Submission on new Aged Care Act

1. The draft of the new Age Care Act is an advance on the current Act but further modifications are necessary. A summary of some of my concerns was recently published in *Pearls and Irritations* at https://johnmenadue.com/proposed-new-aged-care-act-leaves-gaps-in-rights/. I have included that piece as an Appendix to be considered as part of this submission.
2. In addition to the concerns raised in that piece and in the Appendix, I have comments about proposed new section 49 and Part 3.

Section 49: long term restriction

3. This section of the Act restricts the System Governor from approving any support where the individual's need is only short term.
4. So let us assume that the individual is already in receipt of care for other long-term needs (e.g. help with cleaning or gardening) and has a fall which does not require admission to a hospital. Their GP considers they may benefit from some short-term physiotherapy as part of a reconditioning program, the aim of which is to prevent further decline.
5. It would seem good public policy to provide support in those circumstances and I recommend that the long-term restriction be removed.
6. Even if the person does require a public or private hospital admission, it would seem a good investment to prevent an individual's decline, in addition to being morally sensible.

Part 3 classifications

7. This part of the Act governs the creation and use of classifications in the payment model. It carries over the old approach to funding both community and residential care, that is an individual is assigned to a class which has a budget attached and the person in the community can be provided services within that budget or the residential care provider is paid the budgeted amount.
8. This type of approach – in the hospital sector called prospective payment as the allocation is set prospectively - was common last century but is probably not best practice now, especially for community care.
9. Unless the allocation is set at the maximum spending possible in each class, which could lead to cost blow-outs, payment policy typically sets the budget for a class at one of the measures of central tendency, such as the mean.
10. But individual needs vary and so there is a risk of adverse selection. Where a provider is large (say in the case of hospital payment), payment policy assumes that this individual variation evens out ('swings and roundabouts') across the cohort of individuals being cared for by the specific provider. This is not the case for many residential aged care providers, nor for community care.
11. Further, providers have an incentive to engage in cherry-picking which may make access harder for people whose needs are at the high end of any expected range of the classification class.
12. A more modern approach, certainly for community care, would have been to fund the approved package of care as approved with retrospective moderation. The revised Act should have considered this type of development.

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[redacted]
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Appendix: Proposed new Aged Care Act leaves gaps in rights (as published in *Pearls and Irritations*, 12 January 2024, at https://johnmenadue.com/proposed-new-aged-care-act-leaves-gaps-in-rights/)

The current Aged Care Act, dating from the Howard Government era and infused with its neo-liberal ideology, is set to be repealed and replaced by a new one, purportedly incorporating a 'rights basis' as recommended by the Royal Commission on Aged Care Quality and Safety which reported in 2021.

The government released a draft of the new Act on December 14, the start of Australia's summer holiday season, with comment due back as we are dusting the sand from our feet mid next month. The draft sets out a new governance framework for aged care, undoubtedly better than the old which, however, is a very low bar indeed.

Unfortunately, it is hard to kill the zombies that stalk the aged care policy corridors. Although some of the right words might now be there, the draft Act is still riddled with the old ideology - of a health department ('System Governor') which is all care but no responsibility, extensive reliance on markets to address consumer needs, albeit with some improvement in regulatory oversight.

What rights?

First the good news. The Act defines quality care in a good way and incorporates a long list of individual rights for participants in the aged care system. These are much needed and welcome advances. In many cases, the rights are carried over into other sections of the Act to shape the governance minutiae, and rights language appears to be scattered randomly through many other sections.

The general phrasing for each articulated right in section 20 is 'An individual has a right to xxx'. Core to the new Act is this focus on the individual as a rights-bearing entity. Appropriately, the Act accepts that individual's choices should be emphasised, recognised, and accepted.

However, the Act appears to ignore the reality that an individual is not a completely free-standing entity, disconnected from their surrounding context. *Pace* Margaret Thatcher, there is such a thing as a community. The draft Act has a Thatcherian individualistic emphasis, founded on a naïve belief in markets which can fix everything, and that government's role is to sit back and weed out the occasional bad apple. This is not good enough.

These fundamental failures are most in evidence in the section on the right to 'equitable access' (section 20 (2)) which states:

> An individual has a right to equitable access to:
>
> (a) have the individual's need for funded aged care services assessed, or reassessed, in a manner which is culturally safe, culturally appropriate, trauma-aware and healing-informed;

and accessible and suitable for individuals living with dementia or other cognitive impairment; and

(b) palliative care and end-of-life care when required.

So, an individual has a right to assessment, and a right to palliative care, but nothing in between. Section 45 provides that the assessment report must be provided to the Health Department 'as soon as practicable', but there is no parallel requirement to provide it to the individual assessed in the same time frame.

Most importantly, there is no right to services to respond to assessed need. There is a weak 'function' assigned to the Department of Health 'to facilitate equitable access to funded aged care services' (Section 132) but no parallel right that needed services exist. Government has effectively washed its hands of any obligation to ensure that people can get the services they need, presumably on the invalid assumption that services will just emerge to respond to demand expressed in a perfectly functioning market. Section 20 does not create a right to information about quality of care that a person might experience, thus vitiating a key assumption that market participants can make informed choices. The idea of a government role in service development is missing from the Act.

The Aged Care Quality and Safety Commission is given a number of functions (section 141), but publishing information about relative quality of care is not one of them. Worse, in a later section (section 322), disclosure of information which might impact on a provider's commercial interests is absolutely protected, with no offsetting consideration about how that protection might impact adversely on consumers' interests.

The draft Act recognises decisions might be automated (Part 7), but nothing seems to have been learned from the Robodebt tragedy, and there is no requirement that decision algorithms are consistent with the Act's right-based principles or any of the other provisions of the Act.

Finally, the new Act smacks of 'rights washing' - high sounding rhetoric is simply there to placate consumers and advocates, allowing providers to continue on their way unimpeded, and government to eschew any role in creating and steering a consumer-focused service system. And this 'rights washing' is up there for all to see. The draft Section 21 of the Act literally provides government and industry with a 'get out of jail free' card: 'Nothing in this (aged care rights division of the new Act) creates rights or duties that are enforceable by proceedings in a court or tribunal'.

Although the government's plan is for the new system to be in place from July 2024, there is still a lot of work to be done in making sure the new Act responds in a meaningful way to the issues raised in the Royal Commission on Aged Care Quality and Safety.