

- Kathleen Puls

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## **AGED CARE LEGISLATIVE REFORM SUBMISSION**

An interest in health law and aged care has prompted me to respond to the Aged Care Bill 2023 Exposure Draft. I'm a retired nurse with experience in clinical practice and in education. I've taught students in various undergraduate and post graduate programs, and in vocational education courses. I regularly accompanied students on placement in aged care facilities and I observed enormous variation in the quality of care provided. My ongoing interest in aged care was fostered during the years that I was a community ambassador with Advance Care Planning Australia, a role in which I communicated with people providing aged care services, people receiving them and their supporters and advocates.

While the new legislation directed at reforming aged care addresses many of the problems in aged care it still has some way to go before we can claim that we are fully recognising the rights of older people. The fact that the new Act is to commence in July 2024 reduces the opportunity for community participation by limiting the time for interested parties to consider the exposure draft and provide feedback.

The community demonstrates very little trust in aged care. The Royal Commission demonstrated that vulnerable older people were not respected and often not well cared for and sensational media reports of incidents in aged care contribute to the loss of trust.

Significant change, good clear communication and transparency are essential for any rebuilding of trust.

I will not attempt to identify every part of the new framework I am unsure about but would like to raise some of the points that concern me.

## **MORE INFORMATION REQUIRED**

**(1) PRIORITISATION AND PLACE ALLOCATION:** In Chapter 2, ('Entry into the Commonwealth Aged Care System) Part 4, Prioritisation and Part 5, Place Allocation, are still to be drafted. The proposed arrangements are in Consultation paper No.2, but clear information needs to be readily available if there is to be community participation.

**(2) FUNDING:** Chapter 4 'Fees, Payments and Subsidies' is still to be drafted. The Aged Care Taskforce is yet to provide the "advice on funding arrangements for aged care to ensure that the aged care system is fair and equitable for all Australians" that is stated in its Terms of Reference. Consultation Paper no 2 tells us that "provisions are intended to mirror the current legislative framework" but information regarding means testing, subsidies and payments is urgently required so that there is opportunity for informed feedback.

**(3) RULES:** It is concerning that there is no draft of the Rules available yet and Section 413 in Chapter 8 of the Aged Care Bill 2023 does not provide sufficient information. Issues or uncertainties may sometimes be able to be resolved in delegated legislation but the need for transparency and inclusiveness means that it needs to be accessible in time to enable participation by interested parties.

### **(4) CONSUMER DIRECTED CARE.**

There is no reference to Consumer Directed Care in the Draft. The statement of Rights in Chapter 1 says that the individual has a right to exercise choice and make decisions that affect the individual's life including in relation to funded aged care services the individual has been approved to access. This should be clarified as it suggests that the right to independence and autonomy only applies to services approved by others.

## **HOME CARE**

Our population is ageing and care and support will be increasingly provided in the home in coming years. While the new support at home packages will not commence until 2025, it needs to be made clear that all recipients of aged care services have rights that must be respected and upheld, even if the Exposure Draft does not specifically address the rights of those receiving care in the home. More information about the regulation of home care is needed, including information about the right to Consumer Directed Care, which will provide the person receiving care with increased ability to make choices and to have more control over what happens to them.

## **MANDATED REVIEW**

We cannot wait until every possible problem or uncertainty in the new legislative framework is identified and addressed before the new Act directed at upholding the rights of older people commences. However, any part of the new legislative framework that fails or is at risk of failing to protect the rights of the older person needs to be identified and corrected. The tight time frame means review of the legislation will be necessary much sooner than the proposed five years to ensure it is fit for purpose and that its objects are being met.

The significant changes in the regulation of the sector, including increased care provided in the home mean some changes and/or additions will almost certainly be needed, particularly in the early years. A clear obligation to review the legislative framework at least every three years should be included in the Act.

## **STATEMENT OF RIGHTS**

The inclusion of the Statement of Rights in the legislative framework is very welcome, and it needs to be very clear that the rights of those receiving aged care services, whether in residential care or in the home must be respected and upheld. The language used could sometimes be improved, with words such as 'appropriate', 'safe', or 'fair' being replaced with more precise words.

The right to high quality care should also be included in those rights. Chapter 1, Section 20(2) tells us that there is a right to equitable access of assessment of the need for aged care services, but it does not state that there is a right to high quality care to meet those needs. There is no place in aged care (or any other area of health care) for care that is not of high quality and surely it is reasonable to expect that all care provided in the aged care sector would be high quality! However, experience tells me that it is not always so.

## **QUALITY STANDARDS**

It may be suggested that the listed rights already encompass the right to high quality care, and that the Aged Care Quality Standards will ensure that care given is high quality. The Quality Standards have been reviewed and strengthened and will come into effect when the new Aged Care Act commences but Quality Standards do not in themselves guarantee high quality care. In the most recent audit, while some improvement was noted, only 81% of the residential services audited were compliant with the requirements of the eight quality standards. Home service rates were even worse, with only 63 % found to be fully compliant.

It has been suggested that an audit will commence with a request for information, for replies to some questions. If this is correct it would effectively provide notice of an upcoming visit by

auditors. Sadly, experience in the sector tells me that notification of upcoming assessment sometimes means that a service provider will take action to create the appearance of meeting the standards and will improve or even fabricate their records.

A clear statement in the legislative framework that there is a right to high quality care would clarify and strengthen the obligation to provide it. The right to high quality care is sometimes not upheld. For example, individual communication needs of those receiving care, or of their supporters are not always met. Staff skill mix is not always appropriate in aged care. Staff are not always adequately educated or supervised, many do not have good understanding of advance care planning and its importance, and the need to respect the values and preferences expressed by those in their care. Those providing palliative care or end of life care do not always have the appropriate knowledge and skills. Understanding of supported decision making and the need to facilitate access to the support necessary for such decision making is still very limited in the sector.

The definition of high-quality care in the legislation Chapter 1 (s19) is by necessity broad, and a possible need to change that definition is a further reason the legislative framework should be reviewed at least every three years.

## **ACCOUNTABILITY**

Providers must have a clearly stated duty to uphold rights, simply requiring them to “not act in a way that is incompatible with the rights specified” (Chapter 1, s21(2)) is not sufficient. The power imbalance between providers and recipients of aged care services means that those providing care must be held accountable for any failure to respect and uphold rights.

The legal obligation of providers to provide care that upholds the rights of those being cared for must be clearly stated. Those receiving services must be aware of their rights, they must be informed in a way that they can understand, with strategies to assist communication and understanding being utilised whenever necessary.

It is a positive that Part 5, S120 (1) indicates that a registered provider must ensure, so far as is ‘reasonably practicable’, that their conduct does not adversely affect the health and safety of individuals receiving funded aged care services. However, the legislation will not meet its objects unless there is effective enforcement.

Consultation paper no 1 suggested that Aged Care Workers would also have a statutory duty of care and it is disappointing that this is not clearly stated in the Exposure Draft. I suggest that it needs to be very clear that all those providing care in the aged care sector have a duty of care, and that they will be held accountable if it is breached. What can be reasonably expected of a registered nurse would not be the same as what can be reasonably expected of a care worker or assistant in nursing in similar circumstances, but they all should have a statutory duty of care and should be aware of it. They should be educated to work within their scope of practice, with adequate supervision when required and should be held accountable if they breach their duty of care.

## **MANAGEMENT OF COMPLAINTS**

Requiring those receiving care to complain about any breach of their rights before the problem can be addressed is not reasonable and does not provide adequate protection for vulnerable people. It is essential that there are easily accessible and effective pathways to address any failure to act in accordance with the rights and wishes of the person receiving care.

The Complaints Commissioner needs to be independent and separate from the Aged Care Quality and Safety Commission which is closely involved with providers in the accreditation process. The complaints framework needs to be included in the Act, with clarification of the role and powers of the Complaints Commissioner and it needs to be clearly stated that the Complaints Commissioner has power to compel those complained about to give evidence. There is need for power to impose significant penalties where necessary and for transparency.

## **CONCLUSION**

Aged care has been poorly funded and inadequately regulated for many years, and this legislative framework will contribute to the rights of those who are accessing or seeking to access funded aged care services being respected and upheld.

However, there must be effective regulation, with providers being accountable for the service they provide. Good communication and accurate reporting of action taken to hold them accountable are necessary to ensure ongoing rights-based care of older members of our community

Kate Puls

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