

# Aged Care Bill 2024 [Provisions]

Submission from the Office of the Inspector General of Aged Care

September 2024



# Introduction

The acting Inspector-General of Aged Care (Inspector-General) and supporting Office of the Inspector-General (the Office) welcome the opportunity to make a submission to the Community Affairs Legislation Committee's Inquiry into the Aged Care Bill 2024 (the Bill).

The Office also welcomes the introduction of the Bill, which is a seminal milestone in the delivery of the aged care reform agenda recommended by the Royal Commission into Aged Care Quality and Safety (Royal Commission).

## Overview of the Inspector-General and supporting Office

The Office was established under the *Inspector-General of Aged Care Act 2023* (IGAC Act) to provide independent oversight of the aged care system by exercising its statutory functions to monitor, review and report on the Commonwealth's administration, regulation and funding of aged care.

The Office provides an impartial perspective to the complex systemic issues pervading the aged care system, thereby driving greater accountability and transparency and facilitating continuous improvement for older people, their families and the community more broadly.

## Reporting on the implementation of the Royal Commission into Aged Care Quality and Safety's recommendations

A key aspect of the Office's reporting obligations under the IGAC Act includes the requirements in section 29 to prepare 2 reports by 1 June 2024 and 1 June 2025 respectively on the progress made by the Commonwealth towards implementing the Royal Commission's recommendations.

In the [2024 Progress Report](#), which was delivered to the Minister for Aged Care on 30 May 2024 and tabled in Parliament on 2 August 2024, the Office noted the importance of the Bill to the aged care reform process, and the significant risks to those reforms if the Bill was not implemented by 1 July 2025. The Office also called on the Australian Government to revisit the Royal Commission's recommendations for an entitlement to aged care based on assessed need. A range of key sector and community concerns in relation to provisions within the exposure draft of the Bill were also canvassed.

The 2024 Progress Report built upon the assessment the Interim Inspector-General of Aged Care prepared in July 2023 (Interim Report). In the [Interim Report](#) the Interim Inspector-General reiterated the importance of the new Act to the aged care reform agenda and the need to minimise potential delays in its commencement.

## Key points of the Bill

The Bill responds to the Royal Commission's calls for existing provider-focussed aged care laws to be replaced with a new Aged Care Act (new Act) placing older people's rights and wellbeing first. It is intended the Bill will implement almost 60 Royal Commission recommendations to create an improved aged care system, including:

- the rights of older people seeking or accessing aged care services
- a single point of entry into aged care, supported by common eligibility requirements and culturally safe assessments



- a new framework for registered aged care providers and workers responsible for delivering aged care services, including strengthened accountability requirements
- funding arrangements for the aged care system, including legislating the Government's response to the Aged Care Taskforce, and
- a new regulatory model to be overseen by the Aged Care Quality and Safety Commission (the Commission), supported by stronger regulatory powers.

In preparing this submission, the Office has taken a thematic approach. Accordingly, the Office has focussed on key parts of the Bill which implement Royal Commission recommendations of particular importance to aged care consumers and the sector, and to key Royal Commission recommendations which the Bill does not seek to implement. Consistent with the Office's role as an oversight body, in the submission the Office has also sought to avoid making proposals which fall within the Department of Health and Aged Care's remit of designing and implementing aged care policy.

### **The fundamental architecture of the aged care system**

The Royal Commission called for a paradigm shift to the architectural foundations of Australia's aged care system, which is premised on access to care being rationed. Royal Commissioners recommended a new seamless aged care program be established, with access to care a universal entitlement based on an assessed need, coupled with certainty of funding.<sup>1</sup> The Royal Commission drew a direct comparison with the Age Pension system, in which a person who meets government criteria for a pension automatically receives one. In aged care they go on a waiting list. In the 2024 Progress Report, the Inspector-General presented to Government the rationale for implementing the 2 recommendations that would achieve that keystone reform.

The Bill, however, retains the rationed approach that has always been a feature of Australia's aged care system. The Explanatory Memorandum clarifies this intent through several provisions. In particular, the intent of clause 23(2), which forms part of the new statement of rights, is to recognise 'that the aged care system is not a demand-driven system and aged care resources are not unlimited'. Rather, an individual has a right to 'equitable' access to have their needs for funded aged care assessed or re-assessed. People who have been assessed as both in need of and eligible for support and care, but do not receive it, may find this notion of 'equity' confronting.

Taken as a whole, the operation of the Bill is clearly designed to implement a system of rationing the provision of aged care, and maintaining a separation of care in the home and in residential facilities. Under Division 1 of Part 5 of Chapter 2, the Minister must determine the number of places available for allocation each financial year and then directly allocate those places to individuals. These provisions preserve the principle of aged care being delivered through a finite number of places.

The Office reiterates calls made in the 2024 Progress Report to commit to an aged care system which includes a universal entitlement to care based on assessed need, augmented by the funding mechanisms to support such a right. This would put the aged care system in a far stronger position to eliminate lengthy waiting periods, and to ensure older people receive the support they need. While the policy underpinning a universal entitlement could not be implemented through the new legislation by 1 July 2025, it is achievable in the medium term.

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<sup>1</sup> Recommendation 25: A new aged care program; Recommendation 41: Planning based on need, not rationed.



## Embedding older peoples' rights in aged care

The Royal Commission recommended the new Act enshrine the rights of older people seeking and receiving aged care, primarily through recommendation 2.<sup>2</sup> Stakeholders consulted in the preparation of the 2024 Progress Report stressed the importance of individuals' rights, with several suggesting they should be strengthened through a variety of mechanisms, including through more robust obligations on providers to comply with those rights, and for rights to be legally enforceable.

The Bill seeks to establish a rights-based framework through the statement of rights in clause 23, which outlines a list of rights framed around access and delivery of aged care.<sup>3</sup> A positive duty would also be imposed through clause 24(2) for registered providers to take 'all reasonable and proportionate steps' to act compatibly with the rights listed in clause 23. Additionally, clause 144 provides it is a condition of registration that a provider must demonstrate it understands the rights under the statement of rights, and have practices in place to ensure the delivery of funded aged care services is in accordance with clause 24(2).

The Office considers the approach taken in the Bill to safeguard individuals' rights to be largely aspirational. In particular, the Office is concerned that it will not implement a rights-based framework as clear or as robust as Royal Commissioners envisaged, because the pathways available to individuals to understand and assert their rights lack the necessary vigour to drive real change. Clause 24(3) provides that the statement of rights does not create rights or duties enforceable in a court or tribunal. Rather, the Office understands that the primary mechanism for those seeking to invoke their rights is to lodge complaints with the Complaints Commissioner. Although the Complaints Commissioner's complaints functions in clause 358(a) include upholding the rights under the statement of rights, and that in carrying out those functions the Complaints Commissioner must take into consideration the rights in the statement of rights, it is unclear what positive action the Complaints Commissioner could take to assert an individual's rights. Rather, the approach taken in the Bill to giving effect to the statement of rights appears to be to rely on the Aged Care Quality and Safety Commissioner to take various compliance actions, such as enforcing the Quality Standards, Code of Conduct, or relevant provider obligations in clause 144.<sup>4</sup>

The Office acknowledges the Royal Commission did not propose that each right should be separately and directly enforceable in the courts, which is the rationale cited in the Explanatory Memorandum for clause 24(3).<sup>5</sup> The Office however, contends the fundamental characteristics of a rights-based approach includes empowering individuals to be aware of and understand their rights, to provide meaningful mechanisms to individuals to claim those rights, and to create both incentives and obligations on providers and government to value and protect those rights.

Additionally, although Royal Commissioners did not propose that individuals should be able to enforce rights through the courts, they did propose that rights should form aspects of a general non-delegable and positive duty on providers to provide high quality and safe care.<sup>6</sup> The Office does not consider the approach taken in the Bill to embed high quality care meets the standard envisaged

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<sup>2</sup> Recommendation 2: Rights of older people receiving aged care. See also *Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect*, Vol. 1: Summary and recommendations, pp. 79-80.

<sup>3</sup> The Objects in clause 5, and aspects of the statement of principles in clause 25, are also intended to form components of a rights-based framework.

<sup>4</sup> Breaches of the registered provider obligations may attract a civil penalty.

<sup>5</sup> *Royal Commission into Aged Care Quality and Safety, Final Report: Care Dignity and Respect*, Vol. 3A: the new system, p. 19.

<sup>6</sup> Recommendation 14: A general duty to provide high quality and safe care.



by Royal Commissioners. The Explanatory Memorandum clarifies that the approach to embedding high quality care is to provide a clear goal for providers and workers to aim toward for in delivering aged care services.<sup>7</sup> While clause 147 provides that registered providers must demonstrate a capability for, and commitment to, continuous improvement towards the delivery of high-quality care, no definitive timeframes are specified, and the terms of the clause are again largely aspirational.

Similarly, while welcome, the statutory duties on registered providers and certain responsible persons to ensure, so far as is reasonably practicable, that conduct does not cause adverse effects to the health and safety of individuals will arguably not capture all rights which are important components of high quality care.<sup>8</sup>

Finally, the Office acknowledges the transition to a rights-based framework will take time. To that end, going forward the Office intends to assess the impact of the statement of rights and other mechanisms to meaningfully improve the rights of older people seeking or receiving aged care.

## Entry into the aged care system

Difficulties experienced by older people at the initial point of entry into aged care is a longstanding systemic issue.<sup>9</sup> During preparation of the 2024 Progress Report, the Office heard accounts of older people having to wait several months for assessments, followed by further, often extended waiting periods post-assessment. In some cases, people unfortunately died while waiting for aged care services. The Office contends those conditions are inimical to the Royal Commission's calls for an aged care system which guarantees universal access to the supports and services an older person is assessed as needing.

Part 2 of Chapter 2 of the Bill is intended to establish a new single pathway for entering Commonwealth-funded aged care. In summary, it allows individuals to apply for access to funded aged care services based on eligibility criteria, followed by a needs assessment if the System Governor makes an eligibility determination. The System Governor must ultimately decide on whether the individual requires access to services.

While the framework ostensibly reflects the Royal Commission's recommendations for common eligibility criteria and a single comprehensive assessment process<sup>10</sup> there are no mechanisms which would provide certainty of access in line with the Royal Commission's intent. It is therefore unclear whether the new legislation will play a significant role in ameliorating extended waiting times or other persistent systemic issues at the point of entry into aged care. This is particularly pertinent to resolving waiting times following assessments, which are arguably contingent upon addressing a range of supply-side issues, such as rationed numbers of home care packages and shortages and imbalances in the aged care workforce.

It is also important to note the significant divergence between the aged care program recommended by the Royal Commission, and the approach the Government has ultimately chosen to proceed with. As discussed in the 2024 Progress Report, the Royal Commission recommended a new aged care program combining current home and community programs and residential care should be established.<sup>11</sup> In contrast, the Bill will provide the legal basis for the new Support at Home Program,

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<sup>7</sup> Explanatory Memorandum, Aged Care Bill 2024, p. 74.

<sup>8</sup> See Division 1 of Part 5 of Chapter 3.

<sup>9</sup> *Royal Commission into Aged Care Quality and Safety, Final Report: Care Dignity and Respect*, Vol. 3A: the new system, p. 150.

<sup>10</sup> Recommendation 28: A single comprehensive assessment process.

<sup>11</sup> Recommendation 25: A new aged care program.



which is to commence from 1 July 2025, while residential care is to remain a stand-alone service category with different access to services.<sup>12</sup>

## Registered provider obligations and conditions of registration

The Office is encouraged by the breadth of responsibilities on registered providers, responsible persons and workers set out in Part 4 of Chapter 3. A number of these are intended to respond to important Royal Commission recommendations, and to varying degrees, they fulfil those objectives.<sup>13</sup>

The Office notes, however, that the Bill has taken an alternative approach towards implementing several pivotal recommendations. In particular, several recommendations required providers to meet a range of obligations around workforce training as conditions of their approval. Recommendation 30, for example, stated training on cultural safety and trauma-informed service delivery for all workers providing direct care should be a condition of approval. Similarly, recommendation 80 would require workers receive regular training about dementia and palliative care as a condition of providers' approval. Stronger training requirements were also proposed for workers delivering aged care to First Nations Australians.<sup>14</sup>

The Bill does not implement these recommendations as intended by the Royal Commission. While clauses 152(c) and (d) do require registered providers to ensure aged care workers meet qualifications and training requirements as a condition of registration, significant details are to be set out in the Rules. Specifically, there is no indication as to which providers and workers will be subject to those requirements, and what training will be mandated. The Office also understands that Standard 2 of the new quality standards includes requirements for regular, competency-based training. As the 2024 Progress Report argued, the Office does not consider these approaches to be as robust or as effective as the Royal Commission's recommendations to establish explicit training requirements in primary legislation.

While the Office supports measures in Part 4 which will hold registered providers and workers more accountable and lead to higher quality care, it is imperative that systemic issues underpinning the supply, retention and quality of the aged care workforce are not overlooked.

## Funding of aged care services

Chapter 4 establishes an appropriate framework for the provision of Commonwealth funding for aged care services, and for individuals to provide means-tested contributions and fees.

Following the release of the Aged Care Taskforce's final report in March 2024, the Inspector-General issued a [statement](#) welcoming the Taskforce's findings and noting their close alignment with the key principles and observations in the 2023 Interim Report. The framework established in Chapter 4 is consistent with those principles and observations, namely the need for:

- funding to be adequate, secure, and sustainable into the future
- funding arrangements to be equitable and ensure aged care remains accessible to all, regardless of means
- the costs of aged care to be transparent and understandable, and
- funding to be economically sound and designed to ensure investment and growth.

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<sup>12</sup> See clauses 10(2) to (4).

<sup>13</sup> For example, see clause 175, which requires registered providers registered to deliver residential care to have at least 1 registered nurse on duty at each aged care home 24/7, which responds to recommendation 86.

<sup>14</sup> Recommendation 48: Cultural safety.



It should be noted the Inspector-General's Statement also drew attention to the fact the Taskforce Final Report did not include provision for implementation of Royal Commission Recommendations 25 and 41, to establish an on demand aged care stem, as the Office has already discussed above.

The specifics of the funding arrangements agreed between the Government and Opposition are not for the Office to judge. However, it could be anticipated that in the future the Office may review whether the arrangements achieve the objectives of the funding framework and of the Act.

### **Strengthening provider governance**

The Royal Commission found aged care legislation did not provide a sufficiently strong basis to support robust provider governance.<sup>15</sup> Similarly, the 2023 Interim Report highlighted the importance of strengthening provider governance in embedding high quality care in legislation and in practice.<sup>16</sup>

In response to Royal Commission recommendations around improving provider governance<sup>17</sup> a number of key reforms were implemented through earlier legislative processes, which are to be carried over into the new Act.<sup>18</sup> The Office welcomes the suite of provisions in the Bill which are directed towards strengthening provider governance and reporting obligations, particularly those which will enhance the linkages between the governing bodies and leadership of registered providers and the clinical and care provision needs of those they are providing aged care services to. Over time, this will be an important component of a system that prioritises the provision of high-quality care for older Australians.

Clause 157, for example, provides it is a condition of approval that registered providers must include at least one member of the governing body with experience in the provision of clinical care, in addition to its independent, non-executive members. Additionally, clause 158 would create a condition of registration for certain registered providers to establish 'quality care advisory bodies', which are consistent with the intent of recommendation 90(b). These bodies will provide regular reports to registered providers' governing bodies on the quality of care being delivered by the provider. Governing bodies will be required to consider reports or feedback from aged care advisory bodies when making decisions around the quality of care the registered provider is delivering.

Finally, both the 2024 Progress Report and the 2023 Interim Report noted that recommendation 88(2) of the Royal Commission's final report, which is vital to improving transparency around the affairs decisions of approved providers, is to be implemented through the new Act.<sup>19</sup> The Office calls for greater visibility around the government's intent to implement recommendation 88(2), as it has not identified any provisions in the Bill which would implement that recommendation.

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<sup>15</sup> *Royal Commission into Aged Care Quality and Safety, Final Report: Care Dignity and Respect*, Vol. 3B: The new system, p. 455.

<sup>16</sup> Office of the Interim Inspector-General of Aged Care, *Progress Report: Implementation of the Recommendations of the Royal Commission into Aged Care Quality and Safety*, July 2023, p. 41.

<sup>17</sup> See recommendation 88: Legislative amendments to improve provider governance; recommendation 89: Leadership responsibilities and accountabilities; and recommendation 90: New Governance Standard.

<sup>18</sup> *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* and related subordinate legislation.

<sup>19</sup> Recommendation 88(2) required 'protected information' in aged care legislation to be removed from the exemption in Schedule 3 of the *Freedom of Information Act 1982*.



## Strengthened Commission and new regulatory mechanisms

The Royal Commission made several recommendations calling for strengthened capabilities for the Commissioner and System Governor to enhance accountability.<sup>20</sup> The Office acknowledges the suite of measures in the Bill which are intended to strengthen the Commission's regulatory role and improve quality of care.

The Royal Commission found that existing enforcement options were insufficient and called for the Quality Regulator to be appropriately resourced with a range of enforcement tools to detect and address non-compliance.<sup>21</sup> Chapter 6 of the Bill expands the regulatory powers conferred on the Commissioner and Systems Governor. The Office concurs with the approach of incorporating the regulatory framework in the *Regulatory Powers (Standard Provisions) Act 2014*, and the conferral of additional monitoring and investigative powers, which are commensurate with the reforms recommended by the Royal Commission. The Office also notes that Chapter 6 establishes a civil penalty regime, which is analogous with Royal Commissioner's recommended approach.<sup>22</sup> The Office also considers the new banning provisions to be a reasonable compliance mechanism.

While not included in the Bill, the Office would like to acknowledge the government's commissioning of the Capability Review of the Aged Care Quality and Safety Commission, as recommended by the Royal Commission,<sup>23</sup> and subsequent implementation of its recommendations. These initiatives offer tangible evidence of government commitment to improve the quality of aged care.<sup>24</sup>

## Establishment of the Complaints Commissioner

The Royal Commission called for a significantly improved complaints handling process within aged care.<sup>25</sup> Recommendation 98 advocated that a new Complaints Commissioner be established within the quality regulator to manage and resolve complaints.

The Bill seeks to implement recommendation 98 through clause 356, which establishes the Complaints Commissioner within the Commission. The Minister would be responsible for appointing the Complaints Commissioner.

The Office supports the approach in the Bill, noting it is consistent with the Royal Commission's proposal. It strikes an appropriate balance between providing a degree of separation, through an independently appointed Complaints Commissioner with distinct statutory functions, whilst delivering key benefits through combining the complaints and compliance functions within the one overarching agency. From a practical perspective, it will also achieve efficiency gains by allowing the Complaints Commissioner to leverage the Commission's resources.

More broadly, the Office notes complaints mechanisms in the Bill are of particular interest given the Inspector-General's statutory role in overseeing the Commonwealth's administration of the

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<sup>20</sup> Recommendation 97: Strengthened monitoring powers for the Quality Regulator, Recommendation 103: A wider range of enforcement powers.

<sup>21</sup> *Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect*, Vol. 3B: the new system, pp. 529.

<sup>22</sup> Recommendation 101: Civil penalty for certain contravention of the general duty.

<sup>23</sup> Recommendation 104: Aged Care Quality and Safety Commission capability review.

<sup>24</sup> Office of the Inspector-General of Aged Care, *2024 Progress Report: Implementation of the Recommendations of the Royal Commission into Aged Care Quality and Safety*, June 2024, Recommendation 104 pp.136.

<sup>25</sup> *Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect*, Vol. 3B: the new system, pp. 507-508.





complaints management framework across the aged care system. Complaints handling and outcomes continues to be a major focus of consumers' lack of confidence in the aged care system.

### **First Nations Australians in aged care**

The Office acknowledges the importance of the First Nations Aged Care Commissioner (FNACC) to promote culturally safe aged care for older First Nations people across Australia. The appointment of the Interim First Nations Commissioner, Ms Andrea Kelly, was a welcome step towards improving engagement between First Nations people and communities with the aged care sector.

Despite this progress, the Office notes a statutory FNACC has not been incorporated within the Bill, and is pending the outcomes of public consultations.<sup>26</sup> The Office urges progression and finalisation of the FNACC as a critical milestone in achieving equitable access to aged care for First Nations people and to drive necessary accountability to instil Closing the Gap principles across the aged care sector.

The Office is aware of sector concern regarding the eligibility and age constraints for First Nations Australians accessing aged care. Chapter 2 affirms in part recommendation 47 of the Royal Commission's findings by supporting development of pathways for First Nations Australians to access assessments. First Nations Australians who do not meet the eligibility requirements but require care, however, are subject to decisions of the System Governor.<sup>27</sup>

### **Disclosure of Pricing Authority information to the Office**

Currently, the Independent Health and Aged Care Pricing Authority (Pricing Authority) does not have explicit legislative authority to disclose protected information (particularly aged care information) to the Office, despite such information being necessary for the Inspector-General's oversight of the Pricing Authority's aged care functions. The Bill does not provide such an authorisation, and therefore, the Office requests a legislative mechanism allowing the disclosure of protected information to the Inspector-General be established to facilitate a comprehensive and legally sound information exchange.

### **Provisions set out in the Rules**

The Office has observed that a significant number of critical clauses throughout the Bill are reliant upon additional provisions to be set out in the Rules. In the absence of those Rules, there is a degree of uncertainty around how many clauses will operate. For example, clause 157, which is part of the new framework of governance conditions, mandates that registered providers 'of a kind prescribed by the rules' must ensure their governing bodies meet relevant membership requirements. Although the Explanatory Memorandum provides some information about what the Rules may contain it is not certain which providers would need to meet these requirements, or why all providers should not be required to meet them, without citing the Rules. In such cases it is therefore not possible to definitively judge the degree of alignment with Royal Commission recommendations until we see the Rules.

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<sup>26</sup> See the Explanatory Memorandum to the Bill, pp. 4 and 9.

<sup>27</sup> Recommendation 47: Aboriginal and Torres Strait Islander aged care pathway within the new aged care system.



## Conclusion

The Office reiterates the important milestone the introduction of the Bill represents in the implementation of aged care reforms, as Australia seeks to implement an historic shift from a scheme focussing on providers to a human-rights based framework. As outlined in this submission, it is imperative following introduction of the Bill to maintain momentum in implementing the Royal Commission's recommendations by ensuring commencement of the new Act by no later than 1 July 2025.

The retention of an aged care system based on the rationing of aged care rather than assessed need is of concern to the Office, as it negates the core intentions of a rights-based system envisioned and recommended by the Royal Commission. The Office reiterates its position that a universal rights driven system is achievable and would create a sustainable, strengthened aged care system in which people could have confidence.

The Office will shortly commence preparation of the 2025 progress report on the implementation of the recommendations of the Royal Commission and will consider the provisions of the Bill in greater detail through that process.

Under the IGAC Act, the Office is required to complete a detailed review of the effectiveness of the Commonwealth's implementation of the Royal Commission's recommendations by 1 March 2026. This will require the Review to commence no later than mid-2025 and will provide an additional opportunity for a comprehensive evaluation of the new legislation, including the Rules and implementation process.