# A New Aged Care Act: Exposure Draft

## Department of Health and Aged Care

BallyCara

*Inspiring healthy & happy living*

Submission from BallyCara Limited

To: Mel Metz
Department of Health and Aged Care, Legislative Reform Branch

**Submitted via** email to agedcarelegislativereform@health.gov.au

13 February 2024

## Table of Contents

## Introduction

Thank you for the opportunity to input into this important consultation.

BallyCara is a charitable organisation providing services throughout South-East Queensland and Melbourne (Victoria) with a passion and focus on inspiring an active, healthy and happy life across generations and communities. BallyCara provides wellness and home care services to enable people to live fulfilling lives and stay connected with their community as well as a range of accommodation services from retirement living to varying levels of residential aged care.

BallyCara submits general comments on the themes and approach of the proposed Aged Care Act, and more detailed feedback on eight of the nine chapters of the exposure draft. The content of this submission was created in consultation with members of the BallyCara community, including members of the Executive team.

### Position Statement

The exposure draft of the new Aged Care Act represents a significant shift in the right direction; however, **this is a once-in-a-generation opportunity to define aged care for the coming decades** and must be done right.

BallyCara supports a rights-based act with robust regulatory measures and accountability, monitoring, and review measures. We understand that such an act must cater to the complexity and diversity of the sector, and it must fit with current arrangements while also being future-proof.

While a good start, the new Act requires further development to hit these marks.

The 'missing' sections of the exposure draft and subordinate legislation make it difficult to assess the whole picture, including its intent and implications.

For further clarification on any points in this submission, please contact [redacted]

Submitted on behalf of BallyCara Limited by:


**Sharon Blackburn CBE** — Executive Director

**Lachlan Green** — Policy and Project Officer

## Recommendations

**General**

1. Commit to meaningful consultation and deliberation on the critical unseen sections of the legislation, even if this requires shifted timelines.

2. Consider how the Commission and Department could be reframed in the Act to empower collaboration between providers and policymakers for the highest-quality care and ensure accountability of sector governance and regulation.

**Chapter 1**

3. Clarify how the Act proposes to affect residents receiving aged care services in Retirement Villages. It is not clear if operators themselves will be introduced into the legislative framework.

4. Clarify definitions, or publicise regulatory interpretations, of significant failure and systematic patterns of conduct.

5. Ensure adequate resourcing and developmental support to enable all providers to meet this standard of high-quality care.

6. Consider embedding greater flexibility across legislative and regulatory frameworks to enable and incentivise innovation.

7. Consider revising S22(3)(a) to read, "in a setting appropriate to their circumstances, that is recognised as their home."

8. Prepare supporter and representative guidance material, including training packages, decision-making resources, and guides on legal protections/expectations, for:
   - Older people
   - Supporters
   - Representatives
   - Providers
   - Substitute Decision Makers appointed under state/territory law (i.e., EPOAs and guardians)

**Chapter 2**

9. Ensure clear, firm timelines for eligibility decisions with appropriate accountability and monitoring.

10. Consider whether there are more efficient methods to classify residential care recipients that can guarantee adequate resourcing to providers.

**Chapter 3**

11. Undertake a detailed impact assessment of registration changes and receive assurance of continuity from relevant stakeholders (incl. insurers and brokerage partners).
12. All providers, no matter the nature of their owning entity, must be subject to alike registration requirements.
13. Tighten the language of S78 to ensure that providers retain their right of response to potential variations.
14. Consider how registration conditions, and lapses in these conditions, can be managed through a relational approach, and collaborative engagement, rather than punitive measures.
15. Consider the proportionality of the penalties introduced for breaches of statutory duties, particularly those of strict liability.
16. Review the strict liability and fault-based offences in S120(5-6) and S121(6-7) to ensure there is a clearly identifiable difference in the substance of the offence types.
17. Consider whether compensation applications would be better left to the regular processes of the justice system.

**Chapter 4**

No recommendations.

**Chapter 5**

18. Revise the functions of the System Governor and Regulator to ensure person-centredness and relational regulation.
19. Ensure the functions of the System Governor and Regulator are suitably different and communicate their clear, standalone purposes.
20. Reconsider the statutory appointment of a Complaints Commissioner, rather than an employed role in the Commission. This role should be independent.
21. Reconsider the need for a worker screening database separate from that of the NDIS.

**Chapter 6**

22. Ensure robust, comprehensive accountability measures are in place to ensure the Regulator is appropriately executing their functions.

23. Offer the sector guidance on how the System Governor and the Regulator will each utilise their granted powers, and how this use will differ for the body's distinct purposes.

24. Reconsider whether banning orders for non-person entities are appropriate and necessary. Clarify why banning orders are needed in addition to other enforcement powers.

**Chapter 7**

25. Ensure information management provisions are supported by effective systems at a System Governor and regulator level, to assure providers that information will be effectively managed and retained.

26. Provide guidance material that specifies how updated information management requirements will differ from requirements under the Privacy Act 1988.

**Chapter 8**

No recommendations.

**Chapter 9**

27. Provide a transition period of minimum 6 months to enable necessary changes to be embedded in service providers, the Aged Care Quality and Safety Commission, and the Department of Health and Aged Care.

28. During the transition period, the regulator should dedicate resources to working collaboratively with providers to prepare for changes.

29. Undertake, and publicise, a detailed sector impact assessment for each of the proposed changes. If this has already been completed, it should be publicised in the spirit of transparency and accountability.

## General Comments

There is significant need for a new Aged Care Act that centres older people and supports a principled aged care sector. This exposure draft does many things right. Elements of this act, including the statements of rights and principles, could be considered a starting point for the philosophical shift demanded by the Royal Commission.

However, **this is a once-in-a-generation opportunity to define aged care for the coming decades**. This must be done right.

While there are specific areas of the new Act that can be improved, there are also some concerning themes that run throughout.

- This draft is incomplete, with many operative aspects unclear or undeveloped.
- The approach that is outlined can be read as reliant on punishment rather than meaningful collaboration.
- While it is right to lead with this foundational change, there is risk in formalising the new Act before other system reforms (such as the Support at Home Program) have a final form.

## Success Contingent on Undrafted and Unclear Sections

The draft presents an incomplete vision of the sector. The success of many aspects will hinge on undrafted, unclear, or unseen material.

*It is unfair and unproductive to ask people to consult on a document that is incomplete.*

Complete processes of justice and accountability, system funding, understanding of what services can be delivered where and to who; these are a few aspects that cannot yet receive meaningfully consultation. Undeveloped or unseen material, including "the Rules", will determine the success of facets including, but not limited to:

- Which services and service types will be funded (S8(1), S10(3))
- The places aged care may be delivered (SS4-5, S7)
- The regulation of reportable incidents and restrictive practices (SS15-17)
- Decision-making timelines (S47(4), S67(2))
- The capacity and capabilities of system regulators (S57(2))
- Classification, prioritisation and allocation of older people within the system (Chapter 3, Parts 4-5)
- How the sector will be funded (Chapter 4)
- The function of critical failure powers (Chapter 6, Part 11)
- Appeal and review processes (Chapter 8, Part 2)

Matters of funding and subsidy will also depend on the unseen report of the aged care taskforce. It is impossible for those consulted to make fair and balanced submissions without this complete information.

**Recommendation 1:** Commit to meaningful consultation and deliberation on the critical unseen sections of the legislation, even if this requires shifted timelines.

## Favouring a Punitive Approach

Reading the new Act paints an image of a sector where fear of punishment could be the primary tool for ensuring compliance and care quality.

The new Act grants significant powers to the Commission, framing them as rule makers, rule enforcers, and sector judiciary. BallyCara is not necessarily concerned by any of the granted powers. But there is concern that the breadth of, and focus on, punitive powers may guide the Commission toward a reactionary approach to regulation, rather than their purported commitment to relational regulation.

The powers introduced through Chapters 3, 5 and 6 (and are discussed throughout this submission) could hinder the ability for meaningful collaborative relationships between providers and regulator. The functions of the system governor and regulator in Chapter 5, which give limited focus to collaboration and relationships, cast further uncertainty on the Act's proposed approach.

Granted powers require extensive and rigorous accountability measures. These are not clear in the new Act.

***High-quality care cannot be regulated into the sector***, it must be developed and led by providers working with older people and system regulators/governors.

**Recommendation 2:** Consider how the Commission and Department could be reframed in the Act to empower collaboration between providers and policymakers for the highest-quality care and ensure accountability of sector governance and regulation.

## Alignment with Further Changes

The new Act not only needs to sustainably fit with current sector arrangements (with changes where necessary), but needs to be future-proofed, allowing for further developments in the sector.

With Support at Home reform delayed by several years, and without clarity on what that programme will look like in its final form, the sector requires assurance that this legislation can provide the necessary foundations for that programme and other changes.

- Will the Support at Home programme (and other future reforms) confidently fit within this legislation, particularly as it has not yet reached its final form?
- Has the Department undertaken modelling and impact assessment that could provide the sector assurance of a future-proofed legislative framework? If yes, this should be shared with people using services.

## Chapter 1

The Introduction of the new Act introduces terms, concepts, and ideas that carry underpin the rest of the document, and the future of the sector. These definitions need to be clear,

*This section of our submission contains content relevant to consultation questions 1, 3, 5,*

### Where Funded Aged Care Services are Delivered

S9(3)(b) reads, "To avoid doubt, a ***residential care home*** includes … a place within a retirement village that has been converted to a place described by subsection (2)." It is unclear whether collections of Retirement Village residents living in near proximity to each other, receiving in-home care/support services or potentially assisted living support, will now be classified as a residential care home.

It is unclear whether this draft is proposing an expansion of residential care homes to include settings that were not previously included.

- Has the Department consulted with retirement living providers on this change?
- Has any modelling or sector assessment been undertaken to ascertain how this will affect retirement living providers?

**Recommendation 3:** Clarify how the Act proposes to affect residents receiving aged care services in Retirement Villages. It is not clear if operators themselves will be introduced into the legislative framework.

### Significant Failures and Systematic Patterns of Conduct

S18(1) reads as follows,

> conduct involves a ***significant failure*** if the conduct represents a significant departure from the conduct that could reasonably be expected from a registered provider or responsible person, having regard to the requirements registered providers and responsible persons are subject to under this Act.

S18(2) then outlines that conduct can be determined to be part of a ***systematic pattern of conduct*** through considering: number of contraventions, period over which contraventions occur, number of individuals affected, and the provider's response to contraventions.

The definitions of *significant failure* in conduct and *systematic patterns of conduct* are, prima facie, intensely discretionary and will rely on relative comparison. The Commission's discretion and interpretation will determine how these facets of the legislation will be applied.

**Recommendation 4:** Clarify definitions, or publicise regulatory interpretations, of *significant failure* and *systematic patterns of conduct*.

## Definition of High-Quality Care

The definition of High-Quality Care provided in S19 is generally strong. Under subsection (c), BallyCara supports the inclusion of provision (vi) which prioritises subjectively meaningful connections to community.

However, provisions such as (vii) and (x), which prioritise the ability for residents to retain connection to pets and access bilingual workers if desired, are significantly dependent on resourcing and environmental design. Providers operating single-site/regional services, and those operating in thin markets (such as in regional and remote areas), may struggle to attain some of these standards without additional material and operational support.

**Recommendation 5:** Ensure adequate resourcing and developmental support (i.e., supporting aged care workers to learn new languages) to enable all providers to meet this standard of high-quality care.

Page 20 of the Consultation Paper reads, "We heard that high quality care needs to foster a change in sector culture by promoting innovation." This is correct, but this goal remains unachieved in the proposed legislative framework for the sector.

In BallyCara's response to 'A New Model for Regulating Aged Care – Paper No. 2' in June 2023, BallyCara submitted:

> the proposed model does not seem to stray from prescriptive and punitive approaches that load providers with strict reporting requirements and focus on punishing rather than incentivisation and collaboration. This will hinder the goals of innovation, further contributing to cultures of reactivity and the treatment of compliance as the highest standard (rather than the minimum).

The final draft of the Aged Care Quality Standards and proposals throughout the new Act continue an approach that does not incentivise innovation.

**Recommendation 6:** Consider embedding greater flexibility across legislative and regulatory frameworks to enable and incentivise innovation.

## Statement of Rights

In S20, the grouping of the statement of rights under relevant headings improves the accessibility of the Statement significantly. BallyCara also supports the inclusion of public life involvement in S20(12)(b), which is known to be a crucial component of quality of life.

BallyCara is also completely supportive of the inclusion of S21(2), which realistically outlines the potential of rights being limited and balanced in the attainment of a functioning community.

## Statement of Principles

There is a seemingly unwarranted absence from the Statement of Principles under S(22)(3).

- In the original draft of the principles, S22(3)(a) read, "being able to reside at home … or, where that is not possible, in a setting appropriate to their circumstances, that is recognised as their home."
- In the exposure draft, S22(3)(a) reads, "be able to reside at the individual's home … or, if that is not possible, in a setting that is appropriate given the individual's circumstances and preferences."

The notable absence is the mention of a service setting that is recognised as a person's home. BallyCara praised this inclusion in the original draft and would recommend its re-addition, to highlight the significance of residential care as a person's home first and foremost.

**Recommendation 7:** Consider revising S22(3)(a) to read, "in a setting appropriate to their circumstances, that is recognised as their home."

## Supporters and Representatives

The supporter and representative arrangements outlines in Part 4, and from Page 29 of the Consultation Paper, are confusing and potentially hazardous.

There is significant risk introduced by an opaque, multi-pronged system that does not appear to be fully understood by the drafters of these consultation documents. Consider this statement on Pages 30-31 of the Consultation Paper:

> People will now be able to have multiple supporters, or multiple representatives at the same time. However, they will only be able to have one of either a supporter or representative.

It is totally unclear whether this means: (a) a person may have only one supporter or representative active at any time, even with multiple appointed, or (b) while they may have multiple appointed, a person can only have supporters OR representatives, not both appointed.

Questions will undoubtedly arise over the decision-making domain of these representatives as it intersects with the health- and finance-based domains of Substitute Decision Making under other jurisdictions. The Department, and the Minister, may be better served by working with federal, state and territory Attorney Generals to progress Enduring Power of Attorney harmonisation laws, and utilise that role where possible to avoid decision-maker conflicts and confusion.

To progress these arrangements will require immense support from the Department and the Commission.

**Recommendation 8:** Prepare supporter and representative guidance material, including training packages, decision-making resources, and guides on legal protections/expectations, for:

- Older people
- Supporters
- Representatives
- Providers

- Substitute Decision Makers appointed under state/territory law (i.e., EPOAs and guardians)

## Chapter 2

In detailing entry to the Aged Care System, Chapter 2 includes a variety of moving parts that will need to align to ensure sustainable and effective operation. The success of this alignment will heavily rely on unseen aspects of the legislative framework.

*This section of our submission contains content relevant to consultation questions 13 and 15.*

### Eligibility for Entry

The success of entry eligibility processes will be dependent on the undrafted rules, including timelines for approval decisions (S47(4)). Clear, reasonable decision-making timelines are required to ensure older people are not left in bureaucratic limbo while attempting to enter the system.

**Recommendation 9:** Ensure clear, firm timelines for eligibility decisions with appropriate accountability and monitoring.

### Classification

While eligibility and classification assessments are to be separated under the new Act, the note under S58(2) allows for classification assessments to be included with notice of eligibility assessment outcomes. This clearly outlines that, while separate, these assessments will be closely linked for those receiving home care and support.

Under S63, an older person accessing residential care will only be classified post-admission. The sector will require minimum funding guarantees, and interim funding arrangements, to ensure people can receive adequate care and services before classification.

Without detailed information on sector funding, it is unclear how this will unfold.

### Prioritisation and Place Allocation

Contrary to the points regarding residential care classification above, Page 44 of the Consultation Paper suggests residential care placement will be prioritised on the basis of urgency. This introduces a question:

- If urgency of care is being assessed with a residential care eligibility assessment, why can a preliminary classification not also be made?

**Recommendation 10:** Consider whether there are more efficient methods to classify residential care recipients that can guarantee adequate resourcing to providers.

No further comments can be made on prioritisation nor place allocation without clearer definitions and proposals.

## Chapter 3

There are several concerning aspects of Chapter 3 related to provider registration and obligations.

*This section of our submission contains content relevant to consultation questions 17 and 18.*

### Provider Registration and Re-registration

The new nature of registration and re-registration increases power for the regulator on questions of registration. While the current system essentially has a process for re-affirming a provider's ongoing accreditation, the new system establishes a responsibility to apply for *re-registration*.

Under proposed laws, at any time a provider will only have a *fixed period* of *operational certainty*.

It is unclear how this will affect business sustainability and continuity. For example, it is not clear whether this change will affect a provider's ability to insure their home or receive business loans for capital development.

**Recommendation 11:** Undertake a detailed impact assessment of registration changes and receive assurance of continuity from relevant stakeholders (incl. insurers and brokerage partners).

A note on Page 49 of the Consultation Paper states, "Arrangements for State and Territory government providers … have not been finalised. This will be discussed further with relevant stakeholders…"

Unless a provider is delivering specialised services or in otherwise complex circumstances, all providers delivering the alike service types must be subject to alike registration requirements. Relaxing registration requirements for any provider, operated by any entity, undermines the integrity of the sector. Assuring the community, including older people looking for care, of aged care quality requires a sector where there are no unnecessary exemptions.

**Recommendation 12:** All providers, no matter the nature of their owning entity, must be subject to alike registration requirements.

### Variation or Suspension of Registration

S78 suggests the Commission will have to provide written notice if they are considering varying a provider's registration, "in a way that may have a significant adverse impact on the provider's delivery of funded services." The notice will give the provider a right of response to the potential change before it is made.

- But what if the proposed variation is only predicted to have a low to medium adverse impact?

The proposed language introduces numerous questions. If the estimated impact is not classified as "significant", does this release the Commissioner from their responsibility to give the provider preliminary warning of the variation? And does it remove the provider's right of response?

Consider removing the word "significant" before adverse impact.

**Recommendation 13:** Tighten the language of S78 to ensure that providers retain their right of response to potential variations

## Conditions of Registration

The penalties introduced for contravening any condition of registration (250 penalty units under S88(3)) are intensely costly. Particularly considering proposed conditions of registration are broad.

As an example of the potential consequences of these new penalties, mandatory reporting requires providers self-assess and report any breaches or contravention of duties under the Act. However, the impetus to do so thoroughly and completely is hindered by a threat of penalty if it is reported.

***Innovation*** and ***continuous improvement*** require a spirit of **openness** and **collaboration**.

Overabundance of punitive measures, even if they are rarely utilised, may affect such a spirit developing in the sector. Would it be more fitting if such measures were reserved for significant failures or systematic patterns of condition-breaching conduct?

**Recommendation 14:** Consider how registration conditions, and lapses in these conditions, can be managed through a relational approach, and collaborative engagement, rather than punitive measures.

## Statutory Obligations

BallyCara generally supports the inclusion of a statutory duty in the legislation and submits that the duty on digital platforms seems reasonable and fair (though it lacks clarity on the scope of covered platforms).

However, the severity of penalties proposed in this section, particularly the penalties for responsible persons, seem disproportionate to the reality of the sector.

Board governance of an aged care provider is an important and significant role. The penalties for responsible persons seem disproportionate when the majority of board members in the aged care sector are volunteer appointments.

These volunteers will be strictly liable for deaths, serious injuries, and serious illnesses. An unfortunate reality of an intensely human-dependent sector (that works with many highly vulnerable humans) is that there exists a miniscule risk that serious failures can occur. Does the legislation imply that these rare occurrences represent a dereliction of responsibility?

- What incentive is there for a person to take up a volunteer board position when this risk becomes a punishable contravention of the Act?

**Recommendation 15:** Consider the proportionality of the penalties introduced for breaches of statutory duties, particularly those of strict liability.

S120(5-6) and S121(6-7) introduce strict liability and fault-based offences for the death, or serious injury or illness of a service recipient, for both registered providers and responsible persons.

While the difference between strict liability and fault-based offence is implied by their title, for those with legal knowledge, the substantive wording of the two provisions do not differ at all.

**Recommendation 16:** Review the strict liability and fault-based offences in S120(5-6) and S121(6-7) to ensure there is a clearly identifiable difference in the substance of the offence types.

Two additional points on this Chapter:

- It is not wholly clear how the statutory duty for registered providers will be applied in circumstances with multiple contracted providers. This is a key concern for the future Support at Home programme, when the Department intends for self-managed packages and multiple provider care to be far more common. While the duty always falls back to the central provider, is this always appropriate? And how does this work when that central provider is not immediately clear?
- S127(2)(a)(i) allows the Federal Court to make an order for compensation on application from the Commissioner, with consent from the individual. Is this a suitable function for the Commissioner?

**Recommendation 17:** Consider whether compensation applications would be better left to the regular processes of the justice system.

## Chapter 4

Few comments, and limited recommendations, can be made without seeing Chapter 4 drafted or any reporting from the Aged Care Taskforce. While the report was due for public release in February 2024 (which has now reportedly been delayed), the release timeline has not allowed for meaningful engagement before closure of consultation.

*This section of our submission contains content relevant to consultation questions 21, 22, 23, and 24.*

### Means Testing

All older people must have the protected right to receive aged care services.

While BallyCara supports the principle of people paying according to their means, such a system needs robust, comprehensive, and dynamic protections to ensure people are not left paying more than they can afford.

Page 66 of the Consultation Paper reads, "The means testing arrangements in the Aged Care Act sit within the subsidy provisions of Chapter 3. These can be hard to follow and interpret. As such, we are proposing to move the means testing provisions…"

The inaccessibility of provisions within the Aged Care Act does not stem from their location, but rather the unnecessary complexity of their content, and a lack of effective guidance and interpretation of said content.

No further comment can be made on "means testing" without clear definitions and detailed proposals.

### Subsidies and Payments

No comment can be made on "Subsidies and payments" without clear definitions and proposals.

## Chapter 5

Chapter 5 introduces several concepts of system governance that require further consideration and refinement.

*This section of our submission contains content relevant to consultation questions 25, 26, and 27.*

### Functions of the System Governor and Regulator

Within Part 2, there is no mention of the System Governor functioning to uphold the principles of the sector, nor the rights or quality of life of older people.

In Part 3, there is a lack of prioritisation given to any functions related to the "relational regulation" approach that the Commission has previously committed themselves to. Beyond engagement and education functions (S143), which makes prescriptive implications that the Commission will be instructing providers on how to best deliver care, there are limited functions that encourage the Commission to work collaboratively and proactively with providers.

**Recommendation 18:** Revise the functions of the System Governor and Regulator to ensure person-centredness and relational regulation.

Question 26 of the Consultation Paper asks, "Is it clear how the roles of the System Governor and Commissioner differ, but also fit together, as regulators of the aged care system?".

Frankly, it is totally unclear how the two bodies differ or why they should fit together? Their roles should be unique, with one acting as the government department at the centre of system governance and the other as the main regulatory body. As such, their functions should be distinct.

However, take provider capacity-building as an example.

- S132(1)(c)(iii) establishes that it is the function of the System Governor to provide education to ,"build the capacity of registered providers to adopt best practice in the delivery of funded aged care services."
- S143(c) establishes that it is the function of the Commissioner to build capability of registered providers, "to understand and promote the objectives of this Act," which includes the delivery of high-quality care and services.

The functions of the two bodies are worded distinctly, but how these functions will be distinctly operationalised is not clear. This uncertainty is only heightened by Chapter 6 (see 'Expanded Powers of the System Governor and Regulator' below), where their regulatory powers are near identical.

**Recommendation 19:** Ensure the functions of the System Governor and Regulator are suitably different and communicate their clear, standalone purposes.

### Complaints Commissioner

Page 75 of the Consultation Paper suggests that the new Act is committed to "increasing the transparency and accountability of the Commission" as it relates to complaints processes. But Page 76 confirms that the role of Complaints Commissioner is simply an executive employee of the Commission.

Is it fair to call this role a commissioner? Why not an assistant commissioner?

As it stands, it is not clear how this role will improve transparency or integrity of the complaints process, or why the role is even explicitly named in the Act. It does nothing to improve accountability, as the delegation of authority remains with the Commissioner. Very little changes with the addition of this role.

**Recommendation 20:** Reconsider the statutory appointment of a Complaints Commissioner, rather than an employed role in the Commission. This role should be independent.

BallyCara supports the decision to maintain the functions of the Inspector-General without adding the complaints function. We agree that it would compromise the Inspector-General's scope.

## Worker Screening Database and Laws

SS166-167 introduce a worker screening database and information sharing laws with the NDIA. A separate database from that of the NDIS seems unnecessary, and contrary to previous plans for a more unified human services sector.

Is it intended that an aged care worker screening database exempts workers from NDIS screening and vice versa? This appeared to be the intention in earlier consultations that discussed harmonising the regulatory approach across care and support sectors.

However, no further comment can be made on "Worker Screening Laws" without clear definitions and detailed proposals.

**Recommendation 21:** Reconsider the need for a worker screening database separate from that of the NDIS.

## Chapter 6

Chapter 6 portrays a punitive but confused vision of the sector. The final version of the Act needs to improve clarity on regulatory functions within the system.

*This section of our submission contains content relevant to consultation questions 29, 30, and 31 .*

### Expanded Powers of the System Governor and Regulator

The Commissioner's powers are significant in this vision of the sector. This chapter, paired with those powers discussed under Chapter 3 and 5, illustrate a sector where fear of punishment could be the primary tool used to enforce compliance.

BallyCara is not inherently opposed to any power granted to the regulator, however the use of these powers must be balanced, measured, and accountable. There is no clear accountability measures for the Commissioner, which the Consultation Paper acknowledges was a desire of the Royal Commission (Page 75).

**Recommendation 22:** Ensure robust, comprehensive accountability measures are in place to ensure the Regulator is appropriately executing their functions.

As mentioned above under Chapter 5 'Functions of the System Governor and Regulator', the different functions of the System Governor and Regulator are ill-established. The similarity of their granted power adds to this confusion.

Chapter 6, parts 2 to 10, grants the following powers to both Department and Commission:

- Entry, search, and seizure powers
- Application for civil penalty
- Issuance of infringement notices
- Application for injunction
- Acceptance and enforcement of undertakings
- Issuance of Required Action, Compliance, and Adverse Action Warning notices

It is unclear why each power is required for both bodies, when the Governor and Regulator should have clear and distinct regulatory responsibilities.

**Recommendation 23:** Offer the sector guidance on how the System Governor and the Regulator will each utilise their granted powers, and how this use will differ for the body's distinct purposes.

No comment can be made on "Critical Failure Powers" without clearer definitions and proposals.

### Banning Orders for Entities

BallyCara accepts the appropriateness of banning orders as they apply to individuals within the sector. The new act, however, proposes to introduce banning orders for non-person entities, including registered providers.

S286 gives the Commissioner the power to prohibit or restrict (ban) a registered provider from delivering funded aged care services. Page 82 of the Consultation Paper summarises,

> "This includes where the registered provider has contravened the new Act, is unsuitable to deliver those services, or poses a severe risk to the health, safety and wellbeing of individuals to whom it is delivering services."

This addition raises two questions for further consideration:

- Is this power *necessary* in the context of the wider suite of regulatory powers the regulator can exercise?
- Would there be an *appropriate* circumstance in which this power should be applied?

Regarding the necessity of this power, it is not clear when or why banning orders would be applied rather than powers for variation or revocation of registration. Previous provisions, primarily under Chapter 3, establish that the regulator controls who will be considered a registered provider and the conditions required to maintain that registration. Those provisions already grant the power to withdraw the ability for a provider to provided funded services.

Regarding the appropriateness of this power, issuing banning orders against providers may risk impacting the continuity of care and services. Enforceable notices, requiring action or compliance, as well as proposed critical failure powers, will surely be more effective methods for ensuring older people can receive the highest quality care and services possible.

In summary, it is unclear why this power is needed when the regulator can better ensure compliance and high-quality care through combining registration powers with other enforcement powers.

**Recommendation 24:** Reconsider whether banning orders for non-person entities are appropriate and necessary. Clarify why banning orders are needed in addition to other enforcement powers.

## Chapter 7

The information management requirements that are so far drafted in Chapter 7 seem relatively appropriate for the future of the sector. However, these requirements require strong information management infrastructure across the sector to empower sustainability and security.

*This section of our submission contains content relevant to consultation question 34.*

### Information Management Assurance

There are significant opportunities to improve from current information management systems. BallyCara has had numerous experiences of providing information to Government bodies, only to have the same information requested in the next interaction.

Chapter 3 authorises regulatory bodies to receive confidential information about older people and service providers. However, does not currently make any provisions regarding how this information is to be managed. It is not appropriate to introduce these rights without also outlining corresponding responsibilities.

It is unclear whether the Act plans to introduce record keeping requirements for the Department and the regulator, as these elements are not drafted.

- **Note:** The exposure draft does not identify that Parts 2 and 3 are missing, or to be drafted. Record keeping is only mentioned in the Consultation Paper.

**Recommendation 25:** Ensure information management provisions are supported by effective systems at a System Governor and regulator level, to assure providers that information will be effectively managed and retained.

### Interface with the Privacy Act

It is not immediately clear how proposed information management provisions will interact with existing requirements under the *Privacy Act 1988*.

Providers have existing information management obligations under the Privacy Act that dictate personal and health information gathering, access, usage, and record-keeping requirements. Introducing additional obligations will require assurance that these can be met at the same time as the Privacy Act obligations.

**Recommendation 26:** Provide guidance material that specifies how updated information management requirements will differ from requirements under the *Privacy Act 1988*.

## Chapter 8

BallyCara has no comments nor recommendations to submit on the content of Chapter 8.

## Chapter 9

The sector cannot rush this change. The tight, ever-shrinking timeline to complete consultation and get this legislation before parliament is putting substantial pressure on this once-in-a-generation reform. The Department and Government must ensure that changes are effectively and sustainably embedded in the sector.

*This section of our submission contains content relevant to consultation questions 42, 44, 45, and 46.*

### Phased Approach to Reform

The Department and the Government has seemingly already committed to the phased approach to reform shown on Page 99 of the Consultation Paper. This is evidenced by stages 1-3 being complete, and 4-6 being markedly progressed.

There is no need to provide comment on this part of the consultation.

### Readiness Arrangements and Timelines

Effectively readying the sector must be done in a considered manner. Providers must be given enough time and support to effectively embed these changes, but there also must be a clear end point when changes are enacted, and the system can operate as intended.

Whilst BallyCara maintains our general support for changes, and are confident that the sector can adapt, there are several changes that will slow down this process. For example, the detail-oriented work required to ensure minor terminology changes are captured and embedded, such as 'key personnel' to 'responsible persons' (see S11). In our response to 'A New Model for Regulating Aged Care – Paper No. 2' in June 2023, BallyCara highlighted how these inconsequential changes of language can heighten workloads for providers. In that response, we submitted:

> Providers are still expending resources to update forms, policies, and documentation, and educate staff, to reflect the additional governance responsibilities of the aged care reforms for 'Key Personnel' – and will only have to recommence the exercise with the second change … Frivolous changes, that disregard recent reform and do not consider impacts to providers, encourage a culture of reactivity in the sector. If they continue with the proposed model, said culture will continue too.

Table 1 summarises some of the changes and estimates the scale of readiness responses that will be required in the sector.

*Table 1: Estimated readiness activities for proposed changes.*

| ***Proposed Change*** | ***Scale of Readiness Activities*** |
|---|---|
| Embedding statement of rights and other revised principles (i.e., high-quality care) | • Mild readiness activities.<br>• Will require embedding in policies, and staff and consumer learning. Will also likely require internal evaluation and review processes. |
| Registration requirements | • *Totally dependent on Department and regulator readiness and system effectiveness*<br>• If transition arrangements are effective, limited readiness activities required for existing providers.<br>• However, there is a possibility that ineffective systems for transition can add significantly to required timelines. |
| CHSP registration requirements | • Uncertain. The success of these requirements will rely on undrafted and unseen material (incl. the rules). |
| Revised provider obligations | • Limited readiness activities required.<br>• While these will not be overly different to current operational requirements, providers will need to ensure embeddedness in policies and learning. |
| Revised standards | • Larger scale readiness activities required.<br>• The revised standards do not necessarily immediately shift the standard of care expected in the sector (so will not require any significant operational shifts), however will require reformed policies, procedures, learning material, and evidencing processes. This may take time to complete and embed across the organisation. |
| Prudential standards | • Uncertain. The success of these requirements will rely on undrafted and unseen material (incl. the rules). |

| | |
|---|---|
| Worker screening requirements | • Uncertain. There is no clarity on these requirements offered in this consultation. |
| New statutory duties | • Limited readiness activities required.<br>• Will require simple policy updates and learning activities/resources. |
| Language changes (i.e., *key personnel* to *responsible persons*) | • Mild readiness activities required.<br>• Updates will be required throughout internal documentation, resources, and learning.<br>• Not a complex preparation but will require detail-oriented work. |

Most legislative and regulatory changes will require administrative updates followed by staff and/or Consumer learning. Ensuring embeddedness will take some time, and the complexity of readiness activities will be increased by the *volume* of change occurring at a single time. The Department and regulator will also need to consider the effort required to transition their own operations effectively.

- We estimate that the sector will require **a minimum of 6 months** to effectively transition to the requirements of the new Act.

Larger providers with centralised administrative support will be at an advantage with managing the transition, while smaller providers (particularly single-site Residential homes and region-specific home care providers) will require significant effort to meet requirements. During this transitional period, we suggest the Commission dedicates their significant resources to working with these providers, in a spirit of collaboration, to prepare for the new requirements.

| |
|---|
| **Recommendation 27:** Provide a transition period of *minimum 6 months* to enable necessary changes to be embedded in service providers, the Aged Care Quality and Safety Commission, and the Department of Health and Aged Care. |
| **Recommendation 28:** During the transition period, the regulator should dedicate resources to working collaboratively with providers to prepare for changes. |

While a detailed, integrated readiness support plan will be useful for the sector, it is concerning that there appears there has been no sector impact assessment of these significant changes.

The high-level changes summarised across pages 100-101 of the Consultation Paper are not useful for the sector in their current form. Each change requires a model of predicted impact on consumer, provider, and sector operations and sustainability. If this has been completed, it should be publicised in the spirit of transparency and accountability.

| |
|---|
| **Recommendation 29:** Undertake, and publicise, a detailed sector impact assessment for each of the proposed changes. If this has been completed, it should be publicised in the spirit of transparency and accountability. |