Submission to Department of Health and Aged Care

Re: Exposure Draft of the Aged Care Reform Bill

About Publica

Publica (www.publica.org.au) is a not-for-profit public policy organisation concerned with strengthening family and community relationships throughout Australia. One way of strengthening communities and building connections between the generations is through the involvement of volunteers in developing relationships with the aged, many of whom are lonely and socially isolated. In this context, particularly, Publica has a particular interest in regulation that impacts upon the capacity of not-for-profit organisations to involve volunteers. This is the main focus of its submission on this Bill, but it also discusses the draconian offence provisions that apply to all aged care workers.

The Board of Publica is chaired by Rev. Dr Michael Jensen, and its Executive Director is Dr Patrick Parkinson AM, Emeritus Professor of Law at the University of Queensland.

Executive Summary

By threatening severe punishments for aged care staff, volunteers and boards of not-for-profit organisations if they breach vague and poorly worded offence provisions, or if they are found to have committed offences of strict liability, this Bill undermines its objective of enabling the sector to draw upon a sufficiently skilled workforce and cohort of volunteers.

The threat of heavy fines for aged care staff who breach the code of conduct, first introduced in the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*, is a poor regulatory strategy and needs to be reconsidered. The offence provision is inappropriate as a means of encouraging compliance with a code of conduct that sets standards rather than creating rules. The maximum fine is for an amount greater than the majority of people earn after tax in a whole year. It is a wholly disproportionate response to the identified problem and may deter people from wanting to work in the sector unless they are indemnified or fully insured against legal risk. Such an indemnification policy or additional insurance will add cost to aged care organisations that are already struggling financially. This will impair the Government's objective to promote the financial sustainability of aged care organisations.

The definition of aged care staff includes volunteers of any kind, whether or not involved in direct care, and however limited their time commitment to the organisation. It subjects them to the same draconian penalties as full-time workers for perceived breaches of the code of conduct. The legislation will diminish the lives of people in aged care if it deters volunteers from engaging with the sector, for example by visiting the lonely in residential care facilities.

Particularly concerning is the new provision that threatens volunteers who serve on the boards of not-for-profit organisations with heavy fines or imprisonment in certain circumstances where there has been a failure of care in service provision. The enactment of such offences is very likely to lead to resignations from the boards of not-for-profit organisations delivering aged care, and these organisations may find great difficulty in replacing them with suitably qualified and competent leaders. Several organisations that provide aged care also provide a great range of other social support and caring services. Both state and federal governments rely very heavily on these large, not-for-profit organisations to deliver social services. It follows that damaging the effectiveness and good management of these organisations will have detrimental impacts far beyond aged care.

For these reasons, the offence provisions applicable to individuals other than registered providers need to be reconsidered. There are other ways of regulating the industry, encouraging better management of aged care services and improving the quality of service provision.

Offences committed by aged care workers

The draconian s.118

The proposed legislation does not only impose requirements on registered providers. It also creates offence provisions that apply to individual aged care staff. Section 118 of the exposure draft provides:

> (1) An aged care worker of a registered provider must comply with the provisions of the Aged Care Code of Conduct that apply to the worker.
>
> 2) An aged care worker of a registered provider contravenes this subsection if the worker fails to comply with the provisions of the Aged Care Code of Conduct that apply to the worker.

There is a penalty for breach which is 250 penalty units. Each penalty unit is $313 so the maximum fine is $78,250. That is far more than average yearly after-tax earnings for full-time employees.

This provision was introduced by the present government in the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022.* The Explanatory Memorandum to that Bill provides no justification for the severity of the maximum fine.

Such heavy penalties would ordinarily be expected to have a damaging impact on both recruitment and retention. Aged care staff are not particularly well-paid and many have other employment options.

No doubt, organisations can address the detrimental impact on staff recruitment and retention by insuring personnel against the risk of fines, or agreeing to indemnify them. The increased

expenditure in doing so will drive up the cost of providing aged care services, exacerbating the significant financial pressures the sector is already experiencing. There may well be no commensurate benefit in improving the quality of service provision.

The lack of clarity in the provision

As an offence provision, s.118 is very poorly conceived. It is axiomatic that before someone is subjected to punishment, it must be clear what behaviour the law forbids, or put differently, what exactly it is that the law requires. The court also must be able to know when the law has been broken in order to determine whether an offence has been committed.

The nature of a code of conduct is that it sets standards. There is conduct that clearly meets the standard, and conduct that clearly does not; but in between those two poles is a great range of conduct that falls short of excellence but is somewhere above appalling.

The current code of conduct exemplifies this:

> When providing care, supports and services to people, I must:
>
> (a) act with respect for people's rights to freedom of expression, self-determination and decision-making in accordance with applicable laws and conventions; and
>
> (b) act in a way that treats people with dignity and respect, and values their diversity; and
>
> (c) act with respect for the privacy of people; and
>
> (d) provide care, supports and services in a safe and competent manner, with care and skill; and
>
> (e) act with integrity, honesty and transparency; and
>
> (f) promptly take steps to raise and act on concerns about matters that may impact the quality and safety of care, supports and services; and
>
> (g) provide care, supports and services free from:
>
> (i) all forms of violence, discrimination, exploitation, neglect and abuse; and
>
> (ii) sexual misconduct; and
>
> (h) take all reasonable steps to prevent and respond to:
>
> (i) all forms of violence, discrimination, exploitation, neglect and abuse; and
>
> (ii) sexual misconduct.

Some of these represent clear "do nots", for example (g) and (h); but others set a standard of behaviour and it cannot really be determined where the line falls between legality and illegality. When, for example, can it be said that an aged care worker has not acted with sufficient "respect for people's rights to freedom of expression, self-determination and decision-making"? It is also not clear how serious the breach must be before a prosecution will be launched. Is a once-off failure enough, or must the failure be repeated?

There are various ways to enforce a code of conduct, not least through dismissal of an employee who consistently or egregiously breaches the standards expected. A penal provision seems like

the least efficient and effective way of achieving the desired outcome, as prosecution can be such a cumbersome and expensive process for government and only a proportion of all offences that could be prosecuted are in fact, taken to court, given resource constraints.

The inclusion of volunteers as aged care workers

As the Productivity Commission says in its draft Philanthropy report (*Future Foundations for Giving*, Nov. 2023, p.6), "volunteering at an aged care home…may contribute to social norms, networks and trust that facilitate co-operation within or between groups and promote co-operative behaviour".

Section 10(4) specifically states that the definition of aged care workers includes volunteers "engaged by" the registered aged care provider or an associated provider – for example another organisation that supplies the volunteers. This is a broader definition than in the current legislation. Section 7 of the *Aged Care Quality and Safety Commission Act 2018*, as amended, provides that an aged care worker includes a volunteer "who provides care or other services to the care recipients provided with aged care through an aged care service of the provider". The new definition in s.10(4) does not even mention providing care services.

Anglicare is an example of a large aged care organisation that encourages volunteer involvement. Opportunities to help others include chatting with residents, running a bingo session or sharing their creative talents at a residential aged care home (https://www.anglicare.org.au/volunteer). The involvement of volunteers in this way will no doubt enhance the experience of elderly people in residential care, some of whom would otherwise have no-one at all to visit them. Volunteers may also provide residents with more recreational opportunities than could otherwise be provided.

The definition of a volunteer in the Bill is extraordinarily broad. The current Bill does not have any threshold below which someone is *not* deemed to be a volunteer for the purposes of the law if they volunteer any time at all to an aged care service. Are the members of a choir that comes once a month to sing for the residents classified as volunteers within the meaning of the legislation? It would seem so.

All such volunteers are exposed to the risk, albeit a relatively remote risk, of crippling fines if they offer their time and talents to help people in aged care. The Explanatory Memorandum to the 2022 Bill says that the reason to include volunteers was to ensure that "the Code will apply to a broad range of workers, including volunteers and employees of contractors of approved providers where they provide care or other services to care recipients." It is one thing to require that volunteers be made aware of the code of conduct – that is a reasonable and proportionate regulatory strategy. It is another thing entirely to make them liable for the same huge fines as full-time aged care workers.

Furthermore, organisations engaging volunteers ought morally to advise them that they are at the risk of severe punishment in their volunteer role. The deterrent impact of this on volunteering

could only reasonably be met by providing insurance cover for them against such legal risk. Again, that drives up costs for the organisation.

The draconian provisions relating to board members

Section 11(2) makes clear that members of governing bodies are responsible persons within the meaning of the Act.

Section 119 imposes the same problematic liability for failing to comply with the code of conduct as has already been discussed in relation to aged care workers.

Section 121 imposes various due diligence requirements on responsible persons in terms of ensuring that registered providers "do not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services." There are numerous offences that follow from any failure to exercise that due diligence. For the most part, these are strict liability offences, subject to a defence of having acted reasonably. These offences refer to "conduct", but that word is defined in s.7 as including omissions to act.

It follows from this that a failure of service that exposes an individual resident to a risk of death or serious injury or illness could result in all board members receiving a maximum fine of nearly $47,000 as well as the registered provider being fined (s.120(4); s.121(4)). If the failure results in death, serious injury or illness of an individual, then each board member could be fined up to $156,500, as well as the registered provider being fined (s.120(6); s.121(6)). Both of these are strict liability offences, subject to a defence of reasonable excuse.

Section 121(7) is identical to s.121(6) except that it is defined as a fault liability offence. That is, the prosecution must prove not only that the conduct or failure to act had a causal connection with the death or serious injury or illness of the individual, but that the responsible person was at fault. Presumably this means intentional, reckless or negligent conduct or an intentional, reckless or negligent omission to act. The onus of proof of this would be on the prosecution, but there is still a defence of reasonable excuse, for which the defendant has the onus of proof. This is very poorly drafted. If it is a fault-based offence then the nature of that fault, particularly in relation to omissions to act, must be made clear. There also needs to be a clear explanation of how a defence of reasonable excuse could operate in conjunction with fault-based liability.

The maximum penalty for breach of s.121(7) is a fine of $313,000 or five years imprisonment or both. The quite recent experience of the Covid pandemic will no doubt raise questions in the minds of board members of not for profit organisations that run aged care facilities about whether they are prepared to accept such a severe legal risk. A number of aged care homes experienced multiple deaths as the coronavirus spread among the residents, in circumstances where the organisation received some blame.

In circumstances where the liability is said to be strict (that is arising in the absence of intention, recklessness or negligence), there are limits to what board members can do to protect themselves from liability. Of course, they can be insured or indemnified against such a risk, but the fault-

based offence provision is more concerning. The threat of imprisonment in circumstances where the requisite failure may be one of omission might present too great a risk for a volunteer to take, given that neither insurance nor indemnification will protect against such a risk.

The risk of personal prosecution and the reputational damage that could follow therefrom, may well deter capable people from serving on these boards. This is no doubt an issue already in relation to the 2022 reforms.

Offence provisions as a regulatory strategy

Of course, offence provisions play a role in the regulation of industries or charitable organisations. However, there are reasons for serious concern about the offence provisions in this Bill.

Strict liability offences

The application of strict liability offences to health and aged care workers is inappropriate. Strict liability offences have traditionally been used sparingly, for the obvious reason that no-one should be held liable for committing an offence in the absence of proven fault.

This Bill has nine offences which are wholly or partially matters of strict liability. This regulatory strategy seems to be increasingly adopted by public service departments in Canberra. For example, the ACT's Voluntary Assisted Dying Bill contains no less than 34 strict liability offences according to an analysis by the Australian Nursing and Midwifery Association in its submission on that Bill. Most of these offences are applicable to medical practitioners and nurses who volunteer to do the very tasks that the legislation itself is intended to facilitate – that is, to provide euthanasia. This is a strange way to encourage people to volunteer for such an ethically controversial role.

Strict liability offences have their advantages for regulators, of course. If prosecutors do not have to prove intention or recklessness, then the offence is much easier to prosecute, less time-consuming and therefore cheaper for government. However, regulatory convenience is not a sufficient justification for morally problematic penal provisions. The abundant use of this convenient regulatory strategy can only create tensions between the regulators and regulated and lead to perceptions of unfairness. That may make recruitment and retention more difficult.

Deterring people from working or volunteering in aged care

There are already recruitment and retention problems in aged care, and the requirement to have a registered nurse in a residential facility at all times will no doubt exacerbate the staffing pressures. Most people working in aged care have other choices in terms of employment, given that they have transferrable skills. In a situation where demand for workers exceeds supply, it seems odd to try to drive improvements in aged care by threatening staff with draconian penalties for breaches of the law. It is especially counter-productive to use offence provisions that do not

provide any clarity about when the law might be said to be breached, as discussed above. It also seems most unwise to threaten volunteers with very heavy fines.

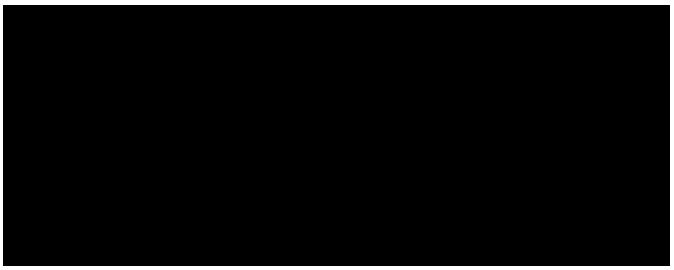
Of course, organisations can mitigate the threat to recruitment and retention by insurance or by providing indemnification guarantees. That is what a rational organisation, struggling to recruit and retain sufficient staff and volunteers, would logically try to do. The main effect will be to drive up costs in a sector that is struggling financially. In a situation where an aged care service is losing money or only marginally viable and regulatory demands are perceived to be excessive, one likely outcome is that the decision will be made to close it.

It is particularly unwise to use draconian offence provisions as a regulatory strategy in relation to the governance of not for profit organisations that rely on having eminent and experienced people willing to serve as volunteers on their boards.

People who volunteer to serve on the governing boards of large not-for-profit organisations providing aged care services (often along with many other services for needy or vulnerable people) are typically highly responsible, experienced and eminent professionals. They volunteer for such roles because they are people of integrity and public spiritedness. Adopting a punitive approach towards them therefore does not make too much sense if the government wants to encourage the most capable people to serve on such boards.

Many of these organisations are very large, having responsibility for hundreds of millions of dollars, thousands of staff, and for meeting the needs of tens of thousands of people. They play a critical role in both state and federal government funded service provision. Governments could not easily do without them.

For these reasons, it is recommended that the regulatory strategy, insofar as it creates offences applying to individuals other than registered providers, should be reconsidered.



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January 2024