

NHLF and FPDN Joint Submission
New Aged Care Act: Exposure Draft
Consultation Paper No 2
March 2024

About the NHLF

The National Health Leadership Forum (NHLF) was established in 2011. The NHLF is a collective partnership of national organisations who represent a united voice on Aboriginal and Torres Strait Islander health and wellbeing related matters, with expertise in health (e.g., healing and mental health and social and emotional wellbeing) and aged care policy, program development and delivery, professional practice, workforce and research.

The NHLF was instrumental in the formation of the Community-led Close the Gap Campaign and continues to be part of the leadership of the Campaign, committed to achieving health equality, we draw strength from cultural integrity, the evidence base and community.

The NHLF provides advice and direction to the Australian Government on the development and implementation of informed policy and program objectives that contribute to improved and equitable health and life outcomes, and the cultural wellbeing of Aboriginal and Torres Strait Islander peoples. Our vision is for the Australian health and aged care systems to be free of racism and inequality, and all Aboriginal and Torres Strait Islander people have access to effective, high quality, appropriate and affordable services.

We note this is a joined submission from NHLF Members and the FPDN. FPDN is not a member of the NHLF and has joined this submission as we all share the same goals with respect to care for our older people and elders.

The Members of the NHLF are noted on the last page of this submission. We also note that NATSIAACC will also make a separate submission to this consultation.

About FPDN

The First Peoples Disability Network Australia (FPDN) is the national organisation of and for Australia's First Peoples with disability, their families and communities. We actively engage with communities around Australia and represent Aboriginal and Torres Strait Islander people with disability in Australia and internationally. Our goal is to influence public policy within a human rights framework established by the United Nations Convention on the Rights of Persons with Disability and the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with our principle of community control, our organisation is governed by First Peoples with lived experience of disability.

FPDN is the First Nations' Disabled Peoples Organisation and Disability Representative Organisation, as well as the Aboriginal community-controlled disability peak, and member of the Coalition of Peaks, a partner to all Australian governments through the National Agreement on Closing the Gap and a key Commonwealth partner dedicated to progressing implementation of Australia's Disability Strategy 2021-2031.

OPENING STATEMENT

The National Closing the Gap Agreement (the National Agreement), signed by federal, state and territory governments, recognises that First Nations people can experience poorer life expectancy and health outcomes.¹ The National Agreement also commits all parties to working in new ways that recognise First Nations peoples' distinct expertise and rights. This can be achieved through the application of the four Priority Reforms, set out by the National Agreement and adherence to culturally informed, rights-based frameworks. For example, the United Nations Declaration on the Rights of Indigenous Peoples² which sets out the right for First Nations people, including our older people and those with disability, to have self-determination, to live where they choose, and to freely share their culture.

On 28 November 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs published its report on its inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.³ Australia signed onto the UNDRIP in 2009. However, the Declaration is non-binding on signatories, and nation states cannot be compelled to implement it. The NHLF and the FPDN supports the Committee's recommendation that the Australian Government aligns all legislation and policy development with the UNDRIP.

The Convention on the Rights of Persons with Disabilities (CRPD)⁴ is ratified into Australian law and is referenced into the proposed new Act. Australia's Disability Strategy 2021-2031⁵ is another important framework in Australia and whilst it focuses on employment, safety, education, health and community attitudes, it is underpinned by Australia's commitment to the CRPD. The Disability Sector Strengthening Plan (Disability SSP) was developed in partnership between all Australian Governments and the First Peoples Disability Network (FPDN) under the National Agreement's Priority Reform 2. The Disability SSP's Guiding Principles bring together Australia's commitments under CRPD, CTG and Australia's Disability Strategy as well as UNDRIP into a simple framework which enables all commitments to be upheld through the following:

- Human rights
- Self-determination
- Cultural integrity
- Cultural safety
- Partnership
- Place based
- Innovation
- Empowerment
- Equity
- Sustainability
- Knowledge
- Nationally consistent approach.

¹ Australian Government Productivity Commission, 'Socioeconomic outcome area 1: Aboriginal and Torres Strait Islander people enjoy long and healthy lives,' accessed 19 February 2024.

² United Nations, 'Declaration on the Rights of Indigenous Peoples,' 2006, accessed 19 February 2024.

³ Commonwealth of Australia, Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs 2023, Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia', Parliament of Australia, Canberra.

⁴ United Nations, 'Convention on the Rights of Persons with Disabilities,' 2006, accessed 22 February 2024.

⁵ Australian Government Department of Social Services, 'Disability and Australia's Disability Strategy,' 2023, accessed 22 February 2024.

The NHLF and FPDN strongly recommends application of these principles to any and all reform, policy, programs and services that impact the lives of older Aboriginal and Torres Strait Islander peoples.

Within the New Aged Care Act, the word disability only appears in reference to the National Disability Insurance Scheme (NDIS). Disability is far broader than the NDIS which only funds a small portion of people with disability. The broader concept of disability needs to be clearly referenced in the act to recognise that older people seek aged care for disability supports as well as ill health or frailty.⁶ For the reforms to the aged care system to be effective there is an imperative for more investment and better synchronisation with other components of Australia's human/social services system. For example, support services for people with a disability must go beyond the NDIS to ensure that we are not relying on the aged care system to fill the gap. The cost-shifting and lack of care and responsibility by governments was exacerbated when state and territory governments eagerly vacated this sector and moved responsibility onto the NDIS. The conscious support of wealth creation through social and taxation policy that preference private home ownership and private rental market has led to the decline of social housing to the detriment of many people on social welfare payments, low to middle incomes who without social housing supports, have fallen into social disadvantage and/or poverty. The impacts on Aboriginal and Torres Strait Islander Australians is greater social and economic exclusion and a continuation of inequity made worse by ineffective implementation of the National Agreement.

We are in an era where intergenerational wealth is new for some Aboriginal and Torres Strait Islander peoples and will impact on peoples' ability to navigate the aged care system, as well as impact on eligibility, assessment and family/community connections. This context will need to wrap around the implementation of the new Act to ensure that no harm is created. This is particularly important, given the reforms of the aged care system are still based on the assumption that marketisation is the solution to the provision of human services, which is fundamentally problematic as it ignores the fact that for many areas outside of metropolitan or regional areas capacity is limited or non-existent. The focus of the market disrespects the very nature of Australia's geographical expanse. The NHLF and FPDN call for intervention of government in areas that are considered 'thin markets' with direct investment and assistance to communities to establish their own aged care service. This investment should be placed based and include making education and training available for local people to enable them to work in their own community to provide aged care services.

⁶ Council on the Ageing (COTA), 'Aged Care Act Exposure Draft. Key Issues Paper: National organisations working with older people and carers,' January 2024, accessed 23 February 2024.

We urge the government to stand fast with implementing a New Aged Care Act and reforms to the system that centres people/clients as the priority not the profit capacity of service providers, and ensuring the new reforms reflect the learnings and recommendations from the Royal Commission into Aged Care Quality and Safety (Royal Commission) framed around a greater focus on health and wellbeing.

In light of the Productivity Commission's recent analysis and recommendations⁷ from its Review of the National Agreement on Closing the Gap, and the call for the government to share power with the Aboriginal Community Controlled sector and embed accountability to drive positive change, this submission highlights how this can be best done in relation to implementation of the new Aged Care Act, building on learnings from elsewhere including the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

SUMMARY OF RECOMMENDATIONS

Chapter 1

1. Include reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) alongside the current references to International Covenant on Economic Social, and Cultural Rights and the Convention on the Rights of Persons with Disabilities; under, **Part 1 section 5 Objects**, and applied through the Act. It is also suggested that a reference to the United Nations Sustainable Development Goals (SDG), goals 1, 3 and 16⁸ also be included:
 - Goal 1 – no poverty
 - Goal 3 – good health and wellbeing
 - Goal 16 – partnerships
2. Include definitions for the term's cultural safety and culturally appropriate care as they are referenced in the Act but not defined. Ensure they are aligned with the Australian Health Practitioners Regulation Agency (Ahpra) definition to give providers a clear understanding of how to meet their obligations under the Act, under **part 2 definitions and concepts**.
3. Include a new principle, under **part 3 rights and principles**, similar to the recent amendment in the Health Practitioner Regulation National Law, requiring the development of a culturally safe and respectful aged care workforce that:
 - is responsive to Aboriginal and Torres Strait Islander peoples and their needs for healthy ageing; and
 - contributes to the elimination of racism in the provision of aged care services.

⁷ Productivity Commission 2024, Review of the National Agreement on Closing the Gap, Study report, volume 1, Canberra.

⁸ United Nations, 'Sustainable Development Goals', accessed 01 March 2024

4. Culture is a foundation for Aboriginal and Torres Strait Islander peoples' health and wellbeing. Therefore, access to community and cultural systems of belief should form part of healthy ageing and care provision. Include a **new principle** that recognises the cultural determinants for healthy ageing.
5. To include reference to 'Island Home' in addition to 'Country' in the Statement of Rights.
6. Include a clear expectation of what is an appropriately skilled workforce under **object (g)** and **Section 19 (viii)**.
7. Attainment of 'high quality care' should not be aspirational within the Act and the differences between 'quality care' and 'high quality care' must be explicit. Suggest including concepts exceeding 'quality care' to be truly aspirational.
8. Include greater framing of health and wellbeing within aged care, including better access to allied health as part of the quality care.

Chapter 2

9. We recommend that Aboriginal and Torres Strait Islander people should be eligible for funded aged care services from 45-49 to support flexibility within the aged care system and acknowledge the role of trusted providers in delivering aged care services to vulnerable people.
10. NATSIFLEX program must continue under the new Age Care System but with improvements including resourcing. Services that can be provided to a client within their home should be flexible enough to allow a provider to either continue delivering what they currently provide or be creative to meet the needs of their clients.

Chapter 3

11. The Department engage NATSIAACC to co-design a process to ensure that the data collected under the new Aged Care respects Indigenous Data Sovereignty. The New Act should be consistent with principles of Indigenous Data Sovereignty and Indigenous Data Governance: <https://www.maiamnayriwingara.org/mnw-principles>.

Chapter 4

12. Any monies resulting from any Commonwealth or State Stolen Generations Redress Schemes should be exempt from consideration under income and assets means testing for Aged Care services.

Chapter 5

13. There must be Aboriginal and Torres Strait Islander representation on the Aged Care Quality and Safety Advisory Council and an embedded link within the Act to the First Nations Health Ageing and Aged Care Advisory Group (current known as the First Nations aged Care Governance Group).

RESPONSE

This submission aligns with the chapters of the New Aged Care Act and responds to the New Aged Care Act Exposure Draft Consultation Paper No 2. Responses to specific questions are noted, otherwise general comments are made in relation to each proposed chapter

1. CHAPTER 1 – INTRODUCTION

Question 1: Are the revised Objects, Statement of Rights and/or Statement of Principles clear and do they achieve their intent? If not, what changes are required?

- 1.1. The objects, Statements of Rights and/or Statement of Principles are clear in their intent. However, the new Act needs to go further given the deficiencies and problems within the current aged care system, highlighted by the findings and recommendations from the Royal Commission. This includes national workforce and workplace regulation, an effective and accessible complaints mechanism, and pathways to ensure the right to self-determination for to all older Aboriginal and Torres Strait Islander people, including people with disability in aged care.⁹
- 1.2. The NHLF and FPDN strongly recommends the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) should be referenced in the new Aged Care Act. This will ensure that a service is safe and reflects and meets the needs of all Australians including the First Peoples of this country and including their rights as older people and those with a disability (where applicable).
- 1.3. Accordingly, the NHLF strongly recommends - the following amendments:
 - 1.3.1. Under **object (a)** include reference to the UNDRIP alongside the International Covenant on Economic, Social and Cultural Rights and the CPRD.
 - 1.3.2. Include reference to the United Nations Sustainable Development Goals (SDG), particularly SDG 1, 3 and 16.
 - 1.3.3. Under **part 2 definitions and concepts**, include the terms culturally safe and culturally appropriate aligned with the Australian Health Practitioners Regulation Agency (Ahpra) to give providers a clear understanding of how to meet their obligations under the Act.
 - 1.3.4. Under **part 3 rights and principles**, include a new principle similar to the National Law that regulates health professionals for example: the Aged Care System is to ensure the development of a culturally safe and respectful multidisciplinary workforce that:
 - is responsive to Aboriginal and Torres Strait Islander Peoples and their needs for healthy ageing; and

⁹ Parliament of Australia Royal Commission into Aged Care, 'Chapter 10,' accessed 23 February 2024.

- contributes to the elimination of racism in the provision of aged care services.

1.3.5. Under **part 3 (12)** include a new principle that recognises access to community and cultural systems of belief. For example:

- The cultural determinants of health are the protective factors that enhance resilience, strengthen identify and support good health and wellbeing. These include, but are not limited to, connection to Country and/or Island Home, family, kinship, and community, beliefs and knowledge, cultural expression and community; language; self-determination and leadership.¹⁰
- The new aged care system, represented through the New Aged Care Act needs to understand that the system will be important to achieve the aim of healthy ageing under the National Aboriginal and Torres Strait Islander Health Plan 2021–2031.

1.3.6. The aged care reforms should also reflect the United Nations Sustainable Development Goals 2030 Agenda¹¹ which outlines a stronger focus on older persons so that countries like Australia can actively prepare for inclusion within community design and accessibility for older people with and without disability.

1.4. Recognising the intent to only include reference to conventions that are directly relevant to the Constitutional authority for the new Act, we argue that the New Aged Care Act Objects and Statement of Rights must include specific references to the rights of Indigenous peoples. General references to cultural rights, self-determination and freedom from discrimination do not adequately recognise the unique experiences and needs of Indigenous peoples. We support the positions in the NATSIAACC submission to consultation paper 1 recommending that:

- the Objects of the new Aged Care Act give effect to Australia’s commitment to UNDRIP¹²
- the Statement of Rights must be consistent with UNDRIP and enshrine Aboriginal and Torres Strait Islander peoples’ right to diversity, cultural safety and self-determination in an aged care context, by incorporating the rights contained in UNDRIP.
- The National Aboriginal and Torres Strait Islander Health Plan 2021–2031 (the Health Plan) forms part of this. The Health Plan is also consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁶ these rights include:
 - the right to practice culture
 - the right to self-determination

¹⁰ 2021. Commonwealth Department of Health and Aged Care. National Aboriginal and Torres Strait Islander Health Plan 2021–2031. Publications Number: DT0002195

¹¹ United Nations, ‘Ageing and disability,’ accessed 22 February 2024.

¹² NATSIAAC, 2023, A new Aged Care Act: the foundations Consultation paper No. 1 National Aboriginal and Torres Strait Islander Ageing and Aged Care Council Submission September 2023, <https://natsiaacc.org.au/wp-content/uploads/2023/10/NATSIAACC-Submission-New-Aged-Care-Act-Foundations.pdf>

- 1.5. The right to make decisions on matters that affect people’s wellbeing and communities’ sustainability. The Act will require providers to deliver services in a manner consistent with the Statement of Rights, therefore, there must be protections within the statement addressing the specific rights of the colonised Aboriginal and Torres Strait Islander peoples of Australia to ensure our rights are upheld in the service context.
- 1.6. As noted above, the Act must include definitions for the term cultural safety and culturally appropriate care and ensure they are compatible with the Health Practitioner Regulation National Law Act 2009 (National Law) that regulates health professionals and overseen by the Australian Health Practitioners Regulation Agency (Ahpra) to give providers and their staff a clear understanding of how to meet their obligations under the new Aged Care Act. These concepts are not interchangeable and require explanatory notes to provide guidance. It cannot be assumed that providers will have an informed understanding of how to apply these concepts.
- 1.7. Cultural safety has evolved and is increasingly understood to be a significant priority for the contemporary Australian health workforce, including its recent inclusion as a national regulatory requirement of all registered health professionals. It is embedded in the objectives and guiding principles of the National Law, and the professions’ respective Codes of Conduct, and it is essential that aged care providers have a shared and comprehensive understanding of the meaning of the cultural safety of Aboriginal and Torres Strait Islander peoples to support health workforce to uphold their professional obligations to Aboriginal and Torres Strait Islander peoples.¹³
- 1.8. With regard to **object (b) (iii) and statement of rights (2) equitable access** - this object and right will fail under current conditions where there is a lack of available and appropriate workforce across the country. The rights-based approach to the Act does not address the accessibility deficiencies within aged care which is compounded as the broader human/social services systems continue to decline, and universal access is becoming defined by eligibility criteria. To achieve this object, it is imperative that the broad social services systems are also meeting the needs of communities to ensure one system and/or jurisdiction is not undermining Aged Care through a lack of accountability and investment such as disability support services.
- 1.9. With regard to the definition of high-quality care, the Act must reflect that some of the statement of principles should be expectations of basic care rather than be aspirational. A provider could keep aspiring and never achieve therefore relieving a provider from delivering.

¹³ Ahpra & National Boards, 2022, *Joint statement: Aboriginal and Torres Strait Islander health and cultural safety at heart of National Law changes*, viewed 19 January 2024, <https://www.ahpra.gov.au/About-Ahpra/Ministerial-Directives-and-Communiques/National-Law-amendments/Joint-statement.aspx>

1.10. With regard to **object (g) appropriately skilled workforce and Section 19 (viii)**

“...implementing inclusive policies and procedures, in partnership with Aboriginal or Torres Strait Islander persons, family and community...” We provide the following comments:

- 1.10.1. The New Act or its Rules should provide a clear expectation of what is meant by an “appropriately skilled workforce”, including compliance specifications for ensuring the right skill-mix, staffing standards and other essential requirements such as cultural knowledge and understanding, to meet the relative needs of the aged care recipients and communities. Staffing standards, such as minimum care minutes for Enrolled Nurses (ENs) would support quality care and mitigate the risk of role substitution by less qualified categories of worker.
- 1.10.2. The NHLF strongly supports the 2023 introduction of the requirement for aged care providers to ensure a minimum standard of that at least one RN is on-site and on duty at all times and to comply with mandated direct care minutes including 40 minutes delivered by an RN.¹⁴ While this is an essential staffing measure, our member organisation CATSINaM, is advised that an unintended consequence from the new requirements is a downturn in EN employment in the sector. This raises skill-mix concerns should RNs be overloaded to cover EN duties and ENs substituted by AINs. The introduction minimum care minutes for ENs is recommended to mitigate these risks.
- 1.10.3. Furthermore, the potential decrease in EN recruitment by aged care providers may impact the quality of care provided to Aboriginal and Torres Strait Islander peoples if fewer Aboriginal and Torres Strait Islander ENs are recruited. Diminished employment prospects for ENs will adversely impact nursing career pathways for the Aboriginal and Torres Strait Islander aged care workforce, Aboriginal and Torres Strait Islander ENs. In 2022, aged care was the principal areas of practice (with the highest headcount) for Aboriginal and Torres Strait Islander nurses¹⁵ and is a critical workforce that must be expanded and developed. The Assistant in Nursing (AIN) to EN to RN career development pathway is key to attracting, training, and retaining our aged care workforce and a pivotal strategy to driving culturally safe age care for Aboriginal and Torres Strait Islander peoples.

¹⁴ Aged Care Quality and Safety Commission, 2023, Regulatory Bulletin Workforce-related responsibilities – including 24/7 registered nurse and care minutes, 2023-19, <https://www.agedcarequality.gov.au/sites/default/files/media/rb2023-19-regulatory-bulletin-workforce-related-responsibilities.pdf>

¹⁵ Government Department of Health (DoH) 2022, ‘Factsheet selector dashboard, nurses and midwives 2022, Australian-born Aboriginal and/or Torres Strait Islander’, *Nursing and midwifery dashboards*, viewed 11 August 2022, <https://hwd.health.gov.au/nrmw-dashboards/index.html>

- 1.10.4. Additionally, the NHLF supports previous submissions by the National Association of Aboriginal and Torres Strait Islander Health Workers and Practitioners¹⁶ regarding the role of the Aboriginal and/or Torres Strait Islander Health Worker and Practitioner workforce to understand the deeply traumatic lives of some of our older loved ones and the role they can play in achieving a culturally responsive and trauma-informed personal care workforce.
- 1.10.5. In this respect it is important to understand that of the two professions Aboriginal and/or Torres Strait Islander Health Practitioners are required to register with Ahpra and have a level of clinical skill comparable with that of an EN. To successfully complete their qualification, they are required to undertake a minimum of 500 hours of clinical work. Comparatively, people undertaking a Diploma of Nursing to become an EN must complete 400 hours of clinical work.
- 1.10.6. All aged care staff will require upskilling to be able to deliver culturally responsive and trauma-informed personal care and this approach embedded into the aged care system. **This is particularly important in the absence of upskilling Aboriginal and Torres Strait Islander Health Workers and Health Practitioners to meet the needs and complexity of wellbeing for Stolen Generations survivors.**
- 1.10.7. We would also like to see a greater framing within aged care of health and wellbeing, including better access to allied health. Greater inclusion of the allied health workforce in aged care is a crucial area for action to redesign and reimagine aged care with Aboriginal and Torres Strait Islander people, families, and communities in Australia as they support the full potential of individuals to maximise mobility, functionality, reablement and rehabilitation. Research has shown the effectiveness of allied health interventions, including the reduction in need for further services.”¹⁷
- 1.10.8. The allied health workforce plays a pivotal role in primary and preventative health care. However, there are few clear commitments from governments expanding opportunities for their roles and contributions with the aged care services and broader healthcare system. This is also backed by the Royal Commission which found that allied health services are underused and undervalued across the aged care system.

¹⁶ National Association of Aboriginal and Torres Strait Islander Health Workers and Practitioners (NAATSIWHP) ‘Building, Training and Supporting the Aged Care Workforce Roundtable’ held over the 5-6 December 2022.

¹⁷ Indigenous Allied Health Australia, position statement: <https://iaha.com.au/wp-content/uploads/2022/09/Aboriginal-and-Torres-Strait-Islander-Aged-Care-Position-Statement-Final.pdf>.

Question 2. Some First Nations stakeholders indicated that they would also like to see a right to remain connected to Island Home (in addition to ‘Country’) included in the Statement of Rights? Do you agree? We would appreciate feedback from First Nations persons regarding their views on whether Island Home should be included here and in other relevant places in the new Act.

1.11. Yes. The NHLF strongly support the inclusion of ‘Island Home’ in addition to ‘Country’ in the Statement of Rights. Article 12 of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) states that First Nations people should have access to religious and cultural sites, which includes Country and/or Island Home.

Question 3. Do you consider the revised definition of high-quality care will encourage providers to aim higher? Does it align with your future vision for aged care?

1.12. We support the legislation of requirements for all providers to meet suitable levels of cultural competency, accessibility and inclusion. Culturally safe and culturally appropriate care should form the basis of quality care and be part of normal care delivery.

1.13. The definition of high-quality care (and the Act as a whole) must not be aspirational. The delivery of culturally safe and culturally appropriate care should be non-negotiable and obligatory, not something providers have to aim towards but never achieve. Furthermore regarding (viii) relational requirements of a partnership with Aboriginal and Torres Strait Islander persons - family and community must also be referenced to support conditions for effective partnerships. Relational approaches with Aboriginal and Torres Strait Islander communities are a way of engaging that: privileges and elevates Aboriginal and Torres Strait Islander voices; canvasses and establishes shared values; recognises and resets power imbalances and embodies humility.¹⁸ Relational approaches with Aboriginal and Torres Strait Islander peoples are optimised in culturally safe contexts that are free of racism, effectively forming conditions for successful engagement.

1.14. The legislative requirement of cultural safety must be accompanied by resourced research that assess people’s experiences, and funding for the delivery and application of First Nations community-led tools that support all organisations to understand, improve and evaluate their performance of cultural inclusion, safety and accessibility. For example, FPDN is currently developing an evidence-informed Cultural Model of Inclusion Framework, Organisational Tool (self-assessment organisational monitoring tool), workforce capabilities and training and capability development activities. Its application and implementation across the public service, non-Indigenous and community-controlled disability sectors would increase cultural safety, accessibility and inclusion and disability rights informed policy, programs, services, and evaluations.

¹⁸ Relational Approaches 2024, What is a relational approach?, *Relational approaches*, viewed 21 January 2024, <https://relationalapproaches.com/approaches/>

Question 5. Are the proposed roles of supporters and representatives clear and distinctive? Please tell us why or why not.

1.15. There is too much confusion around the provisions around the roles of supports and representatives as they interact within other Commonwealth programs such as the NDIS and other jurisdictions such as VACT in Victoria. More clarity is required to ensure there are no conflicts regarding authority to act on someone's behalf between various programs, laws and tribunals to ensure families are not thrown into unnecessary chaos and internal conflicts. The Act needs to be clear who has the authority to support and act on behalf of an older person within aged care and that this authority does not undermine or conflict existing 'authorities' within other service systems. Further, there will need to be sufficient resources, supports and training to ensure that all staff in an aged care context understand the differences between the roles and responsibilities of supporters and representatives to ensure clarity about the roles.

2. CHAPTER 2 – ENTRY TO THE COMMONWEALTH AGED CARE SYSTEM

Question 10. What transitional arrangements would you like to see put in place to ensure there is a smooth transition to the new eligibility arrangements and to manage any impacts on people who do not meet the eligibility criteria?

- 2.1. There must be flexibility around eligibility / entry pathway into aged care where there are no alternative services available within a community. For many communities there is only a single service provider and therefore the only one on the ground able to undertake general eligibility assessments, emergency or urgent care needs assessments. In these situations, these services need more financial support to provide social services support to assist a person without necessarily taking up an aged care place, where they would otherwise not be eligible or required.
- 2.2. Aged Care assessments must not be dictated by what's available and/or the system over the needs of the person and their family, as this would place a risk of failure of the reforms.

Question 11. Do you consider there are alternative services that can, or should, be made available for Aboriginal or Torres Strait Islander persons aged 45-49 who are homeless or at risk of homelessness?

- 2.3. In order to avoid Aboriginal and Torres Strait Islander people aged 45-49 who are homeless or at risk of homelessness, entering the aged care system there must be alternative social supports system available and accessible for them. Without such alternative support there should be provisions within the Aged Care Act to fund this group of people. It is noted that aged care services may not be the right services for younger people and ideally there should be widely available services for Aboriginal and Torres Strait Islander peoples requiring access. However, in some circumstances, aged care will be the right services for some Aboriginal and Torres Strait Islander people who experience early ageing, do not have access to another provider, or would prefer to be with safe and trusted provider of their choice. But it must not be seen as the default action, particularly given that many mainstream aged care homes in their current state are not culturally safe or accessible for older Aboriginal and Torres Strait Islander people.
- 2.4. Further, the CRPD, article 19,¹⁹ outlines the rights of people with disability, including older people with disability, to live with full inclusion and participation in the community. This includes people with disability:

¹⁹ United Nations, 'Convention on the Rights of Persons with Disabilities,' 2006, accessed 22 February 2024.

- having choice in where they reside and with whom they reside with.
- Having access to in-home and community support services to prevent isolation and segregation from community.
- Having equal access to services and facilities that are responsive to their needs.

Alternative social pathways and supports for older Aboriginal and Torres Strait Islander people should be informed by these rights.

- 2.5. The proposed eligibility requirements for non-Indigenous people allow for assessment of a person who is aged over 50 and homeless or at risk of homelessness. Eligibility criteria for Aboriginal and Torres Strait Islander must include a comparable category with an adjusted age (for example 45-49) in recognition for the ongoing impacts of colonisation on ageing and the relative social, economic and health disadvantages experienced by some Aboriginal and Torres Strait Islanders peoples.
- 2.6. The NDIS Review²⁰ also acknowledges the gap in supports for individuals with complex needs, including older people with complex support needs. Specially, the Review highlights that funding is not available in a timely manner when individuals are transitioning from hospital care or from the justice system. These delays are reinforced by the siloed government service systems which create barriers to the quick exchange of information and in turn access to appropriate support. The NDIS Review recommends person-centred, not system-centred, supports for individuals with complex needs including homelessness.
- 2.7. Similarly, older people with psychosocial disability may cycle through homelessness services and hospitals or correctional facilities.²¹ Without integrated complex care, older individuals with psychosocial disability are at greater risk of homelessness.

²⁰ Commonwealth of Australia, Department of the Prime Minister and Cabinet, '[Working together to deliver the NDIS. NDIS Review: Final Report](#),' accessed 22 February 2024.

²¹ Commonwealth of Australia, Department of the Prime Minister and Cabinet, '[Working together to deliver the NDIS. NDIS Review: Final Report](#),' accessed 22 February 2024.

Q.11 (cont.) - Does aged care currently meet the needs of this particular group of individuals? We are keen to hear from First Nations stakeholders about their experiences or those of their family and community.

- 2.8. The current aged care system and the new reforms including the New Aged Care Act, still remain framed around the dominant culture's perspective of ageing and economic and community expectations. The system is not flexible enough to cater to Aboriginal and Torres Strait Islander peoples, their communities and organisations. The complexities surrounding Stolen Generation survivors and their families compounds the need for flexible, culturally based aged care services. The new Act must allow for an Aboriginal Community Controlled Aged Care service to accept someone based on need or community criteria rather than narrowly defined criteria such as income or age. This is a clear example of the issue reflected in the Productivity Commission's Review of the National Agreement, which highlighting that mainstream systems and culture need to be fundamentally rethought.
- 2.9. There are many communities across the country that lack sufficient human/social services system to cater to people's needs regardless of level of disadvantage, and who rely on the community-controlled health organisation as the primary source of support. In the absence of government services provided by governments (both at the state, territory or Commonwealth level) the communities should have the flexibility to determine how they will support and care for their elders. The community should be supported to grow their existing services and expand into providing aged care support including residential care.
- 2.10. The NATSIFAC program must continue under the new Age Care System with improvements including expansion and additional resourcing. The aged care system must be flexible enough to allow an increase in Aboriginal and Torres Strait Islander providers of aged care. This means that providers must be supported to continue delivering services as well as allowed opportunities for creativity and innovation to meet the ongoing and increasing needs of their clients.
- 2.11. The NHLF understands that NATSIAACC is undertaking further consideration on the matters raised in questions 14 to 16 and therefore will defer to their advocacy when that arises.

3. CHAPTER 3 – REGISTERED PROVIDERS, AGED CARE WORKERS AND DIGITAL PLATFORM OPERATORS

- 3.1. As the new Act places a duty on responsible persons of a registered provider to exercise due diligence to ensure that a registered provider complies with the provider’s duty (section 121), we recommend the Department, in consultation with NATSIAACC as the peak body and facilitator, apply a co-design approach for the implementation of the new Aged Care Act and how it will apply to Aboriginal and Torres Strait Islander aged care providers.
- 3.2. Regarding Section 11 Meaning of responsible person, the NHLF has significant concerns about who is included in the criteria of a responsible person of a registered provider particularly 1(b) (c):
 - (b) any other person who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the registered provider.
 - (c) if the registered provider delivers, or proposes to deliver, a funded aged care service:
 - (i) any person who has responsibility for overall management of the nursing services delivered by the registered provider, or overall management of the nursing services delivered at an approved residential care home of the registered provider, and who is a registered nurse; and
 - (ii) any person who is responsible for the day-to-day operations of the registered provider.
- 3.3. Due to the highly variable staffing arrangements of aged care providers and the 24-hour service environment, it is feasible that non-executive RNs who have shift management duties for nursing services could be identified as a responsible person and made accountable for controlling activities outside their experience, level, scope of practice and/or operational control. The criteria must be revised to ensure RNs, who are not executives, are not wittingly or unwittingly, made responsible for the failures of providers. Due to the seriousness of the related penalties, redefining the responsible person is a critical consideration. Again, we stress that the provision of culturally care should be obligatory and not an objective, ambition or goal.
- 3.4. The New Act notes there are separate obligations placed on responsible persons, aged care workers of registered providers, including to comply with the Aged Care Code of Conduct (the Code). However, the Code does not include or reference cultural safety.²² Yet, there are expectations within the Act such as the definition of high-quality care (viii) and the Safeguarding Functions of the Commissioner (chapter 5, part 3 div 2) that culturally safe care is an expectation. If this is to be achieved aged care providers and their workforce must behave and conduct themselves in such a way to ensure that culturally safe and accessible

²² Federal Register of Legislation - Aged Care Quality and Safety Commission Rules 2018

care, which incorporates flexibility and recognises their unique experiences delivered at all times.²³The Act must recognise, and providers and aged care workers must understand, what culturally safe means and its intrinsic link to clinical safety and quality care for Aboriginal and Torres Strait Islander peoples.

- 3.5. The rules that will go with the new Act are subordinate to the Act and can be changed more easily by government. Therefore, the NHLF advocates for cultural safety to be included within the new Act, as per the National Law for health professionals, to ensure that it becomes embedded practice within Aged Care.
- 3.6. The New Act should align with and support National Agreement on Closing the Gap Priority Reform Four: Shared Access to Data and Information at a Regional Level: Aboriginal and Torres Strait Islander people have access to, and the capability to use, locally-relevant data and information to set and monitor the implementation of efforts to close the gap, their priorities and drive their own development.
- 3.7. The New Act should be consistent with principles of Indigenous Data Sovereignty and Indigenous Data Governance: <https://www.maiamnayriwingara.org/mnw-principles>. The NHLF recommends that the Department engage NATSIAACC to co-design a process to ensure that the data collected under the new Aged Care respects Aboriginal and Torres Strait Islander people's data sovereignty.

²³ Department and Health and Aged Care, A new Aged Care Act: exposure draft Consultation paper No.2. P22

4. CHAPTER 4 – FEES, PAYMENTS AND SUBSIDIES

- 4.1. We note that Chapter is not yet drafted as it is waiting on the report of the Taskforce. We recommend that as the policy on this Chapter is developed, that there must be extensive, sector-wide consultation on the proposed policy. It is strongly urged that the development of the policy to be co-designed with the sector, particularly as it relates to Aboriginal and Torres Strait Islander people and their providers of care.
- 4.2. Further, consultation will be required on the draft provisions. In addition, there should be a review stage to ensure that there are no detrimental impacts on Aboriginal and Torres Straits Islander people and their providers of care including consideration of the following:
 - 4.2.1. Numbers of Aboriginal and Torres Strait Islander people receiving aged care services in all locations, and communities.
 - 4.2.2. Impact on providers of aged care services to Aboriginal and Torres Strait Islander people.
 - 4.2.3. Impact on Aboriginal and Torres Strait Islander allied health professionals and allied health assistant workforce.
 - 4.2.4. Impact on Aboriginal Health Workers and Practitioners, Enrolled and Registered Nurses.
- 4.3. Regarding Chapter 4, Part 2 – Means testing. Any monies resulting from any Commonwealth or State Stolen Generations Redress Scheme should be exempt from consideration under income and assets means testing. The precedent exists for social security income testing for National Redress Scheme payments to ensure that redress amounts do not make recipients worse off.⁹ The income testing of redress payments to Stolen Generations is contradictory to intent, and all State or Territory redress payments should be exempted as being assets as well as income.
- 4.4. The inclusion of redress payments as assets for aged care eligibility negates the role redress plays in compensating survivors for impacts of removal. The impacts of lessened economic opportunities for survivors are still felt today in lower health and social and emotional wellbeing outcomes for both survivors and their descendants. Many survivors have had reduced opportunities to build positive financial legacies for their families and descendants, an important consideration for many survivors towards end of life. Further, anecdotal evidence shows that some survivors are hesitant to apply for redress due to its perceived impact on access to essential aged care services. Ensuring that the survivor retain the payment will have a marked difference on their financial wellbeing as they age, decreasing the likelihood of income stress for themselves, and their carers.

5. CHAPTER 5 – GOVERNANCE OF THE AGED CARE SYSTEM.

- 5.1. All governance arrangements and functions in the New Act should align with and support the National Agreement’s Priority Reform Areas. Particularly Priority Reform Three 3 Transforming Government Organisations, Governments, their organisations and their institutions are accountable for Closing the Gap and are culturally safe and responsive to the needs of Aboriginal and Torres Strait Islander people, including through the services they fund.
- 5.2. The Act governance structural arrangement is confusing with a System Governor, Aged Care Quality and Safety Commission (ACQSC), Aged Care Quality and Safety Council and a Complaints Commissioner that sits within the (ACQSC).
- 5.3. Additionally, there is an inherent conflict of interest if the Department of Health and Aged Care is the system governor, and it is a SES position that performs the functions of the Complaints Commissioner. The NHLF supports the role of Complaints Commissioner sitting outside of the Department.
- 5.4. The NHLF queries the knowledge, understanding and capability within the Department of Health and Aged Care to undertake the role of System Governor. Good governance will require a sound understanding of and experience in day-to-day service delivery.
- 5.5. The NHLF also queries why the position of Aboriginal and Torres Strait Islander Aged Care Commissioner sits outside of the Act when other governance arrangements are included in the Act. This position should be included be protected in the Act and be an independent statutory office.
- 5.6. Overall, the Governance arrangements and those who exercise its power will need to be performed in a culturally inclusive, safe and rights-informed manner as with complaint handling. Thus, both UNDRIP and CRPD need to be part of the infrastructure of the Aged Care System.

6. CHAPTER 6 – REGULATORY MECHANISMS

Question 29. Do you consider the expanded powers made available to the Commissioner will ensure they can take a pro-active and risk-proportionate approach to the regulation of the sector?

6.1. This will only occur if the ACQSC explicitly and in writing provides for this approach. If not already, this will need to be in the guidance documentation for the Standards. The proportionate approach must be clearly outlined, otherwise there is a risk that it is open to interpretation and preference and become dependent on the individual ASQSC staff.

Question 31. Does the new Act provide sufficient clarity regarding the role of the Department in managing the integrity of the aged care program? Is there anything you would like to see included in the new framework to ensure program assurance is maintained?

6.2. A previously mentioned, there is some confusion around the governance arrangements. There is also doubt about the Department's capacity to function as System Governor because of the lack of hands-on service delivery experience and lack of understanding of living in remote, rural, regional Australia within the APS. This is a lack of experience which can create a rigid approach to interpreting matters such as eligibility assessments, complaints from clients, families, even providers.

6.3. The NHLF would also argue for positive obligations be placed on providers to deliver high-quality care as part of the registration approval process.

6.4. The new Act should include reasonable timeframes within which the Aged Care Quality and Safety Commissioner and System Governor must make decisions by and communicate those decisions by.

6.5. In regard to whistle blower provisions, the aged care workforce and responsible persons should be protected within the Act.

7. CHAPTER 7 – INFORMATION MANAGEMENT

Question 34. Do you agree with the proposed scope of protected information under the new Act? What information do you think should be protected under the new Act?

7.1. Yes. We support the resulting changes to protected information as per the Royal Commission recommendations, 67, 88 and 109.

Question 35. What challenges could there be with the proposed whistleblower framework, and do you have any proposed solutions?

7.2. We support the New Aged Care Act reflecting the findings and recommendations of the Royal Commission Recommendation 99. Noting that there is potential for additional parts to chapter 7 of the Act to allow for better information sharing between aged care and health this is supported as long as it is in line with the Royal Commission recommendations.

Question 36. What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

7.3. Intergenerational trauma and mistrust of authority informed by apprehended discrimination are barriers to disclosing information for First Nations people. Intergenerational trauma stems from colonisation, a lived history of interactions with government and authorities. Apprehended discrimination informs high stress and avoidance behaviours when First Nations people are interacting with services.

7.4. For First Nations people with disability, systems are structured by western norms, including a medical/ diagnosis base and discriminatory perspective on what it means to live with disability which fails to recognise their strengths, and instead focuses on perceived weakness. This instils a real fear in those with continuing community, cultural and care responsibilities, given that diagnosis, and categorisations of “disabled” have historically been used as pretexts for the state-sanctioned removal of children, isolation or relocation of families²⁴.

7.5. Additionally, the administrative process of disclosing information is inherently prohibitive as it is time consuming and linguistically challenging. A systemic review of First Nations voices in disability support services also found the following, which is applicable in this context: “the mismatch in the language used by agencies and Indigenous people creates barriers to the uptake of services by Indigenous people, and thereby challenges the desired self-determination of Indigenous people with disabilities and their communities.”²⁵

²⁴ Ravindran, S., J. Brentnall and J. Gilroy (2017). ‘Conceptualising disability: A critical comparison between Indigenous people in Australia and New South Wales disability services agencies. Australian Journal of Social Issues 52: 367-387; and Rees. P. B. (2003). The Need to Know: A Report on Disability and the Aboriginal Communities of South Australia. Adelaide, A.H. C. o. S. Australia.

²⁵ Ravindran et al 2017 page 378

8. CHAPTER 8 – MISCELLANEOUS

Question 37. Do you have any concerns about review rights under the current aged care legislative framework that you would like to see addressed under the new Act?

- 8.1. The NHLF supports the expanded number of reviewable decisions throughout the new Act, including those decisions made by the System Governor as well as the Commissioner. Also agree that there needs to be a consistent approach to all reviewable decisions.
- 8.2. Having the reviewable decisions made by the System Governor and/or Commission to be reviewed by a new federal administrative review body is supported.

Question 38. Are there any decisions that should only be delegated to staff of senior levels by the System Governor and the Commissioner

- 8.3. The delegating provisions that enable the System Governor, which is the secretary of the Department of Health and Aged Care, to delegate to other APS officials increases the governance risk to the new aged care system.
- 8.4. The delegation provisions within the Act, allows for senior public servants to take on a role that as previously mentioned, may not have the knowledge, experience or understanding of aged care service delivery or from a community's perspective. This lack of lived experience may lead to the official taking a rigid bureaucratic approach to this role to the detriment of a person-centred and rights-based approach to aged care. This concern is legitimate when we consider the failures in the current aged care system, the NDIS system and the role Centrelink/Services Australia in *robodebt*, as well as the lack of progress against the National Agreement on Closing the Gap.

9. CHAPTER 9 – THE REFORM TIMELINE AND READINESS SUPPORT

Combined: -Question 39. Do you support a phased approach to reform? Question 40. Do you consider this will allow for staged implementation and more time for consultation on key changes? Or do you consider that it will add complexity and prove challenging for the aged care sector?

- 9.1. The phased implementation plan must be accompanied with a funding strategy (especially for readiness support), milestones, timelines and monitoring framework. The health and aged care sector must be given sufficient time to prepare for the upcoming changes.
- 9.2. To assess the impact of the new system on Aboriginal and Torres Strait Islander people and the providers of their care, the NHLF and FPDN supports NATSIAACC's recommendation that an Aboriginal and Torres Strait Islander impact assessment and evaluation of the legislative regime is conducted within the first year of implementation.
- 9.3. One of the concerns with the timeframes is that there are numerous parts of the new Act that have not been drafted and still require consultation. A more fulsome understanding of the new Act is required to inform the relevant phasing/timeframes to support the delivery of care to meet older people's needs.
- 9.4. There will need to be sufficient time between the passage of the legislation and its commencement for the aged care sector to receive training, supports, implement new/updated policies and procedures. In the absence of sufficient transition time and support, there is a risk to older people, providers of their care as well as the workforce, which is already stretched.
- 9.5. Further, as referenced above, it will be necessary for First Nations people to co-design and consult on all further components of the aged care system.



NHLF Leading Aboriginal and Torres Strait Islander healthcare
National Health Leadership Forum

MEMBERS



Australian Indigenous Doctors' Association
<https://aida.org.au/>



Australian Indigenous Psychologists' Association
<https://indigenoupsychology.com.au/>



Congress of Aboriginal and Torres Strait Islander Nurses and Midwives
<https://catsinam.org.au/>



Gayaa Dhuwi (Proud Spirit) Australia
<https://www.gayaadhuwi.org.au/>



The Aboriginal and Torres Strait Islander Healing Foundation
<https://healingfoundation.org.au/>



Indigenous Allied Health Australia
<https://iaha.com.au/>



Indigenous Dentists' Association of Australia



The Lowitja Institute
<https://www.lowitja.org.au/>



National Association Aboriginal and Torres Strait Islander Health Workers and Practitioners
<https://www.naatsihwp.org.au/>



Torres Strait Regional Authority
<https://www.tsra.gov.au/>



National Aboriginal and Torres Strait Islander Ageing and Aged Care Council

Association of Aboriginal and Torres Strait Islander Physiotherapists