Law Council
OF AUSTRALIA

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Senate Community Affairs Legislation Committee

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About the Law Council of Australia

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

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Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia (**Law Council**) acknowledges the contribution of its National Elder Law and Succession Law Committee, National Human Rights Committee, the Queensland Law Society and the Victorian Bar Association in the development of this submission.

Executive Summary

1. The Law Council thanks the Senate Community Affairs Legislation Committee (**Committee**) for the opportunity to make a submission in relation to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (**the Bill**).

2. The Bill introduces eight measures as part of the second stage of reforms in response to the Final Report of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**). [1]

3. This submission focuses on the following aspects of the Bill:

   - Schedule 1 – Residential aged care funding;
   - Schedule 2 – Screening of aged care workers, and governing persons, of approved providers;
   - Schedule 3 – Code of conduct and banning orders;
   - Schedule 4 – Extension of incident management and reporting;
   - Schedule 5 – Governance of approved providers; and
   - Schedule 9 – Restrictive practices.

4. The Law Council welcomes the Australian Government's efforts to implement the Royal Commission's recommendations. However, it also raises concerns about the limited timeframe that Parliament has allowed for consultation on the Bill given the significance of the proposed reforms. The Law Council's review has been similarly curtailed.[2]

5. Within this constraint, the Law Council makes a number of recommendations to strengthen these reforms. These include:

   Schedule 2: Screening of aged care workers, and governing persons

   Obligation on approved providers to comply with new screening requirements

   - Better define the nature and scope of the obligation on approved providers to comply with new requirements regarding the screening of aged care workers and governing persons, rather than leaving these to be entirely determined by the Accountability Principles.
   - Set out the key matters of which the Minister must be satisfied on reasonable grounds for a law of a State or Territory to be determined as an aged care screening law, including with respect to procedural fairness safeguards. Ensure that such determinations are subject to disallowance.

[1] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021).
[2] Including that in the time available, the Law Council has been unable to review the impact of certain Schedules, including Schedule 6, regarding greater information sharing, and Schedule 8, regarding the Independent Health and Aged Care Pricing Authority.

New Screening Database

- Tighten provisions concerning the permitted disclosure of protected information in the Screening Database to where 'where it is necessary' for particular purposes, rather than 'relating to' those purposes.

- Remove provisions which expand the Screening Database's purposes, capture of information, and permitted disclosure outside matters set out in Bill.

- Enable individuals to individuals to seek access to information held about them in the Screening Database and challenge it where it is incorrect.

- Ensure that decisions which are overturned on review, such as exclusion, suspension, and revocation decisions, from the Screening Database.

Schedule 3 – Code of Conduct

Code of Conduct

- Set out the key features of the Code of Conduct (**the Code**) in the Bill. Alternatively, include at least high-level guidance regarding the matters which should be contained in the Code's content, and make clear the mechanism for persons to challenge acts or decisions under it.

- Ensure that the Commissioner's statutory information-gathering powers expressly recognise the privilege against self-incrimination.

- Consider statutory causes of action for those who have suffered loss and damage as a result of breaches of the Code and seek compensation.

Banning Orders

- Require that the lack of compliance with the Code required for a banning order to be made is sufficiently serious or persistent. Alternatively, that it is such that the individual is likely to pose a significant risk to the safety, health or wellbeing of one or more care recipients.

- Ensure that banning orders cannot be made only the basis of future non-compliance, rather than actual non-compliance, with the Code.

- Ensure that banning orders are not made on basis of convictions: involving minors; which have been quashed or set aside; or to which a spent convictions scheme applies.

- Limit banning order criteria regarding insolvency to governing bodies.

- Ensure a minimum of 14 days to respond to a potential banning order.

- Consider requirements for the regular review of banning orders.

Register of banning orders

- Limit the provisions concerning what may be included on a register of banning orders to those set out in the primary legislation.
- Restrict access to the register to aged care providers, and do not provide access to the public.
- Exclude banning orders which have been revoked or overturned on review from inclusion on the register and note where such processes are on foot.
- Include requirements that the register must be kept up-to-date and correct.
- Require that individuals may access information about them in the Register and seek its correction if it is incorrect.

Schedule 5 – Governance of approved providers etc.

- Frame requirements regarding membership of governing body around 'executive' or 'non-executive' members. Consider exempting organisations registered under Australian charities legislation.
- Consider limiting determinations for Commissioner exemptions to 'special circumstances'.
- Limit new obligations to ensure that staff members have appropriate qualifications, skills and experience and are given opportunities to develop their capability, to appropriately target specific categories of staff members.
- Consider removing new positive obligations on directors of approved providers which are wholly owned subsidiaries to avoid acting in the holding company's best interests.

Suitability matters

- Avoid an individual's suitability being determined by reference to matters which have been overturned on appeal, set aside or quashed.
- Avoid application to minors and or convictions which are subject to state and territory spent convictions schemes.
- Remove an individual's experience in providing aged care as a suitability matter.
- Tighten scope of adverse findings and enforcement action by government bodies as suitability matters.
- Avoid further suitability matters being set out in the rules.
- Avoid an individual's suitability being determined by reference to banning orders, exclusion, suspension and revocation decisions which have been overturned.

Schedule 7 – Use of refundable deposits and accommodation bonds.

- Consider a statutory cause of action for compensation from approved provider should be made available.

Schedule 9 – Restrictive practices

- Do not progress Schedule 9 until it, and the proposed relevant amendments to be made to Quality Principles, have been subjected to further detailed consultation amongst stakeholders.

Schedule 1 – Residential aged care funding

Overview

6. A person must be approved by the Secretary under Part 2.3 of the *Aged Care Act 1997* (Cth) (**Aged Care Act**) to receive either residential care or home care, and some kinds of flexible care, before an approved provider can be paid a subsidy for providing that care.[3] Approval requires an assessment of the person's care needs.[4]

7. Under the existing Aged Care Act an appraisal of the level of care needed by a residential aged care recipient, and some kinds of flexible care, is made by the approved provider in accordance with the Aged Care Funding Instrument (**ACFI**) Answer Appraisal Pack.[5] The ACFI classification of a care recipient, based on this appraisal,[6] affects the subsidy amount payable to an approved provider for residential care.[7]

8. Schedule 1 of the Bill seeks to build on previous amendments made to the Aged Care Act which inserts Part 2.4A of the Aged Care Act to enable to Secretary to start assessing each residential aged care recipient using the new Australian National Aged Care Classification (**AN-ACC**) for the purposes of classifying the care recipient according to level of need.[8] From October 2022, case classifications of the AN-ACC will replace the ACFI as the residential aged care subsidy calculation model.[9]

9. Proposed new subsection 96-2(14) of the Aged Care Act provides that the Secretary may delegate all of the Secretary's powers and functions under Part 2.3 of the Aged Care Act, with respect to the approval of care recipients, to a person making an assessment of the person's care needs.[10]

10. Schedule 1 of the Bill responds directly to Recommendation 120 of the Royal Commission which proposes that the Australian Government fund approved

[3] Aged Care Act s 19-1.
[4] Ibid s 22-4.
[5] Ibid s 25-3(3) and *Classification Principles 2014* (Cth) (**Classification Principles**) s 15.
[6] Ibid ss 25-1 – 25-2 and Chapter 2 of the Classification Principles.
[7] Ibid s 44-3(2) and Chapter 2 of the Aged Care (Subsidy, Fees and Payments) Determination 2014 (Cth).
[8] Ibid s 29C-3 and Chapter 3 of the Classification Principles.
[9] The Bill, sch 1, item 32. See also sch 1, item 5.
[10] Ibid, sch 1, item 51.

providers for delivering residential aged care through a casemix classification system, such as the AN-ACC model.[11]

Comments

11. The Law Council refers to concerns raised by the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny of Bills Committee**)[12] that the delegation of legislative power under new subsection 96-2(14) of the Aged Care Act may be overly broad, and that further guidance on these issues should be prescribed in the legislation.

12. The Law Council notes that there is an existing power[13] to delegate the Secretary's powers and functions under Part 2.3 of the Aged Care Act to a person making assessment for the purposes of section 22-4. The Bill does not amend this existing power.[14] Part 2.3 provides for the approval of a person to receive either residential care or home care before an approved provider can be paid residential care or home care subsidies for providing that care.[15]

13. It may be appropriate that the person making the assessment is also determining the approval of such individuals under Part 3, noting that eligibility under Part 2.4 for eg, residential care is determined based on: a person's physical, medical, social or psychological needs that require the provision of care; whether the needs can be met appropriately through residential care services; and the person meeting any Approval of Care Recipients Principles criteria.[16] The Approval of Care Recipients Principles 2014 in turn place further emphasis on the assessment of the person's health and wellbeing for the purposes of residential care eligibility.[17]

14. It is not immediately clear how broad the class of persons making the assessment is under section 22-4 is, and what kinds of qualifications they may have. There are no criteria set out in the Approval of Care Principles 2014. The Committee may wish to enquire into this point for the purposes of satisfying the concerns raised by the Scrutiny of Bills Committee.

Schedule 2 – Screening of aged care workers, and governing persons, of approved providers

Overview

15. Schedule 2 is intended to respond in part to Recommendation 77 of the Royal Commission which proposes, amongst other things, a national registration scheme for the personal care workforce with the following key features:

[11] Royal Commission, *Final Report: Care, Dignity and Respect* (2021) 290.
[12] Senate Standing Committee for the Scrutiny of Bills, 'Scrutiny Digest 16 of 2021' (21 October 2021) 1.
[13] Aged Care Act, s 96.2(14).
[14] Other than deleting the Secretary's powers and functions under the Subsidy Principles under s 96.2(14)(b).
[15] In some cases approval under the Part to receive flexible care is required before flexible care subsidy can be paid.
[16] Aged Care Act, s 21.2.
[17] Approval of Care Recipients Principles 2014.

> …criminal history screening requirements.[18]

16. The Schedule includes proposed paragraph 63-1(1)(1a) of the Aged Care Act,[19] which creates an obligation on approved providers to comply with the requirements of the *Accountability Principles 2014* (Cth) (**Accountability Principles**) relating to the screening of:

    (a) aged care workers - being persons employed or otherwise engaged, including on a voluntary basis, by an approved provider or a contractor or subcontractor of an approved provider;[20] and

    (b) governing persons - being members of the group of persons who is responsible for executive decisions of the entity or any other person who has authority or responsibility for, or significant influence over, planning, directing or controlling the activities of the entity at that time, where the entity is not a State or Territory[21].

17. The details of the obligation are not set out in the primary legislation and will be determined through the Accountability Principles.

18. The Explanatory Memorandum states that the new screening obligations will replace existing police check requirements set out in Part 6 of the Accountability Principles following a suitable transition period.[22] It further anticipates that approved providers will be required to ensure that specified aged care workers and governing persons are screened in accordance with the Accountability Principles.[23]

19. Proposed new section 74AH of the *Aged Care Quality and Safety Commission Act 2018* (Cth) (the **ACQSC Act**) provides that approved providers which are corporations commit an offence if they fail to comply with the responsibility under section 63-1(1)(1a) (ie the requirements of the Accountability Principles relating to the screening of aged care workers and governing persons).[24] The maximum penalty is 250 penalty units (currently $55,500). For clarity, the Law Council suggests that Item 8 specify that paragraph 63-1(1)(1a) is a reference to the Aged Care Act.

20. Schedule 2 also amends the ACQSC Act to expand the functions of the Aged Care Quality and Safety Commissioner (**the Commissioner**) to include establishing, operating and maintaining the Aged Care Screening Database (**Screening Database**).[25]

21. Under proposed section 7A, the Minister may, by legislative instrument, determine a law of a State or Territory to be an aged care screening law.[26] To do so, the Minister must be satisfied that the law establishes a scheme for the screening of aged care workers, and governing persons, of approved providers; and the State or Territory

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[18] Royal Commission, *Final Report: Care, Dignity and Respect* (2021) 260.
[19] The Bill, sch 2, item 1.
[20] The Bill, sch 3, item 5.
[21] Ibid.
[22] Aged Care and Other Legislation Amendment (Royal Commission Response No 2) Bill 2021, Explanatory Memorandum (**EM**), 54.
[23] Ibid.
[24] The Bill, sch 2, item 8.
[25] Ibid (proposed section 74AG of the ACQSC Act).
[26] Ibid, sch 2, item 4.

must agree to the making of the determination.[27] Section 7A legislative instruments are stated not to be subject to disallowance, due to the operation of subsection 44(1) of the *Legislation Act 200*3.[28]

22. The Screening Database must be kept in electronic form.[29] Its purpose is to contain up-to-date information about individuals who have applied for an aged care screening check and the outcome of their screening applications, as well as information about the following decisions made in respect of those individuals:

    (a) clearance decisions;

    (b) exclusion decisions;

    (c) revocation decisions; and

    (d) any other decisions made under an aged care screening law.[30]

23. Any additional purpose for the Screening Database determined by the Minister is proposed to be a legislative instrument.[31]

24. Proposed section 74AG(5) provides a non-exhaustive list of the kind of information that may be included in the Screening Database. This relates to information regarding the screening of each applicant and extends to information relating to an applicant whom a screening application is no longer being considered.[32]

25. An aged care screening check is an assessment about whether an aged care worker, governing person of an approved provider or someone seeking to become a worker or governing person poses a risk to care recipients. The assessment is made under an aged care screening law.[33]

26. The Commissioner may disclose protected information,[34] that is, information contained in the Screening Database to the following nominated persons or bodies:

    (a) an approved provider, or to a contractor or subcontractor of the approved provider, for worker screening purposes;

    (b) a registered NDIS provider or another person or body, for disability worker screening;

    (c) the Commissioner of the NDIS Quality and Safeguards Commission; or

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[27] Ibid.
[28] Ibid (note to proposed subsection 7A(1)). Subsection 44(1) of the Legislation Act provides that Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the Corporations Act 2001) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and authorises the instrument to be made by the body or for the purposes of the body or scheme;
unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.
[29] The Bill, sch 2, item 8 (proposed s 74AG(2) of the ACQSC Act).
[30] Ibid (proposed s 74AG(3) of the ACQSC Act).
[31] Ibid (proposed ss 74AG(3)(c) and 74AG(8) of the ACQSC Act).
[32] See proposed para 74AG(5)(b) of the ACQSC Act.
[33] The Bill, sch 2, item 3.
[34] Protected information is defined under existing subsection 60(2) of the ACQSC Act to include personal information.

(d) a state or territory, or state or territory authority, for screening of aged care workers and governing persons; or

(e) a person or body of a kind specified in the rules for the purposes specified in the rules in relation to a person or body of that kind.[35]

27. Schedule 2 clarifies that the Screening Database may include personal information.[36]

28. The Law Council notes in this context that personal information is subject to the protections of the *Privacy Act 1988* (Cth) (the **Privacy Act**). 'APP entities' (or relevant agencies or organisations[37]) must not do an act, or engage in a practice, that breaches an Australian Privacy Principle.[38]

29. The Screening Database itself is excluded as a legislative instrument.[39]

30. Broader information sharing and mutual recognition of screening decisions across the aged care sector and NDIS worker screening database is provided for by new section 74AI of the ACQSC Act.[40]

Comments

Provider obligations - offence for non-compliance

31. As outlined, schedule 2 proposes that providers must comply with the requirements of the Accountability Principles with respect to the screening of aged care workers and governing persons.[41] The precise nature of these requirements is yet to be determined. At the same time, the Schedule introduces an offence for corporations which fail to comply with these requirements with a maximum penalty of 250 penalty units.[42]

32. Where such penalties apply it is important that the requirements to which they relate are set out in primary legislation. According to the Commonwealth's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, 'the content of the offence should not be provided in another instrument unless there is a demonstrated need to do so.'[43] In this case, no additional detail or justification is provided.

33. The Law Council's Rule of Law Principles emphasise that the law must be both readily known and available, and certain and clear. In that context:

(a) the intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide

[35] The Bill, sch 2, item 7.
[36] Ibid, item 8 (proposed s 74AG(7) of the ACQSC Act).
[37] Privacy Act, s 6. Relevant agencies and organisations are also defined in the same section.
[38] Privacy Act, s 15. The Australian Privacy Principles are set out in the clauses of Schedule 1 to the Privacy Act.
[39] Ibid (proposed s 74AG(9) of the ACQSC Act).
[40] Ibid, item 8.
[41] The Bill, sch 2, item 1.
[42] The Bill, sch 2, item 8 (proposed s 74AH of the ACQSC Act).
[43] Commonwealth Attorney-General's Department, 'The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (September 2011).

range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction; and

(b) the fault element for each element of an offence should be clear.[44]

34. The Law Council queries whether Schedule 2 satisfies the above criteria. It recommends that the relevant obligation of providers with respect to the screening of aged care workers and governing persons be better defined in the primary legislation, at least with respect to its nature and scope.

Recommendation

- **Proposed 63-1(1)(1a) of the Aged Care Act should better define the nature and scope of the obligation on approved providers to comply with new requirements regarding the screening of aged care workers and governing persons, rather than leaving these to be entirely determined by the Accountability Principles.**

Employment screening

35. The Explanatory Material states that the intention of Schedule 2 is to establish the legislative authority for 'nationally consistent pre-employment screening for aged care workers of approved providers'.[45] As discussed, this is intended to respond to the Royal Commission's recommendation for a national registration scheme for the personal care workforce.[46]

36. As outlined, proposed new section 7A simply requires that the Minister must be satisfied that the law establishes a scheme for the screening of aged care workers, and governing persons, of approved providers.

37. The provision leaves it open to the Minister's discretion as to whether a State or Territory scheme is sufficient. It does not require that the scheme includes any particular features which would promote national consistency. This may result in very different schemes operating under the auspices of a 'national scheme', and result in uncertainty including for multijurisdictional operators and providers.[47]

38. Further, there are no guarantees that procedural fairness requirements will be included in aged care screening laws which are determined under section 7A – for example, ensuring that a person can seek reasons and review of decisions made under such laws, including exclusions, suspensions and revocations of clearances. In the Law Council's view there should be assurances in the primary legislation that such decisions will be subject to procedural fairness guarantees.

39. It is also unclear whether these laws will address screening with respect to criminal or broader matters. Some hint at what is intended with respect to an aged care

[44] Law Council, 'Rule of Law Principles' (Policy Statement, March 2011).
[45] EM 1.
[46] Royal Commission, *Final Report: Care, Dignity and Respect* (2021) recommendation 77.
[47] This approach of referring to, or relying upon, State and Territory structures to support the Aged Care Act is repeated in Schedule 9 in relation to restrictive practices where the attempt is made to rely upon the guardianship rules in each jurisdiction to provide the support for the objects of the Aged Care Act. This does not assist national providers and gives rise to problems in interpretation.

screening law may be provided by the definition of an aged care screening check[48] (relating to the Screening Database) which refers to a person who poses a 'risk' to care recipients. However, this is a vague and broad reference and the concept of 'poses a risk' is not defined. A risk to the elderly can arise from the clinical support, domiciliary support, or financial support provided by persons. This definition may encompass any process to prohibit any person who may abuse a person in any way.

40. In the past, the Aged Care Act sought to be prescriptive in relation to criminal history, especially violent history, as a basis for excluding aged care workers. While this may have often been appropriate and necessary, practitioners report that it has also resulted in some long-term employees losing their employment in aged care in circumstances which were unwarranted. This legislation will go further as it is not limited to criminal checks and will capture volunteers who make up a large proportion of aged care workers, particularly for not-for-profits. Practitioners also highlight that there are ongoing challenges in aged care worker recruitment.

41. As such, it is important to ensure that there is a careful balance struck – both to ensure that pre-screening does appropriately safeguard aged care recipients from clear and genuine risks to their health and wellbeing, while also ensuring that any proposed screening laws are not so draconian that they work against providing good care for residents. There may also be the need for such laws to encompass exemption processes where individuals can establish that they do not pose a risk, for instance, with respect to a decades-old, single conviction after which their record has been exemplary.

42. In the Law Council's view, Parliament should set out the key features which it believes should be included for a scheme to meet the Minister's satisfaction under section 7A.

43. As noted, section 7A determinations will not be subject to disallowance on the basis of subsection 44(1) of the *Legislation Act 2003* (Cth). The Explanatory Memorandum states that:

> *A note under this subsection provides that a legislative instrument made under new section 7A is not subject to section 42 (disallowance) of the Legislation Act (see subsection 44(1) of the Legislation Act). This recognises that it is undesirable for Parliament to disallow instruments that have been made for the purposes of a multi-jurisdictional body or scheme, as disallowance would affect jurisdictions other than the Commonwealth. If a determination under new section 7A is disallowed, the Aged Care Quality and Safety Commission (Commission) would be limited in its ability to properly perform its functions or unable to perform them at all.*[49]

44. As considered by the Scrutiny of Bills Committee, the fact that section 44 of the *Legislation Act 2003* (Cth) applies to an instrument is not, of itself, a sufficient justification for excluding parliamentary disallowance.[50] Further, it is unclear to the Scrutiny of Bills Committee how allowing for disallowance would limit or prevent the Aged Care Quality and Safety Commission from performing its functions.

[48] The Bill, sch 2, item 3.
[49] EM 56.
[50] Scrutiny of Bills Committee, 'Scrutiny Digest 16 of 2021' (21 October 2021) 3.

45. The Law Council's concerns in this context were highlighted in its submission to the Standing Committee for the Scrutiny of Delegated Legislation regarding the exemption of delegated legislation from parliamentary oversight recognising that to exempt an instrument from disallowance gives rise to significant scrutiny concerns.[51]

46. In this context, the Law Council supports the Scrutiny of Bill Committee's recommendation that the Bill be amended to provide that determinations under proposed section 7A are subject to disallowance, to ensure that they are subject to appropriate parliamentary oversight.

Recommendations

- **Proposed section 7A should set out the key matters of which the Minister must be satisfied on reasonable grounds for a law of a State or Territory to be determined as an aged care screening law, including with respect to procedural fairness safeguards.**
- **Determinations under proposed section 7A should be subject to disallowance.**

Screening Database

47. The Screening Database may include personal information,[52] in potentially large amounts. Proposed section 61A provides for the permitted disclosure of protected information (including personal information)[53] contained in the Screening Database to various parties, including contractors and subcontractors of an approved provider for the purposes of screening.

48. While section 60 of the ACQSC Act provides that it is an offence for a person who obtains protected information in the course of performing functions, or exercising powers, under or for the purposes of that Act or the rules to record, use or disclose it for unauthorised purposes, this would not appear to extend to a contractor or subcontractor of an approved provider.

49. However, under section 95B of the Privacy Act, agencies entering into Commonwealth contracts are required to take contractual measures to ensure that contracted service providers[54] for the contract do not do acts, or engage in practices which would breach Australian Privacy Principles if done or engaged in by the agency. Agencies must ensure that Commonwealth contracts do not authorise contracted service providers to do or engage in such practices. They must also ensure that the Commonwealth contract contains provisions to ensure that such an act or practice is not authorised by a subcontract.

50. 'Contracted service providers' are defined as organisations that are party to a government contract and responsible for the provision of services to an agency under it, or a subcontractor for the government contract.[55] A 'subcontractor' refers to

[51] Law Council, submission to the Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight* (2 July 2020).
[52] The Bill, sch 2, item 8 (proposed subsection 74AG(7) of the ACQSC Act).
[53] Protected information is defined in s 60(3) of the ACQSC Act and includes personal information, as well as information that relates to the affairs of an approved provider, or relates to the affairs of an applicant.
[54] Privacy Act, s 6.
[55] Ibid.

an organisation that is a party to a contract with a contracted service provider etc, and is or responsible for the provision of services to an agency, or to the contracted service provider for the government contract.[56]

51. While 'organisations' do not include small business operators,[57] small business operators do not fall into this exception if they are contracted service providers for a Commonwealth contract.[58] Therefore, contractors and subcontractors would be bound by the Privacy Act obligations regardless of their size.

52. Although the Explanatory Memorandum states that 'the information that is accessible to providers will be limited to what is necessary for them to check whether an aged care worker or governing person has been screened in accordance with the approved provider's responsibilities and the Accountability Principles'[59] the Bill does not limit disclosure in this manner. Instead, protected information may be disclosed 'for purposes relating to the screening of an individual etc'[60] under the Bill. The Law Council recommends that consideration be given to including the words 'where it is necessary for', at relevant parts of section 61A.

53. Paragraph 61A(e) further permits the Commissioner to disclose protected information contained in the Screening Database to a person or body of a kind specified in the rules, for the purposes specified in the rules. The Law Council queries the appropriateness of this clause. In its view, it is preferable to clearly outline in the primary legislation the persons or bodies to which the protected information may be disclosed. For example, it would be inappropriate to expand access to this information to law enforcement bodies, immigration authorities, or welfare agencies without adequate Parliamentary scrutiny. It recommends that paragraph 61A(e) be deleted.

54. The Law Council further notes that the Screening Database may operate for any other purpose as established by the Minister under paragraph 74AG(8)(a).[61] This is open-ended and should be deleted. Given that the Screening Database is to include significant amounts of personal information, the purposes for which it is established should be determined by Parliament.

55. Similarly, the Screening Database may include any other information determined by the Minister under paragraph 74AG(8)(b).[62] The Law Council queries the necessity of including this open-ended power, which may enable significant kinds of additional personal information to be included.

56. While the stated purpose is for the Screening Database to contain up-to-date information, there is no requirement to delete information which is irrelevant to a screening application or wrong, or mechanism to enable an individual to challenge the information recorded on this basis. Related to this, there is no apparent mechanism by which a person can seek access to information held about them in the Register, including whether it records that an exclusion, suspension or

[56] Ibid. Full definition set out in s 6.
[57] Ibid, s 6C.
[58] Ibid, s 6D (4)(e).
[59] EM, 13.
[60] The Bill, sch 2, item 7.
[61] The Bill, sch 2, item 8 (proposed para 74AG(3)(c) of the ACQSC Act).
[62] Ibid (proposed paras 74AG(5)(j) and 74AG(8)(b) of the ACQSC Act).

revocation decision is in force. The Law Council recommends that consideration be given to mechanisms which enable individuals to seek access to such information and challenge it where it is incorrect. There may be undeserved reputational damage to individuals if a Screening Database was made too readily available with broad commentary permitted to exist unchecked, unamended or able to be challenged.

57. It further considers that there should be a positive requirement to remove decisions which are overturned on review, such as exclusion decisions, suspension decisions, or revocation decisions, from the Screening Database.

58. The Law Council notes that paragraph 74AG(5)(b) provides that information relating to an applicant in relation to whom a screening application is no longer being considered may be included in the Screening Database. It queries the justification for including this information.

Recommendations

- **Section 61A should be amended so that protected information in the Screening Database may be disclosed 'where it is necessary' for particular purposes, rather than 'relating to' those purposes.**
- **The following provisions should be deleted:**
  - **Paragraph 61A(e), permitting the disclosure of protected information in the Screening Database to a person or body of a kind specified in the rules, for the purposes specified in the rules.**
  - **Paragraph 74AG(3)(c) and subsection 74AG(8), permitting the Screening Database to operate for any other purpose as established by the Minister.**
  - **Paragraphs 74AG(5)(j) and 74AG(8)(b)), enabling the Screening Database to include any other information determined by the Minister.**
- **Mechanisms should be included which enable individuals to seek access to information held about them in the Screening Database and challenge it where it is incorrect.**
- **The Commissioner should be required to remove decisions which are overturned on review, such as exclusion decisions, suspension decisions, and revocation decisions, from the Screening Database.**

Schedule 3 – Code of Conduct

Overview

59. Schedule 3 is intended to respond to Recommendation 77 of the Royal Commission which (amongst other things) recommends a code of conduct for the personal care workforce and the power for a registering body to investigate complaints into breaches of the code of conduct and take appropriate disciplinary action.[63] It also

[63] Royal Commission, *Final Report: Care, Dignity and Respect* (2021) 260.

responds to Recommendation 103 which recommends that banning orders be available as part of a wider range of enforcement powers for the Quality Regulator.[64]

60. Schedule 3 of the Bill seeks to facilitate the Code, which will be made under the rules to the ACQSC Act,[65] that will apply to approved providers and aged care workers, including governing persons.[66] The details of the Code are not made available.

61. Item 1 of Schedule 3 amends the responsibilities of approved providers under the Aged Care Act to require that they:

    (a) comply with the provisions of the Code which apply to the approved provider (proposed paragraph 54-1(1)(g)); and

    (b) take reasonable steps to ensure that aged care workers and governing persons of the approved provider comply with the provisions of the Code that apply to them (proposed paragraph 54-1(1)(ga)).

62. Failure by approved providers to comply with proposed paragraph 54-1(1)(g) may result in a sanction, including revocation and suspension of the approval of the provider,[67] being imposed under existing section 63N of the ACQSC Act.[68]

63. Further, an approved provider which is a corporation and fails to comply with the applicable provisions of the Code will contravene proposed new section 74AB of the ACQSC Act. This attracts a civil penalty of up to 250 penalty units (currently $55,500).[69]

64. Aged care workers and governing persons of approved providers must also comply with the provisions of the Code that apply to the worker or person (as applicable).[70] Should the relevant approved provider be a corporation, the aged care worker or governing person who fails to comply with the provisions of the Code which apply to them may also be subject to a civil penalty of up to 250 penalty units.[71]

65. Proposed section 18A of the ACQSC Act provides for the Code functions of the Aged Care Quality and Safety Commissioner.[72] In particular, subsection 18A(1) provides that the Code functions of the Commissioner are to, in accordance with the rules, deal with information given to the Commissioner relating to a failure by an approved provider, aged care worker or governing person to comply with the Code. Item 10 of Schedule 3 to the Bill amends the existing rule making provisions in section 21 of the ACQSC Act to reflect the Code functions proposed in section 18A.

[64] Ibid 274.
[65] See s 77 of the ACQSC Act which enables the Minister to make rules.
[66] The Bill, sch 3, item 11.
[67] The kinds of sanctions that may be imposed are outlined in s 63R of the ACQSC Act.
[68] See note to proposed s 74AB of the ACQSC Act (The Bill, sch 3, item 11).
[69] The Bill, sch 3, item 11.
[70] Ibid (proposed ss 74AC and 74AD of the ACQSC Act).
[71] Ibid.
[72] Ibid, sch 3, item 9.

66. Proposed Part 8A of the ACQSC Act concerns enforcement and compliance. It provides that key provisions of the ACQSC Act[73] and Chapter 4 of the Aged Care Act are subject to monitoring under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**). It also enables authorised officers to enter premises under a warrant or with the consent of the occupier to exercise monitoring powers under Part 2 of the Regulatory Powers Act for the purposes of determining whether the provisions of the Code are being complied with.[74] It also expands the applications of enforceable undertakings and injunctions under Parts 6 and 7 of the Regulatory Powers Act to include compliance with the provisions of the Code,[75] and provides for certain information gathering powers, as discussed below.

67. Schedule 3 further proposes to introduce new powers for the Commissioner to impose banning orders on current and former aged care workers and governing persons of approved providers, prohibiting or restricting them from:

    (a) being involved in the provision of any type of aged care or specified types of aged care; or

    (b) engaging in specified activities as an aged care worker, or as a governing person, of the provider.[76]

68. The Commissioner may also make similar banning orders with respect to individuals who have not previously been aged care workers, or governing persons, of an approved provider but are considered unsuitable to be in the provision of aged care.[77] This responds to the Royal Commission's recommendation that a wider range of enforcement powers be made available, including banning orders.[78]

69. The circumstances in which a banning order may be made are discussed below. However, they include where the Commissioner reasonably believes that an individual did not comply, is not complying or is not likely to comply with a provision of the Code that applies or applied to the individual.[79] A banning order may apply generally or be of limited application, be permanent or for a specified period, and be made subject to specified conditions.[80]

70. Civil penalties apply for approved providers, workers or governing persons for breaching a banning order or a condition to which the order is subject. The civil penalty for such a contravention is up to 1,000 penalty units (currently $222,000).[81] They also apply to corporations which are approved providers, where a banning order is in force against an aged care worker or a governing person of the approved provider, and the corporation fails to take reasonable steps to ensure that the

[73] That is, proposed new ss 74AC(1) and 74AD(1) of the ACQSC Act (The Bill, sch 3, item 16).
[74] The Bill, sch 3, item 13.
[75] Ibid, sch 3, item 14.
[76] Ibid, sch 3, item 25 (proposed ss 74GB(1)-(2) of the ACQSC Act).
[77] Ibid (proposed ss 74GB (3)-(4) of the ACQSC Act).
[78] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021) 274 (Recommendation 103). .
[79] Eg, the Bill, sch 3, item 25 (proposed s 74GB(2) of the ACQSC Act).
[80] Ibid (proposed s 74GC(2)(c) of the ACQSC Act).
[81] Ibid (proposed s 74GD(1) of the ACQSC Act).

individual does not engage in conduct that breaches the banning order or condition. The civil penalty is again up to 1,000 penalty units (currently $222,000).[82]

71. The Commissioner must establish and maintain a register containing certain information about individuals against whom a banning order has been made at any time.[83]

Comments

Code of Conduct

Details of Code left to delegated legislation

72. As outlined, Schedule 3 seeks to insert proposed section 74AE to the ACQSC Act to provide that the rules (to be determined by the Minister[84]) may make provision for, or in relation to, a Code. The Law Council agrees with the Committee's concern that there is no additional detail on the face of the Bill as to the kinds of matters that may be included in the Code.[85]

73. Significant consequences, including the permanent loss of a person's livelihood, their personal and professional reputation, and substantial penalties attach to contraventions of the Code. Should the Code contain conduct requirements which may be considered relatively minor, it would be inappropriate to attach such consequences and penalties to its contravention.

74. In this context, practitioners have raised that the broad statements driving aged care reforms, which are directed towards addressing persons 'posing a risk' may mean that the Code is also drafted in a manner which is open to broad interpretation. As such, the question arises as to whether it should be an outline of expected behaviours, for which the breach is the basis for a civil penalty of up to 250 penalty units, as described above.

75. The Law Council's general position is that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation. As such, it agrees with the Scrutiny of Bills Committee's view that Parliament should determine the features of the Code in primary legislation, rather than leaving this to the delegated legislation.[86] While the Law Council recognises that the rules establishing the Code would be legislative instruments[87] and subject to disallowance, it considers that this would provide for inadequate scrutiny given the volume of delegated legislation which is before Parliament annually.[88] It also notes that non-disallowance can be a blunt instrument, which

[82] Ibid (proposed s 74GD(2) of the ACQSC Act).
[83] Ibid (proposed s 74GI of the ACQSC Act).
[84] See existing s 77 of the ACSQC Act.
[85] Scrutiny of Bills Committee, 'Scrutiny Digest 16 of 2021' (21 October 2021) 4 [1.12].
[86] Ibid [1.13].
[87] See existing s 77 of the ACSQC Act.
[88] Each year, the Executive makes about 1600 disallowable legislative instruments. See Parliament of Australia, *The Senate and Legislation* (Senate Briefs, February 2020).

does not allow Parliament to easily address individual drafting aspects which raise concern.[89]

76. The Law Council recommends that the key features of the Code be set out in primary legislation. In the alternative, it recommends that the Bill is amended to include at least high-level guidance regarding the matters which should be contained in the content of the Code.

Recommendations

- **The key features of the Code of Conduct should be set out in the Bill.**
- **If this is not accepted, the Bill is amended to include at least high-level guidance regarding the matters which should be contained in the content of the Code of Conduct. The primary legislation should also make clear the mechanism for persons to challenge any act or decision made under the Code.**

Application to volunteers

77. As noted, an aged care worker or governing person who fails to comply with the provisions of the Code which apply to them may be subject to a civil penalty of up to 250 penalty units (currently $55,500).[90] Aged care workers include volunteers.[91]

78. This highlights the need to ensure that the details of the Code are appropriately framed with respect to their application to different groups, including volunteers who may not receive similar amounts of training as paid employees.

79. This may raise issues of indemnities and responsibilities between the approved provider and volunteers, including the terms of engagement with volunteers and whether an approved provider could seek redress against a volunteer for any breach. The Law Council notes, that by operation of civil liability legislation, in some jurisdictions, approved aged care providers will be held legally responsible for the acts or omissions of its volunteers.[92]

Information gathering

80. Part 8A provides for certain information gathering powers with respect to compliance and enforcement. Under proposed section 74FA of the ACQSC Act,[93] when the Commissioner believes on reasonable grounds that a person has information or documents relevant to whether an aged care worker or governing person of an approved provider that is a corporation is complying with an applicable provision of

[89] Section 42 of the *Legislation Act* provides for disallowance of either legislative instruments or provisions of legislative instruments. However, Odgers Senate Practice comments that has been practical difficulty with disentangling provisions from one another in Parliament, with the effect that certain provisions cannot be disallowed.
[90] The Bill, sch 3, item 11 (proposed ss 74AC and 74AD of the ACQSC Act).
[91] See definition of aged care worker under the Bill, sch 3, item 5.
[92] For example, the *Civil Liability Act 2002* (NSW) in general terms provides protections to a volunteer doing work except where the volunteer is acting outside the scope of the authorised activities. Accordingly, a Code of Conduct that requires 'no harm' or 'no abuse' of residents leads to a position where a volunteer who causes injury to a resident may fall outside the protection of the civil liability. It is understood that some other jurisdictions' legislation does not state that the organisation will avoid liability.
[93] The Bill, sch 3, item 23.

the Code, the Commissioner may by written notice require the person to attend before an authorised officer to:

(a) answer questions relating to the matter; and/or

(b) give specified information or documents.

81. A person who fails to comply with a requirement of the written notice commits an offence, with a maximum penalty of 30 units (currently $6,660).[94]

82. The Explanatory Memorandum to the Bill notes that:

> *These provisions are similar to those currently applying under section 74F. To the extent that this provision impacts on a person's privilege against self-incrimination, it is reasonable and proportionate to ensure the integrity of aged care workers and governing persons and their compliance with the Code of Conduct. The purpose of the provision is to ensure the Commissioner has all the relevant information and documents available to them in order to make an informed decision about any enforcement action it may take against an individual in relation to a breach of the Code of Conduct.*[95]

83. While the Bill (and the ACQSC Act) do not expressly abrogate the privilege against self-incrimination, the Law Council considers that there should statutory provisions clearly recognising it under both proposed subsection 74FA(5) and existing section 74F.

84. In this context, the Law Council notes that a fundamental rule of law principle is that all people are entitled to the presumption of innocence and to a fair and public trial. Under this principle, no one should be compelled to testify against him or herself. When a person is subject to questioning by the state, he or she should be given appropriate warnings about this right, which should be observed by the state.[96]

Creation of statutory causes of action

85. The Law Council raises for consideration the question of whether there should be the creation of statutory causes of action for those who have suffered loss and damage as a result of breaches of the Code and seek compensation.

Recommendation

- **Proposed section 74FA and existing section 74F of the ACQSC Act should be amended to expressly recognise the privilege against self-incrimination.**
- **Consideration should be given to whether there should be the creation of statutory causes of action for those who have suffered loss and damage as a result of breaches of the Code and seek compensation.**

[94] Ibid (proposed s 74FA(5) of the ACQSC Act).
[95] EM, 66.
[96] Law Council of Australia, *Policy Statement: Rule of Law Principles,* March 2011, Principle 3.

Banning Orders

Thresholds

86. As outlined, Schedule 3 to the Bill seeks to amend the ACQSC Act to provide new powers for the Commissioner to impose banning orders on aged care workers and governing persons of approved providers.

87. If an individual engages in conduct that breaches a banning order, or a condition of a banning order, that is in force against an individual, a civil penalty of 1,000 penalty units may be imposed (currently $222,000).[97] The same penalties apply to corporations which fail to take reasonable steps to ensure that their aged care workers or governing persons do not breach a banning order is in force.[98]

88. The powers to make banning orders are set out in proposed section 74GB of the ACQSC Act. Under subsection 74GB(2), with respect to current and former aged care workers, the Commissioner must not make a banning order unless:

    (a) the Commissioner reasonably believes that the individual did not comply, is not complying or is not likely to comply with a provision of the Code that applies or applied to the individual; or

    (b) the Commissioner reasonably believes that the individual is not suitable:

    i. to be involved, or to continue to be involved, in the provision of any type of aged care or the specified types of aged care; or

    ii. to engage, or to continue to engage, in the specified activities as an aged care worker, or as a governing person, of the approved provider; or

    (c) the Commissioner reasonably believes there is an immediate or severe risk to the safety, health or well-being of one or more care recipients if the individual:

    i. is involved, or continues to be involved, in the provision of any type of aged care or the specified types of aged care; or

    ii. engages, or continues to engage, in the specified activities as an aged care worker, or as a governing person, of the approved provider; or

    (d) the individual has at any time been convicted of an indictable offence involving fraud or dishonesty; or

    (e) the individual is an insolvent under administration.[99]

89. With respect to individuals who have not been involved in aged care previously, the Commissioner must reasonably believe that the individual is not suitable:

[97] The Bill, sch 3, item 25 (proposed s 74GD(1) of the ACQSC Act).
[98] Ibid (proposed s 74GD(2) of the ACQSC Act).
[99] Ibid (proposed s 74GB(2) of the ACQSC Act).

(a) to be involved in the provision of any type of aged care or the specified types of aged care; or

(b) to engage in the specified activities as an aged care worker, or as a governing person, of the approved provider.[100]

90. The Law Council adds that the reference in proposed subsection 74GB(4) to proposed subsection 74GB(2) appears to be intended to refer to proposed subsection 74GB(3), and should be reviewed for accuracy.

91. In making determinations as to a person's suitability, the Commissioner must have regard to certain suitability matters.[101] The Law Council notes that these are defined in Schedule 5.[102] It makes recommendations below regarding how these matters may be amended to limit the potential for unfair outcomes.

92. With respect to the above tests, the Law Council notes that the requirement of 'reasonable belief' brings an important objective element to these decision-making powers.

93. At the same time, it is concerned that under proposed paragraph 74GB(2)(a), there is no requirement that an individual's lack of compliance with the Code is sufficiently serious to justify a banning order. Under this test, the relevant breach may, on the face of the legislation, be relatively minor and have caused no actual harm. The Law Council recommends that paragraph 74GB(2)(a) be amended to require that the lack of compliance be sufficiently serious or persistent. Alternatively, the lack of compliance should support a conclusion that as a result of the lack of compliance, the individual is likely to pose a significant risk to the safety, health or well-being of one or more care recipients.

94. The Law Council further notes that proposed paragraph 74GB(2)(a) would enable a banning order to be made based on the reasonable belief that the individual 'is not likely to comply with a provision of the Code'.

95. The Law Council is concerned that banning orders may be made, potentially prohibiting people permanently from employment in the aged care sector and damaging their professional or personal reputation, based on an assessment of future conduct, where no breach of the Code has been established. It queries the need for this aspect of the test, noting that other limbs of the test are available to respond to situations of immediate or severe risk, or where the evidence supports the view that the person is unsuitable to provide aged care.[103] It recommends that the words 'or is not likely to comply with' be deleted.

96. The Law Council also recommends, with respect to proposed paragraph 74GB(2)(d), that this limb of the test be amended so that it does not apply:

[100] Ibid (proposed s 74GB(4) of the ACQSC Act).
[101] Ibid (proposed s 74GB(5) of the ACQSC Act).
[102] The Bill, sch 5, item 26 (proposed s 8C of the ACQSC Act).
[103] Eg, proposed paras 74GB(2)(b) or (c) of the ACQSC Act.

(a) to individuals who were minors when the relevant offence was committed;

(b) where a conviction has been quashed or set aside;

(c) where a conviction is not subject to disclosure due to a legislated spent convictions scheme.

97. The Law Council further queries whether the fact that an aged care worker who is an insolvent under administration should qualify them for a banning order.[104] While this may be appropriate for governing persons, the justification of applying this criterion with respect to aged care workers, including volunteers, is unclear. It notes that individuals who have been in insolvency may be seeking new pathways in life and that volunteering or working in aged care may be important in that context. It recommends that proposed subsection 74GB(2)(2) be limited to governing bodies only.

Recommendations

- **Paragraph 74GB(2)(a) should be amended to require that the lack of compliance with the Code of Conduct required for a banning order to be made is sufficiently serious or persistent. Alternatively, the lack of compliance should be such that the individual is likely to pose a significant risk to the safety, health or wellbeing of one or more care recipients.**
- **The words 'or is not likely to comply' should be deleted from paragraph 74GB(2)(a).**
- **Paragraph 74GB(2)(d) should be amended so that it does not apply:**
  - **to individuals who were minors when the relevant offence was committed;**
  - **where a conviction has been quashed or set aside; or**
  - **where a conviction is not subject to disclosure due to a legislated spent convictions scheme.**
  - **Proposed paragraph 74GB(2)(2), regarding insolvency, be limited to governing bodies only.**

Procedural fairness safeguards

98. The Law Council recognises that an individual may also apply to have a banning order varied or revoked by the Commissioner under proposed section 74GG.

[104] The Bill, sch 3, item 25 (proposed s 74GB(2)(2)).

Similarly, the individual may apply to have a condition to which the order is made varied or revoked under section 74GH.

99. The Law Council welcomes the Bill's inclusion of key decisions concerning banning orders as reviewable decisions.[105] These include a decision:

    (a) to make a banning order against an individual;

    (b) under section 74GF to vary a banning order made against an individual;

    (c) under section 74GG not to vary or revoke a banning order made against an individual;

    (d) under section 74GH not to vary or revoke a condition to which a banning order against an individual is subject; and

    (e) under section 74GH to specify one or more new conditions to which a banning order against an individual is subject.

100. Reviewable decisions may be subject to internal independent review, and potentially Administrative Appeals Tribunal review, under Part 8B of the ACQSC Act.

101. The Law Council also welcomes proposed section 74GE, which provides that before the Commissioner makes a banning order against an individual, the Commissioner must by written notice notify the individual that such an order is under consideration.[106] This requirement does not apply in circumstances of immediate and severe risk.[107]

102. Under the general requirement, the notice must set out the reasons why the Commissioner is considering the banning order, and invite the individual to make submissions in relation to the matter. The person must do so within 14 days after receiving the notice or within a shorter period if specified in the notice. The Commissioner must consider any submissions made by the individual in accordance with the notice.[108]

103. The Law Council considers that a person must, however, have adequate time to consider the notice and respond to the Commissioner. This may require preparing adequate documentation and seeking legal advice. The ability to substitute a shorter period for a response in the notice does not provide for any minimum timeframe for a response.

104. The Law Council considers that a 14-day minimum period is appropriate. It recommends that proposed subparagraph 74GE(3)(b)(ii), enabling a shorter period to be substituted, be deleted from the Bill. Similar provisions elsewhere in the Bill should also be deleted.[109]

[105] The Bill, sch 3, item 26.
[106] The Bill, sch 3, item 25 (proposed s74GE(1) of the ACQSC Act).
[107] Ibid (proposed s 74GE(2) of the ACQSC Act).
[108] Ibid (proposed s 74GE(3)-(4) of the ACQSC Act).
[109] Eg, the Bill, sch 3, item 25 (proposed s 74GG(4) of the ACQSC Act).

105. The Commissioner has powers to, on his or her own initiative, vary or revoke a banning order made against an individual if satisfied that it is appropriate to do so.[110] However, there is no automatic trigger to this process. The Law Council suggests that consideration be given to requiring the regular review of banning orders, including any conditions placed on a person, to ensure that they remain fair, appropriate and adapted to their purpose.

106. In this context, it notes concerns raised by the Scrutiny of Bills Committee that, in cases where a person is required to comply with banning order conditions but has since left the aged care sector, it is unclear whether these conditions—which may include compulsory training—would remain enforceable, with failure to comply resulting in a civil penalty of up to $222,000.[111] A regular review requirement could prompt the revocation of an order where it is no longer necessary or appropriate, such as where a person has left the sector.

Recommendations

- **Proposed subparagraph 74GE(3)(ii), enabling a shorter period to be substituted in which a person may respond to the Commissioner regarding a potential banning order being made, should be deleted.**
- **Consideration be given to requiring the regular review by the Commissioner of banning orders made, including any conditions placed on a person, to ensure that they remain fair, appropriate and adapted to their purpose.**

Register

107. Item 25 of Schedule 3 to the Bill seeks to insert proposed section 74GI into the ACQSC Act to provide that the Commissioner must establish and maintain a register of each individual against whom a banning order has been made (**the Register**). This must include particular information including the person's name, ABN, the details of the banning order (including any conditions to which the order is subject) and any other information specified by the rules.[112]

108. This requirement applies to a banning order, even it is no longer in force.[113]

109. Proposed subsection 74GI(4) also provides that the rules may make provision for making the Register, or specified information, publicly available. In this regard, the Explanatory Memorandum states it is intended to make information about banned individuals 'accessible to the public' in order to put employers on notice of individuals who are unsuitable to provide aged care services.[114]

110. In the Law Council's view, significant matters, such as the information that can be included on a Register, should be set out in primary legislation rather than left to the

[110] Ibid (proposed s 74GF of the ACQSC Act).
[111] Scrutiny of Bills Committee, 'Scrutiny Digest 16 of 2021' (21 October 2021) 6 [1.21].
[112] The Bill, sch 3, item 25 (proposed s 74GI(1) of the ACQSC Act).
[113] Ibid (proposed s 74GI(2) of the ACQSC Act).
[114] EM, 71.

rules. This is particularly the case if, contrary to the Law Council's view set out below, the Register is to be made public.

111. The Law Council agrees with concerns highlighted by the Scrutiny of Bills Committee, that even if the only identifying information may be an individual's name, publication of the fact of the banning order, and details of the order, is likely to have a considerable effect on the individual's right to privacy and reputation, as it indicates they are not suitable to be involved in providing aged care services.[115]

112. Public access to the Register may further engage other rights, such as the right to work.[116] This incorporates the right of people to decent work, providing an income that allows the worker to support themselves and their family. Individuals should not be unfairly deprived of this right.[117] In this context, public access to the Register may result in other employers, well outside those operating in the aged care or related sectors, refusing job applications or terminating employment in circumstances in which an individual is well able to perform the job and poses no risk to others. The Law Council does not consider that banning orders should apply to ban individuals from work *per se.*

113. To ensure that the limitation on these rights is no more than strictly necessary, the Law Council recommends that access to the Register is restricted to aged care providers, rather than made available to the public. This would be in line with the purpose of the provision to put employers on notice of individuals who were found unsuitable to provide aged care services (as provided for in the rules).[118]

114. Further, as noted, the Register includes a banning order made at any time, including if it is no longer in force.[119] This would appear to include banning orders that may have been revoked or overturned on review, eg, because they were invalidly made or made in error. This runs the risk of individuals being unfairly precluded from access to employment in unfair circumstances. It is also not clear if the Register would make clear where a person was seeking revocation or review of a banning order, or such a process is otherwise underway.

115. The Law Council recommends that proposed subsection 74GI(2) be amended to exclude a banning order from inclusion on the Register which is no longer in force because it has been revoked or overturned on review. Further proposed subsection 74GI(1) should be amended to require that the Register record a note where a process of revocation or review in relation to a banning order is currently on foot.

116. The Law Council notes that the rules 'may' make provision for the correction of information that is included in the Register.[120] It recommends that this be amended to 'must' to ensure that wrong information may be corrected. Individuals should be able to access information about them in the Register and seek such correction. It

[115] Scrutiny of Bills Committee, 'Scrutiny Digest 16 of 2021' (21 October 2021) 7.
[116] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 6, 7 and 8.
[117] Parliamentary Joint Committee on Human Rights, *Guide to human rights* (2015) 51.
[118] EM, 71.
[119] The Bill, sch 3, item 25 (proposed ss 74GI(1) – (2) of the ACQSC Act).
[120] Ibid (proposed para. 74GI(4)(a) of the ACQSC Act).

considers that the Commissioner should be separately required to ensure that the Register is up-to-date and correct under proposed subsection 74GI(1).

Recommendations

- **The information that can be included on a Register should be set out in primary legislation rather than left to the rules. This is particularly the case if, contrary to the Law Council's view, the Register is to be made public.**
- **Access to the Register should be restricted to aged care providers, rather than made available to the public.**
- **Proposed subsection 74GI(2) should be amended to exclude a banning order from inclusion on the Register which is no longer in force because it has been revoked or overturned on review.**
- **Proposed subsection 74GI(1) should be amended to require that the Register record a note where a process of revocation or review in relation to a banning order is currently on foot.**
- **The Commissioner should be required to ensure that the Register is up-to-date and correct under proposed subsection 74GI(1).**
- **Paragraph 74GI(4)(a) should require that the rules make provision for the correction of the Register. This should include providing the ability for individuals to access information about them in the Register and seek its correction if it is incorrect.**

Schedule 4 – Extension of incident management and reporting

117. Paragraph 54-1(1)(e) of the Aged Care Act provides that an approved provider of residential aged care or flexible care delivered in a residential setting has a responsibility to manage incidents and take reasonable steps to prevent incidents, including through implementing and maintaining an incident management system (**SIRS**). Schedule 4 of the Bill would extend the SIRS beyond residential care to home care and flexible care delivered in a home or community setting from 1 July 2022.[121]

118. The SIRS must comply with the requirements set out in the Quality of Care Principles 2014 (Cth) (**Quality Principles**).[122]

119. Schedule 4 of the Bill is intended to respond to Recommendation 100 which recommends the expansion of the serious incident reporting scheme to address all serious incidents, including in home care.[123]

[121] Item 1, Schedule 4.
[122] Para 54-1(1)(e) of the Aged Care Act.
[123] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021) 272.

Comments

120. The Law Council continues to welcome the Australian Government's efforts to implement a SIRS. It has long called for the development of a SIRS to increase accountability and transparency of approved aged care providers in reporting, investigating and adequately responding to serious incidents.[124] It considers that the SIRS will be an important initiative in protecting vulnerable older Australians.

121. The Law Council further supports the extension of the existing SIRS beyond residential care to home care and flexible care delivered in a home or community setting from 1 July 2022. Persons receiving home care and flexible care delivered in a home or community setting should be entitled to protection equivalent to that provided to persons in residential care by the existing SIRS.

Schedule 5 – Governance of approved providers etc.

Overview

122. Schedule 5 of the Bill introduces significant changes to the governance requirements for approved providers. Key changes include the following.

    (a) Membership of governing bodies – a new requirement to ensure that (i) a majority of the members of the governing body are independent non-executive members; and (ii) at least one member of the governing body has experience in the provision of clinical care.[125] A limited exception to (i) is where the governing body has fewer than five members and the provider provides care to fewer than 40 care recipients; and (ii) where the governing body has fewer than five members.[126] A determination may also be sought from the Commissioner that this requirement does not apply.[127]

    (b) Quality of care and consumer advisory bodies – a new requirement for providers to establish, and continue in existence, a 'quality care advisory body'.[128] There is also a new requirement to offer, at least once every 12 months, care recipients and representatives the opportunity to establish a consumer advisory body to give the governing body feedback about quality of care.[129]

    (c) Staff qualifications – a new requirement for the governing body to ensure the staff members of the provider have appropriate qualifications, skills or experience to provide the care or services provided; and are given opportunities to develop their capability to provide that care or those services.[130]

[124] See Law Council, Submission to the Royal Commission into Aged Care Quality and Safety (29 July 2020) 32-36 and Law Council, Submission to the ALRC, *Elder Abuse Discussion Paper* (6 March 2017) 36.
[125] The Bill, sch 5, item 16 (proposed s 63-1D(2) of the Aged Care Act).
[126] Ibid (proposed s 63-1D(3) of the Aged Care Act).
[127] Ibid (proposed s 63-1E of the Aged Care Act).
[128] Ibid (proposed s 63-1D(5) of the Aged Care Act).
[129] Ibid (proposed s 63-1D(7) of the Aged Care Act).
[130] Ibid (proposed s 63-1D(9) of the Aged Care Act).

(d) Constitution – an approved provider that is a wholly-owned subsidiary, where the holding company is not an approved provider, must ensure that the that the constitution of the provider does not authorise a director of the provider to act in good faith in the best interests of the holding company.[131]

(e) Reporting – a new responsibility of approved providers to prepare an annual statement on their operations which will be made publicly available.[132] This is intended to help care recipients and their families to understand key details of providers, including information about financial circumstances, staffing levels and complaints.[133] The published statement must not include personal information about an individual, other than an individual who is one of the key personnel of the provider.

(f) Suitability of key personnel – the disqualified individual test[134] is replaced with a suitability test for key personnel.[135]

(g) There is a new requirement for approved providers to notify the Commissioner if an individual becomes, or ceases to be, one of the key personnel of the provider, as well as where the provider becomes aware of a change of circumstances that relates to a suitability matter.[136] This notification must be given within 14 days. The provider must state whether they have considered the suitability matters in relation to the individual and are reasonably satisfied that the individual is suitable to provide aged care (both where there is a new appointment, and a change in circumstances). A strict liability offence applies to corporations which are approved providers for failure to comply, with a penalty of 30 units (currently $6,660).[137]

(h) An obligation also rests on individuals who are key personnel of an approved provider to notify the provider, where a corporation, if they become aware of a change of circumstances that relates to a suitability matter in relation to the individual. This must also occur within 14 days. An individual also commits an offence if they fail to comply, with a penalty of up to 30 penalty units.[138]

(i) The Commissioner may, at any time, determine that an individual who is one of the key personnel of an approved provider is not suitable to be involved in the provision of aged care. When deciding whether to make this determination, the Commissioner must consider the suitability matters in relation to the individual outlined under new section 8C, but is not limited to considering only these matters.[139] A

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[131] Ibid (proposed s 63-1H of the Aged Care Act).
[132] Ibid, sch 5, item 16 (proposed s 63-1G of the Aged Care Act) and item 17 (proposed s 86-10 of the Aged Care Act).
[133] EM, 80.
[134] Disqualified individual is currently defined in section 8A of the ACQSC Act. This section is repealed (sch 5, item 25).
[135] See sch 5, items 27 and 29. The meaning of suitability matters is inserted by new section 8C of the ACQSC Act (item 26) and includes the individual's experience in providing aged care or other relevant forms of care, whether the individual has been convicted of an indictable offence and whether a civil penalty order against the individual has been made. This definition is further discussed below.
[136] Ibid, Sch 5, item 6.
[137] Ibid.
[138] The Bill, sch 5, item 12 (proposed s 10A-1 of the Aged Care Act).
[139] Ibid(proposed s 10A-2 of the Aged Care Act).

corporation which is an approved provider commits an offence if it fails to comply with the Commissioner's determination, attracting a penalty of up to 300 penalty units).[140]

(j) Approved providers must, at least every 12 months, consider the suitability matters, and be reasonably satisfied that an individual who is one of their key personnel is suitable to be involved in the provision of aged care. They must do so in accordance with requirements in the Accountability Principles.[141] If they fail to do so, they may commit an offence (penalty of up to 300 penalty units (currently $66,600)).[142]

123. Schedule 5 is intended to align with recommendations 88 to 90 of the Royal Commission which relate to provider governance.[143] In particular, it relates to the following key aspects of these recommendations.

(a) Recommendation 88 – The Aged Care Act and the ACQSC Act should be amended to require that:

i. the governing body of an approved provider providing personal care services must have a majority of independent non-executive members (unless the provider has applied to the Commissioner for an exemption and the exemption has been granted);

ii. the constitution of an approved provider must not authorise a member of the governing body to act other than in the best interests of the provider;

iii. an applicant for approval to provide aged care services must notify the Commissioner of its key personnel, and an approved provider must notify the Commissioner of any change to key personnel within 10 business days of the change;

iv. a 'fit and proper person' test should apply to key personnel in place of the 'disqualified individual' test; and

v. an approved provider must provide an annual report to the Secretary of the Australian Department of Health containing information to be made publicly available through My Aged Care.

(b) Recommendation 89 – The ACQSC should, as part of its approval of aged care providers and accreditation of aged care services, require governing bodies to ensure that their leaders and managers have professional qualifications or high-level experience in management roles; and adopt and implement a plan to manage and support staff training, professional development and continuous learning, staff feedback and engagement, and team building.

(c) Recommendation 90 – Any governance standard for aged care providers developed by the Australian Commission on Safety and Quality in Health and Aged Care should require every approved provider to:

[140] Ibid (proposed s 10A-2A of the Aged Care Act).
[141] The Bill, sch 5, Item 15 (proposed s 63-1A of the Aged Care Act).
[142] The Bill, sch 5, item 12 (proposed s 10A-2B of the Aged Care Act).
[143] Royal Commission, *Final Report: Care, Dignity and Respect* (2021) 265-268.

i. have members of the governing body who possess between them the mix of skills, experience and knowledge of governance responsibilities, including care governance, required to provide governance over the structures, systems and processes for ensuring the safety and high quality of the care delivered by the provider;

ii. have a care governance committee, chaired by a non-executive member with appropriate experience in care provision, to monitor and ensure accountability for the quality of care provided, including clinical care, personal care and services, and supports for daily living; and

iii. allocate resources and implement mechanisms to support regular feedback from, and engagement with, people receiving aged care, their representatives, and staff to obtain their views on the quality and safety of the services that are delivered and the way in which they are delivered or could be improved.

Comments

Membership of governing bodies

124. As noted, section 63-1D requires a majority of the members of the governing body of the provider are independent non-executive members and at least one member of the governing body of the provider has experience in the provision of clinical care.

125. The Law Council generally supports strengthening the new provider governance arrangements under proposed 63-1D. It raises for consideration, whether the new responsibility that requires in the case of an approved provider, at least one member to have experience in the provision of clinical care,[144] goes far enough and whether it should also require the experience to be in a relevant field of clinical care related to aged care. In this regard the amendments do not specify the type of clinical experience required to qualify as a member of approved provider's governing body. However, it also recognises that this may not always be possible eg, in rural, regional and remote areas which lack such skills.

126. With respect to introducing a majority of independent non-executive members, the Law Council notes that in the context of corporate governance, as outlined by Dixon J in *Jaques v AIG Australia Ltd*[145]:

> *The essential characteristic of an executive director is his or her discharge, usually as an employee, of executive functions in the management and administration of the company. Non-executive directors are usually independent of corporate management. In contemporary corporate governance theory, the role of independent, non-executive directors is encouraged.*[146]

[144] The Bill, sch 5, item 16 (proposed s 63-1D(2(b) of the Aged Care Act).
[145] [2014] VSC 269 (13 June 2014).
[146] Ibid, [15] (Dixon J).

127. Problems may arise in relation to defining 'independent' in the context of private companies, charitable groups, and church groups. For example, as noted by the Australian Institute of Company Directors:

> *The main difference between private companies and larger public companies is the lack of distinction between owners and managers. In private companies, they tend to be the same people because of the small size and lack of complexity of operations. They often have a quite informal approach to governance.*[147]

128. Due to their smaller size, some of these bodies may fall within the exception outlined at proposed subsection 63-1D(3). However, other bodies will not and for some, such as churches, resolving what is 'independent' may not be clear. For example, with respect to whether a priest constitutes an executive or a non-executive member, guidance may be needed. The Law Council suggests that a definition which is related to 'executive' or 'non-executive' may be better than 'independent'.

129. It further notes that a charity group board is already by operation of the *Australian Charities and Not-for-profits Commission Act 2021* (Cth) (**ACNC laws**) and regulations subject to relevant codes and standards. An amendment may be to provide an exemption to any organisation registered under the ACNC to remove this problem. By exempting ACNC registered bodies from adding further 'independent directors', current members would not be relieved from their broader obligations under the Aged Care Act. For ACNC boards, the obligation could be retained to have a clinical member on the board.

130. The Law Council raises for consideration, with respect to whether the application under proposed section 63-1E of the Aged Care Act by a provider to the Commissioner for a determination that the requirement that at least one member of the governing body has experience in the provision of clinical care does not apply to the provider, should be limited by the addition of the words 'in special circumstances' before the words which create the right to apply. The addition of these words should limit the number of applications and make it clear that the requirement should apply save in special circumstances. When deciding whether the circumstances are special, the Commissioner may then take into account certain matters listed in section 63-1E(4) amongst others.

Recommendations

- **Regarding the section 63-1D(2) requirement requiring the majority of members of the governing body, consideration be given to:**
  - **a distinction based around 'executive' or 'non-executive' members, rather than 'independent non-executive' members; and/or**
  - **exemption to any organisation registered under the ACNC.**

[147] Australian Institute of Company Directors, 'Governance Issues in Private Companies', online article (undated), <*http://aicd.companydirectors.com.au/resources/all-sectors/roles-duties-and-responsibilities/governance-issues-in-private-companies?no_redirect=true*>.

- **Regarding proposed section 63-1E, consideration be given to whether an application to the Commissioner for a determination should be limited by the addition of the words 'in special circumstances'.**

Staff qualifications

131. Subsection 63-1D(9) sets out a new requirement for the governing body to ensure the staff members of the provider have appropriate qualifications, skills or experience to provide the care or services provided; and are given opportunities to develop their capability to provide that care or those services.

132. The Explanatory Memorandum states that

> *Those who hold managerial and leadership positions in providers of aged care are in a position to exert a profound influence over the culture and care environment and the people who operate within it. Introducing this responsibility for an approved provider to require that their governing body ensures that the staff members of the provider have appropriate qualifications, skills or experience to provide the care or other services aims to ensure staff have the necessary attributes to fulfil their roles. This will include ensuring that managers within the organisation have the professional experience and qualifications in management roles to enable them to manage complex aged care businesses well and to support the broader reforms recommended by the Royal Commission.*[148]

133. While the Law Council welcomes this objective, it is concerned that this obligation may be too broad to be practicable, and in many cases simply not applicable. Under the Aged Care Act, a 'staff member' of an approved provider means an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services.

134. Staff members of approved providers may range from senior managers, to nursing staff, to cleaners and manual staff. Some may provide services to care recipients and others do not provide direct care or services. The Law Council recognises that under proposed subsection 63-1D(9), there is an emphasis on ensuring 'appropriate qualifications, skills or experience', which permits for the scope of these obligations to vary for different staff. However, it may be unnecessary for approved providers to ensure that eg, contracted cleaners or kitchen hands have opportunities to develop their capability to provide those services, over and above ensuring that their services meet broader contractual and legal standards. It may also be difficult to determine appropriate qualifications for unskilled labourers working in aged care.

135. The Explanatory Memorandum discussion appears most concerned with ensuring that managers and leaders of approved providers have the professional experience and qualifications in management roles to enable them to manage complex aged

[148] EM, 91.

care businesses well. However, there may be other categories of staff which would clearly benefit the proposed obligations in subsection 63-1D(9).

136. The Law Council recommends that proposed subsection 63-1D(9) be narrowed to target specific categories of staff members, in line with the policy objective sought.

Recommendation

- **Proposed subsection 63-1D(9) should be narrowed to target specific categories of staff members, as appropriate to achieve the policy objective sought.**

Responsibilities regarding constitution of providers that are subsidiary corporations

137. Section 63-1H places a positive obligation on the duty of directors of an approved provider that is a wholly owned subsidiary to ensure that the Constitution does not authorise a director of the approved provider to act in good faith in the best interests of the holding company.

138. The Law Council notes that under section 187 of the *Corporations Act 2001* (Cth), a director of a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:

(a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;

(b) the director acts in good faith in the best interests of the holding company; and

(c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.

139. This amendment represents a shift from these principles.

140. The Law Council recognises that the Royal Commission raised concerns about the board independence of organisations that are subsidiaries of other entities[149] and that this amendment implements its recommendation 88.

141. However, it also notes that given approved providers within the industry both in for-profits and not-for-profit organisations, are part of a broader group that are financially, structurally and organisationally interdependent, the reform not only puts current structures in a difficult position, but also impacts the ability for approved providers in the future to be supported.

142. The amendment puts the aged care providers in a standalone position which is contrary to the principles of Corporations Law and obligations on directors (outside the Aged Care Act) to meet their fiduciary obligations. An aged care provider that is losing money that must act only in the interests of the aged care provider, and not its

[149] See eg, Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021), 133.

parent funder, is put into an impossible position of continuing to meet its ongoing ability to operate.

Recommendation

- **Consideration should be given to removing section 63-1H, placing a positive obligation on the duty of directors of an approved provider that is a wholly owned subsidiary to ensure that the Constitution does not authorise a director of the approved provider to act in good faith in the best interests of the holding company.**

Suitability

143. As noted, several new obligations and powers in Schedule 5 (and other Schedules) are connected to questions of an individual's suitability, having regard to specific 'suitability matters'. Failure to comply with some of these obligations results in offences, including strict liability offences.

144. For example, the Commissioner may determine that an individual who is one of the key personnel of the provider is not suitable to be involved in the provision of aged care. Providers must notify the Commissioner where a change of circumstances relates to a suitability matter with respect to key personnel, and indicate that they have considered suitability matters with respect to key personnel. Individuals who are key personnel of an approved provider must notify the provider if they become aware of a change of circumstances that relates to a suitability matter in relation to the individual. Providers must, at least every 12 months, consider the suitability matters in relation to individuals who are their key personnel, and keep records of such matters.

145. The definition of suitability matters is set out the new subsection 8C(1) to the ACQSC Act.[150] This states that each of the following matters is a *suitability matter* in relation to an individual:

    (a) the individual's experience in providing, at any time, aged care or other relevant forms of care;

    (b) whether a NDIS banning order against the individual is, or has at any time been, in force;

    (c) whether the individual has at any time been convicted of an indictable offence;

    (d) whether a civil penalty order against the individual has been made at any time;

    (e) whether the individual is, or has at any time been, an insolvent under administration;

[150] The Bill, sch 5, item 26.

(f) whether the individual is or has at any time been the subject of adverse findings or enforcement action by any of the following:

i. a Department of the Commonwealth or of a State or Territory;

ii. the Australian Securities and Investments Commission;

iii. the Australian Charities and Not-for-profits Commission;

iv. the Australian Competition and Consumer Commission;

v. the Australian Prudential Regulation Authority;

vi. the Australian Crime Commission;

vii. AUSTRAC;

viii. another body established for a public purpose by or under a law of the Commonwealth;

ix. a State or Territory authority (including, but not limited to, a body that is equivalent to a body mentioned in subparagraphs (ii) to (vii));

x. a local government authority;

(g) whether the individual:

i. is, or has at any time been, the subject of any findings or judgment in relation to fraud, misrepresentation or dishonesty in any administrative, civil or criminal proceedings; or

ii. is currently party to any proceedings that may result in the individual being the subject of such findings or judgment;

(h) whether the individual is, or has at any time been, disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth);

(i) any other matter specified in the rules.

146. Subsection 8C(2) provides that this section does not affect the operation of Part VIIC of the *Crimes Act 1914* (Cth) (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

147. The Law Council welcomes the inclusion of subsection 8C(2). It recommends that this should be broadened to recognise where convictions are similarly relieved from disclosure under state and territory legislated spent convictions schemes.

148. However, it is concerned that the focus in subsection 8C(1) on whether certain events have occurred 'at any time' with respect to an individual (eg, conviction, civil penalty order, banning order, adverse findings) does not allow for the possibility that these were overturned on appeal. This may lead to the possibility of an individual's suitability being determined by reference to matters which were ultimately

overturned - whether due to lack of evidence, mistake, error, or an invalid exercise of power.

149. The Law Council recommends that proposed subsection 8C(1) be amended to avoid this possibility. In accordance with its previous remarks, it also recommends that the suitability test be amended so that it does not apply to individuals who were minors when relevant offences were committed.

150. Paragraph 8C(1)(a) refers to the individual's experience in providing, at any time, aged care or other relevant forms of care. While this is an important factor for the purposes of employment, it is a subjective and indeterminate concept in this context. For example, both key personnel and providers must provide notification within strict timeframes when there is a change in circumstances that relates to a suitability matter in relation to the individual.[151] However, an individual's experience in providing aged care would be anticipated to automatically alter (improve) over time given their role as key personnel. The Law Council queries the inclusion of paragraph 8C(1)(a) on that basis.

151. While there has been little time to consider these issues fully, the Law Council is also concerned that proposed paragraph 8C(1)(f) may be too broadly framed. This includes whether an individual is or has at any time been the subject of adverse findings or enforcement action by any of a large number of bodies, including any Department of the Commonwealth or a State or Territory, or any body established for a public purpose by or under a law of the Commonwealth. For example, Services Australia may be considered to carry out enforcement action with respect to social security debts, which are reasonably common. Scenarios in which persons may be considered to be 'the subject of adverse findings or enforcement action' may include the recent Centrelink online debt compliance scheme, which involved large numbers of persons being issued debts in circumstances which were found by the Federal Court to be unlawful.[152]

152. The Law Council recommends that the Committee make inquiries of the Department regarding the numbers and types of departments, agencies and matters which would fall within the scope of proposed paragraph 8C(1)(f), and that consideration be given to tightening its scope.

153. The Law Council also queries the need to include further suitability matters in the rules, as set out in paragraph 8C(1)(i). Given that the suitability matters are central to key obligations set out in the Schedule, they should be determined in the primary legislation.

154. The Law Council further notes that schedule 2, item 5 of the Bill[153] inserts further amendments expanding the definition of 'suitability matters' to include whether any of the following decisions are in force, or have ever been in force:

    (a) an exclusion decision;

[151] The Bill, sch 5, items 6 and 12 (proposed ss 9-2A, 10A-1 of the Aged Care Act).
[152] *Amato v Commonwealth of Australia* (Federal Court of Australia, VID611/2019, 27 November 2019).
[153] Proposed para 8C(1)(ab) of the ACQSC Act.

(b) a suspension decision; or

(c) a revocation decision that revokes a clearance decision made in respect of an individual.

155. Further, schedule 3, item 6 expands 'suitability matters' to include whether a banning order is, or has at any time, been in force.[154]

156. The Law Council raises similar concerns as those discussed above with respect to these additional matters – that is, the potential for unfairness where such decisions have been overturned on internal or external appeal. The Bill's relevant provisions should be narrowed to preclude this possibility.

Recommendations

- **Proposed subsection 8C(1) be amended to avoid:**
  - **the possibility of an individual's suitability being determined by reference to matters which have been overturned on appeal, set aside or quashed;**
  - **application to individuals who were minors when relevant offences were committed; and**
  - **taking into account convictions which are relieved from disclosure under state and territory legislated spent convictions schemes.**
- **Proposed paragraph 8C(1)(a), concerning the individual's experience in providing, at any time, aged care or other relevant forms of care, should be deleted.**
- **Consideration be given to tightening the scope of proposed paragraph 8C(1)(f), concerning adverse findings and enforcement action by government bodies.**
- **Paragraph 8C(1)(i), providing for further suitability matters to be set out in the rules, should be deleted.**
- **Section 8C should be amended to avoid the possibility of an individual's suitability being determined by reference to banning orders, exclusion decisions, suspension decisions and revocation decisions which have been overturned on review.**

Schedule 7 – Use of refundable deposits and accommodation bonds

Overview

157. Schedule 7 of the Bill amends the Aged Care Act to enable the Secretary or Commissioner to request information or documents from an approved provider or borrower of a loan made using a refundable deposit or accommodation bond. Currently, only information may be requested from an approved provider[155] and

[154] Proposed para 8C(1)(aa) of the ACQSC Act.
[155] See section 9-3B of the Aged Care Act.

does not extend to the detail of information envisaged by these amendments.[156] The amendments create a strict liability offence for a borrower who does not comply with a request (30 penalty units, currently $6,660).[157] The purpose of these amendments is to support continued oversight of the use of refundable accommodation deposits and bonds to make a loan, noting that such use may impact on an approved provider's financial viability.[158]

158. Amendments are also introduced so that if the operation of the obligations on approved providers to give information about their ability to refund balances would result in an acquisition of property otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation. In the event that the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings by which the court determines the amount.[159] Similar provisions are included with respect to information obligations on borrowers.[160]

159. Further, the period of liability for the existing offences for the misuse of refundable deposits and prior to an insolvency event for both providers and key personnel of providers will be extended from 2 years to 5 years.[161] The amendments aim to achieve the objective of ensuring that a refundable accommodation deposit or bond paid by residents and guaranteed by the Commonwealth are only used for purposes that are legally permitted.[162]

160. Consequential amendments are made to the ACQSC Act to enable the Commissioner to issue an infringement notice for a borrower that commits an offence for failing to comply with a request under these amendments.[163]

161. Schedule 7 of the Bill responds in part to Royal Commission Recommendation 134. This states that:

> *From 1 July 2023, the Prudential Regulator should have the following additional statutory functions and powers, to be exercised in connection with, or for the purposes of, its prudential regulation and financial oversight functions:*
>
> *a. the power to conduct inquiries into issues connected with prudential regulation and financial oversight in aged care;*
>
> *b. the power to authorise in writing an officer to enter and remain on any premises of an approved provider at all reasonable times without warrantor consent;*

[156] See eg, the Bill, sch 7, items 3, 4, and 12.
[157] The Bill, sch 7, item 12 (proposed section 52N-3(6) of the Aged Care Act).
[158] EM, 110.
[159] The Bill, sch 7, item 9 (amending section 9-3B of the Aged Care Act).
[160] The Bill, sch 7, item 12 (paras 52N-3(7)-(8) of the Aged Care Act).
[161] The Bill, sch 7, item 11 (paras 52N-2(1)(d) and 2(g) of the Aged Care Act).
[162] See EM, 16.
[163] The Bill, sch 7, item 14 (paragraph 74EB(1)(d) of the ACQSC Act).

c. full and free access to documents, goods or other property of an approved provider, and powers to inspect, examine, make copies of or take extracts from any documents.[164]

Comments

162. The Law Council supports the introduction of Schedule 7. It supports ensuring adequate oversight of the use of refundable accommodation deposits and bonds to make a loan, noting that such use may impact on an approved provider's financial viability.

163. It considers that the extension of responsibility to borrowers should be allowed with some caution as they are not persons directly involved in the operation of the aged care service, and may often be an arms-length organisation.

164. The Law Council raises for consideration whether the compensation provisions should be extended to provide not only for the institution of proceedings in the Federal Court of Australia, or the Supreme Court of a State or Territory, for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines, but also a statutory cause of action for compensation from an approved provider, not limited by the words 'such reasonable amount of compensation as the court determines'.

Recommendation

- **Consideration whether the compensation provisions envisaged in Schedule 7 should be extended to provide for a statutory cause of action for compensation from an approved provider, not limited by the words 'such reasonable amount of compensation as the court determines'.**

Schedule 9 – Restrictive practices

Overview

165. Schedule 9 was added to the Bill on 14 October 2021 via Government amendments,[165] which were agreed by the House of Representatives on 25 October 2021.

166. Paragraph 54-1(1)(f) of the Aged Care Act provides that the responsibilities of an approved provider in relation to the quality of the aged care provided by the approved provider includes ensuring that a restrictive practice in relation to a care recipient is only used in the circumstances set out in the Quality Principles. The Quality Principles form a legislative instrument made by the Minister for the purposes of section 96-1 of the Aged Care Act.

[164] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (2021), 299.
[165] Parliament of the Commonwealth of Australia, House of Representatives, *Aged Care and Other Legislation Amendment (Royal Commission Response No 2) Bill 2021* (ZB120).

167. Recent changes to Quality Principles have introduced a consent-based model for the use of restrictive practices in residential aged care facilities. In circumstances where a care recipient lacks capacity to consent to a restrictive practice, the Quality Principles require a 'restrictive practices substitute decision-maker' to consent to the restrictive practice.[166]

168. The Quality Principles define a 'restrictive practices substitute decision-maker' as a 'person or body that, under the law of the State or Territory in which the care recipient is provided with aged care, can give informed consent to:

- the use of the restrictive practice in relation to the care recipient; and
- if the restrictive practice is chemical restraint - the prescribing of medication for the purpose of using the chemical restraint,
- if the care recipient lacks the capacity to give that consent.[167]

169. Item 1 of Schedule 9 of the Bill introduces a new subsection 54-10(1A) of the Aged Care Act, providing that the Quality Principles made for the purposes of paragraph 54-1(1)(f) may make provision for, or in relation to, the persons or bodies who may give informed consent to the use of a restrictive practice in relation to a care recipient if the care recipient lacks capacity to give that consent.

170. The intention behind this provision is, as stated in the Supplementary Explanatory Memorandum to the Bill:

> *To address issues raised by the interaction with current State and Territory consent and guardianship laws. Item 1 to new Schedule 9 will allow for the Quality of Care Principles to authorize a person or body to consent to the use of restrictive practices where it is not clear that State and Territory laws currently provide for this authorization. It is proposed that the Quality of Care Principles will include a hierarchy of people who would be authorized to provide consent to the use of a restrictive practice in relation to a care recipient where the care recipient lacks the requisite capacity to consent to the use of the restrictive practice themselves. It is intended that this will be an interim solution to apply while State and Territory Governments establish new legislative arrangements to address the current issues, and will ensure that appropriate individuals are authorised to consent to the use of restrictive practices nationally.*[168]

171. Further, new section 54-11 of the Aged Care Act provides immunity from civil or criminal liability for a 'protected entity' in relation to the use of a restrictive practice in residential care settings if informed consent was provided (including by a restrictive practices substitute decision-maker) and the restrictive practice was used in the circumstances set out in the Quality Principles.[169] A 'protected entity' includes both

[166] *Quality Principles 2014* s 15FA(1)(f).
[167] *Quality Principles*, s 4 'restrictive practices substitute decision-maker'.
[168] Supplementary Explanatory Memorandum to the Bill, 17.
[169] The Bill, sch 9, item 3.

the approved aged care provider and any individual who used, or assisted in the use of, the restrictive practice.[170]

172. The purpose of this new section is, according to the Supplementary Memorandum:

> *to ensure that approved providers and relevant individuals are not liable to any civil or criminal action when they are adhering to the obligations on the use of restrictive practices under aged care law. This is because the proposed consent arrangements may result in an approved provider, or relevant individual, relying on consent by a person who is authorized to give that consent under the Commonwealth's aged care laws, but who may not have the requisite authority under the State and Territory laws.*[171]

173. Schedule 9 relates to Recommendation 17(1)(b)(v) of the Royal Commission. Recommendation 17 states that:

> *1. The Quality of Care Principles 2014 (Cth) should be amended by 1 January 2022 to provide that the use of restrictive practices in aged care must be based on an independent expert assessment and subject to ongoing reporting and monitoring. The amendments should reflect the overall principle that people receiving aged care should be equally protected from restrictive practices as other members of the community. In particular, restrictive practices should:*
>
> *a. be prohibited unless:*
>
> *(i) recommended by an independent expert…, or*
>
> *(ii) when necessary in an emergency to avert the risk of immediate physical harm…; and*
>
> *b. only be used:*
>
> *(i) as a last resort to prevent serious harm after the approved service provider has explored, applied and documented alternative, evidence-based strategies to mitigate the risk of harm;*
>
> *(ii) to the extent necessary and proportionate to the risk of harm;*
>
> *(iii) for the shortest time possible to ensure the safety of the person or others;*
>
> *(iv) subject to monitoring and regular review (to be stipulated in the behaviour support plan) by an approved health practitioner;*
>
> *(v) in accordance with relevant State or Territory laws and with the documented informed consent of the person receiving care or someone authorised by law to give consent on that person's behalf;*
>
> *(vi) in the case of chemical restraint, if prescribed by a doctor who has documented the purpose of the prescription.*

[170] Ibid (proposed s 54-11(3) of the Aged Care Act).
[171] Supplementary Explanatory Memorandum to the Bill, 18.

2. In making these adjustments, the Australian Government should consider whether any adjustments or additions are warranted as a result of the statutory review of Part 4A of the Quality of Care Principles 2014 (Cth) [emphasis added].

Comments

174. The Law Council has recently noted in a submission to the Department of Health,[172] with respect to the ability under the Quality Principles of 'a restrictive practices substitute decision-maker' to give informed consent to the use of a restrictive practice where a care recipient lacks the capacity to give that consent, that not all State and Territory legislation explicitly provides for the use of a restrictive practice by a substitute decision-maker. As such, the current wording of the Quality Principles is likely to give rise to uncertainty.

175. For example, it noted that the *Guardianship Act 1987* (NSW) does not explicitly provide for guardianship orders to authorise (or otherwise) a guardian to make decisions about the use of restrictive practices. The NSW Civil and Administrative Tribunal has accordingly adopted its practices to ensure that it considers guardianship appointments to make decisions about restrictive practices to be directed to the Commonwealth scheme.[173]

176. As such, the Law Council noted that practitioners have raised that it will be necessary for providers to make applications to State tribunals to seek appointment of such decision-makers.

177. In response to Schedule 9, the Queensland Law Society (**QLS**) has further raised with the Law Council that the difficulty with the 'restrictive practices substitute decision-maker', is that in some jurisdictions, including Queensland, it is unclear exactly who would have the authority to consent to a restrictive practice in a residential aged care setting. An attorney for personal matters under an enduring power of attorney, and a guardian appointed by the Queensland Civil and Administrative Tribunal (**QCAT**) may have such a power in Queensland, but this is currently not clear.

178. It notes that proposed subsection 54-10(1A) places no boundaries on the persons or bodies who may be authorised by the Quality Principles to give informed consent to the use of a restrictive practice in relation to a care recipient if the care recipient lacks capacity.

179. While the intention is to establish a hierarchy of people who would be authorised to provide such consent, it is unclear what kinds of people are envisaged to be included. This raises questions as to whether they would be appropriately skilled, informed, independent and able to act in the best interests of the care recipient. This matter is left at the broad discretion of the Minister.

[172] Law Council, Aged Care Quality Principles, Submission to the Department of Health, 27 October 2021.
[173] Ibid, citing Office of the Public Advocate (Qld), Reform Options Paper, 5 October 2021, < 20211005-OPA-Restrictive-Practices-Reform-Options-paper.pdf (justice.qld.gov.au)>.

180. If a restrictive practices substitute decision maker provides informed consent, and the restrictive practice is used in the circumstances set out in the Quality of Care Principles, new section 54-11 would provide immunity from civil or criminal liability for a protected entity in relation to the use of a restrictive practice in residential care settings.

181. The Law Council is concerned that this will give rise to outcomes where individuals without power under State and Territory law to authorise restrictive practices will nonetheless be empowered under the Quality Principles to authorise restrictive practices, including chemical and physical restraints. It is unclear what kinds of duties and obligations such individuals will be under in making such authorisations, outside of the broader requirements of the Aged Care Act and Quality of Care Principles.

182. It is further concerned that Schedule 9 has only recently been introduced, and has not been subject to appropriate consultation, given the nature of the subject matter, which has been of strong concern to the Royal Commission and many stakeholders.

183. It recommends that Schedule 9 should not be progressed until it, and the proposed amendments to be made to the Quality Principles under the proposed subsection 54-10(1A), have been subject to further detailed consultation amongst stakeholders.

Recommendation

- **Schedule 9 should not be progressed until it, and the proposed amendments to be made to Quality Principles under the proposed subsection 54-10(1A), have been subjected to further detailed consultation amongst stakeholders.**

184. Should this recommendation not be accepted, there are a number of alternative options available. The Law Council has not, in the time available, been able to establish a consensus position on these options.

185. These include that:

(a) proposed subsection 54-10(1A) should set out in full the hierarchy of persons and bodies which are envisaged to be included for these purposes, rather than leaving this to the Quality Principles; or

(b) if this does not occur, at the very least, proposed subsection 54-10(1A) should require that the Minister must be satisfied on reasonable grounds that any persons or bodies who are included in the Quality Principles are appropriately skilled, informed, independent and able to act in the best interests of the care recipient regarding the use of a restrictive practice.

Alternative approach – Queensland Law Society position

186. The QLS has strongly recommended that:

(a) the proposed new subsection 54-10(1A) be deleted;

(b) the existing paragraph 54-10(1)(f) of the Aged Care Act should be replaced with 'require that authorisation for the use of the restrictive practice has been given in compliance with any applicable law of the State or Territory in which the care recipient is provided with aged care'; and

(c) the definition of 'restrictive practices substitute decision-maker' be removed from the Quality Principles; and

(d) the existing paragraph 15FA(1)(f) of the Quality Principles be replaced with the words 'authorisation for the use of the restrictive practice has been given in compliance with any applicable law of the State or Territory in which the care recipient is provided with aged care'.

187. The QLS notes that while this would leave the authorisation process unclear in some States and Territories (as it has been for some years), it would mitigate the Commonwealth Quality Principles from adding to, or causing continued lack of clarity. It would also allow the States and Territories to clarify their respective process for the authorisation of restrictive practices in residential aged care. For example, in Queensland, the *Guardianship and Administration Act 2000* (Qld) and the *Disability Services Act 2006* (Qld) provides a specific framework for the authorisation of restrictive practices usage in disability services settings. The *Mental Health Act 2016* (Qld) regulates the use of restrictive practices in mental health facilities.

Consent model

188. In this context, the QLS notes that it has reservations about the adoption of a consent model for restrictive practices in relation to a substitute decision maker. Some of the reasons for this reservation are set out in the Public Advocate's recent Reform Options Paper, *Improving the regulation of restrictive practices in Queensland: a way forward* (Reform Options Paper).[174] The reasons are as follows:

(a) The requirement for substitute consent, when the person themselves does not have capacity to consent to the practice, is problematic. Modern human rights developments are increasingly requiring any substitute decision-maker to make decisions that the person themselves would likely have made. This means, in the context of restrictive practices authorisation, substitute decision-makers should only consent to restrictive practices that the person themselves would likely have consented to.

(b) The idea that a substitute decision-maker should be responsible for authorising a restrictive practice puts them in an unusual position. Substitute decision-makers are ordinarily put in place to ensure a person's wellbeing. People appoint attorneys (often relatives) under enduring powers of attorney to make financial and/or personal decisions that accord with their will and preferences. Guardians and administrators are appointed by guardianship tribunals (QCAT in Queensland) for similar reasons.

(c) While restrictive practices can be utilised to protect the person themselves from coming to harm, they are also used to protect other people from the

[174] Office of the Public Advocate (Qld), Reform Options Paper, 5 October 2021, <20211005-OPA-Restrictive-Practices-Reform-Options-paper.pdf (justice.qld.gov.au)>.

behaviour of the person. Requiring substitute decision-makers to authorise restrictive practices puts them in the position of seeking what's best for the person, as well as making decisions to ensure the safety of others around the person. This type of decision-making places a considerable burden on substitute decision-makers, who will inevitably feel pressured to consent to the practice (or risk the person, often a loved one, harming someone else).

(d) It would be rare for a person on whom a restrictive practice is proposed, or for their substitute decision-maker (especially in the case of private guardians and attorneys), to have the clinical expertise to identify other less restrictive means of dealing with the circumstances that have given rise to the request to use a restrictive practice. A person who has been appointed under their parent's enduring power of attorney, and suddenly finds themselves being asked to consent to a chemical restraint, cannot be expected to know, for instance, other behavioural approaches, or environmental changes, that may make the restrictive practice unnecessary. This means the 'consent' safeguard - certainly when it involves people who have not had experience in the role before - will rarely operate effectively.

189. Additionally, the QLS notes that a consent model in relation to substitute decision-makers risks encouraging unwanted applications to have enduring powers of attorney or guardianship appointments revoked where the aged care facility does not agree with an attorney or guardian's decision in relation to restrictive practices.

190. The Law Council notes that the QLS proposal would remove the requirement for informed consent to be given to the use of a restrictive practice in relation to a care recipient more generally. It also recognises that informed consent formed a part of the Royal Commission's Recommendation 17.

191. However, the Law Council also recognises that the QLS proposal raises important questions of how law reforms in this area align with principles of supported decision-making more generally, having regard to the meaning and application of article 12 of the *United Nations Convention on the Rights of Persons with Disabilities.*[175] Australia has accepted the obligations under this treaty to recognise that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life, and to take appropriate measures to provide persons with disability access to the support they may require in exercising their legal capacity.

192. At present, some state and territory jurisdictions have shifted towards greater recognition of supported decision-making, while others have not. A concerted approach to law reform may be needed across federal, state and territory laws to achieve this change. The Law Council has received mixed views as to where relevant boundaries should be drawn.

193. As noted, it has not, in the time available, been able to consult more broadly on the specific matters raised by the QLS, including on the extent to which current State or

[175] *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

Territory laws govern the use of the restrictive practices with respect to aged care recipients, or would require reform to do so.