hold aged care providers to account for their service provision in Australia. The Quality Standards, which a residential care service is assessed against, provide that 'where meals are provided, they are (to be) varied and of suitable quality and quantity'.[266] However, the meaning of 'varied' and of 'suitable quality and quantity' is open to interpretation. The Law Council notes the concerns of the Dieticians Association of Australia outlined in its submission to the Royal Commission regarding the 'generality' of these nutrition standards.[267]

184. The ACQSC's 'Guidance and Resources for Providers to Support the Aged Care Quality Standards' 2019 (**Quality Standards Guidance**) is designed to help approved providers understand their obligations under the Quality Standards, including in terms of managing hydration and nutrition. However, as noted by the Dieticians Association of Australia, this guidance 'still requires interpretation by service providers and accreditation surveyors.'[268]

185. The Law Council considers that more prescriptive provisions should be drafted and included in the Quality Standards to hold aged care providers accountable for the nutrition standards they provide.

186. In accordance with a recommendation made by the Qld Parliamentary Committee, in developing these nutrition standards, regard should be had to the nutritional guidelines for older people provided by the National Health and Medical Research Council's *Australian Dietary Guidelines*.[269]

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[260] See Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 6.
[261] Cherie Hugo, 'What does it cost to feed aged care residents in Australia?' (2018) 75 *Journal of Dietitians Association of Australia* 6-10.
[262] Ibid.
[263] ICESCR, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[264] General Comment No. 12: The Right to Adequate Food (Art. 11) [8].
[265] Ibid.
[266] Quality of Care Principles 2014 sch 2, standard 3(f).
[267] Dieticians Association of Australia, Submission to the Royal Commission into Aged Care Quality and Safety, March 2019, 18.
[268] Ibid.
[269] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) recommendation 18 citing National Health and Medical Research Council, Australian Dietary Guidelines (2013).

187. Malnutrition is a multifaceted problem. In addition to the quality of food provided, there is also concern with its delivery to residents of aged care facilities. While a large proportion of residents need assistance to eat,[270] in many instances staffing levels are insufficient to support this care. Malnutrition is reportedly often due to residents not eating food, rather than poor quality.[271]

188. Within residential aged care facilities, the nutritional and food management needs of residents vary. Food restrictions or limitations may be imposed as a result of perceived or assessed risks of choking or other swallowing concerns, resulting in poor nutritional outcomes.

189. A special diet may be required to manage the nutrition of residents with particular medical conditions. For example, dementia-based nutrition research indicates that a variety of mealtime strategies can be implemented to improve residents' nutrition and functioning.[272]

190. Managing the particular nutritional and food management needs of a patient requires appropriately trained and qualified staff. In this regard, the Law Council considers that staffing is a critical element in addressing malnutrition. The issue of staff resourcing is discussed further below.

Recommendation

- **The Quality Standards should include more prescriptive nutrition provisions, having regard to the specific guidelines for older people in the National Health and Medical Research Council's *Australian Dietary Guidelines*, to hold aged care providers accountable for the nutrition standards they provide. The provisions should also impose minimum standards for hydration.**

Medical treatment

191. The Law Council is concerned that quality of care is compromised by poor relationships between the aged care and health systems undermining older persons' rights to the enjoyment of the highest attainable standard of health. Based on feedback received by its constituent bodies, the Law Council notes that it can be difficult for residents of aged care facilities to see their choice of doctor or seek a second opinion. Often, residential aged care facilities have certain general practitioners who visit the facility and have an ongoing relationship with staff. This forms what is essentially a restricted service arrangement. Routines develop whereby doctors speak to staff rather than the resident. The Law Council is concerned that this practice prioritises the preferences of the aged care facility above the resident's direct access to, and engagement with, their trusted health care practitioner.

192. On 1 March 2019, the Australian Government introduced new Medicare Benefits Schedule items for professional services provided by a general practitioner or medical

[270] Transcript of Proceedings, *In the matter of the Royal Commission into Aged Care Quality and Safety* (Melbourne, day 56 of proceedings, The Honourable T. Pagone QC and Commissioner Ms L.J. Briggs AO, 11 October 2019) P-5774.
[271] Emily Baker, 'Aged care residents malnourished, staff panicked, Hobart dietitian tells royal commission' *ABC* (online, 21 August 2019) <https://www.abc.net.au/news/2019-08-21/aged-care-residents-malnourished-dietitian-says/11432866>.
[272] Rebecca Abbott et al. 'Effectiveness of Mealtime Interventions on Behaviour Symptoms of People with Dementia Living in Care Homes: A Systematic Review' (2014) 15(3) *Journal of the American Medical Directors Association* 185.

practitioner at a residential aged care facility.[273] This includes a call-out fee to cover doctors' costs of travel to a residential facility, and new attendance items. The Law Council welcomes recent changes to the Medicare Benefits Schedule and supports an ongoing review of these items to incentivise general practitioners to continue to visit their patients.

193. Encouraging general practitioners to continue to visit their patients once they enter a residential aged care facility enables continuity of care and the development of trusted relationships. It further empowers residents and reduces the risk of abuse or neglect associated with a disconnection from their choice of medical care.

194. In 2015 the Australian Government commissioned a report into the role of nurse practitioners in aged care.[274] The benefits of increasing the role of nurse practitioners in aged care include addressing gaps in care delivery where general practitioners were unable to visit, and improved care coordination.[275] Consideration could be given to the allocation of Australian Government funding for the trialling the use of nurse practitioners in aged care, including expanding their scope of practice to prescribe certain medications and order pathology testing for residents in consultation with general practitioners, as recommended by the Qld Parliamentary Inquiry.[276]

195. More generally, the Royal Commission has heard concerns about the information exchange between aged care services and the broader health care system and the level of coordination between the aged care and health care systems.[277] The Law Council recommends improved information sharing frameworks to streamline care, but notes that careful consideration must be given to privacy and confidentiality obligations.

Recommendations

- **The Australian Government should continue to review the Medicare Benefits Schedule relating to general practitioner visits to residential aged care facilities to incentivise continuity of care.**
- **The Australian Government should implement improved information sharing frameworks to streamline care, subject to privacy and confidentiality considerations.**

Diversity

196. Older persons are not a homogeneous group. This is highlighted in the preamble to the UN Principles which acknowledges 'the tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses'.[278] The needs of older persons differ depending on where they fall within this age group as well as the existence of other

[273] Department of Health, 'MBS Online- New arrangements for GP Residential Aged Care Facility (RACF) services' (5 April 20219) <http://www.mbsonline.gov.au/internet/mbsonline/publishing.nsf/Content/Factsheet-NewItemsRACF>.
[274] Davey et al. 'The National Evaluation of the Nurse Practitioner – Aged Care Models of Practice Initiative 2011-2014' (Summary of findings, 2015).
[275] Ibid.
[276] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) recommendation 1.
[277] Transcript of Proceedings, *In the matter of the Royal Commission Into Aged Care Quality And Safety* (Canberra, day 69 of proceedings, The Honourable T. Pagone QC and Commissioner Ms L.J. Briggs AO, 9 December 2019).
[278] GA Res 46/91, UN Doc A/Res/46/91 (16 December 1991).

factors, such as economic deprivation, ill health, disability, racial, ethnic and cultural background, homelessness and geographic isolation.

197. Nine 'special needs groups' are identified under the Act for whom there is additional consideration in the planning and delivery of appropriate aged care services.[279]

198. On 6 December 2017, the Australian Government launched the Aged Care Diversity Framework which identifies additional special needs groups such as people with disability.[280] The framework seeks to embed diversity in the design and delivery of aged care, and support action to address barriers to recipients accessing quality and safe aged care services. The Law Council welcomes the Australian Government's Aged Care Diversity Framework and corresponding action plans.[281]

199. At the same time, members of the legal profession remain concerned by the delivery of aged care to older people with special needs. In particular, the Law Council notes concerns surrounding the delivery of care to people with disabilities and First Nations people.

People with disabilities

200. The Law Council, through its constituent bodies, has received feedback regarding the difficulties which can be faced by recipients of aged care with disabilities. For example, in residential aged care this includes the range of activities not always appropriately catering to residents with vision impairment or low vision. Activities such as board games, bingo, jigsaw puzzles, sight-seeing bus-rides, sing-alongs requiring reading of lyrics, television viewing and guided exercise all require vision.

201. It understands that difficulties also arise where some staff do not recognise and respond to the needs of such residents in aged care facilities. This includes by failing to identify themselves or failing to provide descriptions of provided food. Other examples include inadvertently or carelessly restricting resident access to auditory entertainment (for example by failing to assist residents to plug in headphones or by unplugging radios so that outlets can be used for other equipment and not reconnecting to power), and having unrealistic expectations of residents' involvement in their own care (for example, asking them to place their hands on a lifter when the resident cannot see the handles).

202. In the case of hearing impairments, the Law Council understands that older persons are sometimes left without the benefit of their hearing aids, either due to carers failing to assist in fitting the aids or failing to ensure that batteries are working correctly.

203. With better staff training and processes, the Law Council submits that these issues could be addressed in consultation with disability experts and older people with lived experience. In some instances, measures needed may be relatively simple, for example, such as placing a notice in residents' rooms to remind staff that the resident has vision or hearing impairments. The Law Council acknowledges that some aged care services are responding to the needs of aged care recipients better than others in this regard and it is important that examples of good practice are shared. It also recognises that staffing

[279] The Act s 11-3. These groups are a) people from Aboriginal and Torres Strait Islander communities; b) people from culturally and linguistically diverse backgrounds; c) people who live in rural or remote areas; d) people who are financially or socially disadvantaged; e) veterans; f) people who are homeless or at risk of becoming homeless; g) care-leavers; ga) parents separated from their children by forced adoption or removal; and h) lesbian, gay, bisexual, transgender and intersex people.
[280] Australian Government Department of Health, 'Aged Care Diversity Framework' (December 2017) <https://www.health.gov.au/sites/default/files/documents/2019/12/aged-care-diversity-framework.pdf >.
[281] Australian Government Department of Health, 'Aged Care Diversity Framework action plans' <https://www.health.gov.au/resources/collections/aged-care-diversity-framework-action-plans>.

pressures may mean that staff are overwhelmed by their responsibilities and that this impedes their ability to respond effectively to diverse needs. Ensuring that sustainable staffing arrangements are in place is a critical overarching issue for the Royal Commission's consideration, as discussed in the 'Investment in the Aged Care Workforce' section of this submission.

204. The Law Council considers access to independent advocacy, including specialised legal assistance services, to be particularly relevant to many people with a disability to ensure appropriate individualised support.

First Nations people

205. Having regard to the need to recognise multiple, diverse perspectives, particular regard should be had to the experience of First Nations older persons. It is well documented that First Nations people have lower health outcomes and a lower life expectancy compared to non-Indigenous Australians.[282] Older First Nations people also have higher rates of disability than non-Indigenous people.[283] For example, in the 2016 Census, 27 per cent older First Nations people needed assistance with core activities (self-care, mobility or communication tasks), compared with 19 per cent of older non-Indigenous people.[284]

206. In 2016-17, the age profile of First Nations people in permanent residential aged care was substantially younger than that of their non-Indigenous counterparts (26 per cent in care were aged under 65, compared with three per cent of non-Indigenous Australians).[285] Due to the shorter life expectancy of First Nations people, there is a need for access to aged care facilities at an earlier point compared to other Australians.

207. Consideration must also be given to service delivery for First Nations people in remote settings. First Nations' people make up relatively large proportions of the total population in remote (14 per cent) and very remote (42 per cent) areas.[286] In the Northern Territory, around 80 per cent of the First Nations population live in remote or very remote areas, the highest proportion of all the States and Territories.[287]

208. In addition to the specific medical needs associated with above findings, First Nations older people require culturally safe care, as recognised by health professionals and the Australian Government.[288] A 2017 joint report by the Australian Association of Gerontology and the Aboriginal and Torres Strait Islander Ageing Advisory Group highlights that:

> *Aboriginal and Torres Strait Islander Elders need access to culturally appropriate services, and they generally want to be cared for in their communities where they*

[282] See, eg, Department of Prime Minister and Cabinet, *Closing the Gap Report* (2019) < https://ctgreport.pmc.gov.au/sites/default/files/ctg-report-2019.pdf?a=1>.
[283] Australian Institute of Health and Welfare, *Older Australia at a Glance* (Webpage, 10 September 2018) <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/diversity/aboriginal-and-torres-strait-islander-people>.
[284] Ibid, citing ABS, *Aboriginal and Torres Strait Islander population, 2016.* (Catalogue no. 2071.0, 2017).
[285] Ibid.
[286] ABS, *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2016* (Catalogue No. 2076.0, 13 March 2019)
[287] Ibid.
[288] See, eg, Australian Department of Health, *Ageing and Aged Care: People from Diverse Backgrounds* (2019) < https://agedcare.health.gov.au/older-people-their-families-and-carers/people-from-diverse-backgrounds>.

are close to family, and where they can die on their land.[289]

209. However, the joint report also found that:

> *Aboriginal and Torres Strait Islander people face ongoing challenges finding services that are appropriate to their needs and circumstances, and often have problems accessing services where they exist.*[290]

210. The Law Council welcomes the Royal Commission's specific focus on this issue.[291] The Interim Report concludes that 'aged care for First Nations people needs to be delivered in ways that are flexible, adaptable and culturally safe'.[292] This includes:

- devising culturally appropriate assessment processes to access aged care;
- facilitating aged care provision on Country and 'return to Country' where that is not possible; and
- greater provision of First Nations' specific services in cities and regional areas.[293]

211. The Law Council looks forward to the further exploration of, and emphasis upon, these issues in the Royal Commission's final report. It stresses the need for services which are not only First Nations-specific, but First Nations-led, in close consultation with local communities. This is not only relevant to aged care service delivery itself, but broader services which uphold individuals' rights and ensure accountability, such as First Nations' legal services.

Recommendations

- **That greater emphasis be given to recognising and addressing the diverse needs of people with disability in aged care service delivery, with any measures underpinned by sustainable staffing, training and procedures.**
- **The Royal Commission strengthen its emphasis on addressing First Nations people's needs in aged care in ways that are flexible, adaptable and culturally safe, as well as First Nations-led. This should extend to services which uphold individuals' rights and ensure accountability of service delivery, such as First Nations' legal services and advocacy networks.**

Investment in the aged care workforce

212. Issues with the aged care workforce underpin several of the quality and safety issues identified above. These issues are not new and have been the subject of numerous inquiries and recommendations over the last two decades.

213. In 2017, the Government set up an independent Taskforce, led by Professor John Pollaers OAM, to develop a strategy for growing and sustaining the workforce providing aged care services and support for older people. The Taskforce delivered its report *A*

[289] Australian Association of Gerontology and the Aboriginal and Torres Strait Islander Ageing Advisory Group, *Assuring equity of access and quality of outcomes for older Aboriginal and Torres Strait Islander peoples: what needs to be done* (November 2017) <https://www.aag.asn.au/documents/item/2198> 7.
[290] Ibid.
[291] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 114.
[292] Ibid 190.
[293] Ibid 190.

Matter of Care, Australia's Aged Care Workforce Strategy[294] (**Aged Care Workforce Strategy**) in June 2018. The report sets out 14 'strategic actions' to be implemented by the Australian Government and the aged care industry to achieve reform. Several of these strategic actions are discussed further below.

214. Currently there are concerns with the lack of government action in response to the Aged Care Workforce Strategy. In his evidence provided to the Royal Commission in October 2019, Professor Pollaers suggested that the Government was yet to establish its position with respect to those practical and necessary strategic actions that were its responsibility.[295]

Recommendation

- **The Australian Government should work with the aged care industry to implement the Aged Care Workforce Strategy Taskforce Report recommendations.**

Ratios

215. Subsection 53.1(1)(b) of the Act states that it is the responsibility of an approved aged care provider 'to maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met'. There is no statutory definition, Ministerial regulation, or elaboration in the Quality Principles or Quality Standards as to what an adequate number would be. This is problematic.

216. The absence of minimum ratios has a direct impact on the quality of care received by residents in aged care facilities. As highlighted by the Royal Commission, excessive work demands and time pressure create a barrier to the capacity of workers to deliver quality care.[296] This can lead to increased use of restraints, despite the availability of a range of non-restrictive mechanisms.[297]

217. Ratios should have regard to the appropriate skill mix required to provide high quality and safe care. In the absence of mandated nurse ratios, most care needs are provided by lower skilled personal care workers.[298]

218. In December 2019, Senator Stirling Griff moved an amendment to the Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019 (Cth) which, amongst other things, would have introduced an obligation under section 9-2 of the Act on approved providers to notify the Quality and Safety Commissioner about staff to care recipient ratios.[299] Under the proposed amendments, the Commissioner would make publicly available information about staff to care recipient ratios of residential care services. However, the proposed amendments were defeated. The Law Council

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[294] Australian Government Department of Health, 'A Matter of Care: Australia's Aged Care Workforce Strategy' (June 2018) <https://www.health.gov.au/resources/publications/a-matter-of-care-australias-aged-care-workforce-strategy>.
[295] *In the matter of the Royal Commission into Aged Care Quality and Safety* (Melbourne Hearing 3, 14 October 2019) Exhibit 11-3, Statement of Professor John Pollaers.
[296] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 230.
[297] Ibid 207.
[298] Personal care workers represent approximately 70 per cent of the total workforce providing direct care in residential aged care - Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 16 citing K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, T Karmel, M Moskos, L Smith, H Walton and Z Wei, 2016 National Aged Care Workforce Census and Survey—The Aged Care Workforce, 2016, p 13.
[299] Commonwealth, *Parliamentary Debates,* Senate, 5 December 2019, 5217 (Senator Stirling Griff).

considers that the proposed amendments concerning staff ratios would have increased transparency in the sector and recommends their reintroduction.

219. As a point of comparison, the *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* (Vic) enshrines minimum numbers of nurses and midwives to care for patients. An objective of the legislation is 'to provide for safe patient care in hospitals by establishing requirements for a minimum number of nurses or midwives per number of patients in specified wards or beds, recognising that nursing workloads impact on the quality of patient care'.[300] The ratios are set out in Part 2 of this Victorian Act. They provide a minimum requirement only and are not intended to prevent the operator of a hospital from staffing a ward with additional nurses or midwives beyond the number required by the ratio.[301]

220. Similarly, in Queensland, the *Health Transparency Act 2019* (Qld), amends the *Hospital and Health Boards Act 2011* (Qld) (**Queensland Act**), to introduce a minimum nurse and support worker skill mix ratio and minimum average daily resident care hours in public residential aged care facilities.[302] Relevant provisions of the Queensland Act include the following.

    - Section 138H – grants the power to create a regulation regarding the minimum percentage of nurses or registered nurses that must provide residential care at a State aged care facility during a 24-hour period.
    - Section 138I – grants the power to create a regulation regarding the minimum average daily resident care hours at a State aged care facility. The average daily resident care hours are worked out by dividing the total number of hours of residential care that nurses and support workers provide at the facility on a day by the number of residents at the facility on the day.

221. Although the Law Council welcomes these provisions, it notes that a nationally-consistent approach is needed.

222. To improve transparency, the Qld Parliamentary Inquiry recommends that the Australian Government require providers to display in a public common area at each residential aged care facility the staff to resident ratios at that facility across each shift, for the information of residents, prospective residents and their representatives.[303] It further recommends that the Australian Government require that information about residential aged care facilities that is published in the Schedule to the 'My Aged Care' website includes staff to resident ratios at each of those facilities.[304] The Law Council supports these recommendations. Consideration should also be given to require that providers of residential aged care services disclose the qualifications, training and experience of their staff at the facility.[305]

Recommendations

- **New provisions should be incorporated within the Act to mandate minimum staffing ratios with regard to appropriate skill mix.**

[300] *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* (Vic) s 4(1).
[301] *Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Act 2015* s 9(1)(c).
[302] Health Transparency Bill 2019, Explanatory Notes.
[303] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020), recommendations 20.
[304] Ibid recommendation 21.
[305] Ibid recommendation 37.

- **Residential aged care providers should be required to display in a public common area the staff to resident ratios at that facility across each shift, for the information of residents, prospective residents and their representatives. Consideration should also be given to including staff to resident rations in the Schedule to the My Aged Care website.**

Screening

223. An issue of related concern is staff screening. Part 6 of the *Accountability Principles 2014* (Cth) sets out the police check requirements for aged care staff and volunteers. Subject to limited exceptions, new staff members and volunteers of approved providers are required to provide a police certificate that demonstrates that the person has not been convicted of murder or sexual assault; or convicted of, and sentenced to imprisonment for, any other form of assault.[306] Exceptions are provided where people are relieved from the requirement to disclose under the spent convictions provisions of the *Crimes Act 1914* (Cth).[307] The Police Certificate Guidelines for Aged Care Providers provides further guidance for aged care providers in relation to the police certificate requirements.[308]

224. The Law Council is concerned that this system is not sufficient to protect older Australians. Workers who have been dismissed by one employer for misconduct will not be revealed by a police check if there has been no police involvement in the misconduct.

225. As part of its Elder Abuse Inquiry, the ALRC recommended a national employment screening process for Commonwealth-regulated aged care.[309] The screening process would be broader than the current police check requirement and would include an assessment of relevant reportable incidents under the proposed SIRS and relevant disciplinary proceedings or complaints.[310] The Law Council supports this proposal, subject to the need for careful consideration of the safeguards which are required to avoid unfairly barring individuals from working in the aged care sector in circumstances where they will not pose a genuine risk. It notes that anti-discrimination laws in several jurisdictions prevent discrimination on the basis of irrelevant criminal record.[311]

226. The Australian Human Rights Commission has developed guiding principles for employers to consider in assessing suitability of applicants with criminal records.[312] These guidelines could be useful to aged care providers in determining whether a disclosed criminal offence should preclude a person from working in aged care.

227. The Law Council recommends that consideration should be given to whether relevant dishonesty offences and illegal substance abuse should also preclude employment in the aged care sector, with relief for spent convictions.[313]

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[306] The Accountability Principles 2014 s 48.
[307] *Crimes Act 1914* (Cth), Pt VIIC.
[308] Department of Health, Police Certificate Guidelines for Aged Care Providers (July 2019) available at <https://www.health.gov.au/sites/default/files/documents/2020/01/police-certificate-guidelines-for-aged-care-providers_0.pdf> .
[309] ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 11.
[310] Ibid.
[311] See overview in Law Council, Submission to the Attorney-General's Department, *Review of the Australian Human Rights Commission Regulations 1989 and the Disability Discrimination Regulations 1996*, 17 April 2019, 10-18.
[312] Australian Human Rights Commission, *On the Record Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012), available at: <https://humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.
[313] Law Council, Submission to the ALRC, *Elder Abuse Discussion Paper* (6 March 2017) 38.

228. The Law Council has previously indicated that offences which preclude a person from employment in aged care should not be conviction-dependent. Instead, any adverse finding in relation to a reportable incident should be disclosed. The approved provider can then take this into account when determining whether the applicant is suitable for employment in aged care. [314]

229. In developing the screening process for aged care services, regard should also be had to a nationally consistent scheme such as the mandatory risk-based National Disability Insurance Scheme Worker Screening Check which takes into account risk-based factors beyond the regular criminal checks.[315]

230. The Law Council further supports the ALRC's proposal that a national database be established to record the outcome of employment clearances,[316] but notes that such a database must be subject to appropriate privacy protections, such as those contained in the Act.[317]

Recommendation

- **The Law Council supports the following proposals made by the ALRC, subject to the careful development of appropriate safeguards:**
  - **there should be a national employment screening process for Commonwealth Government funded aged care providers; and**
  - **a national database should be established to record the outcome and status of employment clearances.**

Training

231. As older Australians enter residential care at later stages, with more complex medical conditions, there is increasing demand for a more highly skilled aged care workforce.[318] This challenge was identified in the *Aged Care Workforce Strategy*, which highlighted the need to boost workforce competencies, particularly for personal care workers.[319]

232. To respond to the Strategy's findings, the Aged Services Industry Reference Committee (**IRC**), was established in October 2019. The Aged Care Services IRC's responsibilities include:

- reforming national training package qualifications and skill sets needed by the aged services industry; and
- examining new approaches to career structuring and progression in the sector, and the education pathways needed to support these.[320]

[314] Ibid.
[315] National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018. Registered NDIS providers in all states and territories (except for Western Australia) have responsibilities and obligations in relation to screening their workers under the NDIS Commission.
[316] Law Council, Submission to the ALRC, *Elder Abuse Discussion Paper* (6 March 2017) 38.
[317] The Act s 62-1.
[318] Deloitte Access Economics, *Australia's Aged Care Sector: Economic contribution and future directions*, June 2016, 2.
[319] Australian Government Department of Health, 'A Matter of Care: Australia's Aged Care Workforce Strategy' (June 2018) <https://www.health.gov.au/resources/publications/a-matter-of-care-australias-aged-care-workforce-strategy> 26.
[320] Department of Education, Skills and Employment, 'Aged Care Services IRC' (2020) <https://www.skillsiq.com.au/IndustryEngagement/IndustryReferenceCommittees/AgedServicesIndustryReferenceCommittee>.

The Law Council welcomes this initiative to review accredited training courses for aged care to ensure that graduates have the required skills and competencies to perform the tasks required of them.

233. The Law Council notes with particular concern the absence of a formal industry standard for an entry level qualification to work as a personal care worker.[321] Personal care workers represent approximately 70 per cent of the total workforce providing direct care in residential aged care.[322]

234. A requirement for an entry level qualification to work in aged care will ensure that personal care workers are equipped to deliver quality care to people with complex needs. On this issue, the Qld Parliamentary Inquiry recommends that certificate III level training should be considered as the minimum standard for the industry.[323] For existing employees with certificate II qualifications, there should be recognition of experience on the job in lieu of undertaking additional training.[324] The Law Council supports this recommendation.

235. Having regard to the high proportion of older people in residential aged care with dementia, the Qld Parliamentary Inquiry also recommends that the Australian Government mandate that accredited dementia care training is undertaken by all aged care workers.[325] The Law Council further supports this recommendation.

236. Increased ongoing education and training programs for staff in aged care will positively affect outcomes for residents, patients and staff. This includes appropriate training to assist residents with special needs, identifying and acting on elder abuse, and human rights.

237. Particular regard must be had to the development of training in rural and remote areas. As already highlighted by the Royal Commission, there is currently limited access to training providers in remote locations.[326]

Recommendations

- **The Australian Government should consider mandatory minimum qualifications and training for personal care workers providing residential aged care services.**
- **The Australian Government should mandate that accredited dementia care training is undertaken by all aged care workers.**
- **The Australian Government should consider requiring all aged care staff to undertake ongoing education and training programs. This should encompass appropriate training in cultural competency, identifying and acting on elder abuse, and human rights.**

[321] Commonwealth, Royal Commission into Aged Care Quality and Safety, Submissions by Counsel Assisting, *The future of the aged care workforce* (21 Feb 2020).
[322] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 4 - Restrictive practices in residential aged care in Australia* (2019) 16 citing K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, T Karmel, M Moskos, L Smith, H Walton and Z Wei, 2016 National Aged Care Workforce Census and Survey—The Aged Care Workforce, 2016, p 13.
[323] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) 245.
[324] Ibid.
[325] Ibid 200.
[326] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 186.

Technology

238. The Law Council welcomes improvements to resident care, safety and quality of life, through the use of technology. Whether in residential aged care facilities or private dwellings, technology can be adopted to improve monitoring of the health and wellbeing of older persons. However, technology can also present an unacceptable intrusion into the privacy of older persons and 'may in some circumstances amount to a restrictive practice'.[327]

239. The Law Council submits that there are a range of rights engaged in this context. If those who are caring for older persons are aware of, and required to properly consider, specific human rights of older persons, including by taking into account the older person's wishes in respect of use of monitoring technology, these intrusions on personal privacy and autonomy can be minimised. For example, if some type of monitoring is essential to safety, motion sensors are generally considered less intrusive than cameras.

Recommendation

- **The Australian Government should develop practical guidance for aged care service providers to ensure technology is used, eg for the purposes of monitoring health and safety, in a way that complies with Australia's obligations to protect, respect and fulfil the human rights of older persons.**

Other incidental matters

Supported decision making

240. At the outset of this discussion, the Law Council emphasises that the freedom to make choices about one's own life is an important human right as an essential feature of a person's dignity.[328]

241. The Law Council notes and supports the reference to a person's right to be treated with dignity and respect, and have control and make decisions about their care and other aspects of their life in the Quality Standards.[329]

242. In 2014, the ALRC undertook a comprehensive inquiry to consider how Australia could move towards supported-decision making.[330] The ALRC considered aged care as part of its inquiry.[331] As part of its final report, 'Equality, Capacity and Disability in Commonwealth Laws' the ALRC recommended that all relevant Commonwealth, state and territory laws be reformed to be consistent with the following National Decision-Making Principles.[332]

These are:

- Principle 1: The equal right to make decisions – All adults have an equal right to

[327] See discussion in ALRC, 'Equality, Capacity and Disability in Commonwealth Laws' (Report No 124,18 September 2014).
[328] Dignity is a key principle in a number of international human rights instruments. See eg, ICCPR, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); ICESCR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and CRPD, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008). Also see discussion ALRC, 'Elder Abuse – A National Legal Response' (Report No 131,14 June 2017) 50.
[329] See eg, Standard 1 'Consumer dignity and choice' of the Quality Standards.
[330] ALRC, 'Equality, Capacity and Disability in Commonwealth Laws' (Report No 134, 24 November 2014).
[331] Ibid.
[332] Ibid recommendation 3-1.

make decisions that affect their lives and to have those decisions respected.

- Principle 2: Support – Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.
- Principle 3: Will, preferences and rights – The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
- Principle 4: Safeguards – Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

243. These principles reflect the shift signalled in the CRPD, ratified by Australia, to recognise the autonomy and independence of persons with disability who may require support in making decisions.[333]

244. The Law Council supports, in principle, a move towards a model of supported decision-making in states and territories.[334] However, it notes that there may be issues in practice that will require detailed consideration[335] and careful consultation across all jurisdictions.

Enduring documents and advance care planning

245. Residential aged care facilities have been requiring, for some time, the appointment of an enduring attorney and provide a copy of the appointing document to the facility upon occupancy or, in the case of adults who have lost capacity, requiring that a guardian or administrator be appointed by a Guardianship Board or Tribunal.[336] However, facilities do not appear to have regard to the role of informal decision-makers. For example, facilities have been seen to require appointment of an enduring attorney or appointment of an administrator or guardian where the prospective resident has a spouse with decision-making capacity who is the joint owner of the couple's home, joint holder of bank accounts and their nominee for Centrelink (who can therefore direct how the prospective resident's aged pension is applied).

246. It is now also being reported that some facilities are requiring copies of residents' wills, purportedly to ensure that property, including refundable accommodation deposits, is properly distributed after a resident's death as there have been incidents of property being handed over to the wrong party.

247. Facilities should ensure that staff have sufficient understanding of the role, responsibilities and limitations of attorneys and be alive to the possibility of substitute decision-making powers enabling elder abuse.

248. Facilities should also ensure that they have robust procedures that ensure property is only released to those who are legally entitled to it once a resident has died. This may involve requesting a copy of the will. The Law Council recommends that aged care facilities engage appropriately qualified legal practitioners to assist in the implementation and oversight of this process.

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[333] Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008).
[334] See discussion Law Council, Submission to the ALRC, *Elder Abuse Issues Paper* (17 August 2016) 29.
[335] Ibid.
[336] Some facilities' requirements do not seem to distinguish between an administrator and a guardian, suggesting that there may not be a proper appreciation of how adults' financial and non-financial interests are to be protected.

249. A requirement that aged care facilities encourage residents to complete an advance care planning document as soon as possible after entering an aged care facility was recommended by the Qld Parliamentary Inquiry.[337] The objective of formal advance care planning documents (advance directive) is to guide future decisions about a person's treatment and care.[338] However, constituent bodies have commented that this practice can be very problematic as it can lead to the aged care facility not properly engaging with the resident, but rather with the substitute decision maker as a matter of course – regardless of whether the resident has impaired capacity or not.

250. The National Safety and Quality Health Service Standards (**Health Service Standards**), mandatory for all Australian hospitals and day procedure services, provide a nationally consistent statement of the level of care patients can expect from health service organisations.[339] Action 2.5 of the Health Service Standards state that a health service organisation has processes to identify the capacity of a patient to make decisions about their own care.[340] The Law Council considers that it would be a relatively small step to apply this action to aged care facilities.

Recommendation

- **Residential aged care facilities should ensure that all staff have a sufficient understanding of the role, responsibilities and limitations of attorneys and/or other substitute decision-makers.**

Transparency of funds

251. The Aged Care Funding Instrument (**ACFI**) is a tool used and administered by the Department of Health, to allocate funding based on the needs of aged care residents.[341] It determines funding based on the day-to-day needs of each individual resident. Then, subsidies are paid to the residential aged care home that is providing the daily care.

252. The Law Council's constituent bodies have raised concerns regarding the transparency of funds distributed through the ACFI to residential aged care facilities. These include concerns that:

    - the use of the allocated funding is unsupervised,
    - that there is insufficient accountability in the way the funding is used, and
    - that the ACFI is not intensively or routinely audited.

    Similar concerns were also raised by stakeholders to the Qld Parliamentary Inquiry.[342]

253. Each year, there are two primary reports completed by providers: first, the audited General Purpose Financial Report; and second, the partially-audited Aged Care Financial Report (**ACFR**). The latter of these includes audited prudential requirements.

[337] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) recommendation 22.
[338] See discussion of advanced care planning in Commonwealth, Royal Commission into Aged Care Quality and Safety, *Background paper 5 – Advanced care planning in Australia* (2019) 1.
[339] Australian Commission on Safety and Quality in Health Care, 'National Safety and Quality Health Service Standards' (Second edition, 2017) < https://www.safetyandquality.gov.au/sites/default/files/migrated/National-Safety-and-Quality-Health-Service-Standards-second-edition.pdf>.
[340] Ibid 17.
[341] Commonwealth, Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019) 58.
[342] Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Parliament, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Report No. 33, 24 March 2020) 214.

These relate to the provider's financial viability, in addition to records of individual residents' Refundable Accommodation Deposits. The ACFR also includes unaudited financial reports for residential aged care, which are presented at the provider, rather than site level. For in-home care, these unaudited reports are presented at the service (region) level.

254. The Law Council submits that all aged care providers, who receive ACFI funds, should provide the Department of Health with regular and detailed accounts as to how the funds are spent. To this end, the Law Council recommends that residential aged care financial data in the ACFR be provided at the site level, rather than at the provider level. This would better identify how government, and other streams of funding, have been utilised. This data should be audited. The Law Council understands from members who work closely with providers that this would not impose a significant additional burden on providers, given an external financial audit is conducted each year around the same time.

Recommendation

- **All aged care providers, who receive Aged Care Funding Instrument funds, should be required to provide the Commonwealth Department of Health with regular and detailed accounts as to how the funds are spent at the site level. This data should be audited.**