

# **Submission to the Aged Care Legislative Reform Branch**

## **Exposure Draft of the Aged Care Bill 2023**

Peter Willcocks 12 February 2024

██████████ Victoria,

████████████████████

## Contents

Overriding Statement .....	3
Introduction .....	3
Overview .....	4
Use of computer programs .....	5
Section 398.....	5
Professor Fei Fei Li AI4All .....	6
Assessment and Reassessment.....	6
Australian Medical Association 2021 Recommendation .....	7
Section 44.....	7
Section 45.....	8
Section 45 Aged care needs assessment reports.....	8
Section 46.....	8
Rights .....	9
Section 6.....	9
Section 21.....	10
Section 92.....	10
Section 382.....	11
Section 387.....	11
Section 28.....	11
Section 376.....	12
Section 183.....	12
Section 159.....	13
Missing from the Act.....	13
References .....	14

## Overriding Statement

The exposure draft of the Aged Care Bill 2023<sup>1</sup> was shared with the public on the 14 December 2023 with a closing date for submissions of 16 February 2024. This exposure draft is riddled with 'To be Drafted' and references to 'rules' not included with information provided. This draft is not inclusive of the recommendations of the Aged Care Task Force<sup>2</sup>.

The DoHAC<sup>3</sup> workshop that I attended on the 19<sup>th</sup> January 2024 was conducted by a KPMG partner. The workshop no more than an opportunity for DoHAC and KPMG to hear the views of those in attendance. A statement was made by KPMG that they would not be answering questions on behalf of the Department of Health and Aged Care.

There has been the lack of time for realistic consultancy for people to consult and provide feedback with individual peak bodies and independent advocacy groups. This submission by its very nature will fall far short of what it could have been. The 14 December exposure draft of the Aged Care Bill 2023 will have many additions and changes before it will be presented parliament.

## Introduction

I never thought as I entered my mid 70's that I would become so engaged with aged care policy and change. I am not, as represented by the Department of Health, a sprightly and agile older person, able to stand by a stove whilst preparing a meal for my aged care funded carer. I work from my powerchair. I manage periods of fatigue, pain and short-term memory loss. I am one of the 40,000 or so people of higher need living with disability receiving aged care support. Many of the 40,000 were over the age of 65<sup>4</sup> when the NDIS began.

So, what do I want in the Age Care Act?

The versatility that supports individualised support items that recognise the individual and their individual need.

Inclusions of disability in a true and meaningful way from assessment that recognises individual disability and the specific supports that are required.

Legislation that truly enables In-home support so that people can remain in their own homes with self-management and choice supported in the Act.

Legislation that enables variable periods of respite from overnight to 2-3 months to support recovery so that people can return to in-home support.

Accessible case management that can make immediate determination on services outside service lists that support an older person's individual needs to remain in their own home

Our governments have had ample opportunity and choice to reign in the export and profiteering of services. Regardless of politics, enough is enough.

The thing that makes me angry is that much of the work on the Aged Care Act and the solution before us has been outsourced to people and organisations that in many instances do not have a lifetime commitment to best practice in aged care.

There is no way morally or ethically that this Aged Care Bill should be introduced to parliament without first addressing the systemic design flaws of 'rights washing', the under regulated use of A.I. and with computer program decisions to be taken as those of the system governor.

## Overview

The exposure draft of the Aged Care Bill 2023, differs little from the proposed draft and/or the aged Care Program of 2021 when it was directed by the Morrison Government. Like many programs of the now discredited government it is evident that there has been substantive input from a shadow workforce and outsourcing<sup>5</sup>, that is outside the Department of Health and Aged Care. A form of this Aged Care Act before us, was to be submitted to parliament in 2023 for a program start of July 2024. The election in 2022 brought Labor to government; one of their first substantive acts in Age Care was to reschedule a program start for Support at Home to July 2025.

This Act fails to distinguish between the needs of people receiving support for residential care, in-home support and temporary restorative care. I suspect part of the reason for this is that the LNP government saw advantage to the merging of all these supports, in spite of the risks of powerful entities dominating models for aged care.

This Act fails to support the rights of the individual with the removal of choice as defined by the good practice of consumer directed care where the older person, family and their carers would have input into the type and way supports would be provided.

This Act fails to address individual need through an assessment process that supports best practice of assessment by people with appropriate qualifications in geriatric medicine and health.

This Act fails to support the rights of the individual as the rights only apply in practice to accessing the program and supports, if eligible.

This Act fails to provide immediate forms for redress as it does not support access to courts and tribunals.

This Act fails to acknowledge the good and safe use of computer programs A.I. in this Act places the computer before human expertise and denies immediate recourse or change to the decisions of the program.

This Act fails to recognise the original decent motivation of the Aged Care Royal Commission and risks turning it into a mechanism to enable foreign and local corporations to gouge money out of helpless vulnerable people.

This Act fails to put the needs older of people before commercial interests, methods of monitoring and service flexibility.

### **Recommendation**

*The Government needs to focus on the many aspects of aged care that are currently not working, instead of dismantling one of the few parts of the system that actually works well and simply needs more support,"* Dr Khorshid<sup>6</sup> said of the AMA said in 2021 and that still applies today.

## Use of computer programs

### Section 398

Part 7 Section 398 An exposure Draft Aged Care Bill 2023

*A decision made by the operation of a computer program under such an arrangement is taken to be a decision made by the System Governor.*

*The Commissioner may, under section [to be drafted], substitute a decision for a decision the Commissioner is taken to have made under subsection (2) of this section if the Commissioner is satisfied that the decision made by the operation of the computer program is incorrect.*

## Recommendations

### Legislation needs to drafted to include

- 1. Assessors must have appropriate qualifications in geriatric medicine and health; assessors must be able to draw upon other specialist as required to define best practice.** (A panel of gerontologists, systems managers and consumer advocates will be required to advise on this)
- 2. The Integrated Assessment Tool must be modified to include pathways for the management of individual chronic health conditions and specific disability.** For example, if the older person has heart disease, supports need to be considerate of those needs, if the older person has MS the assessment and supports need to be considerate of that condition.
- 3. Assessors must provide feedback directly to the system manager of all computer program decisions that don't support evidence during assessment**
- 4. Assessors must have the authority to override decisions of the computer program and in such case these decisions need to be reported to the System Governor, the Aged Care Quality and Safety Commission and to the Integrated Assessment Tool Manager**
- 5. Assessor agency whether a subcontractor and/or authorised and/or delegated entity must be first point of call for a complaint with copies send to the Aged Care Quality and Safety Commission and to the Integrated Assessment Tool Manager**
- 6. New sections of the Act must include directions for the management of the Integrated Assessment Tool which include monitoring and implementing computer program changes where advisory and precautionary** (A panel of gerontologists, systems managers and consumer advocates will be required to advise on this)
- 7. New sections must be drafted to define what oversights are to implemented for the management and the review of the Integrated Assessment tool and the assessor** (A panel of gerontologists, systems managers and consumer advocates will be required to advise on this)
- 8. New Sections must be drafted mandating the reporting by service providers, subcontractors and health specialists of outcomes resulting in death or injury from poorly conducted assessments.**

### Comment

The way this computer program (Integrated Assessment Tool) was developed, left much to be desired. The most important component that put humans with expertise of assessment in control was omitted not only from the program development, but also from its operation.

If Artificial Intelligence (A.I.) is to be beneficial to our community, people with expertise in the field of endeavour must always be a part of any ongoing system as 'A.I. teachers' constantly monitoring and directing to provide oversight and review. Those impacted by the decisions must be able to provide immediate feedback. A.I. left to its own development will reflect, like all other aspects of undisciplined introspective practices result in garbage in garbage out.

### **Professor Fei Fei Li AI4All**

Perhaps we could do better to pay heed to one of the most highly respected supporters of A.I., Fei-Fei Li, Sequoia Professor of Computer Science at Stanford, and co-director of AI4All. An extract from Dr Li submission to the Joint Hearing before the Subcommittee on Research and Technology... House of Representatives U.S. Congress.

*I often like to share with my students that there's nothing artificial about artificial intelligence. It's inspired by people, it's created by people, and, most importantly, it has an impact on people. It's a powerful tool we're only just beginning to understand, and that's a profound responsibility*

*I'm here today because the time has come to have an informed public conversation about that responsibility. With proper guidance, AI will make life better, but without it, it stands to widen the wealth divide even further, making technology even more exclusive, and reinforce biases we've spent generations trying to overcome.*

*The second is the emphasis on enhancing and augmenting human skills, not replacing them. Machines are unlikely to replace nurses and doctors, for example, but machine learning assistive diagnosis will help their job tremendously. Similar opportunities to intelligently augment human capabilities abound from health care to education, from manufacturing to agriculture. Finally, AI must be guided by a concern for its impact. We must address challenges of machine biases, security, privacy, as well as at the society level. Now is the time to prepare for the effect of AI on laws, ethics, and even culture.*

*To put these ideas in practice, governments, academia, and industry will have to work together. This will require better understanding of AI in all three branches of government. AI is simply too important to be owned by private interests alone, and publicly funded research and education can provide a more transparent foundation for its development.<sup>7</sup>*

*If there is an overriding theme in The Worlds I See, it is that human and artificial intelligence form a double helix. How this evolves, and with what consequences, will depend, Li says, on whether we create "a healthy ecosystem" in which talent, technology and public sector participation are co-ordinated<sup>8</sup>.*

## **Assessment and Reassessment**

### **Recommendation**

The assessment and reassessment process must recognise the individual and their individual needs, if the supports provided are to achieve the aims of high-quality care and support. Furthermore, without an assessor with appropriate skillsets in geriatric medicine and health directly managing the assessment process, older people will be alienated with the risk that many of their needs will remain unrecognised.

## Australian Medical Association 2021 Recommendation

In September 2021 the AMA<sup>9</sup> wrote to the Minister for Senior Australians and Aged Care Services, the Hon Senator Richard Colbeck. The AMA was very critical of many aspects of the privatisation of services, particularly the automation of the program<sup>10</sup> and the privatisation of the Integrated Assessment Tool. On the 29 November 2023 the Department released information pack for potential tenderers for the single assessment system<sup>11</sup> The tender process via Aus Tender<sup>12</sup> opened 31 January 2024, closing date 14 March 2024. The Aged Care Act is yet to be presented to parliament.

In March 2022 AMA announced modelling<sup>13</sup> estimated that over four years (2021-22 to 2024–25), \$21.2 billion could be saved from avoidable public and private hospital admissions, presentations and stays from older people in the community and in nursing homes:

- \$1.4 billion for potentially preventable hospitalisations from nursing homes
- \$18.2 billion for potentially preventable hospitalisations from people aged 65+ in the community (excluding those in nursing homes)
- \$497 million for people who are taken from nursing homes to emergency departments but never admitted
- \$138 million for the transport costs of people who re-present at emergency departments within 30 days
- \$887 million for people waiting in a hospital for a place in a nursing home

Assessment and monitoring systems are the greatest areas for getting things right, but at the same time unchecked failures lead to unintended individual suffering for a large number of under-supported older Australians.

## Section 44

### Undertaking aged care needs assessments

*The aged care needs assessment must be carried out by the approved needs assessor using an assessment tool prescribed by the rules and in accordance with any other requirements prescribed by the rules.*

*Note: An individual must have an eligibility determination for an aged care needs assessment under section in effect before an aged care needs assessment can be undertaken for the individual.*

### Comment

Assessment via a computer program: - A *decision made by the operation of a computer program under such an arrangement is taken to be a decision made by the System Governor.*

## Section 45

Part 2 Eligibility for entry

Division 3 Aged care needs assessments and reassessments

- (2) *The aged care needs assessment must include:*
- (a) *a discussion with the individual about what the assessment has identified in terms of funded aged care services the individual may require access to and may assist the individual to maintain the individual's independence; and*
  - (b) *a discussion with the individual about the individual's preferences and goals, the next steps in terms of the individual's application for funded aged care services and how the individual will be informed of the outcome of the application; and*
  - (c) *any other thing prescribed by the rules.*

### Comment

Not much point discussing individual's preferences and goals if the next step does not acknowledge their individual need and supports via the services provided. Without knowing what is included in the rules, this section is very open ended.

## Section 45 Aged care needs assessment reports

The report must include information about:

- (a) *the funded aged care services the assessor considers the individual needs in order to meet the individual's care needs;*

### Comment

The funded aged care services are determined by a computer program that allocate services from a service list. Where does individual need fit in if not identifiable by the use of the computer program?

## Section 46 Aged care needs reassessments

- (1) The System Governor must decide if a reassessment of an individual's need for funded aged care services is required if:
- (a) *an eligibility determination for an aged care needs assessment under section 39 is in effect for the individual; and*
  - (b) *the individual makes an application in an approved form; and*
  - (c) *either:*
    - (i) *the System Governor is satisfied that a significant change in circumstances prescribed by the rules applies in relation to the individual; or*
    - (ii) *other circumstances prescribed by the rules apply in relation to the individual.*

### Comment

Surely the service provider (care advisor) must also be able to recommend a reassessment



## Rights

### Recommendation

I have provided a few examples where 'Rights Washing' is evident  
Stephen Duckett 'Proposed new Aged Care Act leaves gaps in rights'<sup>14</sup>; 12 Jan 2024 Full article  
<https://johnmenadue.com/proposed-new-aged-care-act-leaves-gaps-in-rights/>

*'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'.*

### Section 6

#### Chapter 1 Introduction

##### Part 1 Preliminary

*This Act provides for the delivery of funded aged care services to individuals under the Commonwealth aged care system. The services are included in the aged care service list and grouped into service types which are delivered through service groups.*

*The objects of the Act, the Statement of Rights and the Statement of Principles underpin the system and are aimed at ensuring quality and safe care for individuals.*

*Supporters and representatives may be appointed to assist individuals with navigating the system and are required to act in accordance with principles that promote supported decision making*

*Eligible individuals undergo an aged care needs assessment which identifies which funded aged care services are needed. Services are delivered in an approved residential care home, or a home or community setting, and are delivered by entities known as registered providers*

*For certain service groups, there are mechanisms for prioritisation and allocation of limited places.*

### Comment

What Preliminary Section 6 tells us is that I have a right only to services on the service list that I am identified as needing and that those services are to be delivered only via (approved) service groups.

**I have no right or input into what would work for me, nor what I need, nor on how those services are to be delivered; nor do my medical experts or anyone else for that matter.**

## Section 21

### Aged care rights and principles Part 3 Section 21

#### **21 Effect of Statement of Rights**

(1) *An individual is entitled to the rights specified in section 20 when accessing, or seeking to access, funded aged care services.*

(2) *It is the intention of the Parliament that registered providers delivering funded aged care services to individuals must not act in a way that is incompatible with the rights specified in section 20, taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals.*

(3) ***Nothing in this Division creates rights or duties that are enforceable by proceedings in a court or tribunal.***

## Comment

Unlike the recipient of services, the system governor or the delegate have enormous power with recourse to courts or tribunal.

Where is the Rights-based approach?

## Section 92 Rights and principles

### Rights

(1) It is a condition of registration that a registered provider that is registered in a provider registration category prescribed by the rules must:

- (a) demonstrate that the provider understands the rights of individuals under the Statement of Rights; and
- (b) have in place practices designed to ensure delivery of funded aged care services by the registered provider is not incompatible with the rights of individuals under the Statement of Rights.

### **Principles—person-centred aged care system**

*It is a condition of registration that a registered provider that is registered in a provider registration category prescribed by the rules must demonstrate that the provider understands that the safety, health, wellbeing and quality of life of individuals is the primary consideration in the delivery of funded aged care services.*

## Comment

Person centred aged care system does not mean nor reflect choice or consumer directed care. This is just another example of 'high sounding rhetoric is simply there to placate consumers and advocates'-  
Stephen Duckett

## Section 382

### Chapter 8 Miscellaneous Part 4 Appointment of supporters and representatives Division 2 Suspensions and cancellations of appointment

#### 382 Suspension of appointment

*When an appointment may be suspended*

- 1) *The System Governor may suspend the appointment of a person as a supporter or representative of an individual if a circumstance set out in this section applies*
- 2) *A circumstance is that the System Governor reasonably believes <sup>7</sup> that the supporter or representative has caused, or is likely to cause, <sup>8</sup> physical, sexual, financial, psychological or emotional abuse or <sup>9</sup> neglect to the individual.*
- 3) *A circumstance is that the System Governor reasonably believes that the supporter or representative has not complied with, or is not able to comply with, a duty of supporters or representatives referred to in subsection 26(1) or 30(1) respectively.*

#### Comment

The system governor or the delegate has enormous power with recourse to courts or tribunal. Where is the Rights based approach?

## Section 387

387 Cancellation of appointment of representative on request **by individual**

- (1) *If an individual makes a written or verbal request to the System Governor to cancel the appointment of a person as a representative of the individual, the System Governor must consider the request and decide whether to cancel the appointment.*

#### Comment

The system governor or the delegate has enormous power with recourse to courts or tribunal. Where is the rights based approach?

## Section 28

### 28 Role of guardians etc.

- (1) *A person must not make a decision under, or for the purposes of, this Act on behalf of an individual unless the person is appointed as a representative of the individual under section 376.*
- (2) *Subsection (1) applies even if the person:*
  - (a) *has guardianship of the individual under a law of the Commonwealth, a State or a Territory; or*
  - (b) *is appointed by a court, tribunal, board or panel (however described) under a law of the Commonwealth, a State or a Territory, and has power to make decisions for the individual; or*
  - (c) *holds an enduring power of attorney granted by the individual; or*
  - (d) *is a nominee of the individual (within the meaning of the National Disability Insurance Scheme Act 2013 or the Social Security (Administration) Act 1999); or*
  - (e) *is a person of a kind prescribed by the rules*

## Section 376

### Chapter 8 Miscellaneous Part 4 Appointment of supporters and representatives

#### Division 1 Appointment process Section 376

*the System Governor must, subject to subsections (6) and (7), appoint the person under subsection (1).*

*Note: Guardians and persons in other similar positions must not make a decision under, or for the purposes of, this Act on behalf of an individual unless the person is The System Governor must not appoint a person under subsection (1) to be a representative of an individual unless:*

- (a) the System Governor is **satisfied** that the person is able to comply with the duties of representatives referred to in subsection 30(1); and*
- (b) the person has given consent to the appointment; and*
- (c) the System Governor has taken into consideration the wishes (if any) of the individual regarding the making of the appointment; and*
- (d) the System Governor has taken into consideration any other matters prescribed by the rules.*

*Note: The consent of the individual is not required for the appointment of a person as a representative of the individual.*

## Comment

The system governor or the delegate has enormous power with recourse to courts or tribunal. Where is the rights based approach?

## Section 183 Dealing with complaints

*(1) The rules **may make** provision in relation to dealing with complaints made, or information provided, to the Commissioner about an entity's compliance with this Act.*

*(2) Without limiting subsection (1), the rules **may make** provision in relation to the following:*

- (a) how complaints **may be** made to the Commissioner about:
  - (i) a registered provider or aged care worker's compliance with this Act; and*
  - (ii) a registered provider acting in a way that is incompatible with the Statement of Rights; and**
- (b) how complaints **may be** dealt with and resolved;*
- (c) the roles, rights and responsibilities of complainants, registered providers, aged care workers and any other relevant persons;*
- (d) the considerations relevant to dealing with complaints;*
- (e) the processes for resolving complaints, including early resolution and restorative justice processes;*
- (f) the actions that **may be** taken to address complaints, which may include requiring a registered provider or aged care worker to do something;*
- (g) how the Commissioner **may evaluate** the effectiveness of actions taken to address complaints, including by following up on a sample of complaints*

## Comment

Not much certainty in right of all this 'may be' language for 'rules'.

## Section 159

### 159 Consultants

*The Commissioner may, on behalf of the Commonwealth, engage consultants to assist in the performance of the Commissioner's functions*

### Comment

Such a small section with ominous lack of clarity about the role that consultants may have with regard to implied delegation and decision-making powers.

### Missing from the Act

- **Disability:** Any meaningful use of the word disability other than a broad and nonspecific use; there is no reference to disability specific assessment for people ineligible for NDIS; nor is there any references to service that are too specific to needs of people with disability.
- **Consumer Directed Care** is not included in the ACT, Choice is conditional around services available from a service list.
- **Governance of Computer Systems and A.I. management.** There needs to be guidance from the Aged Care Act to ensure that the technical expertise does not disempower the operator over the individual. In put into program development needs clear guidelines to ensure the wide range of expertise from gerontologists, health experts and Aged Care/Disability advocates is integral to design and function. System managers must be monitored to ensure the program is tool not a replacement for human decision making, and/or commercial interests.
- **Rights of Appeal:** A process must be established other than via the delegate or system governor to enable an applicant, their representative or supporter to appeal against an assessment that they believe to be incorrect or inadequate.
- **Case Manager:** Cannot find reference to care advisor or case manager
- **Delegate:** No definition for delegate denoting specific duties and functions
- **SES Officer** No definition for SES officer denoting specific duties and functions
- **Rules of the Minister** and how they are to be applied in each instance.

## References

---

- <sup>1</sup> Exposure Draft Aged Care Bill 2023  
<https://www.health.gov.au/resources/publications/exposure-draft-aged-care-bill-2023>
- <sup>2</sup> Aged Care Task Force, Closed Report not available as at 11 Feb 2024; Cited Feb 2024  
<https://agedcareengagement.health.gov.au/taskforce/>
- <sup>3</sup> Dept of Health Consultation workshop draft new aged care Act; cited Jan 2024  
<https://agedcareengagement.health.gov.au/engagement/consultation-workshops:-draft-new-aged-care-act/>
- <sup>4</sup> NDIS: Eligibly; cited Dec 2023; cited Dec 2023  
<https://www.ndis.gov.au/applying-access-ndis/am-i-eligible>
- <sup>5</sup> Senator The Hon Katy Gallagher Minister for Finance, Public Service & Women: Media Release; cited Dec 23  
<https://www.financeminister.gov.au/media-release/2023/05/06/aps-audit-employment-reveals-coalition-shadow-workforce>
- <sup>6</sup> Australian Medical Assn: Media Release Pub 7 Sep 2021. 7 Privatised aged care assessments will result in poorer health outcomes; cited Dec 23  
<https://www.ama.com.au/media/privatised-aged-care-assessments-will-result-poorer-health-outcomes>
- <sup>7</sup> Artificial Intelligence: With Great Power comes great responsibility by [Fei-Fei Li](#), Sequoia Professor of Computer Science at Stanford, and co-director of [AI4All](#); cited Feb 2024  
<https://www.govinfo.gov/content/pkg/CHRG-115hrg30877/pdf/CHRG-115hrg30877.pdf>
- <sup>8</sup> [Fei-Fei Li](#), Sequoia Professor of Computer Science at Stanford, and co-director of [AI4All](#) cited Feb 2024  
<https://ai-4-all.org/>
- <sup>9</sup> Australian Medical Assn: Media Release Pub 7 Sep 2021. 7 Privatised aged care assessments will result in poorer health outcomes; cited Dec 23  
<https://www.ama.com.au/media/privatised-aged-care-assessments-will-result-poorer-health-outcomes>
- <sup>10</sup> Australian Medical Assn: Media Release Pub 7 Sep 2021 AMA warns about outsourcing assessments in aged care; cited Dec 23  
<https://www.ama.com.au/gpnn/issue-21-number-35/articles/ama-warns-about-outsourcing-assessments-aged-care>
- <sup>11</sup> Dept of Health: Single assessment system – Information pack for potential tenderers 29 Nov 2023; cited Dec 2023  
<https://www.health.gov.au/resources/publications/single-assessment-system-information-pack-for-potential-tenderers>
- <sup>12</sup> Aus Tender: Home Page; Cited Feb 2024  
<https://www.tenders.gov.au/Atm/Show/bc788798-2f24-47e7-bffc-bea4930440c5>
- <sup>13</sup> Australian Medical Assn: REPORT 1 March 2022: Putting health care back into aged care; cited Dec2023  
<https://www.ama.com.au/articles/report-putting-health-care-back-aged-care-0>
- <sup>14</sup> Pearls and Irritations: Public Policy Journal, Proposed new Aged Care Act leaves gaps in rights: Stephen Duckett cited Jan 2024  
<https://johnmenadue.com/proposed-new-aged-care-act-leaves-gaps-in-rights/>