



Submission on

**Aged Care Legislation Amendment
(Aboriginal and Torres Strait Islander Aged
Care Commissioner and Other Measures) –**

**Senate Community Affairs Legislation
Committee**

**Prepared by
COTA Australia**

September 2026

About COTA Australia

COTA Australia is the leading national peak body supporting and advocating for older Australians since 1958. COTA (Council on the Ageing) Australia promotes the rights interests and good futures of older Australians over 50.

Our broad agenda is focussed on challenging ageism, respecting diversity, and empowering people to live their best life as we age.

Authorised and edited by:

Patricia Sparrow

Chief Executive Officer

psparrow@cota.org.au

Prepared by:

Corey Irlam

Deputy CEO

cirlam@cota.org.au

David Wright-Howie

Senior Policy Officer

dwright-howie@cota.org.au

COTA Australia

Level 10, Suite 5

276 Flinders Street

Melbourne Vic 3000

www.cota.org.au

Phone:

1300 COTA AU (1300 2682 28)

Contents

About COTA Australia	2
Introduction	5
Schedule 1 - Independence and accountability of the Commissioner	5
Schedule 2 - Aged care system modifications	6
Schedule 3 – Other measures.....	6
Part 1 – Direct care staff member definition	6
Part 2 – Excluding local government elected representatives from being responsible persons	7
Part 5 – Individual contribution rate	7
Part 6 – Refunding overpaid amounts	7
Part 7 – Individuals awaiting means assessment using refundable accommodation deposit to pay for care	8
Part 9 – Requesting information for individual contribution rate determination.....	8
Part 10 – Exclude asset testing on amounts to be paid as a refundable deposit	8
Part 11 – Residential care fees.....	8
Part 12 – Changes to deemed decision framework	9
Part 13 – Recovering overpayments	10
Schedule 4 – Additional review process for certain classification decisions and priority category decisions	13
Scope of decisions that can be escalated	14
Draft Rules should be public before they are made	14
Expertise of the reviewer	15
Professional judgement and criteria for escalation	16
Time for Department to decide an escalation	17
Time for requesting an escalation.....	18
Consent, advocates and communication	19
Allocation, reassessment and date of effect.....	19
Interaction with reconsideration and Administrative Review Tribunal review	20
Terminology, guidance and consumer information.....	20
Clear terminology	20
Clear information about the original decision, escalation outcome and appeal rights...	20

Published guidance and consumer information	21
Conclusion.....	22

Introduction

COTA Australia welcomes the opportunity to comment on the Aged Care Legislation Amendment (Aboriginal and Torres Strait Islander Aged Care Commissioner and Other Measures) Bill 2026.

COTA Australia supports the legislation establishing a full time Aboriginal and Torres Strait Islander Aged Care Commissioner (Schedule 1) and enacting into legislation the temporary provisions enabled through Henry VIII provisions (Schedule 2).

COTA broadly supports the omnibus of amendments in Schedule 3, while seeking additional safeguards and clarification around delegated rule-making (Part 1), review rights (Part 12), and the potential recovery of Commonwealth overpayments from older people (Part 13).

The Government's decision to establish a human escalation pathway for certain aged care assessment decisions is welcomed as a key step in ensuring an assessment system that is able to meet the needs of older people. While a standardised assessment tool can support national consistency, it should not result in outcomes that don't reflect an older person's actual needs, risks or circumstances. The expertise of assessors and clinicians within the assessment process, and in ensuring the right outcomes for individuals, is critical. No algorithm should ignore the professional judgement of clinicians.

Following evidence presented to the Committee inquiries on 22 and 24 September, and in line with our view that we need the simplest and most direct pathway for older people, COTA Australia outlines its preferred position to amend the rules and policies that currently prevent assessor delegates from exercising professional judgement.

In addition, we have provided analysis of the Government's proposed escalation pathway, with departmental approval, outlined in Schedule 4. It is difficult to comment on the given its reliance on as yet, publicly unreleased Rules. The Bill allows the Rules to set additional conditions for accessing the pathway. These conditions could limit access to a pathway that Parliament has deliberately established to provide human review of assessment outcomes. Any additional conditions should facilitate the operation of the pathway, rather than create new barriers to accessing it.

The legislation needs to ensure that where an experienced assessor delegate has reasonable grounds to believe that an assessment outcome does not adequately reflect an older person's needs, circumstances or risks, there is a timely process for a suitably qualified human decision-maker to reconsider the outcome.

Schedule 1 - Independence and accountability of the Commissioner

COTA Australia supports establishing the Aboriginal and Torres Strait Islander Aged Care Commissioner as a statutory Commissioner within the Aged Care Quality and Safety Commission.

Having a statutory footing broadly consistent with that of the Complaints Commissioner under the Aged Care Act 2024 is a sensible approach.

COTA Australia particularly welcomes the Bill's recognition of the importance of Aboriginal and Torres Strait Islander community involvement in the appointment of the Commissioner. We also welcome the requirement for the Commissioner to develop and publish a standalone annual work plan which will provide transparency about priorities and activities and accountability for progress in meeting them.

Overall, the Bill establishes a strong statutory basis for the Commissioner and provides appropriate independence and accountability arrangements.

Schedule 2 - Aged care system modifications

COTA Australia supports the amendments in Schedule 2, particularly those which ensure continuity and certainty for older people as the temporary arrangements come to an end.

Schedule 2 gives ongoing effect to a range of aged care system modifications currently operating through the Aged Care System Modification Rules 2025. The System Modification Rules were made under the temporary time limited modification power in the Aged Care (Consequential and Transitional Provisions) Act 2024 (commonly referred to as Henry VIII power), which allows delegated legislation to modify the operation of primary legislation.

These modifications were introduced to support implementation of the new Aged Care Act and address practical issues identified during transition to the new system. They include provisions relating to assessment and priority decisions, access to funded aged care services, Support at Home funding and subsidy arrangements, individual contributions, and administrative and payment arrangements.

Schedule 3 - Other measures

COTA Australia broadly supports the practical and participant-focused amendments contained in Schedule 3 including: -

- greater certainty for older people while means assessments are being completed,
- strengthening requirements to refund overpayments,
- improving processes before an individual is determined to have means not disclosed, and
- facilitating continuity where residential care providers change.

Several amendments are proposed where further clarification or safeguards are warranted, particularly where substantive matters are delegated to the Aged Care Rules, access to external review may be affected, or Commonwealth debt recovery could extend to older people.

Part 1 – Direct care staff member definition

Part 1 (item 1) would remove the definition of a *direct care staff member* from the Aged Care Act and provide instead that the term has the meaning prescribed by the Rules.

Given the importance of this definition to care minutes and residential aged care workforce requirements, COTA Australia suggests that the Committee establish the Government's clear policy intent for needing a subordinate legislation definition and why a base line definition cannot be retained in the primary delegated legislation.

Part 2 – Excluding local government elected representatives from being responsible persons

COTA supports Part 2 (items 2–3), which excludes elected local government representatives from automatically being considered responsible persons where a local government authority is a registered provider.

This is a sensible recognition of the distinct governance arrangements applying to local government. However, this change should not diminish the fundamental requirement that every registered aged care provider has clear and effective governance arrangements, with appropriately accountable persons responsible for the delivery of aged care.

Part 5 – Individual contribution rate

COTA Australia supports Part 5 (items 14–16), including the introduction of interim individual contribution rates where an official individual contribution rate determination has not yet been made.

Allowing an older person and their provider to agree in writing to an interim rate provides a practical mechanism for care to proceed while the individual's financial circumstances are being assessed.

COTA Australia particularly welcomes the express requirement for providers to refund overpaid individual contributions once the appropriate contribution has been established. The Rules should ensure that refunds are made promptly following an official determination and that older people are provided with clear information about how any reconciliation has been calculated.

It is also important that agreement to an interim contribution rate is genuinely voluntary and does not become a practical precondition to accessing required care.

Part 6 – Refunding overpaid amounts

COTA Australia supports Part 6 (items 17–28), which strengthens the framework for refunding amounts overpaid by older people in residential aged care, including the capacity to require refunds and provide for the payment of interest.

The proposed provisions are sufficiently broad to encompass higher everyday living fees. The Rules should ensure comprehensive and timely refund rights apply across residential care fees and contributions, including higher everyday living fees, where an older person has been overcharged or has paid an amount to which a provider was not entitled.

Part 7 – Individuals awaiting means assessment using refundable accommodation deposit to pay for care

COTA Australia supports Part 7 (items 29–32), which provides greater flexibility for individuals awaiting a means assessment to use their refundable accommodation deposit to meet relevant amounts.

Older people should retain appropriate choice over how they meet their aged care and accommodation costs while administrative processes for determining their means are completed.

Part 9 – Requesting information for individual contribution rate determination

COTA Australia welcomes the additional consumer protection provided by Part 9 (items 38–41).

In particular, the changes to the means not disclosed process provide an important safeguard against people inadvertently being subject to the highest contribution arrangements because they have missed or not understood an initial request.

Part 10 – Exclude asset testing on amounts to be paid as a refundable deposit

COTA Australia understands that Part 10 (items 42–43) is intended to ensure that proceeds from the sale of a person's former principal home used to pay a refundable deposit are appropriately recognised when determining the individual's assets for aged care means-testing purposes. It supports consistent treatment of amounts available to meet an individuals residential aged care accommodation costs. However, the amendment appears to mean that proceeds from the sale of a former home may be counted as an asset for aged care means-testing even where the older person intends to use those proceeds to pay a refundable deposit, but has not yet done so. This could result in the person being assessed as having greater assets, and potentially being required to make higher contributions, during the period between selling their home, completing their means assessment and paying a refundable deposit.

COTA Australia suggests that the Government clearly explain the practical effect of the amendment for older people, including how it changes the treatment of these amounts from current arrangements and how it interacts with the broader treatment of former-home sale proceeds.

Part 11 – Residential care fees

COTA Australia supports in principle Part 11 (items 44–53), including the establishment of a clearer legislative framework for residential care fee advice and requirements for the System Governor to notify older people and providers of relevant fees and contributions, the period to which an amount relates and the date from which it applies.

Clear and timely information about aged care fees is fundamental to an older person's ability to understand and check the amounts they are being charged.

COTA Australia recommends that implementation of these provisions maintain or strengthen existing notification and reconciliation arrangements and provide appropriate protection where a fee or contribution is changed retrospectively.

Part 12 – Changes to deemed decision framework

COTA Australia notes that Part 12 (items 54–55) removes the deemed decision safeguard for System Governor decisions concerning an older person's eligibility, access, classification and priority for aged care without an equivalent alternative safeguard that ensures older people are aware of their review/appeal rights.

Today when the Dept fails to meet their statutory 90 days to make a reconsideration determination, the original decision is affirmed as the reconsidered decision. It is then available to the individual to move onto the merits review process via the ART if they choose. The proposal to remove the deemed decision from the Aged Care Act retains the 90 day decision making timeframe, which enacts Section 16 of the Administrative Review Tribunal Act 2024 (ART Act) to preserve a right to external review where the reconsideration timeframe expires. However, section 266 of the ART Act expressly exempts decisions deemed under section 16 from its ordinary notification requirements.

While the Department could, by policy or process, intend to notify participants that the 90 day window has been passed and they have a right to external review, the current amendments place no legal obligation on the department to do so.

If the Dept makes its decision in the near term after 90 days the proposal to allow it to continue doing so may provide the cleanest and fastest resolution for the older person.

However, the absence of a formal decision taken under the Aged Care Act and the lack of notification requirement under the relevant ART Act sections does not guarantee that the participant would be informed of their right to seek external review by the ART.

The process proposed by these amendments requires the older person to know that:

- the 90-day period has expired, and
- section 16 of an entirely separate Act deems a decision to have been made, and
- this gives rise to a right of ART review, and
- the ordinary period for exercising that right is then 28 days.

An older person should not be required to understand the interaction between two Acts, identify that a deemed decision has been made and independently initiate external review without being notified of that right.

It is our understanding that ART review of an initial classification decision under s 78(1) is fee-free (including reconsideration of that decision), the exemption does not extend to

decisions to either a change to an existing classification under s 83, nor does it extend to priority decisions under s 86, or changes to priority under s 90.

All Aged Care Act decisions that an older person may seek review of by the ART should not be subject to additional fees and costs, consistent with approaches taken for the NDIS or social security. Older people should not face a financial barrier to obtaining external merits review of decisions affecting their access to, or cost of, aged care. This differential treatment is difficult to justify given the vulnerability of many people accessing aged care, and the potentially significant consequences of the decisions being reviewed. The Government should address this inequality.

Part 13 – Recovering overpayments

COTA Australia has no objection in principle to ensuring that the Commonwealth can recover payments incorrectly made to registered aged care providers.

However, Part 13 (item 56), which inserts proposed section 598A, is expressed more broadly and applies to a “person” who receives a payment purportedly made under the Act. COTA Australia is concerned that this could potentially allow debts to be raised directly against older people, including where an incorrect payment resulted from Commonwealth administrative error.

The Government should clarify the circumstances in which the provision is expected to be used, whether an older person could be a recipient against whom a debt is raised, and the extent to which historical payments could be recovered.

If the provision can apply directly to older people, COTA Australia recommends that appropriate safeguards apply, including reasonable limits on retrospective recovery and effective access to waiver or write-off arrangements where recovery would be unfair or cause hardship.

RECOMMENDATION 1 | Strengthen consumer safeguards in Schedule 3

1.1 Insert a new provision requiring the System Governor, where a reconsideration decision has not been made within the 90-day statutory timeframe, to notify the older person in writing within 14 days that the timeframe has expired, explain the effect of section 16 of the Administrative Review Tribunal Act 2024, and clearly advise the person of their right and the process for seeking external merits review by the Administrative Review Tribunal.

1.2 Amend the ART fee arrangements to ensure that all decisions made under the Aged Care Act 2024 that directly affect an older person are eligible for external merits review by the ART without an application fee to the individual.

1.3 Amend Part 13 (item 56) to ensure appropriate consumer safeguards where debts may be recovered from older people, including limits on retrospective recovery and clear waiver or write-off arrangements where recovery would cause hardship.

COTA's preferred approach: assessor delegate override with program assurance

COTA Australia supports a human override that is as simple, easy to understand and closer to the older person and their assessment. New evidence provided to the Senate during its hearings on 22 and 24 September, together with COTA Australia's understanding of the assessment system, highlighted that:

1. The My Aged Care IT system already has functionality that allows an assessor to manually change a Support at Home classification or priority outcome, similar to the functionality currently used for Assistive Technology and Home Modifications (AT-HM). We assume that use of this functionality can, or could, be auditable, allowing overrides to be monitored through program assurance.
2. There appears to be nothing in the primary legislation preventing an assessor delegate from exercising professional judgement to adjust an IAT-generated outcome. COTA Australia considers that legislation should nevertheless provide an explicit, Parliament-endorsed basis for assessors to exercise that judgement.
3. The principal constraints on changing an IAT result appear to be the Rules and administrative requirements, including published and unpublished manuals, guidance and directions, which require assessors to apply the IAT points-based methodology.
4. The Rules and administrative guidance could be amended to permit assessor delegates to exercise a manual override without requiring a separate departmental approval process, as is currently proposed.
5. Appropriate use of that discretion could be managed through program assurance. Override decisions could be monitored and reviewed, with feedback and coaching where an override has not been appropriately exercised and compliance action available where an assessor / assessor delegate repeatedly or deliberately exercises the discretion inappropriately.

The current Support at Home system is resource constrained. Providing some older people with higher-value classifications or priorities may commit available funding sooner, potentially increasing waiting times or extending interim allocations for others.

However, funding constraints should not prevent assessors from using professional judgement to identify when an assessment outcome will not meet a person's needs. If program funding is insufficient to meet assessed need, this should be addressed by

government through program funding and the Budget process – not by restricting individual assessment decisions.

COTA Australia continues to advocate for an entitlement-based system in which all older people receive the services they are assessed as needing within 30 days.

COTA Australia's preferred approach is for:

- The Rules and any published or unpublished administrative requirements, manuals, guidance or directions that prevent assessor / assessor delegates from exercising professional judgement to override an IAT-generated outcome to be amended or withdrawn.
- The exercise of that discretion should be monitored through a proportionate program assurance framework, rather than requiring prior departmental approval of individual decisions.
- The IAT should remain the nationally consistent starting point (until such time it is reviewed and amended or replaced), with the assessor then able to exercise professional judgement about whether its outcome appropriately reflects the older person's needs, circumstances and risks.

RECOMMENDATION 2 | Assessor delegate override with program assurance

Relevant provisions: Sections 76 (classifications), 84-85 (Prioritisation)

- **Amend the primary legislation to expressly empower assessor delegates to override IAT classification and priority outcomes using professional judgement, with decisions monitored through program assurance rather than requiring prior departmental approval.**
- **Require that all Rules, manuals, policies and guidelines that restrict assessor ability override the IAT classification and priority outcomes be amended in line with the changed legislation and or removed.**

Schedule 4 - Additional review process for certain classification decisions and priority category decisions

We welcome the Government's recognition that a human pathway is required where an IAT-generated outcome does not adequately reflect an older person's needs, circumstances or risks.

While the Committee hearings have identified a more streamlined approach to achieving this if Parliament proceeds with the Government's proposed departmental escalation pathway, it should only be introduced as an immediate and interim safeguard while a simpler assessor-led model is developed and implemented. COTA Australia would continue to work with Government and the Parliament to ensure the interim escalation pathway operated as effectively as possible and ensured older people received the right level of services as a result of the assessment process. The following comments and recommendations are intended to ensure that Schedule 4 operates as effectively as possible during that period.

Proposed sections 90A to 90G establish an 'additional review' process under which an eligible approved needs assessor, with the older person's consent, may ask the System Governor to review specified classification or priority decisions. The reviewer may affirm, vary or substitute the original decision. Proposed subsection 90E(6) is an important safeguard because it allows the reviewer to depart from the criteria, methods or procedures that applied to the original decision. Its effectiveness, however, will depend on which decisions can enter the pathway, how the Aged Care Rules define access to it, the expertise and discretion of the reviewer, how quickly decisions are made and how the pathway interacts with allocation and formal review rights. Several of these matters are left to the Rules and should be transparent before the pathway commences.

The legislation needs to ensure that where an experienced assessor has reasonable grounds to believe that an assessment outcome does not adequately reflect an older person's needs, circumstances or risks, there is a timely process for a suitably qualified human decision-maker to reconsider the outcome.

Sunset the Departmental Escalation Pathway

There is a risk that implementing a separate departmental escalation process diverts effort from broader review and improvements to the operation of the IAT, including the role of professional judgement within the assessment process.

This could be addressed by making Schedule 4 an interim safeguard rather than a permanent additional layer in the assessment system. In this way the issues older people are experiencing right now don't go unaddressed while further review and development work occurs.

RECOMMENDATION 3 | Sunset Schedule 4 after 12 months

Relevant provisions: Schedule 4 of the amendment bill

- **Sunset Schedule 4 after 12 months, to enable further developments and improvements to the operation of the IAT, including the role of professional judgement within the assessment process.**

Scope of decisions that can be escalated

Proposed section 90A defines the decisions that may enter the new pathway. As drafted, it covers ongoing Home Support classification decisions and specified priority decisions for Home Support, Assistive Technology and Home Modifications, subject to any additional conditions prescribed by the Rules. This leaves out other assessment outcomes where the same underlying problem may arise: the assessment process does not adequately reflect the person's needs.

RECOMMENDATION 4 | Broaden the decisions covered by the pathway

Relevant provisions: proposed s 90A(1)–(3); related access decisions under s 65

- **Amend proposed section 90A so the pathway can also apply to Assistive Technology and Home Modifications classification decisions, not only priority decisions.**
- **Include access approval decisions under section 65, including access to individual home support service types such as transport.**
- **Include relevant eligibility, access and classification decisions for the End-of-Life Pathway and Restorative Care Pathway.**
- **Do not automatically exclude decisions made through prescribed-circumstances mechanisms where an assessor has reasonable grounds to consider the outcome inappropriate.**

Draft Rules should be public before they are made

The practical scope of the escalation pathway cannot be assessed from proposed section 90A alone. We note:

- Proposed subsection 90A(3) allows the Rules to prescribe additional conditions a decision must meet before it qualifies for escalation.
- Proposed paragraph 90B(2)(b) allows the Rules to prescribe the circumstances in which a request may be made.
- Paragraph 90B(3)(b) permits additional requirements to be included in the request.
- Proposed section 90E allows the Rules to prescribe matters, criteria, methods and procedures governing the review decision.

Taken together, Rules made under these sections risk materially narrowing access to the pathway or make it difficult to use in practice. The rules must be available for scrutiny and discussion before the passage of the primary legislation to ensure clarity as to how the enabling legislation is intended to be used.

Consider, for example, a person being assessed has a carer that is showing signs of burn out. The standard assessment methodology may correctly result in a Level 4 care classification. However, the assessor may form the professional judgement this, at the prevailing service prices, the funding attached to Level 4 will not purchase enough care to sustain the caring relationship and prevent carer burnout. The assessor may therefore consider that a Level 6 classification is necessary to provide an adequate quantum of support. Neither carer burn out nor the gap between package funding and the cost of purchasing sufficient care is necessarily unusual or exceptional. It is therefore unclear whether the proposed pathway would allow the assessor to seek a higher classification in these circumstances, particularly where the assessor is not disputing the assessment methodology itself but considers its outcome will not translate into sufficient care in practice.

We note that the rules would allow restrictions on what types of decisions may be escalated, and those which cant. For example, only some levels of priority may be available for escalation, rather than allowing all levels to be requested and for guidelines to determine why certain priority levels may not be elevated through the escalation pathway.

RECOMMENDATION 5 | Publish and consult on draft Rules before they are made

Relevant provisions: proposed s 90A(3), s 90B(2)(b), s 90B(3)(b) and s 90E(3)-(4)

- **Publicly release exposure drafts of all Aged Care Rules governing the Part 4A escalation pathway and undertake meaningful consultation before the Rules are made.**
- **Clearly identify any conditions that limit the decisions eligible for escalation under subsection 90A(3).**
- **Clearly identify the circumstances prescribed under paragraph 90B(2)(b) and any additional request requirements under paragraph 90B(3)(b).**
- **Clearly identify any matters, criteria, methods or procedures prescribed for the reviewer under section 90E.**
- **Publish the final Rules, with explanatory material showing how consultation feedback has been addressed, sufficiently before commencement for assessors, advocates and older people to understand how the pathway will operate.**

Scope of decisions that can be escalated

Proposed section 90A defines the decisions that may enter the new pathway. As drafted, it covers ongoing Home Support classification decisions and specified priority decisions for Home Support, Assistive Technology and Home Modifications, subject to any additional conditions prescribed by the Rules. This leaves out other assessment outcomes where the same underlying problem may arise: the assessment process does not adequately reflect the person's needs.

RECOMMENDATION 6 | Broaden the decisions covered by the pathway

Relevant provisions: proposed s 90A(1)–(3); related access decisions under s 65

- **Amend proposed section 90A so the pathway can also apply to Assistive Technology and Home Modifications classification decisions, not only priority decisions.**
- **Include access approval decisions under section 65, including access to individual home support service types such as transport.**
- **Include relevant eligibility, access and classification decisions for the End-of-Life Pathway and Restorative Care Pathway.**
- **Do not automatically exclude decisions made through prescribed-circumstances mechanisms where an assessor has reasonable grounds to consider the outcome inappropriate.**

Expertise of the reviewer

The central purpose of the pathway is to provide meaningful human scrutiny where the standard assessment process has not adequately reflected an older person's needs, circumstances or risks. Independence from the original decision is necessary, but it is not sufficient on its own. The person reviewing the assessment outcome must also be able to understand the clinical, functional and other evidence relevant to the older person's circumstances.

Proposed section 90D allows the review to be undertaken by the System Governor or by a Departmental delegate who was not involved in the original decision. It does not expressly require the reviewer to have relevant clinical or other professional expertise.

RECOMMENDATION 7 | Require access to relevant clinical and professional expertise

Relevant provisions: proposed s 90D(3)–(4) and s 90E(3)

- **Require the entry decision reviewer to have, or have ready access to, clinical and professional expertise relevant to the circumstances under review.**
- **Ensure the reviewer can obtain and consider relevant clinical and other evidence where that evidence is necessary to determine whether the original classification or priority adequately reflects the person's needs.**

Professional judgement and criteria for escalation

Appropriate expertise will only improve outcomes if the Rules preserve genuine professional judgement. Proposed paragraph 90B(2)(b) can determine when an assessor is permitted to request escalation, while proposed section 90E can prescribe matters, criteria, methods or procedures for the review itself. These provisions should support consistent decision-making without recreating another rigid formula that prevents professional judgement being exercised.

For classification decisions, the relevant test should focus on whether there is reasonable evidence that the existing classification does not adequately reflect the individual's needs, circumstances or risks. An older person should not have to show that their circumstances are 'significantly different' from other people at the same classification level or satisfy several separate vulnerability criteria before escalation can occur.

For priority decisions, a single significant risk factor should be enough to justify escalation for all priority levels. Relevant factors should include visual or hearing impairment, significant or rapid cognitive decline or dementia, carer stress or burnout and the sustainability of the caring role, and neurodegenerative conditions where these materially affect the person's care needs or risks.

Equitable outcomes including for cost of service delivery being insufficient to provide the necessary amount of care should also be a permitted reason for escalation. This would include for people in rural and remote areas where geography or a thin market means the assessed classification is insufficient to provide the services required for the person to remain safely at home.

RECOMMENDATION 8 | Ensure the Rules utilise professional judgement and equitable access

Relevant provisions: proposed s 90B(2)(b), s 90B(3)(b), s 90E(3)-(4) and s 90E(6)

- **Use a primary test of whether there is reasonable evidence that the existing classification or priority does not adequately reflect the individual's needs, circumstances or risks.**
- **Include relevant all medical and disability factors that are currently overlooked such as visual or hearing impairment; significant or rapid cognitive decline or dementia; carer stress, burnout or inability to sustain the caring role; and relevant neurodegenerative conditions.**
- **Do not prevent escalation solely because higher service delivery costs are involved, particularly where geography or thin markets affect equitable access.**

Time for Department to decide an escalation

The Bill imposes a short timeframe on assessors to refer the matter for escalation, and a timeframe for the Department to notify after a decision is made, but there is no timeframe for the actual decision to be made itself. An escalation pathway intended to address inadequate support, or priority requires a clear timeframe for a decision.

We note that the proposals to remove the deemed decisions of Government from the bill (Schedule 3, Part 12). In addition to introducing a timeframe for the escalation decision by the Department, the retention of the deemed decision framework should also apply to this decision, whereby if proposal via the escalation pathway is not approved by the Department within a timeframe, it is taken to have been made as proposed by the assessor delegate.

RECOMMENDATION 9 | Set a maximum decision timeframe and notify the older person

Relevant provisions: proposed ss 90D–90F

- **Require the additional review decision to be made no later than 14 days after a valid request is received or accepted.**
- **Require the older person to be notified when the request is received and if it is determined not to have been validly made, rather than sending those notices only to the requesting assessor.**
- **Retain the requirement in section 90F for the final decision, date and reasons to be given in writing to both the assessor and the older person.**

Time for requesting an escalation

Proposed subsection 90B(4) requires a request to be made within seven days of the original decision, although the System Governor may allow a longer period.

COTA Australia supports, in principle, a short timeframe for assessors to initiate an additional review, consistent with the purpose of providing a rapid escalation pathway following an assessment. However, we are concerned that the timeframe should not itself become a barrier to escalation. We recommend 14 days instead of 7 days to ensure there is sufficient time for the decision to be communicated and understood, for the assessor to discuss the issue with the older person, gather the evidence required to support the request and, where needed, for a supporter, advocate or clinician to be involved.

Clear and flexible arrangements for allowing later requests where additional time is reasonably required must be included in the Rules. This should include where the older person needs time to understand the decision and provide consent, where an advocate, supporter or clinician needs to be involved, or where communication, health, disability, cultural, language or geographic circumstances cause delay.

Guidance should make clear that the extension power is intended to prevent the seven-day period becoming a barrier to an otherwise appropriate additional review, while maintaining expectations that seven days is the normal rapid review pathway.

RECOMMENDATION 10 | Retain a rapid request period with flexible extensions

Relevant provisions: proposed s 90B(4)–(5)

- **Amend subsection 90B(4) to provide a standard 14-day period for an escalation request.**
- **Prescribe clear grounds for extension up to 28 days (and beyond if needed) in which escalation requests can still be requested. Grounds for extended periods should not be limiting and must include hospitalisation or an acute change in circumstances; remote location or limited telecommunications; the need for additional clinical information; involvement of an independent aged care advocate or supporter; and disability, cognitive, language, cultural or communication barriers.**

- **Clarify whether statutory timeframes are expressed in calendar days or business days.**

Consent, advocates and communication

Proposed paragraph 90B(2)(a) appropriately requires the older person's consent. The way consent is evidenced should nevertheless be proportionate to a pathway that must operate quickly. Requiring separate written consent could delay or prevent otherwise valid requests. The pathway should also recognise that advocates, supporters and representatives may identify concerns and assist the older person to engage with the assessor.

The pathway should also recognise that advocates, supporters and representatives may identify concerns and assist the older person to engage with the assessor. They should be able to raise concerns and ask the assessor to consider escalation, without changing the legislative requirement that the formal request is made by an eligible assessor.

RECOMMENDATION 11 | Make consent and access requirements workable

Relevant provisions: proposed s 90B(2)(a), s 90B(3) and rules made for those provisions

- **Allow documented verbal consent obtained by the assessor to satisfy the consent requirement.**
- **Recognise the role of advocates, supporters and representatives in raising concerns with the assessor and supporting the older person through the process.**
- **Permit telephone and electronic communication, appropriately documented by the assessor or delegate, where this is more timely or accessible than post.**

Allocation, reassessment and date of effect

Proposed Part 4A does not expressly address whether allocation and service access continue while an additional review is underway. It should be clear that an older person does not lose the benefit of the original classification or priority simply because an assessor is seeking a more appropriate outcome.

Proposed subsection 90F(3) also gives the reviewer flexibility over the date on which a varied or substituted decision takes effect. Where the review corrects the original classification or priority in the older person's favour, the person should not lose their place in the allocation process because the correction occurred later. The more favourable outcome should ordinarily take effect from the date the original decision took effect for allocation and waiting-time purposes. The legislation should also clarify how ordinary reassessment operates where circumstances change during or after the escalation process.

RECOMMENDATION 12 | Protect allocation, reassessment and the effective date of a more favourable decision

Relevant provisions: proposed s 90F(3), s 90G(1) and related allocation provisions

- **Confirm that the original classification, priority and resulting allocation processes continue while an additional review is underway.**

- Where the review results in a more favourable classification or priority, require it to take effect from the date of the original decision for relevant allocation and waiting-time purposes, unless an earlier date is not legally available or would disadvantage the older person.
- Clarify how ordinary reassessment operates during and after the additional review, including where the person's circumstances change while the review is underway.

Interaction with reconsideration and Administrative Review Tribunal review

Proposed section 90G creates a difficult interaction between the new pathway and the existing merits review framework. Under paragraph 90G(2)(a), a later reconsideration is undertaken by reference to the original decision, even where the additional review has already varied or substituted that decision. This can leave the older person dealing with different operative and review decisions at the same time.

For example, if an original Level 1 classification is changed to Level 4 through the escalation pathway and the older person seeks Level 8, the reconsideration process would still proceed by reference to the original Level 1 decision. That structure is difficult to explain and risks generating correspondence that appears inconsistent. COTA Australia supports the protection in subsection 90G(4), which preserves a more favourable escalation outcome where a reconsideration decision would otherwise be less favourable.

RECOMMENDATION 13 | Align the escalation outcome with ordinary merits review rights

Relevant provisions: proposed s 90G(1)–(5), particularly s 90G(2)(a) and s 90G(4)

- **Amend paragraph 90G(2)(a) so that, where an additional review varies or substitutes the original decision, the varied or substituted decision becomes the decision to which reconsideration and subsequent Administrative Review Tribunal rights attach.**
- **Retain the protection in subsection 90G(4) so that an older person does not lose a more favourable escalation outcome because of a less favourable reconsideration decision.**

Terminology, guidance and consumer information

Clear terminology

The terminology used for the escalation pathway should distinguish it clearly from the existing reconsideration and external review framework. 'Additional review' sits alongside statutory reconsideration and Administrative Review Tribunal review, while 'prescribed entry decision' is a technical term that does not readily describe the classification and priority decisions to which the pathway applies. Plain and consistent terminology should be used wherever possible.

Clear information about the original decision, escalation outcome and appeal rights

There is a separate communication problem if proposed section 90G remains in its current form. An escalation decision may vary or substitute the original decision and become the

decision operating for the older person, while paragraph 90G(2)(a) requires a subsequent reconsideration to proceed by reference to the original decision. The risk is not merely technical terminology: the older person may receive one notice explaining that a higher classification now applies and later receive reconsideration correspondence referring back to the lower original classification.

If section 90G is not amended as recommended above, every relevant notice and item of consumer information should clearly identify the original decision, the escalation outcome, the decision currently in effect, the decision legally being reconsidered, the protection in subsection 90G(4), and the person's subsequent Administrative Review Tribunal rights. Correspondence should be coordinated so that older people do not receive notices that appear to contradict one another.

Published guidance and consumer information

Proposed subsection 90E(7) provides that the System Governor may make guidelines relating to the review. Given the complexity of the pathway and the number of operational matters left to the Rules, guidelines should be mandatory and publicly available before commencement. They should be supported by plain-language information for older people, families, supporters, advocates and assessors.

RECOMMENDATION 14 | Use clear terminology and require published guidance and consumer information

Relevant provisions: proposed s 90A; s 90E(7); ss 90F-90G

- **Replace 'additional review' with 'redetermination', or another term that is clearly distinguishable from reconsideration and Administrative Review Tribunal review.**
- **Replace or clearly explain 'prescribed entry decision' using terminology that accurately describes the classification and priority decisions involved.**
- **Amend subsection 90E(7) so relevant System Governor guidelines must be made and published before the pathway commences.**
- **If section 90G remains as drafted, require notices and consumer information to clearly identify the original decision, the escalation outcome, the decision currently in effect, the decision being reconsidered and the person's subsequent review rights.**
- **Ensure the Rules, guidelines and consumer information explain who may initiate escalation, the decisions covered, applicable criteria and timeframes, what happens to allocation while a review is underway, when a changed decision takes effect and how reconsideration and Administrative Review Tribunal rights operate.**

Conclusion

COTA Australia broadly supports the Bill and its overall contribution to a stronger, fairer and more accountable aged care system.

Schedule 1 establishes an important statutory foundation for the Aboriginal and Torres Strait Islander Aged Care Commissioner, with appropriate independence, accountability, community involvement and transparent planning.

Schedule 2 appropriately places necessary transitional system modifications on a permanent legislative footing, providing continuity and certainty as the temporary arrangements expire.

Schedule 3 contains a range of practical and consumer-focused reforms, but requires stronger safeguards to ensure that older people are made aware of their rights to access to external review and the potential recovery of Commonwealth overpayments from older people.

Schedule 4 proposes an escalation mechanism that requires the Department to approve the recommendation of a clinician. This presents an approach that would improve the current issues older people experience with the system allocating packages that don't deliver enough services to meet their needs. However, the hearings identified a simpler more direct method to enable clinicians to override incorrect IAT outcomes. This approach would empower the assessor/assessor delegate to use the existing manual override functionality by introducing explicit legislative provisions that direct them to do so. This is now COTA Australia's preferred approach as it does not introduce additional bureaucratic processes removed from the assessor / assessor delegate's expertise.

Should the Government's proposed escalation pathway be adopted:

- a 12 month sunset clause could be added to ensure it is working in the way it's intended; and
- changes are needed to improve its operation.

Its effectiveness will depend on broad and equitable access, transparent Rules, appropriately qualified decision-makers, timely processes, workable consent arrangements and clear interaction with allocation, reconsideration and Administrative Review Tribunal rights.

Taken together, the four Schedules provide an opportunity to improve aged care governance, stability, consumer protection and responsiveness. The Bill should proceed with the amendments and safeguards recommended in this submission so that its implementation reflects a clear overarching principle: the aged care system must operate transparently, protect older people's rights and ensure that decisions affecting their care can be corrected promptly through qualified human judgement.