Submission on the new Aged Care Act Exposure Draft

Thank you for the opportunity to comment on the exposure draft of the new Aged Care Act. I am making this submission because I believe it is important to draw attention to and place on the public record issues with the draft, not because I have any expectation that the Government will take any action to address these issues.

I say this because the Royal Commission into Aged Care Quality and Safety, made up of two eminent Australians assisted by three KCs, spent over two years and about $100 million, received thousands of submissions, and heard evidence from hundreds of witnesses over many days of hearings, to come up with a set of recommendations about what should be in the new Act and how it should work. In just about every instance the approach suggested by the Royal Commission has been modified, diluted, or simply ignored in the process of drafting the new Act.

For the record, here are five important issues in the exposure draft that should be addressed as the Bill is finalised.

The Act should have high quality care as an object

The Royal Commission recommended that an object of the Act should be to "ensure that older people receive high quality care in a safe and caring environment for dignified living in old age".

This should be unexceptionable – yet the exposure draft does not include high quality care as an objective. The closest it comes is paragraph 5(d): ensuring people using aged care "are free from mistreatment, neglect and harm from poor quality or unsafe care". This is a far cry from ensuring the provision of high quality care.

In a speech on 6 February the Minister for Health and Aged Care boasted that "when you measure healthcare systems across the world, overall, we are the number 3 performing healthcare system". The Minister is clearly asserting that Australia has a high quality health system.

But the exposure draft of the new Act suggests that we will have an aged care system where the standard is that it doesn't actively cause people harm. Imagine if that was the standard we aspired to with health care! "It's not high quality, but it won't actually kill you." Australians expect a better aged care system than that for their parents and grandparents, and for themselves as they age.

Recommendation: *include ensuring the provision of high quality aged care as one of the objects of the Act.*

The Act should include a right to equitable access to services

The Royal Commission recommended a "right to equitable access to care services".

Older Australians needing care will have contributed to the community and society over their lifetimes. If society is going to provide a system of aged care, it should treat people equitably.

The exposure draft includes: "a right to equitable access..." – so far, so good – but it goes on "...to 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".

A right to equitable access to assessment is important. But unless there is a right to equitable access to the services someone is assessed as needing, it is pointless and futile.

Recommendation: *include a right to equitable access to appropriate services after assessment.*

The Act should include a duty to provide high quality care and a compensation regime for people suffering from a breach of the duty

The Royal Commission recommended that there should be "a general, positive and non-delegable statutory duty on any approved provider to ensure that the personal care or nursing care they provide is of high quality and safe so far as is reasonable" having regard to the wishes of the person receiving care and reasonably foreseeable risks.

It then recommended a civil penalty regime for breaches of the duty that also breached the Aged Care Quality Standards and gave rise to harm or a reasonably foreseeable risk of harm, and a compensation regime for persons suffering loss or damage as a result of the breach.

The care-related duty in the exposure draft is a duty to "ensure, so far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety" of care recipients.

So rather than a duty to provide high quality care, the duty is to avoid poor quality care – but only as long as it is "reasonably practicable" to do so.

The exposure draft then goes on to establish a criminal penalty regime for breaches of the duty, rather than a civil penalty regime.

However, an element of the offence is that the breach of the duty "amounts to a serious failure" to comply, meaning it exposes an individual to a risk of death or serious injury or illness and involves a "significant failure or is part of a systematic pattern of conduct".

This formulation means that the DPP will prosecute only the most egregious cases of maltreatment – indeed, I believe the provider involved in the notorious kerosene baths incident may have escaped prosecution under the exposure draft provisions.

Recommendation:

(A) Adopt the Royal Commission recommended framework of a duty to provide high quality care, a civil penalty regime for breaches of the duty that also breach the Quality and Safety Standards, and the possibility of compensation for people suffering loss or damage from the breach.

OR, if the Government really wants the duty to be to provide care that doesn't actively harm people,

(B) Adopt a civil penalty regime for breaches of the duty not to harm care recipients that also breach the Quality and Safety Standards, and the possibility of compensation for people suffering loss or damage from the breach.

The Act should include some powers to assist the system governor to address system failings

The exposure draft provides that the secretary of the Department is the system governor, and in Chapter 5, Part 2 sets out a range of broad functions for the role including facilitating equitable access to aged care; supporting the continuity of services if the delivery of services is disrupted; and promoting the availability of funded aged care services in areas of unmet demand.

Despite these broad-ranging functions, the system governor is given no particular powers to achieve them. The only explicit power conferred on the system governor under chapter 5 is the power to request information or documents from persons – but the person receiving the request is not required to comply with it.

The three functions I mentioned above are all likely to involve some sort of financial arrangement outside the standard framework of subsidies payable under the Act. Under current legislation the Department has sometimes been required to enter into novel arrangements with third parties to ensure continuity of care, and then shoehorn the arrangements into the framework of subsidies payable under the Act. The system governor should have the power to step outside the framework under the Act if this is required to achieve these functions.

Recommendation: *include provisions empowering the system governor to enter into contracts or other arrangements with providers or other bodies if required to ensure equitable access to aged care, support the continuity of services if the delivery of services is disrupted, and ensure the availability of funded aged care services in areas of unmet demand; and providing for the costs to be met from a special appropriation.*

The Act should exclude information about the affairs of providers from the definition of protected information

Section 86-1 of the current Act defines "protected information" as information that was acquired under the Act and is either personal information or information that "relates to the affairs of an approved provider". Section 86-2 then creates an offence (maximum penalty two years imprisonment) for recording, disclosing or using protected information unless authorised by law. In addition, the *Freedom of Information Act 1982* provides a blanket exemption from disclosure under that Act of protected information.

This stringent regime is entirely appropriate for personal information about people applying for or receiving aged care. But it is hard to see the justification for secrecy about the affairs of providers, who are receiving a government subsidy of about 75 percent of costs, and who are allowed to demand interest-free loans of hundreds of thousands of dollars from people seeking care.

At the Brisbane hearings of the Aged Care Royal Commission Professor Ron Paterson (previously engaged by the Government to carry out a review of aged care quality regulation) said:

> "These are publicly-funded providers... who are caring for the most vulnerable members of our community. Why would the default position be secrecy of information about the providers? That strikes me as odd."

The Royal Commission recommended regular proactive publication of a much wider range of information about aged care providers, and also recommended that the blanket exemption from disclosure under the FOI Act should be removed. It would then be up to an FOI decision-maker to balance the public interest in disclosing information about an aged care provider with any potential adverse effect on the provider from the release.

The exposure draft provides that protected information includes personal information and "information that is information whose disclosure could reasonably be expected to prejudice the financial interests of an entity; and is not public; and is not readily discoverable".

While the proposed definition of protected information as it relates to providers is narrower than the current Act, it raises several problematic issues.

Firstly, it is subjective. Every person operating under the Act may have a different view about what information "could reasonably be expected to prejudice the financial interests of an entity". While guidelines could help standardise expectations, it is still a subjective test.

Second, there is a strong likelihood that risk-averse officials will take very wide view of the scope of material that "could reasonably be expected to prejudice the financial interests of an entity",

meaning the definition as applied could be effectively broadened to encompass a wide range of information.

Third, the other side of a ban on disclosing adverse information is that there is no limitation on disclosing positive information. Departmental staff will be able to release freely information about the performance of good providers, while not being able to release information about poor providers. This may result in a distorted view of the performance of the sector.

The exposure draft does not indicate what consequential amendments to other pieces of legislation may be proposed. But if the amendment to the FOI Act simply replaces the reference to the current Act with a reference to the new Act, there will be an automatic exemption from disclosure of any information that "could reasonably be expected to prejudice the financial interests of an entity".

This is not what the Royal Commission recommended, and it will not support informed debate on aged care policy.

Recommendation: *amend the definition of protected information to limit it to information about individuals seeking or receiving care (and their supporters and representatives), and individuals working for care providers (except key personnel).*

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