

## **AGED CARE EXPOSURE DRAFT No 2**

an exposure draft of the Bill for the new Aged Care Act

### **Feedback**

*January/February 2024*

I am supplying feedback to “*various*” documents relating to The Aged Care Exposure Draft released in December 2023.

I have had a direct involvement in aged care for over 15 years with family members being in residential care and I being a “hands on” legal guardian in relation to their care.

I have also worked full time in SA the area of “Health” for 40 years. Working in emergency medicine I had direct contact with many residents and staff in residential care facilities. This involved assisting and providing care to residents in the facilities, not needing hospitalisation. Also supply emergency management and transport for residents in need of hospitalisation. In a lot of cases supporting nursing staff and care staff in managing residents in the facility and during outbreak of infectious diseases etc Including triaging their needs, caring for and supporting resident to stay in the facility when appropriate. Plus assisting in, arranging Ambulance transport for those needing hospitalisation, due to complex needs.

I have also had many contacts with the Aged Care Quality and Safety Commission during my direct care of my family members.

### **COTA & OPAN Key Issue Paper –**

#### **“Key issues in the Aged Care Act Exposure Draft”**

OPAN and COTA, in conjunction with other advocacy groups/bodies have produced a “Key Issue paper that require some attention and suggested modification to the Exposure Draft.

They have held workshops/ meetings in January 2024 to discuss these with community stake holders. I have read the document and attended online meetings and I support the good work done by these parties. At the same time, I strongly agree with the suggestions documented in their feedback paper.

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.

Without further alterations and adjustments to the Espouser Draft and the Aged Care Act this design will, only take Aged Care “back to the past” and not fulfill the recommendations and findings of the Aged Care Royal Commission, that of the Disability Royal Commission and other recent revies.

**1. The Enforcement of the “Rights” of the older person needs to be greatly protected and legislated in the act.** The Charter of Rights had been updated/change and revised but this meant nothing in the contents of this document. OPAN staff went around Australia to inform people and providers about this document and how it was to be presented to the people in residential care, this did not occur as Aged Care Providers took no notice of the Charter of Rights

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

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 Aged Care Act Exposure Draft.

Delivery of 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.

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

- 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.

#### **4. 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.

#### **5. 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.
- 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.

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

\*\* The proposal for Supporter and a Representative is going to be a nightmare. \*\*

I am glad it proposed for 2025; As much work and input need to be taken to make this work. This is a “pet issue” of mine, having past experience in the requirements under law. working in Health and dealing with my family member needs in aged care.

Each state has different rules and legislation in relation to Powers of Attorney and Guardianship.

Advanced Care Directive and planning have also clouded some of the workings.

In SA a major issue became apparent when the SA Government ceased the Enduring Power of Guardianship document as such and declare them to be Advanced Car directive and such watering down the intent of the past Guardianship Legalisation.

I had personal experience and issues with an Aged Care Provider. Where they used part of the Advanced Care Directive against my wishes and caused harm to my brother who was in care with dementia. Complaints to the Aged Care Commission were fruitless and a waste of time. The Enduring Power of Guardianship had a clear meaning in Health and was well understood. The Advance Care Directives has been an issue in Health due to the nature of the preparation and miscommunication.

SA has had a review of the Advanced care directive many years ago, but no definitive action has been taken to correct issues for health staff. Aged Care Staff have very little understanding of the workings of the Advanced Care Directives in SA.

As a Health profession attending Residential Care Facilities I (we) were endlessly coming up with issues and problems between family members (looking after a loved one) and Residential Staff. (nursing)

Residents have unnecessary suffered and died painfully due to incorrect calls and understanding by aged care staff. This is still an ongoing issue that needs resolution.

Yes, “Supporters” are required, as Representative are sometimes oversea or living interstate and/or have no desire to fulfill their obligation due to many reason.

**Yes, there should be both “Supporters” and Representative - as per state legislation.**

There should also be “no” limits on “Supporters” as long as it does not become too erroneous on the aged care providers in terms of sending or releasing information.

Remembering the older person has the decision-making ability and make the final decision for their needs etc. I have acted as a Supporter for residents that need someone to speak up for them due to power imbalance and them being too sacred to face an issue.

## OPAN/COTA Further Recommendations

### **7. The older person should still have access to an advocate being a supporter or one from an approved government sponsored agency.**

- 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.

### **8. The Complaints Commissioner should have direct independent statutory authority and functions.**

***This is a "no brainer" there has so many issue and problem coming from the lack of a proper complaint resonation process and numerous revies of the Complains Commission.***

***Many reviews and inquiries, including the aged care royal commission has highlighted problems that need urgent correction.***

#### 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.

### **9. 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.

### **10. 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.'

#### Possible Solutions

- 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.

## OPAN/COTA Further Recommendations

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

#### 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.*

### **12. Aged care residents must have an absolute right to visitors in all situations.**

#### 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.*

### **13. 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.

#### 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.

#### **14. The role of Independent Professional Advocates must be recognised in the Act.**

Mentioned previously.

##### 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.

#### **15. Disability supports must be explicitly referenced in the Act.**

##### 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.



## OPAN/COTA Further Recommendations

### **16. Carers must be included within the Act.**

#### 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.

### **17. Providers that (MUST) state their services are ‘high-quality care’ must comply and opt-in to an audit against the definition – YES!**

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. Aged Care Act Exposure Draft – Key Issues Paper 21

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

### **18. 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.

### **19. 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.

## **20. The Act must ensure consistent transparency of information.**

### 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.

**Note:** *My experience has shown that that residents /family member are asked to sign a contract and other documents during their “intake visit” to the aged care residential Care Facility.*

*No opportunity is given for “read time” or to be take it away for investigation.*

*“Care Plans” are also done, and residents/family have very little chance to review these.*

*There are many reasons for this including having to go through a Privacy Officer" request process. Even if ever legislative and legal affect are in place prior.*

*Care Plans are not user friendly and are difficult to understand for the lay person.*

*I used OPAN/ARAS to gain assistance and even they had difficulties in reading my brother's Care plan due it size, print and presentation. I had issue getting a copy because of my knowledge of the system, my medical background, my statements and personal appearance to the Aged Care Royal Commission, my complaints to the Complaints Commission and my advocacy.*

## **21. 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).

**To clarify: I strongly agree with the recommendations of OPAN & COTA as addressed above. I have added some extra detail, references and lived experiences to justify these points & my beliefs/opinions.**

- ***I also participated in a Consultative Roundtable Meeting for Advocates  
(all day online meeting) Wednesday 31<sup>st</sup> January 2024  
Conducted by Australian Government - Department of Health and Aged Care.***
- ***I completed an "online survey" conducted by Dementia Australia (and posted the same on Saturday 3<sup>rd</sup> February 2024)  
Answering their questions and adding my views to specific dementia related issues.***

*I attended various Online Meetings, Workshops, and a “face to face”- Conference COTA/OPAN to discuss Aged Care Reforms*

**\*\* Furthermore, I am currently working on further feedback to the Aged Care Exposure Draft No 2 \*\***

**Completed and posted - Saturday 3<sup>rd</sup> February 2024**

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