



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

**A new model for regulating Aged Care – Consultation
Paper No. 2**

**Prepared by
COTA Australia**

June 2023

About COTA Australia

COTA Australia is the peak body representing the almost nine million Australians over 50. For over 70 years our systemic advocacy has been improving the diverse lives of older people in policy areas such as aged care, health, retirement incomes, and more. Our broad agenda is focused on tackling ageism, respecting diversity, and the empowerment of older people to live life to the full.

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Overview

COTA Australia welcomes the opportunity to respond to the proposed regulatory model for Aged Care as detailed in *A new model for regulating Aged Care Consultation Paper No. 2*.

The consultation paper is a significant improvement from the first consultation paper providing more details on how safeguarding is defined and registration categories.

The paper better reflects that the aged care system needs to shift:

- From provider to person centric and rights based;
- From stand-alone and fragmented, to being aligned with the broader care and support sector;
- From a uniform approach to service types, to embracing a sophisticated risk-based approach that incorporates different types and forms of care and services;
- From a limited definition of approved providers, to incorporating individuals, partnerships, and other business structures; and
- From passive and functionary in assessing its requirements of providers, to incentivising excellence, innovation, and continuous improvement.

There is a tension between balancing strong and effective compliance and enforcement with improving the capability of providers through education, support and incentives. Many older people will look to these reforms for assurance that strong enforcement measures are in place to prevent the various stories of neglect identified by the Royal Commission into Aged Care Quality and Safety.

The proposed regulatory model could be clearer on stating that older people receiving aged care services are the key stakeholder. In a human rights-based approach, older people are participants in the system and the regulatory model should recognise this. **They are more than service recipients and their role should be articulated and valued.**

Empowerment of older people in care and support decision making, planning and service direction and regulatory safeguards and protections are complementary. They are both fundamental to the new system and should not be traded off against each other or viewed as needing to be balanced.

COTA Australia has long argued for a stronger regulatory approach to:

- act quickly against poor providers;
- address poor leadership and service culture;
- enhance clinical governance; and
- build staff numbers and quality.

A new, rights-based person-centric regulatory model based on human rights, grounded in a new Aged Care Act was a key recommendation of the Royal Commission into Aged Care Quality and Safety. This is an essential step to improving quality of care, the individuals experience of care, and through that restoring public confidence in the aged care system.

It is disappointing that the rights to be upheld in the new regulatory model have not been made available at the time of this consultation. This proposed regulatory model is also being provided for consultation without details on the new Aged Care Act, including its subordinate legislation. A full and comprehensive response would require viewing the draft proposed legislation and the regulatory model details together. Our comments should be viewed within this limitation.

COTA Australia has a number of recommendations on how the proposed regulatory model could be improved. They are:

1. Services delivered by a registered provider will have the aged care regulatory framework applied to ALL services delivered to aged care eligible clients (whether commonwealth funded or privately funded). This provision makes it clear to the older person how they are protected. These obligations will apply to all subcontractors of the registered providers, including non-registered service providers delivering services on behalf of the registered provider. It will also remove the bulk of risk where an older person may assume their protections service their entire aged care services, not simply those tied to commonwealth funds.
2. Where an older person, in agreement with their assessor or care partner, determines that a service should be purchased from unregistered providers, either via funds transferred from the commonwealth to the older person or the unregistered provider, the provider should be required to meet the of Code of Conduct and operate under the Complaints, regime as occurs in the NDIS. Undertaking steps to establish regulatory system to align a single Code of Conduct, worker registration and screening processes across Aged Care, Disability Support and Veterans Care. This is currently reflected in the Governments work in the Care and Support Economy Taskforce and should be expedited as part of the new Aged Care Act.
3. Better explanation of how consumer protections beyond the Code of Conduct, such as those found in Standard 1 'The Person' will apply to services registered under Categories 1 – 3 need to be included. Once the Statement of Rights is released for consultation, it may be that making clearer the Statement of Rights applies to all service providers will be sufficient. However, based on the consultation paper there appear to be many consumer protections missing.
4. Reviewing the appropriateness of having 'domestic assistance' and 'personal care' in different registration categories with significantly different regulatory approaches. In the current environment, of not requiring any mandatory qualifications or incentivising qualifications within the award, the same worker may deliver both of these services, sometimes in the same shift. The proposed approach risks some organisations and some sole trader provider/workers, not delivering one service type due to the added regulatory burden. This risks a reduced number of available workers to deliver personal care services within the aged care system. Whilst there

are some complexities, personal care can't really be defined as a clinical or specialised support. Personal care is not regulated by AHPRA, while the other kinds of supports in Category 4 are subject to government or industry regulation.

5. Implementing enforcement measures, with significant penalties including criminal offences and compensation measures, as part of the new Aged Care Act.
6. Establishing a clear implementation date for star ratings in home and community aged care services.
7. Providing substantive details on the operation of 'restorative justice' type complaints processes for consultation before the implementation of the new Aged Care Act.
8. A program to inform and support older people using aged care services in the transition to a new regulatory model. This may require funding to be provided.
9. Producing a range of information products and conducting a program of consultation forum for all stakeholders particularly older people on the concept of relational regulation. For example:
 - Collating all information on rights and obligations across the various current and new regulatory model/tools. An older person should then be able to search for all the provider obligations (which may create some consumer rights) across the various regulatory tools. Ensure searching can use Legal Name, Known as, Site Name, Site Known As or any other business name associated in the delivery of services. Link this information within existing websites of My Aged Care and the Regulator.
 - Establishing a 'Charter of Rights' (or other mandatory communication piece) that is given to all new clients explaining, in one plain-language document, all the major rights from across the various regulatory tools and linking to more plain-language explanations about the detail of each of those regulatory tools.
 - Create a central information hub on rights under the new Aged Care Act and the regulatory framework for older people using aged care services. This would include more detailed information on the rights enforced through Statement of Rights, Code of Conduct, Provider Obligations and the Regulator's complaints processes, along with educative information on Australian Consumer Law and explaining major issues within aged care such as the right to take risks, the right to choose if and how your services are delivered, and the right to be actively involved in your care/support delivery (self-management).

Ensuring consistent consumer protections and maximum available workforces should be a core consideration of any regulatory approach. This includes considering when and how aged care services paid for in the private market should be required to comply with aged care regulation.

The consultation paper states (on page 26) "Unregistered providers will continue to be able to provide services to older people. In these circumstances, Commonwealth aged care

subsidies will not be available, nor will these arrangements be covered by the new Act or the new model. However, Australian consumer laws will continue to apply, as with any other private transactions.” COTA Australia does not support this approach that diminishes consumer protections based on the method of payment.

Older people who have a Commonwealth-funded aged care service will assume all private services they purchase from these same providers are also protected by the same regulatory regime. The full suite of regulatory requirements should be applied consistently against the provider, for consumers who have commonwealth funded aged care services, extending those protections to any additional / top up services they purchase privately. This includes any subcontract arrangements.

In the broader private market where the service provider is not a registered provider, it is still appropriate to allow for a consumer to directly purchase aged care services using a blend of their Commonwealth and private funds. In thin markets for some service types this will be critical to ensuring timely availability of services. Core protections such as the Code of Conduct and the Complaints process should apply, and older people and the community will assume they do, where the older person has used in part or whole, their commonwealth funded package. This may be via funds transferred from the Commonwealth to the older person or the unregistered provider, as outlined in their care plan and agreed with their assessor or care partner.

Finally, this leaves private market scenarios where the older person receives no commonwealth funding and is purchasing services on a completely private basis. If they approach a commonwealth funded aged care provider, it is arguable the older person would assume the same protections apply, and we think they should. However, if they approach an unregistered service provider (not an aged care provider – for example Jims Cleaning), who has other older clients in their customer base these protections would not likely be assumed to apply.

In short:

- If a service provider is a registered aged care provider – then older people should be protected by the same aged care regulations irrespective of whether they are paid by Commonwealth-funding or private funding.
- If a service provider is not a registered service provider – then where the service is outlined in the care plan and is purchased directly by the older person, the service provider should be subject to Code of Conduct and Complaints (as occurs in NDIS).

Aged Care Regulations must ensure that they facilitate empowerment models of care and support. This includes enshrining into legislation a mandatory right to 'self-manage' your services, a right to be actively involved in decisions about whether to receive services and how they will be delivered.

The introduction of one regulatory system is necessary as it will assist to address workforce shortages. We propose that, at the commencement of the new Act, the Code of Conduct for

NDIS and Aged Care, along with worker registration/screening processes should be aligned into one system overseen by a new integrated regulator. Transition arrangements, with dual regulators across the single registration scheme, may be necessary for a period of time. This will be more effective than attempts at harmonising systems.

The paper highlights the need for further consultation and consideration regarding the inclusion of “more significant penalties, including criminal offences, and a compensation pathway may be available in certain circumstances”. This approach is critically important to older people and families feeling that their issues and concerns are being seriously addressed. This is not the experience with the current system.

The current regulation (and Regulator) is far from being effective. Accountability is what is needed, otherwise regulation is largely useless. (Carer, NSW)

Having a strong, effective and efficient enforcement response to poor and negligent service practice will also support public confidence in the regulation of the aged care system. There will need to be a proportionate approach to penalties ranging from minor issues through to the most serious of circumstances. COTA Australia would welcome future engagement with the Department of Health and Aged Care on these matters.

There has been improvement in the transparency of residential care services through the introduction of a star rating system. This must be extended and developed for home and community services with a clear deadline set for introduction.

The new Star Rating System is excellent and a great improvement for the Aged Care System (older person using residential respite, SA)

Star ratings should have been implemented long ago. My husband's aged care gave themselves 5 stars on their logo, which I felt was misleading. They have a 3 star rating now and have sheepishly revised their logo. (Carer, QLD)

I think the star ratings are good, we need to extend them this to homecare. (older person accessing home care, SA)

In principle, COTA Australia supports the shift to complaints processes such as ‘restorative justice and other regulatory approaches that build trusting relationships and support continuous improvement’ but more detail is required on how they would be operationalised. It will need to be clearly explained to older people, and their carers, as well as to providers to ensure its success.

A greater commitment and valuing of the role of complaints and the effectiveness of the complaints management system is critical to delivering better outcomes for older people and improving aged care service culture. This should be a central plank of the new regulatory model. It should consider how the complaints process can embed conciliation and mediation processes to uphold human rights. This may include an apology which in some instances will satisfactorily resolve a matter.

Older people receiving care, and their carers and families have told COTA Australia about the importance of a stronger regulatory system. To support the transition between regulatory frameworks Government should commit funds to older people as self-advocates. Peer to peer support would be an effective way to support and enable older people, and their carers, to transition successfully to a new system. COTA Australia has the skills and experience to run such a program and would be pleased to discuss this in more detail.

Raising the quality of aged care

Regulatory Interventions

The evidence of the Royal Commission on Aged Care Quality and Safety demonstrated that the current aged care regulatory approach is ineffective in taking quick and appropriate action to address poor service performance and behaviour. As this paper states, the older people and their representatives and the Australian community require confidence in the aged care system. Strong compliance and enforcement actions by the Regulator against poor service practice is critical, not only for older people and their families but also to restore public confidence in the system.

The definition of high quality care in the new Act will play an important role in shaping service culture change and the regulatory approach. The definition should incorporate delivering on individual needs and choices as part of a clinically assessed care and support plan resulting in excellent health and quality of life outcomes.

It is necessary to ensure that costing to deliver on the new definition of high quality care is implemented at the same time it comes into force.

In principle, COTA Australia welcomes the introduction of the concept or theme of relational regulation. However, more detail is required on what this means and a better explanation to older people and their family/friends of how this approach contributes to high quality outcomes. Our understanding is that relational regulation views all stakeholders as part of a 'regulatory community' where respectful discussions about issues can take place in a 'beyond the referee' context. This approach should contribute to diminishing, if not eliminating, the paternalism of current aged care service culture. At a service and system level, the issues and experience of older people should be heard and fixed on a daily basis, improving connections between older people, service providers and all stakeholders.

Relational regulation should not be seen as an approach that excuses poor service practice and behaviour when strong enforcement action is required. It should help to empower older people in care and support their decision making, planning and capacity to exercise their rights as well as strengthening protections and safeguards.

Relational regulation will need to be operationalised and demonstrated in ways that make sense to people. Information products, events, forums should be funded and supported to develop a relational regulation culture. The Regulator and Department will have a key role in establishing this as part of a transition to a new system. 'Relational regulation' processes should also be encouraged and supported at the community and provider level.

The building of provider capability should not just be focused on the relationship between providers, Regulator, and Department. A key element should also be improving the relationship between older people using services and increasing consumer participation in continuous quality improvement processes. For providers to lift the standard of care in a

way that upholds the rights of older people they need to improve their relationship with older people responding more effectively to their needs and choices.

Valuing complaints at the systemic and individual or local level and improving the effectiveness of the complaints system should be a critical part of the new regulatory model. As the paper rightly states, complaints form an important part of regulatory intelligence at both the system and local level and should inform issues for further investigation and service reform. Complaints are also a key arena for engagement with older people and to hear their voices. A system culture that supports older people to make complaints and communicates and responds to complaints in a timely manner is important. A visible, educative, outreach-focused Complaints Commissioner will be a vital part in making this happen.

COTA Australia supports restorative justice processes that enable older people to share their experience and be heard. As part of this, providers must be willing to listen, apologise and implement change. More work is required to detail how this will be resourced and supported at both the individual service level and the systemic level. An understanding of the effectiveness or otherwise of the current 'open disclosure' regime is critical to this.

While it is appropriate that the new Aged Care Act does not replicate other laws such as Australian Consumer Law, it is necessary for the aged care system to include educative information and signpost to relevant protections contained in other statutes. However, in implementation of the Aged Care Act, both in education and in ensuring that providers understand their obligations, a more joined up approach to explaining key rights found in other legislation is warranted. This includes in particular discrimination laws, consumer protections, and state safeguarding laws and as discussed below a home care and residential care agreement template (which covers key elements and how they must be presented) must be legislated to ensure a consistent presentation of information.

The Aged Care Regulator should have a dedicated and maintained page linking to specific rights under other laws and the regulator and complaints process for these laws. Education to empower older people about their rights, beyond aged care regulation, as part of a single source of information is also necessary.

Role of Government and Non-Government Stakeholders

The paper provides substantive detail on the role of the provider, Regulator and Department.

The regulatory model should clearly articulate the role of older people and their representatives as key participants in the aged care system.

The categorisations of the four safeguarding groupings do not lend themselves to easily see the role of older people and their families within the safeguarding framework. Currently, the only information provided is under the 'Supporting quality care' grouping,

with no further explanation of how older people will play a meaningful role under the 'Holding providers accountable' grouping.

As part of holding providers accountable and meeting the goal of improved transparency, the role of community visitors and individual advocacy program should be made clearer as part of the regulatory model. Their access and ability to interact with residents (and clients) must be clearly stated and supported in both the regulatory framework and the new Act.

The consultation paper does not address the important role of the National Aged Care Advocacy Program (NACAP) in information, education and engagement with older people and aged care providers. NACAP has a key role to play in building the capability of providers to inform and seek feedback from older people using their services. Consideration could be given to expanding NACAP to strengthen the capacity of a diverse range of older people and their representatives to receive and understand regulatory information.

Culture Change

Culture change is essential for high quality care to be delivered to older people in aged care on a consistent basis. This will be a particularly important focus in the first 12-24 months of the implementation of the new Aged Care Act as the sector learns how to operationalise human rights in practice.

For culture change to occur, leadership at all levels is required. Boards, governance committees and management have to be committed to change particularly the inclusion of older people as key informants and participants in continuous quality improvement.

Culture change will need to be supported with education, materials and potentially funding for programs (such as culture change champions) at the local level. At the heart of this culture change should be listening and responding to the older person. People with a passion for service improvement with strong relationships across the local organisation particularly with older people could be identified to become culture champions. In many cases this may be a worker but could also be an older person who is actively involved in governance or consumer advisory committees. The Department or Regulator could implement a demonstration or pilot project approach with evaluation to test the possibility of a broader rollout of a local culture champion program.

Supporting Quality Care

Views on proposed approach

The proposed approach, as stated in the paper, contains many important elements including defining the roles of system stakeholders, improving information and transparency, providing education and support for continuous improvement and offering some incentives to deliver cultural change.

The approach does not sufficiently articulate the role of the residents and clients/participants. The paper provides some text supporting the role of older people, but this is located under a heading related to information. Older people as the key stakeholder in the aged care system should be made explicit in documentation on the regulatory approach.

We support the following suggested language as an appropriate reference for older people in the future aged care act and regulations:

- In long form “**people accessing aged care services**” (or where relevant ‘seeking to access’) is preferred.
- We recognise a shorter format is required for legislation and suggest ‘**Participant**’ would align with the term used in the NDIS.
- If two terms are needed to recognise a ‘home/community care and support’ and ‘residential care’ situation we suggest:
 - ‘**Resident**’ for those within a nursing home.
 - ‘**Home Support Participant**’ for those receiving services in the community or their home.

Older people should be and are the key participants and stakeholders in the regulatory approach. The NDIS provides an example of a regulatory approach where the people accessing care are viewed as participants.

Regulatory protection and safeguards should not limit or conflict with increased empowerment of older people to inform and participate in organisational and systemic processes focused on continuous quality improvement.

The lived experience of older people should be used in regular service delivery and governance at the local level and encouraged by organisational leadership. At a systemic level, the regulatory model should incorporate mechanisms, outside of the complaints process and star ratings, to capture the views and perspectives of older people on the quality of services.

The Department and the Regulator have a key role in providing resources for older people using aged care services on what their rights are, how they should be protected, how they

can receive support to exercise their rights and where they can go for independent information, support and advocacy. Older people should not have to rely solely on providers for information about their rights in aged care.

Engagement and capability implementation challenges and solutions

There are likely to be many engagement and capability implementation challenges. These include:

- An effective complaints system that communicates and responds in a timely and respectful way with older people and utilises complaints information and data to improve outcomes at both a system and individual level. The work of the new Complaints Commissioner will be critical in ensuring that complaints are highly valued in the regulatory model. Investigations by the Inspector General into the effectiveness of the complaints process will also be an important trust building exercise for older people deciding whether to access it.
- Aged Care Regulations must ensure that they facilitate empowerment models of care and support. This includes enshrining into legislation a mandatory right to 'self-manage' your services, a right to be actively involved in decisions about whether to receive services and how they will be delivered (aka choice and control). Ensuring that the right of older people to self-management is promoted and enshrined as a key principle of service delivery and practice in aged care particularly home and community care. Access to self-management is an important part of empowering older people who use aged care services. Assessments should inform the appropriateness and desire of consumers to self-manage. Options of support must be available for those that need assistance to self-manage along with protections for those who don't wish to self-manage. Self-management should be viewed as a spectrum of decision making. Some older people may elect to self-manage some services and not others. Roles and responsibilities for care can be negotiated between the older person and their provider.
- Embedding and operationalising rights so they are understood by all stakeholders, particularly older people, and become a fundamental part of service practice and culture.
- Resources and support for older people independent of providers are critical to delivering a rights-based culture. It will be necessary for a single source of all rights across the various regulatory tools to be explained in one document. This may be best delivered in a way that is similar to the current 'charter of rights' which explains the various key rights in plain English and links to more details for the individual to follow.

- Enabling improved outcomes for older people with diverse backgrounds or with special needs including people experiencing homelessness or Culturally and Linguistically Diverse (CALD) may require some flexibility in the regulatory approach.

Provider capability improvements

Some of the key provider capability improvements should include:

- undertaking demonstrated action to engage with consumers in service implementation, design and governance practices to improve service culture. Listening is a key skill in engagement,
- supporting and utilising complaints processes to improve service outcomes, and
- demonstrating a willingness and readiness to adopt and utilise IT technology to improve systems.

Education and engagement for continuous improvement

Some providers will require education and support to develop meaningful relationships with older people as a key resource and participant in organisational continuous quality improvement processes. While the regulator has an important central role with this, organisations like COTA Australia, OPAN and other community bodies also play a part in supporting consumer engagement and sector quality improvement.

Education and engagement should be complemented by performance benchmarks related to older person participation in quality improvement.

Improving the provision of information to older people and their representatives

Providers should not be the only source of information. Government, in its role as market steward, should consider making information easier to access and to understand for older people. A home care and a residential care agreement template, outlining core elements, must be legislated to ensure a consistent presentation of information. This will ensure a consistent comparison between providers and can be structured to ensure any non-standard terms imposed by this provider is prominent and thus easier to understand.

Accordingly, an agreement template must include:

- A Government approved format top sheet with key information around fees, exit terms, likely costs over the consistent average service use period, costs, complaint process, contact for advocate).
- A requirement for "provider specific terms" to be separately listed to a generic set of terms and conditions developed by Government or the industry.

- A consistent price list aligned to the Support at Home Service List, and any other list.

This approach will not limit a provider's ability to tailor their terms and conditions but will provide a level of safeguarding for the older person to be aware of a comparison of the key information and awareness of what non-standard terms are being applied by including them in a clearly defined section of the agreement.

While a Statement of Rights appears to be proposed to replace the current Charter of Rights, the different language within these two documents will in practice disempower older people. It is likely that the legalese language which will have to be used in the Statement of Rights will be harder to understand than the plain language approach of the current Charter of Rights. A plain language version of the Statement will be an essential educative tool to address this.

Reestablishing a 'Charter of Rights' (or other mandatory communication piece) that is given to all new clients explaining, in one plain-language document, all the major rights from across the various regulatory tools and linking to more plain-language explanations about the detail of each of those regulatory tools.

Becoming a provider (Registration)

Registration categories

It is understandable that services are being grouped together based on common characteristics, related service risks and provider obligations. However, a service classification approach must consider how it will accommodate different levels of qualification, supervision and multi-disciplinary teams within its approach.

For example, some personal care services could include supporting client self-administration of medication or monitoring skin integrity under the direction of a Registered Nurse (in accordance with some state/territory obligations and with clear workforce health and safety policies and procedures), while other types of personal care services may not require direct supervision of a Registered Nurse. Consideration of how similar services requiring different obligations are implemented must form part of the service classification design.

Personal care and domestic assistance

Reviewing the appropriateness of having 'domestic assistance' and 'personal care' in different registration categories with significantly different regulatory approaches. Whilst there are some complexities, personal care can't really be defined as a clinical or specialised support. Personal care is not regulated by AHPRA, while the other kinds of supports in Category 4 are subject to government or industry regulation.

COTA Australia understands that in the current environment of not requiring any mandatory qualifications or incentivising qualifications within the award, the same worker will continue to deliver both of these service types, sometimes in the same shift. The proposed approach risks some organisations and some sole trader provider/workers, opting to remain out of one service type due to regulatory burden.

If Personal Care remains in Category 4, we anticipate that a number of personal care providers will exit the aged care system due to excessive regulation. This in turn would reduce the number of available workers to deliver personal care services within the aged care system, further exasperating the already tight workforce environment in aged care.

Care management

Care management should be a specialised, professional service type ideally delivered independently from providers. It includes reviewing the older person's home care agreement and care plan, ensuring care and services are aligned with other supports including those outside the aged care system, regularly communicating with the older person and their representatives about addressing assessed care and support needs,

ensuring that care and services are culturally appropriate, and identifying and addressing risks to the older person's safety.

The definition of care management in the Quality-of-Care Principles Care and Services for home care services should be changed to recognise it as a valued service and not an administration charge.

Social Support

The rationale for having social support as a distinct registration category is unclear. Social support is currently a service type provided by home and community services and residential care services. A number of services funded as social support seem to be included in Category 1, including community transport and day therapy centres (which would be under registration category 4 given the specialised and therapies delivered).

We are unclear what type of providers remain in the proposed Category 3. Limiting the number of registration categories is important in contributing to a less complicated, easier to understand, aged care system that can be regulated efficiently and effectively. Without a sufficient explanation COTA Australia assumes there are few providers that only deliver social support. Accordingly, it may be more appropriate to recognise social support as a service type under category 1.

Regulation of online platforms

The regulation of online platforms needs to be further considered and developed, including:

- online platforms not delivering care directly,
- the remit of the private market, and
- the opportunities online platforms provide for choice and control older people, including in particular self-managed participants.

Many older people want to be involved in the management of some or all their services. They have the right to be active participants in decision making about their care and service delivery which may include directly engaging with workers (with a limited or no role for providers). COTA Australia could not support regulation that limits autonomy and choice for an individual older person.

When speaking with older people about why they choose services from an online platform they outline the following benefits and attraction:

- a sense of direct control over how their services are delivered,
- the ability to select/screen who comes into their home, and
- the cost efficiencies compared to other traditional service providers.

In a systems sense online platforms can act as a market force driving efficiency and innovation that delivers better services and a better financial outcome for the taxpayer and older people.

Such efficiencies should not come at the expense of the take home income for an individual worker. To ensure these important services remain available a balance needs to be struck that supports innovation while protecting the rights of both the older person and the worker. Informed consent about the arrangements, both for the consumer and the individual worker, would be one protection that could be put in place. It is unclear how the regulation of online platforms will be developed. The platforms do not receive Commonwealth funding but the independent workers, who promote their services on the platform, do. The mechanism to regulate these platforms will require significant consideration to ensure consistency within the regulatory framework proposed. It may be appropriate to create a seventh category in the registration matrix for online platforms and identify what of the regulatory tools should apply and how. However, the current distinction of how regulations will apply to commonwealth funded and privately funded services/registered providers and unregistered providers may make this a complicated approach.

There are a range of sector stakeholder views on the regulation requirements for online platforms. In our discussions with some stakeholders, we identified support for broad requirements and principles to be developed. However, there are differing perspectives on whether requirements should be mandatory, educative or best practice and the specific details of what regulations should be included. Some of the areas for regulation / education to be considered include:

- Informing older people of their rights and ensuring there is clear and simple on-screen messaging explaining any obligations they are taking on by finding workers on the platform;
- Providing information for older people that clarifies the difference between 'registered' and 'unregistered' providers on the platform and how their Support at Home package may be used for each of these types.
- Regulating the minimum hourly rate that a contractor can charge in order to be eligible for Commonwealth-funded services. The focus should be on defining a minimum hourly rate which can be charged to ensure workers and/or contractors receive appropriate incomes. In setting this price the Government can have regard to comparable casual work arrangements and the relevant awards to determine an efficient and fair price floor.
- Informing contractors of their taxation and superannuation obligations and best practice financial behaviours such as pay as you go. It may be appropriate to go so far as to place an obligation on the platforms to assist/facilitate the contractor in easily administering their tax and superannuation obligations.
- Informing contractors of their ability to become a registered provider in order to receive Commonwealth subsidised aged care funding, or identifying how sub-

contracting arrangements with a commonwealth subsidised aged care provider may occur.

- Supporting registered providers to meet their obligations including the new registration / screening processes, keeping required case notes, facilitating record keeping and reporting obligations incl SIRS, providing a mechanism to manage and record individual complaints and facilitating information sharing with case managers who are not engaged within their platform.
- Requiring platforms to verify qualifications and certifications that contractors promote on their profile. This may include adopting a 'skills passport' approach (recently discussed as part of the NDIS Review) that helps workers track their training and provides older people with a consistent understanding of the various certifications in delivering care and support. This could include competency units within an overall qualification and certifications such as first aid certificates.
- Providing information on relevant insurance requirements including public liability (to protect the person employing through the platform from claims on their property), personal accident insurance (including income protection), medical malpractice (for personal support) or professional indemnity (for nursing and other relevant professions)
- Presenting the minimum hourly casual award rate including superannuation at all screens where a worker enters their hourly rate. This could include the requirement for all independent contractors to tick a box if they are below the total hourly equivalent.
- Providing contractors with key education and information links including the worker registration scheme, low cost accredited Certificate IV courses, single units of competencies within qualifications and key certifications such as manual handling. This could be developed by Government.

COTA Australia notes that there is a broader discussion within the federal government around the regulation of the gig economy, including discussions about 'employee like' relationships discussed in both the Fair Work Act consultation and the Care Economy Strategy. COTA agrees that workers should not be financially penalised by the way they choose to attract and engage their work. COTA supports informed consent to ensure that workers and contractors are aware of their financial and regulatory situation and requirements. Careful consideration needs to be given to any actions that will potentially reduce the number of available workers. Criteria should be developed that ensure appropriate consumer protections with the need to have enough workers to meet care needs. It is clear from public statements by the Minister that the NDIS will continue its regulatory approach and aged care having more restrictive regulations will drive workers to that sector at the expense of older people.

Allowing other business types

COTA Australia supports steps to ensure that older people have access to the maximum available workers, contractors and providers to deliver their safe quality aged care. We support the inclusion of non-corporations, such as sole traders, cooperatives and partnerships, to be eligible to deliver Commonwealth subsidised aged care services in a home or community setting as part of the regulatory model.

We are concerned however that the regulatory approach proposed in aged care in regard to registered and unregistered providers is inconsistent with the NDIS. This may cause confusion across the care and support sectors as there are a number of entities that could support older people in their own homes who may choose not to offer services in the aged care system because of the higher level of regulatory burden for small independent operators.

The aged care regulatory model should be consistent with the [NDIS Registered Provider](#) and [NDIS Unregistered provider](#) approach. Workers employed or engaged by unregistered providers are subject to the Code of Conduct, worker screening and complaints management, but, due to the types of services provided, are not subject to the obligations and administrative burden of complying with all of the Quality Standards.

Older people should be able to choose from a larger network of unregistered providers in the same way that people with a disability can. As a principle, all rights afforded to people with a disability, should also be built into the design of the aged care system.

The paper suggests that some aligning of obligations with the NDIS could occur to facilitate providers and workers to enter the aged care sector. No explanation is made as to why aged care is adopting a different approach to the NDIS. At a minimum, instant mutual recognition of comparable roles within the respective regulatory systems should be implemented as part of the new aged care regulatory environment.

This is particularly important for local communities that are unable to attract sufficient workforce to operate separately in aged care and NDIS. Making it easy for workers to work across the sectors is critical to ensuring service delivery.

Implementation challenges

The key implementation challenges are that:

- CHSP providers and clients Older people receiving CHSP services, and their families, are likely to need dedicated support to understand the new regulations that will apply to CHSP for one year in 2024, as well as the new Support at Home Program and its associated regulation from 2025. This education and information should commence in 2023/24.
- Ensuring final decisions about the regulations (including publication of subordinate legislation to implement the obligations) are published in enough time for provider and consumers to adapt to the new environment. Ensuring that empowerment

models of care and support, that includes the right and ability to self-manage, is actively promoted and supported as part of the regulatory changes.

- Separate regulatory approaches for aged care and NDIS will lead to unnecessary duplication, service confusion and potential reduction of services for older people needing support to live at home. If separate regulatory approaches are maintained Government must publicly explain and monitor how services will not be reduced.
- Registration categories should be refined further to incorporate social support as a service type under Category 1 and to remove personal care from category 4.
- Regulation of online platforms needs to be developed further - establishing key requirements, the level of detail related to each requirement and defining what is mandatory and optional.

Provider responsibilities

Views of proposed approach

COTA Australia supports, in principle, the streamlining of provider responsibilities into the broad groupings of overarching obligations, core conditions of registration, category-specific conditions of registration and provider-specific conditions of registration. It is important that protections for older people are enhanced and strengthened in each stream.

Our comments on this are preliminary only and limited by not having the details of the new Aged Care Act available, including subordinate legislation or the Statement of Rights. Understanding and forming a comprehensive view on competing and conflicting rights is difficult without these documents and we reserve the right to change our positions once we have reviewed them.

On the information available we are concerned that older people could perceive their rights have been diminished under this approach.

It is our understanding that Standard 1 'The Person' will not apply to all types of services and will only apply to services delivered under registration categories 4-6 including clinical and specialised supports, respite and residential care.







Given that it is unknown how the Statement of Rights will be directly enforced, it is plausible that some rights will only be upheld through the enforcement of Standard 1.




While noting that some similar items are contained in the Code of Conduct for workers, this does not provide a full coverage of the rights conveyed through Standard 1. In particular a comparison between Standard 1 and the Code of Conduct identifies gaps related to ensuring that consumers are supported to exercise choice, independence and take risks.




COTA Australia is supportive of risk based monitoring and acknowledges the benefits for lower risk services not having the standards apply to them. However, under no circumstances should this approach diminish consumer rights. It is recommended that alternative provider obligations, that maintains all elements of Standard 1, are imposed on all providers whether they are registered or unregistered.

The new provider responsibilities in the regulatory approach under the new Aged Care Act must not diminish the rights of older people using all aged care services particularly their independent capacity to make care and support service planning choices.

Analysing the ‘right to take risk’ across the proposed regulatory framework

<p>The ability to take risks is a key right that should be afforded to all people across all services through all relevant regulatory tools. The table below lists the regulatory tools and its relation to this right. It highlights that the proposed system doesn’t protect this right in all services and through all tools.</p>	<p>To what services does that regulatory tool apply?</p>		
<p>Regulatory Tool</p>	<p>Domestic Assistance Social Support (Reg 1-3)</p>	<p>Nursing Personal Care (Reg 4)</p>	<p>Resi Care Respite (Reg 5-6)</p>
<p>Standard 1: The Person <i>1.3.5 refers to “enabling positive risk-taking”</i> COTA Comment The best protections are explicit protections. This is only achieved for services under registration categories 4-6 where the Standards apply.</p>			
<p>Code of Conduct Does not refer specifically to positive risk taking but does mention “<i>self-determination and decision-making</i>” COTA Comment It may be that a broad interpretation of self-determination or decision making could be extended to how the code of conduct is implemented. Nevertheless, COTA would note this will require a significant effort to ensure consistent understanding and interpretation. How the Commission will deliver such change culture to daily</p>			

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<p>decisions on the ground will require significant co-design with older people and providers.</p>			
<p>Statement of rights Obligations are currently unknown. COTA Comment No draft statement of rights has been released, accordingly it is unclear if the Statement of Rights will have a right to take risks and if that does occur, whether it will be directly enforced, or enforced through another mechanism such as the Code of Conduct</p>	<p><i>Unknown not yet released</i></p>	<p><i>Unknown not yet released</i></p>	<p><i>Unknown not yet released</i></p>
<p>Registration Category Specific Obligations Obligations are currently unknown. COTA Comment One solution may be that gaps in the regulatory framework may be balanced by introducing registration category specific obligations. At first glance COTA believes the vast majority of Standard 1 may need to be applied as a category specific obligation</p>			

<p>The ability to take risks is a key right that should be afforded to all people across all services through all relevant regulatory tools. The table below lists the regulatory tools and its relation to this right. It highlights that the proposed system doesn't protect this right in all services and through all tools.</p>	<p>To what services does that regulatory tool apply?</p>		
<p>Regulatory Tool</p>	<p>Domestic Assistance Social Support (Reg 1-3)</p>	<p>Nursing Personal Care (Reg 4)</p>	<p>Resi Care Respite (Reg 5-6)</p>
<p>on categories 1 – 3 to ensure consistent consumer protections.</p>			
<p>Provider Specific Obligation Obligations are currently unknown. COTA Comment If a complaint against a provider identified a systemic issue within the organisation about being risk adverse, the Regulator could apply a specific obligation on that provider.</p>			

The table above shows that the task of ensuring consistent rights when some regulatory tools do not apply to all service types will be challenging. It is COTA's strong view that of the regulatory tools available in the paper, it is likely that category specific obligations will be necessary to embed the protections contained in Standard 1 (the Person) within the service delivery environments where that standard does not apply. The Statement of Rights which does apply to all areas may be another avenue to uphold consistent rights and plug the gaps in the regulatory framework of the tools discussed in the paper. How the statement is enforced however is critical to assessing the appropriateness of this approach. If it is only enforced via another regulatory tool (e.g. standards, code of conduct), then two key issues are of critical consideration:

- whether the tool that will be used to enforce the statement of rights applies to the situation (e.g. registration categories 1-3 do not include the standard)
- How the tool will have the maximum/broadest interpretation of the narrow words used in the tool, to bring to life the broader protection in the statement of rights

(e.g. will “self-determination and decision making” in the code of conduct, be broadly interpreted to uphold a future hypothetical “right to take a risk” with appropriate enforcement mechanisms that motivated registration categories 1-3 providers to uphold their requirements in a comparable way they would had Standard 1-3 applied to them).

Similar analysis to the above consideration of risk taking should be done against:

- Right to self-manage.
- Ensuring appropriate service delivery for diverse populations (Standard 1.1.2 & 1.1.3).
- Role of family and carers (Standard 1.2.2).
- Supported and Substitute decision making (Standard 1.3.3).
- Transparency and informed consent (Standard 1.4.1-1.4.7).

COTA Australia is concerned that the implementation of the new regulatory framework may diminish some rights for older people particularly the right to take risks and make independent choices and decisions.

The rights of older people using aged care services are not articulated in the obligation’s architecture for the provider registration categories or the risk based approach to provider obligations. All information in the regulatory framework regarding provider responsibilities should reference or demonstrate the relationship with the rights of older people. The focus on a risk based approach does not sufficiently address how rights and the empowerment of older people will be a pillar of the new system.

The draft National Care and Support Economy Strategy refers to “empowerment models of care and support”. The new Aged Care regulatory framework should adopt this type of language.

The intention to make provider obligations and conditions transparent and publicly available is not clear. The introduction of these regulatory obligations that do not apply to all providers, but only to some, will make it harder for older people to know their rights.

COTA Australia proposes a new information tool that is publicly accessible and searchable based on Legal Name, Known as, Site Name and Site Known As, along with any other business name associated in the delivery of services. The registry would contain:

- An acknowledgement of which service category the provider is registered for and thus what regulatory tools apply to that provider,
- A listing of all category specific obligations, and
- A list of all provider specific obligations.

In addition to being a centralised clearing house of obligations, this information should also promote the rights that are required to be upheld by that provider. The information should

be accessible from existing websites such as My Aged Care and the Aged Care Regulator and include:

- The relevant Statement of Rights that are enforced through the relevant regulatory tools applying to that registration category,
- Any category specific or provider specific obligations,
- Links to star ratings, and
- Links to regulatory assessment reports.

Support for older people to know their rights, to enable them to hold workers and organisations accountable and make complaints, is critical. Plain language information must be available through multiple channels not just through an aged care provider.

It is proposed that all registered providers must implement an internal complaints process, incident management system and processes, comply with applicable fees and payments, demonstrate record keeping practices and processes and report specified information. This is an extensive and burdensome list of requirements for a small scale operator providing important but low risk services (e.g. cleaning and/or a lawn mowing company) may act as a deterrent to providing services. This is why we recommend adoption of the NDIS approach to 'unregistered' providers as a key component of the new aged care regulatory system.

COTA Australia recommends the Department of Health and Aged Care establish a central information hub for older people on their rights under the new Aged Care Act and regulatory framework. This would include information on the Statement of Rights, Consumer Rights more generally, Complaints processes, Code of Conduct, dignity of risk, choice and control and self-management.

Implementation challenges and solutions

A major challenge with implementing aged care provider responsibilities or obligations is communicating and demonstrating how the various regulatory mechanisms are used to ensure that the rights of older people using aged care services are upheld.

Currently, without the new aged care legislation being available, it is difficult to fully determine how the Statement of Rights in the new Act, the Code of Conduct, the Aged Care Standards complement each other and whether there are scenarios or case studies where these regulatory tools come into conflict or overlap with each other.

Rights need to be transparent and understood by all stakeholders, particularly older people. They also should be enforceable through clear, efficient and effective regulatory processes. Information on rights under the new model should be publicly available, easily accessible and in plain English.

COTA Australia is concerned that person-centred and rights-based obligations for categories 1 to 3, applied through the Code of Conduct, may not be as effective as obligations for

categories 4 to 6 that will be applied through the Aged Care Standards. The Code of Conduct uses broad language that is potentially interpretable but can cover a wide scope of behaviours and activities. The Standards are comparatively more specific and have been developed over time to address service sector issues.

In the consultation paper, there are examples of how obligations will apply to different providers. However, there are not examples of how the rights of older people using aged care are upheld in different circumstances and scenarios. Regulatory examples from the older person's perspective are needed.

Key risk areas not addressed

A potential long term risk is that, despite the best of intentions, older people will not be empowered to pursue their rights or become active participants in improving the culture of aged care because the regulatory mechanisms are too confusing and complex.

It is important that investment is made in providing information, education and support services to empower older people using aged care services to engage and be participants in continuous quality improvement and to know how to exercise their rights.

Other category specific obligations

Category specific obligations should be regularly updated through reviews of the Quality Standards. Obligations should include requirements for providers to establish mechanisms that enable older people using aged care services to participate in governance, service review and continuous quality improvement processes.

Application and audit of the Quality Standards

In principle, COTA Australia supports the proposed application and audit of the Quality Standards to categories 4 to 6.

The strengthening of the Quality Standards through regular review, that has included input from older people receiving aged care services, provides a robust platform for ensuring that providers meet their obligations.

It is important that the link between the Quality Standards and addressing rights through the Statement of Rights in the new Aged Care Act is demonstrated.

COTA remains concerned about the upholding of rights for service categories 1 to 3.

High quality care

The definition of high quality care in the new Act will be a critical foundation for the new regulatory model and ensuring a rights based approach to care under the new Aged Care Act.

We support the priorities for the definition detailed in the consultation paper. Through our discussions with older people, we have learnt that for many, quality of life is equally as important as clinical support in defining high quality care. Empowering older people to live their best life should be a key theme in the definition.

COTA Australia will continue to engage with older people to further understand what high quality care means to them.

Provider accountability

[View on proposed features](#)

COTA Australia understands and supports the features of proposed approach to provider accountability. The key test will be how the features work to deliver on their intentions. This must lead to:

- A service system that empowers older people to pursue and uphold their rights.
- An active regulator that decisively acts to address poor and negligent service practice and provides engagement and support for person centred care.
- A culture that values complaints as a driver of service improvement and consistently encourages, supports and informs older people in the complaints process.
- Improved data and information about potential and actual risks to older people receiving aged care services resulting in proportionate, timely and effective regulatory action.

[New complaints model](#)

COTA Australia welcomes and acknowledges the commitment to a revised and improved complaints model aimed at playing a key role in shifting the culture and lifting the quality of aged care.

There should be investment in supports that enable older people to understand their rights including the right to raise concerns or complain. Power imbalances should be addressed and the fear of retribution in making complaints removed.

We welcome the establishment of a new Aged Care Complaints Commissioner to oversee the complaints model as a key part of the regulatory model.

It is important that complaints are proactively used to manage risk and prevent poor care.

Key aspects of the complaints model should be:

- Responsiveness, timeliness, and efficiency in addressing complaints and delivering better outcomes for complainants,
- Ensuring transparency of complaints at all systemic and organisational levels to drive accountability,
- Proactive identification and management to prevent vulnerable older people from reaching a state of risk,
- Using root cause analysis to drive continuous improvement, identifying and fixing complaint drivers, and
- Emphasising the recruitment of complaints management staff, at all levels, with the right attitudes, with an aptitude for empathy, problem solving and a willingness to challenge the status quo.

Enforcement mechanisms

The new regulatory model needs comprehensive enforcement powers. When poor and harmful service practice and behaviour occurs, enforcement powers should be effectively used to safeguard and protect older people and send clear messages to everyone as to what is not acceptable.

COTA Australia understands that, under the new regulatory model, the Regulator will be able to select, from a range of enforcement tools, the most appropriate response to a given situation based on the provider's capability and willingness to comply, along with the risk presented. Enforcement powers will mainly be drawn from the *Regulatory Powers (Standards Provisions) Act 2014*.

The broad enforcement powers approach is understandable. It will be critical for clear information to be provided detailing the likely enforcement approach in specific circumstances so that older people and the community can understand how enforcement will work.

We note that civil penalties and additional offence provisions derived from the Regulatory Powers Act are being worked through or under consideration. COTA Australia looks forward to being able to engage with and respond to the details of these enforcement measures.

Restorative justice outcomes

In principle, COTA Australia supports the introduction of the restorative justice approach to complaints and dispute resolution.

Restorative justice can act as an alternative to more adversarial, prescriptive and expensive forms of dispute resolution that may lead to a 'win' for one party but make no contribution to advancing the rights of older people or offer no contribution to service or systemic improvement.

Functionally, our understanding is that restorative justice is a process where all parties come together to collectively resolve how to deal with an offence and determine the implications for the future.

In developing a restorative justice approach, core values or principles will be critical. These could include:

- Healing rather than hurting,
- Listening and learning,
- Respectful dialogue,
- Forgiveness,
- Responsibility, and

- Apology and making amends.

For older people who have a complaint or grievance with an aged care provider or the aged care system, the benefits of a restorative justice approach could be:

- Involvement in a less formal process where their views count,
- An opportunity to have more information about both the processing and the outcome of their case,
- To be able to actively participate in their case,
- To be treated respectfully and fairly,
- To receive emotional restoration, including an apology,
- To potentially receive material restoration, and
- To have contributed to positive changes in aged care system culture at an organisational and systemic level.

The benefits and challenges of a restorative justice approach will need to be fully explored and interrogated. Engagement with older people will be essential in this process.

The test to whether restorative justice works may ultimately depend on the extent to which older people using aged care services feel that the service culture has improved, where their rights are adhered to and where the system is genuinely person-centred.

We look forward to further engagement on the development of this approach and reserve our final position until we have more detail.

[Access to financial compensation \(including the role of the Regulator\)](#)

COTA Australia supports access to financial compensation for older people who are negatively affected by aged care providers that fail to meet their obligations.

We note from the consultation paper that compensation may be available for older people after a conciliation process, or an enforceable undertaking, is accepted by the Regulator. Further information on this is not provided.

We also note that additional compensation pathways are being explored for older people who suffer harm from a provider committing a serious breach of their obligations and/or failing to ensure that the health and safety of older people is not put at risk. This could include both a civil penalty or and offence provision.

These considerations could include compensation claims, with the assistance of the Regulator, on behalf of a class of impacted individuals or restorative justice options that include some compensation. The regulator should be able to seek compensation on behalf of the affected individual/s, but not on its own/government's behalf.

It is difficult to provide a full response without a comprehensive exploration and determination from the Department on proposed compensation arrangements. The detail of these compensation options should be produced, consulted on and resolved soon.

New model transition

Views on transition arrangements

Older people receiving aged care services should be viewed as a key stakeholder requiring funded support, information and advice during the transition period to a new regulatory model.

The consultation paper gives the impression that transition issues and challenges sit exclusively with providers.

Implementation challenges

A broad implementation challenge will be in demonstrating and communicating how the rights of older people using aged care will be exercised through the various regulatory mechanisms available.

How rights are communicated is important. For example, this consultation paper referenced the new '[Code of Conduct for Aged Care](#)' for aged care workers and linked to a Department of Health website. It in turn linked to the amending rules, which had embedded in it the Code of Conduct. This complicated pathway does not make it easy for older people to understand the regulatory protections for them.

Sector support

Funded education and information support should be available for older people using aged care to understand and exercise their rights in the new regulatory model. To support the transition between regulatory frameworks Government should commit funds to older people as self-advocates. Peer to peer support would be an effective way to support and enable older people, and their carers, to transition successfully to a new system. COTA Australia has the skills and experience to run such a program and would be pleased to discuss this in more detail.