Aged Care Act Exposure Draft

Key Issues Paper

National organisations working with older people and carers

January 2024

The Aged Care Act Exposure Draft proposes to replace today's current aged care legislation particularly the Aged Care Act 1997 (which largely focused on the regulation and payment of providers) and the Aged Care Quality and Safety Commission Act 2018. The recent Inspector-General of Aged Care Act 2023 will remain separate from the new Act, as will the Independent Hospital and Aged Care Pricing Authority, established under the National Health Reform Act 2011.

The new Act focuses on the safety, health and wellbeing of older people, and put their needs and preferences first. It aims to create a simplified, rights-based legislative framework, with one piece of primary legislation that regulates aged care (the exposure draft) and a single set of subordinate legislation known as the Rules (not yet published for consultation).

The exposure draft contains provisions that outlines:

- the list of Objects and underpinned by a Statement of Rights and a Statement of Principles;
- the rights of older people accessing aged care services, and the role of Supporters and Representatives who assist them;
- the process of entry into the Commonwealth aged care system;
- the obligations placed on registered providers, digital platform operators, aged care workers and responsible persons of registered providers;
- the functions and powers of the System Governor (Department of Health and Aged Care) and the Aged Care Quality and Safety Commission;
- how information will be kept confidential, records will be kept, and data will be shared;
- how decisions will be made and how they can be reviewed.

The Aged Care Royal Commission recognised that the design of the aged care system meant older people and their families had limited power compared to providers and regulators. It proposed a more transparent, rights-based approach to aged care, with stronger regulatory powers to correct this power imbalance.

We are pleased to see that the exposure draft for the new Aged Care Act addresses much of the feedback older people, families, carers, and other representatives provided in our national consultation forums in August and September 2023. The exposure draft reflects 29 of our submission recommendations.

Whilst this is a good start, the current draft of the Act doesn't go far enough to deliver choice and control, transparency, an effective complaints process and

enforceability of rights. This issues paper has been prepared by COTA Australia and OPAN, in partnership with 10 other older people and carer organisations. It presents a preliminary assessment of some of the key issues in the exposure draft. It also proposes possible solutions for older people, families, carers, other representatives, and stakeholders with expertise and interest in aged care to discuss during the exposure draft consultation period. It is not designed to be an exhaustive list and there will be other issues that arise based on the feedback of older people, carers and stakeholders. The paper does not address aspects of the Act we support.

We acknowledge the concern expressed by many people that the period of time for the consultation on the exposure draft has been short and is based on an incomplete version of the proposed Bill. The Bill does not include information on fees and charges, place allocation, critical powers, review of decisions, some parts of banning orders and use of computer programs to make decisions. We welcome the opportunity to provide feedback to the Australian Government before final decisions are taken on these matters. We expect Parliament to conduct an inquiry into the next version of the Bill, which must include the parts of the exposure draft still missing (e.g. fees and charges) and call on the Australian Government to ensure the 'Rules' (subordinate legislation) are available for this inquiry to scrutinise.

The new Aged Care Act needs to be progressed now. It cannot be delayed past 1 July 2024 and is already way behind the implementation timeframe required by the Royal Commission.

Older people have waited too long for their rights to be upheld and the Aged Care Act starts that process. There will be the ability to advocate during the passage of the Bill through Parliament, to review the next iteration and to campaign for future change – but we must get this done, for all older people.

A final analysis of the Bill will be outlined in our older people and carer organisations joint submission in February 2024.

National organisations working with older people and carers

Council on the Ageing (COTA) Australia | peak body for systemic aged care advocacy.

Older Persons Advocacy Network (OPAN) | peak body for aged care individual advocacy.

Association of Independent Retirees (AIR) | advancing the independence of those fully or partly self-funded in retirement.

Carers Australia | peak body representing Australia's unpaid carers.

Dementia Australia | supporting and empowering people living with dementia.

Elder Abuse Action Australia (EAAA) | acting to eliminate elder abuse.

Federation of Ethic Communities' Councils of Australia | peak body for people from culturally and linguistically diverse backgrounds.

napwha | National association of people with HIV Australia.

LGBTIQ + Health Australia | peak body for LGBT and intersex organisations.

National Seniors Australia | advocating for better outcomes for older Australian members.

PICAC Alliance | unified body of Partners in Culturally Appropriate Care (PICAC) funded organisations.

The Returned and Services League of Australia (RSL) | supporting people who have served or are serving in the Australian Defence Force.

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1. The new Aged Care Act must commence on 1 July 2024 and be reviewed every 3 years

It has been 5 years since the Aged Care Royal Commission began and 3 years since it delivered its landmark report recommending the creation of a new rights-based Aged Care Act. Older people shouldn't have to wait any longer for their rights to be respected in aged care.

Whilst we recognise providers already meet many requirements in the proposed Bill as a result of ongoing regulatory reform in the wake of the Royal Commission, any delay to the creation of a rights-based aged care system is unacceptable. The Albanese Government committed to the Act's commencement in this term as one of its key election pillars. Delaying the implementation of the Act beyond 1 July 2024 would put this commitment at risk given an Australian federal election can be called any time from August 2024. Transition arrangements for parts of the Act, or for how it applies to certain aged care service groups, may be considered.

In addition, the new Act must have the capacity to evolve and respond to legislative changes or international conventions where these impact on the Act. The new Act is a major shift away from how the sector currently operates and any issues or unintended consequences need to be resolved early.

Possible solutions

- The Bill to be introduced into Parliament in March 2024 to enable a 3-month review by Parliament.
- The new Rules proposed to accompany the Act to be tabled in Parliament no later than 3 weeks before submissions to a Parliamentary Inquiry close.
- The Act to commence on 1 July 2024 (or as soon as possible thereafter if parliamentary processes cause delays) with some consideration to transition/implementation timelines for new enforcement activities and CHSP.
- A 3-year review of the Act to be embedded within the Act.

2. The Act must take a human rights-based approach with a focus on wellbeing, reablement and quality of life

A human rights-based approach empowers people to know and claim their rights and increases the ability and accountability of individuals and institutions responsible for respecting, protecting and fulfilling those rights.

The objects of this Bill are to ‘in conjunction with other laws, give effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD)’.

However, the new Aged Care Act does not provide a pathway for enforceability of these rights. The Act only proposes that those rights listed in the Statement of Rights are enforceable through the mechanisms in the Aged Care Act.

This means that the current status quo, where people can complain to the UN on breaches of the conventions and the Australian Government can take action, remains. This rarely happens. This falls short of ‘giving effect’ to the full suite of Australia’s obligations under all international conventions.

‘Giving effect’ to Australia’s obligations under international conventions requires additional pathways to be incorporated into the Act. In addition, the Bill is structured around providing services to people who have ‘ill health’ or ‘sickness’. This is important as it strengthens the Bill to ensure it complies with the Australian Constitution. However, using these terms to frame the Bill perpetuates a medicalised deficit model of care. The new Act must also be framed around reablement, rehabilitation, wellness and quality of life.

Possible solutions

- Aged care providers must have a requirement or positive duty to uphold rights. See possible solutions in Issue 3 below for more details.
- The Explanatory Memorandum must clearly articulate that, the objectives of the legislation are to be read in a ‘positive’ not deficit approach. Particular emphasis that services should enhance reablement, wellness and quality of life should be included in the explanation.
- The right to aged care services to be included in the Statement of Rights. There is an obligation on the aged care system to provide services to all older people.

3. Providers must have a positive duty to uphold rights, with pathways for older people to complain if they do not

The new Aged Care Act outlines a new Statement of Rights. These rights are not directly enforceable. Rather rights will be enforced when another part of the Act is not complied with (e.g. the Aged Care Quality Standards are not followed, or the Code of Conduct is not adhered to, or a provider doesn’t do what the Act requires

of them under their registration conditions or other provider obligations). Some rights are not specifically mentioned in the Standards or the Code of Conduct meaning these rights are unenforceable.

A particular area of concern is, that for some types of home care services (Categories 1-3), only the Code of Conduct applies, which does not directly link to the Statement of Rights or a requirement to uphold rights generally. Putting an obligation in the Code of Conduct to uphold the Statement of Rights should be explored.

A system that largely relies on individuals to raise a complaint is inherently problematic, as a result of the power differentials between the older person and the provider. The power imbalance is even more pronounced where the individual is from a diverse or marginalised group and/or has experienced life trauma. One way to address the power imbalance is to ensure breaches of rights have consequences. This can be done by placing a positive duty on providers to deliver rights-based care.

A recent example of a change to an Act to require a positive duty on organisations is the Sex Discrimination Act, following the Jenkins Review. The new positive duty imposes a legal obligation on organisations and businesses to take proactive and meaningful action to prevent relevant unlawful conduct from occurring in the workplace or in connection to work. This change requires organisations and businesses to shift their focus to actively preventing workplace sexual harassment, sex discrimination and other relevant unlawful conduct, rather than responding only after it occurs.

There are 2 requirements for providers in the current Act. The first is to not to do anything 'incompatible' with the rights outlined in the Act. The second is a mechanism where the government has indicated it will require providers to provide information on rights. Neither of these 2 requirements make a provider act in a positive or proactive way with an obligation to uphold rights. We don't feel the current draft is enough.

A better way would be to introduce a new 'positive duty' on providers to uphold rights – using the recent amendments to the Sex Discrimination Act as a model. The new sex discrimination changes were introduced in the workplace because of the ongoing power differential between institutions and individuals. This results in the ongoing abuse of the rights of those individuals and is comparable to the power imbalance that exists in aged care today. Ensuring a positive duty on providers to deliver on the rights in the Act addresses the power imbalance between providers and older people. It also places the onus on providers to

deliver rights-based care, rather than the current proposal that places the responsibility on individuals to make complaints that their rights have been breached.

A corresponding change will need to be made to the role of the Complaints Commissioner so that they have powers to investigate and enforce compliance with the positive duty.

Possible solutions

- Ensure the legislation has an obligation on providers to give plain English, accessible information about their rights, in formats that are appropriate to older people from diverse backgrounds and with visual and hearing impairments. We note section 105 (b) provides a generic requirement to explain information as outlined in the yet-to-be published Rules.
- Section 92 of the Act is amended to require a positive duty on providers to uphold the rights of older people and deliver rights-based care. The amendment should be modelled on recent changes to the Sex Discrimination Act to require a positive duty on employers to eliminate discriminatory conduct.
- A clear complaints mechanism for older people to raise standalone breaches of rights must be included.
- The Act to include or identify appropriate penalties for breaches of rights resulting from poor and neglectful practice and behaviour by providers, government, or regulators.
- Amend the powers of the new Independent Statutory Complaints Commissioner (see Item 6 for more detail) so that they can investigate and conciliate complaints about breaches of rights and refer to the ACQSC matters requiring enforcement of compliance.
- Elevate the Code of Conduct into primary legislation (section 13) to increase prominence and ensure changes are rare.

4. Ensure principles of choice and control, consumer-directed care and self-management are embedded in the Act

It is heartening to see the continued 'choice and control' principles embedded in the proposed Bill.

One of the objectives of the Act is to 'enable individuals accessing funded aged care services to exercise choice and control in the planning and delivery of those

services'. The first right in the Statement of Rights outlines that an older person will be able to 'exercise choice and make decisions that affect the individual's life' including in relation to 'how, when and by whom those services are delivered to the individual'.

These foundational principles are important to ensuring self-management of home care services and principles of consumer-directed care are maintained in the new system. However, these principles are not directly enforceable and there is no available complaints process. In addition, the new Code of Conduct uses different language, and speaks of 'self-determination' which is open to interpretation as to whether it will be enforced with choice and control and self-management principles as they exist today.

Most importantly, the outlined process for an assessment does not sufficiently ensure a co-design approach to service planning for an individual's needs assessment outcomes. While a discussion with the older person seeking to receive aged care services is required under the exposure draft, no mention is made of the required service plan, nor a requirement to co-design that service plan to the point the older person agrees (or otherwise) to receive the services an assessor has identified they need. New powers of the System Governor allow for the use of a computer program to determine automation of decisions relating to AN-ACC classification and for prioritisation of accessing aged care. Future changes may allow for further use of computer systems in other delegated decisions of the System Governor. It is important to ensure the wishes and preferences of older people are included in the design of such decisions. In some cases, the role of the carer during the assessment process will need to be recognised so they are included in the codesign process for a service plan. It is also necessary with any use of artificial intelligence that the system includes measures to build transparency and confidence. Accordingly, regular audits of use of computers to make decisions on behalf of the system governor will be needed.

Possible solutions

- Include the Code of Conduct in the primary legislation. Ensure via drafting note or explanatory memorandum that 'self-determination' is inclusive of 'choice and control', 'consumer directed care' and 'self-management' principles.
- Upgrade section 44 (2) from a discussion to require assessors to co-design the service plan outlining the services that an individual will receive.

- Amend section 47 to ensure the System Governor must have regard to the older person's wishes and preference as expressed in the service plan when making a determination on the approval of access to funded aged care services.
- Ensure all uses of a computer decisions are monitored and audited, with the findings of the audit included in annual reports on the operations of the system.
- Ensure that breaches of rights do not require another type of action (e.g. breach of standards) to make rights enforceable or be raised as a complaint. There must be an option to directly enforce denial of consumer-directed care, choice and control and self-management approaches to the delivery of care in the areas of assessment, care plan agreement and service delivery.

5. Older people can make decisions and receive the support they require to make decisions when they need it

As with all adults, older people have the right to make decisions about the care and services they receive and the risks they are willing to take. The presumption must always be that older people have the ability to make decisions.

It is positive to see the proposed Bill recognises that individual older people have the right to make decisions for themselves and, where they need assistance in making decisions, that the principles of supported decision-making must be followed. In addition, the proposed Bill recognises that the older person's will and preferences must be upheld (i.e. what would the person have decided for themselves if they were going to make a decision). It is also positive to see that Guardians and Powers of Attorney under state or territory law will be given representative status if they ask for it, unless there's a good reason not to.

However, there are limitations in the proposed Bill. Older people cannot have both a Supporter (to help them obtain and understand information) and a Representative (to assist the older person or make decisions in line with their will and preferences when they can't) at the same time.

Where the System Governor may be required to appoint a Supporter or a Representative on an older person's behalf, the System Governor should be required to consider the strength and currency of the relationship of that individual to the older person. If the older person has a relationship with a carer, then the carer must also be consulted.

In addition, there is no requirement for an advocate to be involved if the older person has issues with their Supporter or Representative or has a cognitive impairment and has no Supporter or Representative acting for them. This must be addressed.

Those working in aged care must understand and be required to use supported decision-making principles and uphold the will and preferences of individuals in daily interactions, where a person needs support with decision.

In addition, the description and application of terms to describe Supporters and Representatives are inconsistently applied throughout the Act. These are important concepts for the progress of the Bill and their roles should be clearly articulated.

Possible solutions

- Amend Chapter 1, Part 4, Division 1 to enable an older person to have both a Supporter and a Representative if they so wish.
- Include as a protection for older people that access to an advocate is provided when requested within Chapter 1, Part 4, Division 1 and create a new subdivision on protections for older people.
- Amend the relevant sections of the Bill, so that supported decision-making principles must be used by those working in aged care when working with older people. For example, Chapter 1, Part 4; Chapter 2, Part 2 Division 3; Chapter 3, Part 4, Divisions 1 & 2
- Workers, and others, must be trained in how to know when and how to use supported decision-making, including understanding the impact of ageism on their attitudes to older people.
- Ensure that terminology and responsibilities of Supporters and Representatives is used consistently throughout the Act.
- Amend Sections 374 and 376 to include that the System Governor must consider the strength and currency of the relationship of that individual to the older person when appointing a Supporter or Representative on behalf of an older person. Include that consultation with the older person's carer must be undertaken by the Representative where there is an existing relationship between the older person and a carer.

6. The Complaints Commissioner should have direct independent statutory authority and functions

The Complaints Commissioner must have direct independent statutory authority and functions. They would be a statutory office holder within the Aged Care Quality and Safety Commission (ACQSC), with ACQSC staff continuing to support both the Complaints Commissioner and the ACQS Commissioner and share information between both functions.

The key difference is that the Complaints Commissioner would not report through, or be responsible to, the ACQS Commissioner but operate independently. They should be appointed by, and be reportable to, the minister and have the powers to compel information, participation in the complaints process and certify enforceable undertakings. Having the ACQS Commissioner judged on the performance of providers creates an inherent conflict of interest in relation to complaints and relegates older people to a secondary consideration.

There are some existing models of multiple independent commissioners within an existing authority that could be drawn on, for example the Australian Human Rights Commission, which has multiple independently appointed commissioners, and the Office of the Australian Information Commissioner, which has an independent Freedom of Information (FOI) Commissioner and an independent Privacy Commissioner.

Possible solutions

- The functions of the commissioner section of the Act is separated to provide specific functions and statutory authority to an independently-appointed Complaints Commissioner, with the authority to compel information, participate in the complaints process and certify enforceable undertakings, answerable only to the minister and Parliament.
  The Complaints Commissioner would continue to be part of the ACQSC, supported by ACQSC staff and with the ability to share information with the ACQSC across both statutory office holder functions.
- The complaints section of the Act be re-written to provide more detail on the responsibilities and authority of the Complaints Commissioner, including annual reporting.
- The Act includes a requirement for the ACQSC's budget to include a dedicated line of funding for the new Complaints Commissioner to directly support their functions.

- The Act must make clear the operation of the ACQSC will continue to support and share information between the functions of the ACQS Commissioner and the Complaints Commissioner.

7. The new Complaints Framework must be included in the Act

The Government has confirmed the new Complaints Framework will have restorative outcomes like mediation and conciliation and open disclosure, however not all of these outcomes are included in the Act. The new features of the Complaints Framework must be included in the Act and endorsed by Parliament. If they are only addressed in the Rules (subordinate legislation), they can be altered by the responsible minister at their discretion.

Possible solutions

- All aspects of the Complaints Framework to be reflected in the Act in the relevant sections including Chapter 5, Part 3 and Part 5. This includes:
    - transparency of the complaints process – reports are to be made publicly available
    - legislate restorative justice pathways (including arbitration, conciliation and open disclosure)
    - annual report on the Complaints Commissioner functions
    - ability to publish and report about continuous improvement and emerging insights and intelligence (including in conjunction with the ACQS Commissioner)
- Service-level agreements are published and reported on.

8. Equitable and timely access to aged care services must be guaranteed within 30 days of application

One of the objects of the Act, stated in Object b(3), is to ensure 'equitable access to, and flexible delivery of, funded aged care services that put older people first and take into account the needs of individuals, regardless of their location, background and life experience.'

However, the legislation does not guarantee equitable access to aged care services, including in thin markets. It guarantees equitable access to an aged care assessment. After that, equitable access to service delivery is just a

consideration the System Governor must make. We know people can wait more than 12 months for Commonwealth Home Support Services (CHSP) in some areas. Sadly, some people have died while waiting for services in their local area to help them.

While the System Governor will be responsible for considering equitable access issues, there is no guarantee that services available in one place will be available in another.

Government currently has no timeframes in the legislation for how long they'll take to make various decisions. To ensure people receive timely access to aged care services, we need service-level agreements across all the steps to getting access that add up to less than 30 days from when they apply.

We acknowledge and welcome the inclusion of the emergency provision that enables access to supports without assessment in emergency situations.

Proposed solutions

- Equitable access in the Act is expanded to include equitable access to aged care services regardless of geographic location or need as per Object b(3).
- Relevant sections of the Act be amended, such as in the section on the System Governor, to ensure Object b(3) is embedded in the Act.
- The Act needs to clearly outline a guaranteed timeframe, so the government can work towards funding a system where care and supports are delivered within 30 days of application for aged care.
- Ensure equitable access is a key criterion in public reporting undertaken by the System Governor.
- Embed a legislative requirement that the System Governor must publicly report on quarterly wait times from application through to the assessment, and from assessment to when the services start.

9. Eligibility for early access to aged care services must be expanded

Ageing is not a linear process. As noted by the World Health Organisation: 'At the biological level, ageing results from the impact of the accumulation of a wide variety of molecular and cellular damage over time . . . These changes are neither linear nor consistent, and they are only loosely associated with a person's age in years.'

The Act refers to 'older individuals' but also includes a limited number of people aged 50-64 years (homeless and First Nations people). We envisage the need for some flexibility to take into account exceptional circumstances for some other groups and individuals under the age of 65. We suggest the creation of clear supporting guidance detailing age exception pathways and evaluation of assessment processes and decisions relating to these instances. Examples where there may be a strong case for an exemption to made to the 65-age barrier include some populations who may experience the early onset of ageing-related chronic conditions due to particular personal attributes or medical issues, such as some people living with HIV (not eligible for support under the NDIS) and those who survived war or forced displacement, including some veterans or Forgotten Australians.

Many people in the early stages of dementia do not meet the eligibility criteria for the NDIS but would benefit from access to community-based cognitive rehabilitation and other supports, including carer supports that may prevent or delay their entry to residential aged care. We also note that the disability service system is currently not always able to meet the needs of people living with younger onset dementia, and that they should not be refused access to funded aged care supports if required.

Possible solution

- The section on eligibility be amended so that the Act outlines a clear pathway to approve exceptional cases for anyone who experiences the early onset of aging-related chronic conditions that fall outside the arbitrary age rules.

10. Aged care residents must have an absolute right to visitors in all situations

Current ways of managing visitation are insufficient to balance the psycho-social, physical, and emotional wellbeing needs of older people against actions to prevent infection. We all saw, and too many experienced, the damaging impact of not having visitors through the COVID pandemic. Lockdowns are not just a feature of a pandemic as they are also used during influenza and gastro outbreaks.

Language used in the Bill regarding the right to 'safe' visitation doesn't fix the problem. It wouldn't overcome what we saw during the peak of COVID lockdowns in aged care where rather than providing safe solutions, many providers just said no visitors. Given the recent rise in COVID cases, and increased lockdowns of aged

care homes due to COVID outbreaks, it's critical we protect older people's mental and emotional health and wellbeing by legally ensuring providers can't lock people away from visitors. Though we acknowledge this can still occur with recognition of state and territory public health and emergency orders.

While providers may require visitors to follow appropriate guidelines that ensure the safety of other residents and staff, such rules should be framed around how to facilitate visitations, not when or whether visitations can occur.

Possible solutions

- Amend the Act so that a 'named visitor' chosen by the older person, or their carer or representative where the person is unable to make a decision or has not left directions on who can visit them, can see them even when outbreaks occur.
- Include in the amendment that where a person is palliative or at end-of-life family and close friends can visit and remain at the person's side.

11. The role of Independent Professional Advocates must be recognised in the Act

The existing aged care act includes provisions for the National Aged Care Advocacy Program. The current exposure draft, unlike the existing Act or the NDIS Act, doesn't legislate the role of independent advocates. An 'Independent Professional Advocate' may be defined as an advocate, employed and trained by a provider of a government-funded aged care advocacy program, who works on behalf of the older person and is independent of an aged care provider. In addition, Independent Professional Advocates should be guaranteed right of entry into residential aged care when an older person has requested the support of an advocate, or an advocate is going to deliver education on rights to residents. It's important that the new Act require government to fund an advocacy program and that these advocates roles are protected in the Act to ensure that all organisations in the aged care system, including providers and the ACQS Commissioner, must consider and support their role.

Possible solutions

- Ensure Independent Professional Advocates are specifically named and recognised in the Act.
- Ensure System Governor, ACQS Commissioner, Complaints Commissioner must have regards for professional advocates in executing their functions.

- Ensure the new Act has specific mechanism to fund the National Aged Care Advocacy Program (not simply via a generic grant outlined in the Rules).
- Ensure advocates have the same right of entry as ACQSC staff and that providers have an obligation to educate older people on their rights through facilitating professional advocates to provide education and advocacy support.

12. Diversity must be further strengthened within the Act

We acknowledge and welcome the specific rights that relate to culturally safe, culturally appropriate, trauma aware and healing-informed care within the Act, as well as having individual's identity, culture, spirituality, and diversity valued and supported. However, the only area that identifies what diversity is, is within the Statement of Principles (which do not apply at a provider level) and as a 'note'.

Possible solutions

- That a 'diversity population list' is raised into the Act itself as a clause rather than a note and that new clause is referenced both within the Statement of Rights and the Principles.
- Stronger positive language around supporting diverse needs during the assessment process within the relevant sections.
- The Act be reviewed to ensure that diversity, equity and equitable access are reflected in the relevant sections.
- Section 392 be amended to ensure grant purposes may be funded for specific populations outlined in the proposed diversity population list clause.

13. Disability supports must be explicitly referenced in the Act

The Act should recognise that older people are not seeking aged care simply due to frailty, ill health or sickness but also for disability supports.

The Act is structured around providing services to people who have 'ill health' or 'sickness'. This is important because it strengthens the Act to ensure it complies with Australia's Constitution. However, some older people will need to access the aged care system not because they're sick, but because they have a disability. Government has mandated all people who acquire a disability on or after the age of 65 years get support for their disability from the aged care system. Accordingly, the Act should recognise and respect the reasons why an older person with a

disability is seeking services from aged care, rather than force people with disability to label themselves as 'sick' or 'ill'.

There is also some concern that the deficit model used in the legislation does not set a sufficient benchmark for the aged care system to seek to reable or rehabilitate older people to improve or maintain their functions. This has implications when considering how aged care will deliver programs that improve wellness (as opposed to treat illness), maintain or improve quality of life (as opposed to ensure quality of care) and generally strive to support older people to maintain their independence.

Possible solutions

- Make supports for people with disability over 65 years an explicit reason to access aged care under Chapter 2 – Entry to the Commonwealth aged care system. Changes will also need to be made to relevant key concepts and definitions in Chapter 1.
- That a definition is inserted into the Act to override the ordinary meaning of the words illness or sickness by defining them to include someone who identifies they have or had a disability, regardless of any medical condition. While it is far from ideal to equate disability to illness this may prove a practical workaround.
- Explanatory memorandum should clearly explain the Act's intention and purpose for older people requiring disability supports.

14. Carers must be included within the Act

The recommendations of the Royal Commission regarding carers have been completely ignored in the Bill. In their recommendations on the new rights-based Act, the Royal Commission stipulated:

- Under Recommendation 2: Rights of older people receiving aged care that 'for people providing informal care, the right to reasonable access to supports in accordance with needs and to enable reasonable enjoyment of the right to social participation.'
- Under Recommendation 3: Key principles 'informal carers of older people should have certainty that they will receive timely and high-quality supports in accordance with assessed need.'

Carers are referred to in the Statement of Rights, Clause 11: 'An individual has a right to have the role of persons who are significant to the individual, including carers, be acknowledged and respected.'

The Statement of Principles, Clause 7 provides a bit more detail but again this is simply recognising carers rather than responding to the role that carers play and their needs: 'The Commonwealth aged care system recognises the valuable contribution carers make to society, consistent with the Carer Recognition Act 2010, and carers should be considered partners with registered providers who deliver funded aged care services'. If carers are to be genuinely viewed as partners, then their role and needs should receive support and their role be respected in law.

Therefore, the rights of carers are not protected and nor are they protected in the Carers Recognition Act 2010. The role and needs of carers in supporting older people who receive aged care services must be responded to or addressed.

Possible solutions

- The rights of carers as stipulated in the Royal Commission be included within the Act.
- The Royal Commission identified that 'The inclusion of entitlements for informal carers in the new Act is consistent with the principles expressed in the Carer Recognition Act 2010 (Cth). However, unlike the Carer Recognition Act, the new Act should provide means of enforcing those entitlements.'
- The role of carers and their importance to older people, as well as their needs, should be reflected in the relevant sections of the Act (e.g. assessment should also consider the needs of the carer, including equitable and timely access to respite and other available supports.)
- Carers be legally recognised within the Act.
- Section 392 be amended to ensure grant purposes includes grants to provide timely, equitable support for carers.

15. Providers that state their services are 'high-quality care' must comply and opt-in to an audit against the definition

The definition of high-quality care in the Bill is much better than the original definition given in the Foundations of the Act Consultation Paper. While we recognise that high-quality care is an aspirational goal, there needs to be a way of determining if providers are delivering high quality care.

One option is that a provider can state they are delivering high-quality care only if they meet the requirements in the definition.

The definition of what constitutes high-quality care will also evolve over time. The Bill needs to include a mechanism to enable the definition to change in line with changing societal expectations.

Possible solutions

- Amend the legislation to keep the existing definition in the Act and allow for new emerging definitions of high-quality care to be enhanced via the Rules (to future proof emerging standards of high-quality care).
- The definition of high-quality care be reviewed every 3 years, regardless of the timeframe for the legislated review of the Act.
- Any provider that wants to promote themselves as delivering high-quality care (or any similar words) must voluntarily consent to be measured against, and meet, the requirements within the definition of high-quality care.
- The ACQSC to assess providers who opt-in above to determine whether the provider is meeting the requirements in the definition of high-quality care. Complaints about high-quality care not occurring to be managed by the Complaints Commissioner.
- The definition should prioritise and include references to 'culturally safe and appropriate' services and ensuring staff are 'culturally competent' to deliver quality outcomes for people with diverse backgrounds and life experiences.

16. Providers need to demonstrate an ongoing commitment to service improvement

There is a missed opportunity in Sections 143 to 149 regarding the requirements of providers and the regulatory process, accreditation and compliance. Compliance is important, but this is a baseline measure of whether providers are doing well. There needs to be more of a focus on ongoing (continuous) improvement. For example, are services improving? Are complaints being used in a positive way to improve service delivery? Are providers aiming for high-quality care?

Possible solution

- Amend sections 143 through to 149 so there is a focus on continuous improvement as well as compliance.

17. Act protections should apply to all aged care services – government funded and private

Many consumer protections in the exposure draft only apply to 'funded aged care services' (i.e. services delivered with funding from the Australian Government, including client co-contributions). Older people accessing 'private aged care services' appear to be missing out on critical protections contained in the Statement of Rights, Complaints Framework and Aged Care Standards with their rights limited to basic consumer and contract law.

Accordingly, it appears it will come down to what the individual aged care contract states about the protections offered for any services beyond those that fit within the 'funded aged care services' definition. This is particularly problematic for clients who 'top up' their government-funded aged care services with privately funded additional home care or residential care services.

We want to see full consumer protections and rights for all people across the 'aged care system'.

Possible solutions

- Consumer protections in the Aged Care Act need to apply to all government-funded aged care service programs, including any 'top up' services, when delivered by a registered provider to a recipient of funded aged care services.
- The new Act to provide a mechanism to develop and approve standardised contract templates, with required content, so older people have a consistent format and information and protections under the Act, such as the right to complain to the Complaints Commissioner, and an agreement by the provider to ensure services comply with the same quality and standards that apply to a government-funded aged care service and with the same consumer protections.
- The new Act to provide clear details, in all clauses, on consumer protections for services delivered by associated providers and other privately delivered services with a relationship to the registered aged care provider.

18. The Act must ensure consistent transparency of information

More information about consumer contributions and fees is needed before a full assessment of the new system can occur.

On an initial read we are pleased to see greater transparency in the Bill, that will give permission for more information to be publicly available. However, some clauses are unclear and appear to leave it up to a decision-maker as to whether the information will be made public.

The Bill proposes to protect information that if disclosed 'could reasonably be expected to prejudice the financial interests of an entity'. This is a very broad protection to shield providers from being transparent and accountable.

Proposed solutions

- The relevant clauses in the Act be clarified so that all relevant decisions 'registers' (which record relevant decisions) in the Act must be consistently made public.
- Two registers are established – one about workers and one about providers. All other relevant documents (e.g. coroner's reports) and relevant decisions (e.g. conditions of registration on a specific registered provider) must be included in these two public-facing documents. Historical information must continue to be preserved and published.
- Raise the bar for protected information from 'prejudice' to 'significantly prejudice', and incorporate in the definition public interest test (e.g. insert at the end 'and for which it is not in the public interest to disclose'.
- Ensure the Act has a right for the individual to have access to all their own information. (e.g. 'even if something is deemed to be protected information, it must be disclosed to the individual to whom it relates or their representatives upon request'.)
- A standardised contract template is essential to assist older people to make informed choices. The Act should require the creation of an industry template, approved by the Aged Care Quality and Safety Commission, which will include those items as stipulated in the Rules including Statement of Rights, Terms and Conditions etc.
- A public commitment by the Australian Government to implement a Home Care Star Ratings Program no later than the introduction of Support at Home. This commitment should be made in or prior to the May 2024 budget to provide time for its development.

- Ensure star rating systems and their calculations evolve and mature to build confidence in their reported outcomes.
- The System Governor, Complaints Commissioner and Commissioner should have clear timeframes within which they must make their respective decisions under the Act. These service-level agreement (SLA) should be required in the Act and allow the Rules to outline the specific SLA timeframes. Currently the Act only includes timeframes for when a response will be sent once a decision has been made. Reporting how often the decision met the SLA timeframe should be reported as part of the System Governor, Commissioner and Complaints Commissioner's annual reports.

19. Fees, contributions and government funding must be fully transparent, fair, equitable and provide quality services – Responding to the Aged Care Taskforce Recommendations

Means testing, subsidies and payments and fees are critically important to older people who use, and will use, aged care services. This is particularly important as user contributions are likely to be increased in the future. However, the legislation's Chapter 4 on fees payments and subsidies was not included in the Exposure Draft legislation, while government considers its response to the Aged Care Taskforce's report and recommendations.

The departmental consultation paper on the Exposure Draft of the proposed Bill states that:

'Provisions in this chapter are generally expected to mirror the current legislative framework. This is because it is anticipated that funding under the new Act will remain largely the same until the introduction of Support at Home.

'Minor changes will be made to resolve issues within the current system and to align it with the new Act's structure and terminology. The provisions will also be presented differently in the new Act and form part of a new, clearer subsidy framework.

'More significant changes to funding and means testing arrangements will be considered once the government considers the recommendations of the Aged Care Taskforce.'

The lack of public information and content in the exposure draft currently erodes confidence in the new legislation and makes it difficult for stakeholders to offer significant feedback.

Older people need to know, and be reassured, that government funds and participant contributions are not being used by providers to gain excess profits. Public reporting should detail the level and proportion of funding spent on care services and aged care system requirements and if any funding is diverted to private corporate or shareholder trusts.

A review and critique of the Aged Care Taskforce's recommendations will be completed once released in early 2024.

Possible solutions

- Review government decisions related to Aged Care Taskforce recommendations in the Bill as part of the Senate inquiry.
- Maintain current measures of transparency and enhance these in the Bill so that it is clear where funding goes to and what it is expended on.
- The Act must state that funding and any co-contributions and/or fees are used for the purpose they are given and are linked to the delivery of high-quality care and that must be publicly reported on.

20. Language needs to be consistent and easy to understand

As it is currently drafted, the legislation is inconsistent in its references to 'mental', 'mental health' and 'cognitive' and should be reviewed in its totality to ensure a consistent terminology is applied. The International Classification of Diseases-11 applies a hierarchy in which 'mental conditions' encompass cognitive, biological, psychological or developmental dysfunction, while 'cognitive' and 'neurocognitive' conditions refer specifically to processes related to attention, memory, judgment, reasoning, problem solving, decision-making, or comprehension.

Possible solution

- Given the high proportion of people living with a cognitive impairment in the aged care system, it is recommended that the definition of 'care needs' (s7 definition parts (a) and (b)) are amended to include both 'mental' and 'cognitive'. This will reflect consistency with references in the definition of high quality care subclause v, and in the Statement of Principles 3 (d).

21. Better protections for older people on the use of Restrictive Practices

The starting point of the NDIS Act is that there are no restrictive practices. Then, if these are needed, there are processes to independently authorise, implement and monitor the use of restrictive practices. Older people must have the same starting point. There is no justifiable reason for older people to be treated differently simply because of their age. This is ageism.

The labelling of restrictive practices as a last resort is insufficient to protect older people and ensure that they are protected from their use. Restrictive practices should not just be a last resort, but also be proportional to the risk of not undertaking these practices. Review requirements on the ongoing use of restrictive practices must also be put in place.

In addition, the requirement for a behaviour support plan should be explicitly stated in the Act rather than the current generic 'the use of restrictive practices is documented.' Representatives must also be included in discussions on the use of restrictive practices.

There needs to be clarification of the difference in using anti-psychotic medicines to treat mental health conditions and/or psychiatric symptoms that may manifest in dementia, and its use as a restrictive practice. When used appropriately for diagnosed mental illnesses, antipsychotic medications can benefit people. However, where they are inappropriately used as a chemical restraint, they can cause significant harm.

Possible solutions

- Amend section 17 restrictive practice requirements so that:
    - review requirements and timeframes are included
    - the requirement for a behaviour support plan is explicitly stated
    - representatives are included in discussions and decisions around the use of restrictive practices.
- Ensure the Rules provide clear guidance that some people with cognitive impairment can benefit from access to pharmaceutical interventions that could be deemed a restrictive practice with appropriate protections and reviews in place.

22. New security of tenure provisions must be included in the legislation

The current aged care act provides for security of tenure where, once an aged care provider accepts a person as a resident or client, there are limited grounds for them to cease services. The current law for residential aged care services associates those provisions to the specific room/bed that the person is accepted into. This means that if there are egregious examples of abuse, including sexual abuse, the aged care provider has limited options to relocate residents into a solution that protects victims of abuse.

It is appropriate that the provider be prevented from automatically removing an older person who may be the aggressor of abuse, especially noting the unique challenges around people experiencing dementia, or cognitive decline, who may not have a usual understanding of their actions.

To balance competing rights of aggressors and victims of abuse, providers should continue to have obligations to all older people, but it is appropriate, in exceptional and extraordinary cases (such as where abuse occurs) and where an agreed outcome cannot be reached, that a pathway (and independent supports/advocacy) to balance the competing rights of all parties including the forced suspension of an individual's security of tenure is available.

Possible solutions

- Security of tenure provisions be included in the Act with the Rules outlining the detail of the processes modelled on the current laws.
- A new provision should be included that allows a provider to apply to the ACQSC to have an individual's security of tenure provisions suspended in exceptional and extraordinary circumstances, following failed conciliation outcomes with all parties involved. In considering the application, the ACQSC will have regard to the rights of all parties involved and will require a comparable, timely alternative housing solution before suspending the security of tenure of any individual accessing aged care services.

23. Clearer consultation timelines for the Support at Home amendments to the new Act

It is positive to see one of the new objects of the Act is to enable people to exercise choice and control in the planning and delivery of their aged care services.

However, the lack of information about how self-management will be supported in the new system from 1 July 2024 needs to be addressed. A firm commitment to older people who choose to self-manage their home care that they will continue to have a say about which workers come into their home, at what time, and the nature of the activities that are undertaken is a critical step to respecting and empowering older people to remain in charge of their care.

Further legislative changes in 2025 will accompany the introduction of the new Support at Home program. Consultation on these changes and the proposed amended legislation and Rules will occur over 2024–2025.