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Senate Standing Committees on Community Affairs
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Parliament House
Canberra ACT 2600

Aged Care Bill 2024 [Provisions]

Thank you for the opportunity to make a submission in response to the Aged Care Bill 2024.

National Seniors Australia (NSA) is the leading advocacy organisation for older Australians. Through our research and advocacy activities, NSA works to improve the wellbeing of all older Australians.

NSA welcomes the release of the complete Aged Care Bill as a further step towards restoring faith in the aged care system. Australians expect a system that delivers quality and safe care, and we hope that the new Act will deliver this.

We welcome the announced improvements as part of the transition to Support at Home, including support for the additional 300,000 participants, reduction in wait times, support for home modifications, and access to assistive technology. While we support the passage of a Bill that will benefit those receiving aged care, we have reservations about the specifics of the Bill.

While we commend the government and opposition for moving this reform forward, the bill must be scrutinised as it passes through Parliament, and the new Act and associated rules must be scrutinised. We implore the parliament to ensure adequate mechanisms within the bill allow for ongoing review and refinement of the bill and rules in the future, including a mechanism for civil society to formally propose rule changes.

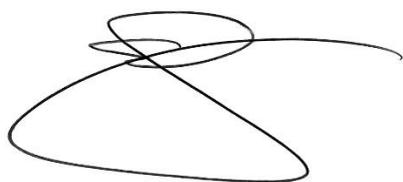
In this regard, we are disappointed with the lack of detail because the many rules under the Act are not publicly available.

We are disappointed the new Complaints Commissioner is not independent of the regulator. We continue to call for this to occur to keep the complaints processes separate from regulation.

While older people accept modest increases in the contributions made to non-clinical care components of aged care are needed, they expect and demand appropriate levels of financial transparency and accountability. In this regard, the draft must bolster transparency and accountability measures to assure older people that the contributions are well spent. As a key public service, aged care should not be a vehicle for profit generation.

As part of this, new rights should be added to the Statement of Rights that confer a right to receiving services commensurate with assessed need and a right to information about a providers' spending of funds. The Act must ensure that public and private funds provided to aged care providers are spent appropriately and that mechanisms exist to demonstrate transparency and accountability publicly.

Yours faithfully



Chris Grice
Chief Executive Officer

Summary of Issues and Concerns

1. Long-term funding certainty for the aged care sector (p. 4)

To fulfil the recommendation of the Royal Commission to fix the systemic problems in aged care funding, a fair and equitable solution to expedite the intended review of the use of RADs is considered.

2. Lack of detail due to absence of Rules (p. 4)

Substantial details necessary to consider as part of the bill are unavailable because the subordinate regulations that will become the rules have yet to be released.

3. New means testing regime is too complicated for consumers (p. 4)

The new means testing is significantly more complex than the existing system and should be simplified.

4. Hotelling costs should come with transparency and accountability (p. 5)

If responsibility for hotelling costs, subject to means testing, will be shifted from the government to residents. In that case, this should be accompanied by transparency from providers about how the money is spent.

5. No requirement to use funds for their specific purposes or right to challenge if a provider is spending funding appropriately (p. 5)

The Statement of Rights and the Statement of Principles are too narrow, and their enforceability is limited. They should be expanded and be able to be investigated by the Complaints Commissioner.

6. Limited transparency regarding the use of public and private funds (p. 7)

Information about how funding is spent should be available and understandable to promote transparency and accountability in the aged care system.

7. New Complaints Commissioner is not independent of the regulator (p. 8)

The Complaints Commissioner is not independent of the Aged Care Quality and Safety Commission. It should be a separate and independent body.

8. The Bill uses the term “may” when instead it should use the term “must” (p. 8)

The Bill gives discretionary powers using the term “may”, whereas “must” should be used to create an obligation instead.

9. The process for transition between levels of Support at Home is unclear (p. 8)

People receiving aged care should have greater certainty during the process of changing Support at Home classification levels.

10. ‘No worse off’ principle and carve-outs (p. 9)

Due to carve-outs from the ‘no worse off’ principle, which isn’t in the bill, people may need to make new and higher contributions. Material released publicly should adequately inform people about these changes.

11. Mechanisms to review and improve the Act are not adequate (p. 10)

The planned review of the Bill is too far in the future. It should be brought forward and be a regular process.

1. Long-term funding certainty for the aged care sector

Following from our earlier [submission](#) in response to the Taskforce, and echoing the recommendation of Commissioner Pagone, NSA believes that if the Aged Care Bill 2024 (the Bill) is to lead to once in a generation reform of the aged care sector, then it needs to provide long-term funding certainty.

The Royal Commission emphasised the systemic issue of insufficient and insecure funding, which was subject to the fiscal priorities of the Australian Government. However, the proposed Bill needs to address this critical problem. It proposed a shift in funding responsibility for residential care from the government to residents and introduced new funding from changes to the Refundable Accommodation Deposits (RADs), with a potential phase-out by 2035. This approach risks undermining what the government described as "once in a generation" reforms and merely deferring the challenging funding questions down the road.

We are committed to supporting an aged care levy in line with the Royal Commission's recommendation. However, in light of Commissioner Pagone's statement about the need for more time to consider the levy's design and to avoid delay in implementing the new ACT, we are dedicated to finding a fair and equitable solution to expedite the intended review of the use of RADs.

2. Lack of detail due to the absence of Rules

A fundamental difficulty in reviewing the new Aged Care Bill, including the proposed means test changes, is the absence of subordinate legislation (the Rules). This task is made worse by significant omissions from the available material and potential errors in the drafting. Additionally, the concise time frame required to respond to the bill only allows a partially considered response.

Examples of these issues include:

- The Bill and Explanatory Memorandum lack specific details on calculating the Support at Home means test. More clarity on this aspect is necessary for better understanding and transparency.
- The Explanatory Memorandum does not provide dollar values for all four income thresholds. As a result, it is not possible to calculate the means test for incomes above \$95,400.
- There may be a drafting error in Section 319, Step 11.

3. New means testing regime is too complicated for consumers

The new means testing is significantly more complicated to understand, contradicting earlier recommendations. Recommendation 5 of the Taskforce was for aged care co-contributions to be "fairer, simpler and more transparent" so that people navigating the system for the first time, at a difficult point in their lives, can understand their decisions. The new means testing approach, which

includes 14 steps, 10 thresholds or areas, and various contributions and supplements, is complex and may benefit from further refinement.

Given the Support at Home means test intends to draw heavily on the Age Pension means test, we question why the same cannot be applied to means testing for residential care.

The government should consider unifying the means testing regimes so that people can more easily understand how much they will be asked to pay for their care. For instance, it is illogical to have an Age Pension means test that operates differently from an Aged Care means test in that one uses the higher of either of the tests and the other a combination of assets and income.

4. Hotelling costs should come with transparency and accountability

One area of concern regarding spending transparency is the shift of hotelling costs from the government to residents. The hotelling contribution represents a significant shift of funding responsibility from the government, which has a range of oversight powers, to consumers whom the aged care system has let down in the past. Additionally, it is not included in the calculation of the lifetime cap.

As the hotelling supplement focuses on non-clinical care, the existing mechanisms for reporting care minutes and care quality need to be revised. Considering the government's and residents' significant funding, the proposed changes should include enhanced financial reporting for residential aged care. This would provide transparency and ensure that residents are informed about allocating the funds they must pay.

5. No requirement to use funds for specific purposes or right to challenge if a provider is spending funding appropriately

The focus on transactional issues related to aged care is limited despite these being significant concerns for older Australians. According to NSA's research, older people are apprehensive about financial transparency and accountability by providers. Addressing these concerns is crucial, especially considering that the bill increases the amount some users must contribute when receiving aged care services.

The Statement of Rights does not include a right to receive services commensurate with assessed needs nor any right for older people to access information about how funding is spent to meet assessed needs.

At best, individuals have the right to access clear and comprehensive information about the costs of aged care services:

S23 (6) states *An individual has a right to seek and be provided with records and information about the individual's rights under this section and the funded aged care services the individual accesses, including the costs of those services.*

S23(6) ensures individuals have the right to access records and information about funded aged care services. However, it's important to note that this right does not extend to knowing how these funds are allocated or whether they align with an individual's assessed needs.

According to S348 (4), the Complaints Commissioner must consider the rights granted under the Statement of Rights.

(4) In performing the functions mentioned in subsection (1), the Complaints Commissioner must:

(b) take into consideration the rights under the Statement of Rights, wishes and views of individuals accessing funded aged care services.

We believe the Statement of Rights should be expanded to include a right to receive services commensurate with assessed needs and a right to information that outlines a provider's spending in accordance with assessed needs.

We propose the inclusion of the following rights in the new Act under:

Statement of Rights S23(2)

Equitable access

(3) An individual has a right to:

(d) funded aged care services being delivered to the individual:

*The inclusion of **(iv) that are commensurate with assessed need.***

S23 (5) Respect for privacy and information

*The inclusion of S23**(7) An individual has the right to seek and be provided with records and information related to a providers' acquittal of funding for their care services.***

The Statement of Principles should be broadened at S23(8) to include "**to reflect this right to information**".

This amendment will provide the legislative means for the Complaints Commissioner to investigate providers' spending thoroughly in response to complaints. It will also serve as a clear reminder to providers that prudent financial management is essential in operating any aged care service.

To ensure effective oversight, it may be beneficial to expand the Complaints Commissioner's authority to gather information pertaining to complaints where either of the Statements has yet to be upheld. This expansion should be rooted in the Statements' content rather than the current registration conditions, which set a minimal standard for providers.

6. Limited transparency regarding the use of public and private funds

An ongoing issue with aged care is the lack of transparency and accountability regarding providers' use of public and private funding.

Mechanisms such as Quarterly Financial Snapshots (QFS), Financial Report on the Australian Aged Care Sector (FRAACS), and Dollars for Care are designed to highlight providers' spending (or lack thereof) across key service areas. However, these tools are ineffective in ensuring funds are spent appropriately.

For instance, while the Dollars for Care initiative aims to provide transparency, the current way information is presented makes it difficult to understand. This limits its usefulness for older Australians, their families, and caregivers. As a result, it fails to encourage providers to use funding appropriately and operate efficiently and effectively. This hinders the initiative's goal of promoting transparency and accountability among aged care providers. The information provided should be easy to understand and read so that users can quickly and easily assess if a provider's expenditures on care, food, and wages are adequate.

The Charter of Rights guarantees the right to be informed about an individual's care and services and to access all information about care and services to make informed decisions. There is a fundamental question about whether the information provided is helpful to consumers when selecting a provider. Additionally, there is a larger question about whether competition and choice are appropriate mechanisms to ensure providers manage funds appropriately.

This deference to choice and competition as the primary means of ensuring providers are spending funds correctly is concerning because it places the onus on older Australians and their families to police the aged care system. This Bill, like the existing Aged Care Act 1997, reinforces the idea that competition and choice are central to quality and safety.

Ideally, specific requirements should be included in the bill or subordinate regulations to compel providers to use funds for their intended purposes. Penalties should be in place for providers who do not comply.

7. Complaints Commissioner is not independent of the regulator

In our [submission](#) relating to the exposure draft Aged Care Bill 2023 in March 2024, the NSA called for the functions of the Complaints Commissioner to sit outside of the Aged Care Quality and Safety Commission as an independent, statutory body accountable directly to the Minister. The current arrangement of the Aged Care Quality and Safety Commission (ACQSC) as both regulator and complaints commissioner needs to adequately meet the needs of older people and their supporters who wish to make formal complaints about treatment or services.

There is an inherent tension between the role of regulator and the role of complaints commissioner. This tension can be exacerbated within emerging regulatory models that emphasise education, continuous learning, improvement, and innovation over strict or punitive compliance.

NSA argues that treating the individual complaint mainly as a data point within regulatory learning can be inconsistent with the principle of person-centred care and the individual rights that underpin the new Act. Hence, we continue to recommend that the Bill include an adequately resourced, separate office of the statutory, independent Aged Care Complaints Commissioner.

8. The Bill uses the term “may” when instead it should use the term “must”

In the Bill, the term “may” is used in instances where the term “must” could be used to provide further certainty with regard to the transparency of information.

For example, the following are instances where “may” should be replaced with “must” to ensure adequate information about providers and their performance is provided to the public:

Section 141 Provider Register

*(4) The Provider Register **may** include any of the following in relation 8 to an entity who was a registered provider:*

*(7) The Commissioner **may** publish on the Commission’s website:*

(a) the Provider Register, in whole or in part; or

(b) any of the information entered on the Provider Register.

Section 541 Authorisations of System Governor to use or disclose information for grants, etc.

*(3) The System Governor **may** publish information under subsection (2) in the form of one or more star ratings for a residential care home.*

*Section 545 Information that System Governor **may** publish about particular funded aged care services*

*(1) The System Governor **may** publish information about any of the following matters relating to funded aged care services delivered in a particular residential care home or home or community setting by a particular registered provider:*

9. The process for transition between levels of Support at Home care is unclear

While the Bill includes reference to an individual being able to apply for a classification reassessment *Section 79 Notice of Decision* states, the System Governor must give an individual a written statement of the assessment decision “within 14 days after the decision is made.” It does not stipulate the timeframe between the assessment date and the date the assessment is given to the System Governor; it only states it must be provided “*as soon as practicable after the assessment is completed.*”

To ensure clarity, it would be beneficial to establish a specific timeframe for making a decision after a reassessment is completed.

Establishing a clear maximum waiting period for an individual to receive a reassessment would be beneficial. This would provide assessment teams with clear guidelines for their workflows and create an onus on the government to fund the assessment process adequately. Timely assessments for aged care services are essential, and shorter assessment and decision timeframes for individuals in the hospital system would help alleviate the cost burden of older individuals in hospital settings.

We are concerned by the inclusion of the following wording within S82:

*(5) An application under this section must:
(b) be accompanied by the application fee (if any) prescribed by the rules.*

This implies that an individual could be asked to pay a fee to have the level of care and support reassessed, signalling further user pay within the system. Our concern is that this could reduce an individual’s willingness to apply for increased care and support to meet their needs. Given that home support packages will be split into more levels, this could create a disincentive to step up care levels appropriately. While the wording “(if any)” is included, we will not understand the implications of this until the rules are published. If clinical care does not attract user pay and a change in function requires additional clinical care, then there should be no application fee for assessment or reassessment of needs.

10. ‘No worse off’ principle and carve-outs

The ‘no worse off’ principle featured prominently in the announcement of the Bill and the support materials released by the Department of Health and Aged Care “(DOHA). Yet there appears to be no mention of this principle in the Bill or Explanatory Memorandum. Instead, there are indications of

significant carve-outs from such a supposed blanket protection for people already in the aged care system.

For instance, [Case studies: Support at Home](#) says the principle will ensure that people already in the Home Care Package system will make the same or lower contributions that they would have under Home Care. But in the Explanatory Memorandum it appears that for people paying Home Care Package fees the no worse off principle ends on 1 July 2027 when they will “pay the same co-contributions as new entrants”.

Another carve-out applies to residential aged care. [Case studies: residential care](#) says there will be “no change for existing residents” and “all residents living in residential aged care before 1 July 2025 will not see a change in their accommodation costs or contributions”. But, again, the Explanatory Memorandum shows that this no worse off principle has some exemptions, with existing residential care residents staying on their current arrangements “until they leave care or move to a new provider”.

If the ‘no worse off’ is, in fact, a principle, then it should be reflected in the Bill.

11. Mechanisms to review and improve the Act are not adequate

The Act is proposed to be subject to an independent review after five years of operation. Given the significant changes proposed in the Bill and the haste with which these changes are being implemented, this timeframe needs to be shorter.

A review should be conducted in 2027, allowing time for the new Act to be implemented and for the then Minister to consider their response. There should also be a review every three years after that. The review should ideally occur soon after a general election to avoid politicising aged care as an essential service for older Australians.

In addition, the new Act should include a mechanism for rolling review and improvement to strengthen civil society's capacity to input into the reform process in the future. This would recognise that we are unlikely to get everything right in the very short time the Rules are being created.

NSA proposes that a formal system for review, which allows civil society and other actors the opportunity to propose changes to subordinate rules, be included in the Bill. This would create a transparent system for how significant portions of the aged care system are regulated, noting that only a selection of the Rules are currently available:

- Aged Care Code of Conduct
- Aged Care Quality Standards
- Aged care service list

- Aged care needs assessment tool

This system could operate similarly to the rule change process for the National Energy Rules.

For example, the Australian Energy Market Commission (AEMC) develops the rules under the National Energy Laws, the Australian Energy Market Operator manages the market daily, and the Australian Energy Regulator monitors performance and compliance. Any stakeholder (apart from the AEM) can propose a rule change, which the AEMC opens for submissions and determination.

Along similar lines, the regulator of aged care services, the Aged Care Quality and Safety Commission (ACQSC), should be empowered to consider proposed changes to the Aged Care Rules, accept submissions, and recommend government changes.

These rule changes could be proposed by the Department of Health and Aged Care, the Inspector General of Aged Care, an Independent Complaints Commissioner, providers or provider representative organisations, medical practitioners, organisations representing workers, and, importantly, civil society working with people receiving or impacted by the aged care system.

Conclusion

NSA acknowledges the crucial milestone presented by the introduction of the Bill in implementing much-needed aged care reforms. This development represents a pivotal moment in Australia's journey towards implementing a transformative shift from a provider-centric approach to a comprehensive human-rights-based framework, placing the well-being and rights of older Australians at the forefront.

We are eagerly anticipating the opportunity to discuss our concerns with you in detail and constructively at the upcoming Brisbane hearing.