



***Response to the
Exposure Draft – Aged Care Bill 2023***

***Young People In Nursing Homes National Alliance
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Recommendations

The Alliance recommends the following three actions be taken to address critical issues associated with the Exposure Draft of the proposed Aged Care Bill 2023 ('the proposed Bill')¹:

1. Amend the proposed Bill

In relation to residential aged care (RAC), the proposed Bill should be amended to:

- (i) limit eligibility for permanent RAC to only those people requiring residential aged care services by explicitly excluding:
 - (a) any person under 65 years, and
 - (b) any NDIS participant over 65 years
- (ii) limit eligibility for respite RAC to those who require temporary residential aged care services by allowing access to individuals who are:
 - (a) over 65 years, or
 - (b) under 65 years but for a maximum of 4 consecutive weeks and a maximum of 8 weeks within any 12-month period.*

*This measure should be reviewed within 18 months with a view to restricting respite RAC to only people over 65 years.

2. Take immediate action to deliver an interim solution

The Commonwealth Government should bring a proposal to National Cabinet seeking agreement from all governments to work quickly together to:

- (i) develop an interim solution to ensure that people under 65 years who are homeless or at risk of homelessness, or who wish to leave RAC, have access to safe and supported living in the community (that is, accommodation and services). These interim solutions may include:
 - (a) refurbishment and re-use of small and/or financially unviable RAC or other facilities
 - (b) commissioning of targeted housing and support services by the NDIS and other state/territory programs
 - (c) expansion of homelessness and health programs to include funding and provision of care and support services for people requiring formal supports
 - (d) repurposing of social and public housing, and
 - (e) use of vacant capacity in NDIS Specialist Disability Accommodation (SDA) properties.

- (ii) establish an oversight and response body with representatives from government and the community to limit unintended consequences of closing off access to RAC for younger people and NDIS participants. This should include close monitoring and reporting of:
 - (a) interim measures including outcomes for individuals living in those interim arrangements
 - (b) number of younger people and NDIS participants being funded to live in permanent RAC while receiving disability services
 - (c) number of younger people and NDIS participants who leave RAC to live in the community and their outcomes
 - (d) number of younger people with disability and older NDIS participants who:
 - i. are discharge delayed in hospital
 - ii. living in step-up/step-down services between the community and hospital
 - iii. living in multi-purpose services (MPS) or other ‘specialist’ or flexible aged care programs, or
 - iv. are being supported by homelessness programs.

3. Initiate codesign for a long-term solution

The Commonwealth Government should bring to National Cabinet a proposal for governments to lead the codesign of a durable solution to the *Younger People In Residential Aged Care* (YPIRAC) issue.

Once eligibility for permanent RAC is closed for all people under 65 years, a strategy should be urgently developed to provide safe, accessible, suitable and secure accommodation and services to allow these individuals to permanently live with dignity outside the RAC system.

¹ Department of Health and Aged Care (DoHAC). *Exposure draft – Aged Care Bill 2023*. Accessed on 14 February 2024 at <https://www.health.gov.au/resources/publications/exposure-draft-aged-care-bill-2023?language=enf>

Introduction

The Alliance welcomes the opportunity to provide feedback on the Exposure Draft of the proposed Aged Care Bill 2023. Our response focusses on two areas of abiding concern - eligibility and the statutory duty of care.

While the duty of care provisions are welcomed, we wish to alert the Minister that other changes will have profound implications for people with disability because of the longstanding interface between disability and aged care.

For the first time in Australian history, there will be a formal age limit on access to aged care services, with eligibility authorised for some people aged 50-65 years.

As drafted, the proposed Bill will formalise discrimination against people with disability and result in significant hardship. The aged care system was developed to specifically support frail older Australians in the later stages of life. Aged care services are neither designed for, nor intended to support, the very different needs of people with disability.

Because of this, successive Commonwealth Governments have had an explicit policy of stopping younger people with disability being admitted to permanent RAC and supporting those already in RAC to safely move to live in the community.

The proposed Bill turns this policy on its head.

It formally flips the Australian Government's position from prohibition to endorsement of younger people living and dying in residential aged care.

While we acknowledge that the drafters of the proposed Bill may have had the intention of assisting with the YPIRAC 'problem' by including age limitations, unfortunately the result does not align with key realities:

- (i) the Aged Care and Disability Royal Commissions clearly stated that RAC is an inappropriate setting and service for people with disability under 65 years;
- (ii) every person under 65 years living in permanent residential aged care had a disability and was homeless or at risk of homelessness at time of their admission – the Aged Care Act delegated legislation² already requires a person to meet both conditions before they can be considered eligible for permanent RAC. The Department's own guideline states:

To approve a younger person for access to permanent residential aged care, the Aged Care Act requires that there are no other care facilities or care services more appropriate to meet the person's needs (Section 6(1)(b) of the Approval of Care Recipient Principles refers). This is in

² Federal Register of Legislation. *Approval of Care Recipients Principles 2014*, s6(1)(b). Accessed on 14 February 2024 at <https://www.legislation.gov.au/F2014L00804/latest/text>

*addition to the overarching requirements specified in the Aged Care Act for all people seeking to access residential aged care.*³

...

*Residential Aged Care (RAC) is not designed to support younger people. The Government is committed to meeting its YPIRAC target that, except in exceptional circumstances, no people under 65 will be living in RAC by 2025.*⁴

That is, notwithstanding that RAC is not appropriate for younger people, for every younger person who was admitted to RAC there was no other option or every other option was less appropriate;

- (iii) the overwhelming majority of younger people who have entered aged care over the last decade are 50-64 years old;⁵
- (iv) more than 95% of younger people in permanent RAC are NDIS participants;
- (v) The Department of Health and Aged Care (DoHAC) has provided substantial funding to provide navigators to assist YPIRAC who are not NDIS participants to transfer to live in the community⁶ which has resulted in a total of 3 individuals leaving RAC since 2021, and
- (vi) 323 younger, homeless, disabled people entered permanent RAC during 2022-23. Most of these younger people will die in RAC⁵.

The risks created by the proposed Bill's inclusion of eligibility exceptions for younger people include:

- **Formalising the discredited practice of younger people with disability living permanently in residential aged care**

By making some people under 65 eligible for aged care services, the Bill codifies placement of younger people in RAC. This directly contradicts the Commonwealth

³ Department of Health and Aged Care (DoHAC). *Principles and guidelines for a younger person's access to Commonwealth funded aged care services*, s3.1: 5. Accessed on 14 February 2024 at <https://www.health.gov.au/resources/publications/principles-and-guidelines-for-a-younger-persons-access-to-commonwealth-funded-aged-care-services?language=en>

⁴ Ibid., s3.3: 7. Accessed on 14 February 2024 at <https://www.health.gov.au/resources/publications/principles-and-guidelines-for-a-younger-persons-access-to-commonwealth-funded-aged-care-services?language=en>

⁵ Australian Institute of Health and Welfare (AIHW). *Younger people in residential aged care*. Accessed on 14 February 2024 at <https://www.gen-agedcaredata.gov.au/resources/younger-people-in-residential-aged-care>

⁶ Department of Health and Aged Care (DoHAC). *Younger people in residential aged care – Priorities for action*. Accessed on 14 February 2024 at <https://www.health.gov.au/our-work/younger-people-in-residential-aged-care/priorities-for-action>

Government's acceptance of *Recommendation 74* of the Aged Care Royal Commission on this issue⁷.

There is no commensurate requirement on the NDIA (or state and territory governments in the case of those not eligible for the NDIS) to guarantee funding or provision of suitable accommodation and services to support younger people to live safely and with dignity in the community. This allows these entities to continue using aged care as a low- or no-cost substitute for the supports they are legislatively required to provide.

- **Restricting the services available to NDIS participants of any age in permanent residential aged care**

As the services available under the Aged Care system are limited and designed specifically for older people (see s8) and not for people with disability, individuals with disability who rely on aged care services will be significantly disadvantaged.

- **Making NDIS participants over 65 years open to inappropriate pressure to enter permanent residential aged care against their wishes**

The NDIS Review⁸ recently recommended that participants over 65 years be able to access the aged care system while retaining their access to the NDIS.

However, because the Department of Health and Aged Care (DoHAC) funds aged care services for NDIS participants in RAC, and then bills the NDIS for reimbursement ('cross-billing'), NDIS participants in permanent RAC receive aged care services that are different to, and more limited than, disability services. As the sole funder of their participants living in RAC, the NDIS is therefore funding more limited services for these participants than they would receive in residential disability services.

If participants over 65 years no longer automatically lose their NDIS access when entering RAC, a real risk emerges that the NDIA will formalise its unofficial policy that participants over 65 years seeking SIL support should instead reside in RAC (at lower cost to the NDIS) rather than continue living in the community with funded disability supports.

- **Continuing the use of permanent residential aged care as an inappropriate proxy for disability services, and discriminating against younger people with disability in the aged care system**

⁷ Department of Health and Aged Care (DoHAC). *Australian Government response to the final report of the Royal Commission into Aged Care Quality and Safety*. Accessed on 12 February 2024 at <https://www.health.gov.au/resources/publications/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety>

⁸ Commonwealth of Australia, Department of Prime Minister and Cabinet. *Working together to deliver the NDIS – Final Report*. October 2023. Accessed on 14 February 2024 at <https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis>

The proposed Bill formally recognises that younger people living in permanent residential aged care will be accorded a lower priority in the provision of residential aged care services than older people:

22(2) The Commonwealth aged care system supports the delivery of funded aged care services by registered providers that:

- (a) puts older people first; and*
- (b) treats older people as unique individuals; and*
- (c) recognises the rights of individuals under the Statement of Rights.*

(Emphasis added)

22(9) Funding by the Commonwealth for funded aged care services supports the delivery and regulation of those services to the individuals who have been prioritised on the basis of need for funded aged care services, taking into account the availability of resources and the needs of the individuals relative to other individuals.

These provisions operate in direct tension with s34 of the NDIS Act which requires the CEO of the NDIA to approve reasonable and necessary disability supports for NDIS participants, including those over 65 years. That is, disability supports for NDIS participants are not to be rationed nor approved based on availability of resources as they are in aged care. Moreover, they highlight that our systems of prescribed aged care services and of individualised disability services in Australia are incompatible.

Young people living and dying in residential aged care

Progress to support younger people in RAC to transfer to live in the community has been painfully slow over the last 5 years, with devastating results. Consider these statistics from the Australian Institute of Health and Welfare (AIHW) in relation to the 95% of YPIRAC who are NDIS participants⁹:

- only around 9% of all exits from YPIRAC each year are accounted for by younger people transferring to live with ‘family/home or other’;
- over 75% of YPIRAC leaving the cohort each year either died or turned 65 (the latter no longer counted as YPIRAC but remain in RAC);
- most younger people who enter permanent RAC will die there.

Despite the introduction of the NDIS Act in 2013 to ensure that people with significant, permanent disability have access to personalised funding plans to meet their disability needs and support them to live safely in the community, thousands of younger people over

⁹ Australian Institute of Health and Welfare (AIHW). *Younger people in residential aged care*. Accessed on 12 February 2024 at <https://www.gen-agedcaredata.gov.au/resources/younger-people-in-residential-aged-care>

the last decade have died waiting for a chance to leave RAC and live that promised life in the community.

The stark truth is that the successive Government strategies to deal with the YPIRAC challenge have been singularly ineffective and this failure has come at great cost to younger people with disability. As a nation, we have failed the vast majority of these younger disabled people by accepting that they will languish in nursing homes and die there.

The Aged Care Royal Commission and the Disability Royal Commission both came out strongly against younger people living in RAC because it was not an appropriate environment. More recently, the NDIS Review has stated in its Final Report that RAC “is considered inappropriate for younger people (except in exceptional circumstances) ... Joint action is required across the disability, aged care, health and housing sectors, and all levels of government to meet the 2025 target.”⁸

However, the basis for these conclusions is often ignored. The Disability and Aged Care Royal Commissions went into some detail and concluded that the two main reasons RAC is inappropriate for younger people are:

- **The environment in residential aged care settings is inappropriate**

Other residents are all older and many have significant health and communication challenges. There is a passive approach to service delivery, residents quickly become deconditioned and institutionalised, and death is common. There is little privacy, little choice or control and often little community engagement.

- **The types of services and the funding available is limited**

Some services required by people with disability are not funded through the aged care system. Where they are theoretically available, there is usually limited funding for things such as assistive technology, allied health care, nursing, social activities, capacity building, community engagement, employment support etc. Even where funding is available, there are barriers to accessing medical, dental and allied health care. Use of psychotropic medication is high. Staff ratios are often lower than in disability care. The food is often poor quality.

Accepting our recommendations means that governments or agencies (including the NDIA) who are responsible for the welfare of people who would be excluded from RAC, will be required to fund the supports required by these individuals to meet their needs.

Specifically, these programs will be required to fund supports in the community for those 50-65 years who are First Nations, homeless or at risk of homelessness, NDIS participants over 65 years, and those receiving palliative care.

These individuals should have choice and control over how they use their funding. If they decide they want to live in a RAC facility, and the RAC provider is able to provide the required services and standard of care, they could then negotiate with the provider.

In these situations, all of the services provided to NDIS participants while living in the RAC facility would be classified as disability services (and not aged care services) and purchased by the participant from their plan funds, and providers would need to meet the NDIS quality and safety standards for all of these services.

The incompatibility of aged care services with NDIS disability services is seen plainly in Sections 8 and 15 of the Exposure Draft. Section 8 defines aged care services:

8. Aged care service list and funded aged care services

(1) The rules *must prescribe a list of services for which funding may be payable under this Act.* The rules must:

- (a) list each service; and*
- (b) describe each service; and*
- (c) specify the service type that the service is in; and*
- (d) specify each service group a service type is in; and*
- (e) specify each service type as a service type that is delivered in a residential care home, or a home or community setting, or both; and*
- (f) specify any specialist aged care program under which a service type can be delivered; and*
- (g) specify each provider registration category under which a service type can be delivered.*

(Emphasis added)

Section 8 requires that a list of services be prescribed that the provider can be paid to deliver. In contrast, the NDIS Act provides for funding for the participant based on their needs.

In other words, instead of determining a person's needs and then approving funding to meet those needs, the proposed Aged Care Bill allows for Rules which will prescribe (that is, limit) the services and service types to be provided by the provider in a range of circumstances. If the NDIS Act empowers participants to choose from an *a la carte* menu (that is, the array of all disability services), then the Aged Care Act provides a more limited *table d'hôte* (a set menu).

In addition, aged care providers will be subject to rules about the services they deliver as per s15:

- 15 (a) how registered providers must treat, and engage with, individuals seeking to access, or accessing, funded aged care services;**
- (b) how registered providers must deliver funded aged care services, including governance arrangements, and arrangements for planning and delivery of palliative care;**
- (c) the physical environments in which funded aged care services are required to be delivered;**

- (d) *how registered providers must deliver quality and safe clinical care to individuals, including infection prevention and control procedures and arrangements;*
- (e) *how registered providers must deliver food and drink to meet the nutritional needs and preferences of individuals;*
- (f) *how registered providers must support individuals accessing funded aged care services in approved residential care homes;***
- (g) *how registered providers must manage and respond to feedback and complaints;*
- (h) *how registered providers must monitor and drive improvements to their delivery of funded aged care services*
(Emphasis added)

Sections 15(a), (b) and (f) prescribe how providers must engage and support individuals to deliver **aged care services**. This is inconsistent with the NDIS Act where there is an expectation that the individual negotiates their **specialist disability supports** with their provider via a discussion that is then formalised in a service agreement. The aged care model, whereby a provider offers a set service model that is the same offer for all residents as part of a statutory obligation, is inconsistent with the NDIS Act.

Ending systemic laziness

The aged care system is intended for, and should be designed to meet the needs of, older Australians only. All other individuals should be supported and funded by the service that has responsibility for their welfare.

In the case of Australian residents with significant disability, this is the NDIS. For others who are homeless or at risk of homelessness, this is state/territory homelessness agencies.

This principle is consistent with the *Statement of Principles* in the proposed Bill at s22(11):

*The Commonwealth aged care system focusses on the needs of older people, and **should not be used inappropriately to address service gaps in other care and support sectors** preventing individuals from accessing the best available services to meet the needs, goals and preferences of those individuals.¹*

(Emphasis added)

The inclusion of the s40 eligibility provision for people under 65 is in direct conflict with the *Statement of Principles* in the same Bill.

Instead of continuing to accommodate the inertia of other responsible programs and agencies (including the NDIA), the aged care legislation should be maintaining the integrity of its own system. It should do this by removing the 'exceptional circumstances' clauses.

Doing so will force the responsible other systems to step up and deliver the supports required by individuals currently named in s40.

Without this action, the Exposure Draft's lack of a definition of 'homeless' and 'homelessness' in s40(a)(3) creates a loophole that, in the absence of the relevant services other systems are responsible for delivering, enables those systems to continue using RAC as an inappropriate destination for younger disabled people.

Turning around a wicked problem

The YPIRAC challenge has drifted and compounded over many years. While the number of younger people in residential aged care has reduced, this has only been achieved by government inertia in the face of the majority of YPIRAC dying in RAC.

As a result, YPIRAC is no longer a simple issue and could even be considered a 'wicked problem'¹⁰. It definitely requires a paradigm shift in thinking by the public sector¹¹.

As with most wicked problems, the causes are complex, multiple and sometimes obscure. However, regardless of the origins, as a nation we have clearly failed to initiate the structural change required to ensure that safe, suitable alternative accommodation and services for people with disability are available in the community so that they can avoid being admitted to permanent RAC.

While the required alternative accommodation and services may not yet be in place for many of these individuals, we believe we have reached the point where the door to permanent RAC must be firmly closed for people whose needs should be funded by other systems; and interim measures should bridge the period until an appropriate long-term solution is in place.

To put it as clearly as possible, we agree with the comments in the 2023 consultation report:

*The intention to limit access of aged care to younger people was welcomed in-principle as it relates to the intentions set by the Royal Commission. However, it was voiced that the reality of younger people in aged care is far more complex and setting restrictions that are too limiting **may place additional pressures on other systems.***¹²
(Emphasis added)

However, we consider that this pressure is required to prompt action so that more unnecessary deaths of younger people in RAC are avoided.

¹⁰ Katsonis M. *What's so wicked about wicked problems?* ANZSOG, 15 May 2019. Accessed on 14 February 2019 at <https://anzsog.edu.au/research-insights-and-resources/research/what-s-so-wicked-about-wicked-problems/>

¹¹ Graham J. *Mindset shift in public service needed to address 'wicked problems', study finds.* The Mandarin, 9 March 2022. Accessed on 14 February 2022 at <https://www.themandarin.com.au/183628-mindset-shift-in-public-service-needed-to-address-wicked-problems-study-finds/>

¹² Department of Health and Aged Care (DoHAC). *A new Aged Care Act: the foundations – Consultation summary report:* 45. Accessed on 14 February 2024 at <https://www.health.gov.au/resources/publications/a-new-aged-care-act-the-foundations-consultation-summary-report?language=en>

The opportunity to resolve YPIRAC

A great deal has changed since the current Aged Care Act was drafted in 1997. The service landscape has undergone life-altering changes and the Commonwealth is now drafting new aged care legislation at a time when there is an increasing appetite for change and collaboration within the NDIS system.¹³

The NDIS is now more than a decade old and has established systems in place to approve plans and funding for participants who are living in RAC. There have been reports of excess capacity in NDIS SDA accommodation¹⁴ and, as a result of changes in the aged care system, smaller and/or unprofitable aged care facilities are appearing on the market¹⁵.

Both options could be repurposed to temporarily accommodate younger people who would otherwise be admitted to permanent RAC. In addition, state/territory social and public housing that may have otherwise been recycled could also be redirected to provide additional interim accommodation.

Other systems such as health and homelessness systems can and should adapt to find additional funding and solutions to care for younger people who need step-up/step-down care and/or are homeless or at risk of homelessness. The model for such adjustment is the Palliative Care sector which is undertaking exactly this task in light of the exclusion of people seeking palliative care and/or end-of-life support from permanent RAC in the proposed Bill.

Without a line being drawn in the sand on inappropriate admissions to permanent RAC, other systems will continue to use the aged care system as an excuse to avoid responsibility for the target groups they are funded to service.

With the Commonwealth and the States already engaged in system reform around foundational supports for people with disability and changes to program design, there has never been a better time to legislate for the exclusion of younger people with disability, and NDIS participants over 65 years, from permanent RAC. A significant opportunity will be lost if these eligibility loopholes are left in the new aged care legislation.

The Alliance therefore recommends that section 40 of the proposed Bill omits all references to people under 65 years having access to permanent RAC and specifically excludes NDIS participants over 65 years from eligibility to access aged care.

¹³ Department of Social Services. *New Taskforce to help improve NDIS registration – Media Release by Hon Bill Shorten MP*. Accessed on 14 February 2024 at <https://ministers.dss.gov.au/media-releases/13786>

¹⁴ Shapiro J and Mason M. *‘Too good to be true’: spruikers feed disability homes frenzy*. Australian Financial Review, 9 September 2022. Accessed on 14 February 2022 at <https://www.afr.com/wealth/personal-finance/too-good-to-be-true-spruikers-feed-disability-homes-frenzy-20220908-p5bget>

¹⁵ Lucas C. *Dramatic rethink of aged care needed as operators stare down \$9.3b black hole*. The Age, 15 September 2022. Accessed on 14 February 2024 at <https://www.theage.com.au/national/victoria/dramatic-rethink-of-aged-care-needed-as-operators-stare-down-9-3b-black-hole-20220902-p5bf19.html>

Systemic benefits of deleting s40 and closing aged care to younger people

If the Commonwealth removes access to permanent RAC for people under 65 years and NDIS participants over 65 years, expected benefits consistent with current government policy include:

- **Placing the focus on responsible other programs to be accountable** for these individuals directly rather than using RAC as a no- or low-cost default option.
- **Requiring the NDIS and other government agencies to directly fund individuals on the basis of need** rather than a funding arrangement designed for a different cohort of older people.
- **Supporting individuals to choose** whether they live in an aged care facility, if they consider it the most suitable option based on location, community connection or other reason.

If the person is funded through a program other than Aged Care, then they can enter that RAC facility as a 'private' resident and negotiate a support arrangement that is individualised. If that person is an NDIS participant, they are likely to have a higher funding level than they would under the current cross-billed aged care arrangement so their choices around support will expand.

- **Ending the cross-billing arrangement between the NDIA and DoHAC** for provision of aged care services to the NDIS
- **Supporting specialist facilities for First Nations and homeless people** to continue operating as multi-purpose services with multiple funders and service offerings, rather than solely aged care facilities limited by aged care funding arrangements.

NDIS Participants over the age of 65

The Alliance strongly recommends that access to residential aged care by NDIS participants **of any age** be excluded under the proposed Bill.

That is, no NDIS participant should have their disability needs funded by the aged care system. The NDIS is legislatively required to fully fund disability supports.

Over the two decades that the Alliance has worked on this issue, we have seen many instances of older residents of group homes or individuals living in their own homes being pushed involuntarily towards residential aged care by both service providers and the NDIA.

For example, it has been relatively common for providers to 'relinquish' residents whose needs have changed and who therefore challenge the provider's established service routines and business model, by refusing to accept them on discharge from hospitals, citing their incapacity to meet the person's changed needs.

In some cases, the NDIA has refused to fund additional support for the individual and this has led to the relinquishment. In other cases, providers have not bothered to pursue increased funding and made a unilateral decision to take the participant to the emergency department of the nearest hospital, stating that they can no longer care for the person.

Where these individuals were clients of the *Disability Support for Older Australians* (DSOA) program (previously known as *Continuity of Care*), which provides block funding to providers, the increasing care needs of individuals as they aged meant increasing costs and narrowing of financial margins, and individuals were consequently at higher risk of relinquishment.

In the case of the NDIS, we are aware of a growing number of participants over 65 years who have had requests for additional support turned down specifically because they are nearing or have turned 65. Planners and delegates have told participants that because of their age there is a 'community expectation' that they should now access the aged care system and, even where they were entitled to retain their NDIS access, that it was not reasonable or necessary for the NDIS to fund additional supports to the services provided in RAC.

In 2023 we supported two individuals in this situation who were both homeowners living in their own homes. One was 64 years old and was advised that her current NDIS plan would be her last as she would be 65 years old at her next plan review so she needed to be planning to go to an aged care facility. This individual was adamant that she did not want to enter permanent RAC and wanted to continue living in her home.

Another 67 year old participant had a delegate remove her SIL and SDA approval from her plan during a hospital discharge process stating that, as she was over 65 years old, it was socially appropriate to go to RAC from hospital.

This case was appealed at the Administrative Appeals Tribunal (AAT) and the SIL service was subsequently restored after 12 months of argument. This participant is living successfully in a community accommodation setting and has subsequently experienced increased function and reduction in medication use.

While the actions of these NDIA staff are not consistent with the NDIS legislation, the frequency of these decisions across different planning teams leads us to believe there is an internal strategy to address the number of participants over 65 years in the NDIS by 'directing' them to RAC. We believe that planners/delegates are simply responding to internal directions on to how to 'manage' this cohort of participants.

The NDIS has responsibility for these participants over 65. The new Aged Care Act must therefore exclude NDIS participants over 65 years from accessing permanent RAC to safeguard the aged care system from the NDIS using RAC as a no- or low-cost option for this cohort.

NDIS Review and repeal of s29(1)(b) from the NDIS Act

Under the NDIS Act, s29(1)(b) requires that if a participant is first admitted to permanent residential aged care after the age of 65, they will immediately lose access to the NDIS and all of their NDIS entitlements. Individuals who have unknowingly encountered this situation, have been significantly disadvantaged as a result of abruptly losing access to individualised therapy, equipment, capacity building and community access support.

In its explicit comment and recommendations regarding people with disability over 65 years of age in RAC, the Aged Care Royal Commission pointed to the significant difference in funding and opportunity in the Aged Care and NDIS systems.

However, in its recently published final report, the NDIS Review not only recommended repealing s29(1)(b) of the NDIS Act but went further and recommended that while NDIS participants should retain their NDIS entitlements after the age of 65, they should also have access to 'reasonable and necessary' aged care services.¹⁶

While the Alliance has campaigned for the repeal of s29(1)(b) and welcomes the Review's recommendation, if the Review's recommendation regarding concurrent access to aged care and disability services is accepted, it will open the door to more NDIS participants being 'moved' to this hybrid service model – aged care services making up the core with disability supports added when the planner considers they are required.

In making such a recommendation, the NDIS Review seems to have ignored the significant differences in the two systems that were highlighted by the Aged Care Royal Commission.

The support documents to the NDIS Review report¹⁷ reveal that when the Review considered the consequences of a mandatory age trigger for individuals to transition from the NDIS to the aged care system, the Reviewers found that the very real risk of harm and disadvantage to participants made this option untenable:

While (a mandatory upper age limit on participation in the NDIS) would have a significant impact on scheme cost growth, it would do so at significant negative outcomes for participants. As we have already noted, it is a very different experience to have a lifelong disability compared to acquiring a disability later in life. For a number of participants over 65, the supports that the NDIS provides would not be fully replaced by the aged care system in its current state. This would create a change in care levels

¹⁶ Commonwealth of Australia, Department of Prime Minister and Cabinet. *Working together to deliver the NDIS. Independent Review into the National Disability Insurance Scheme. Final Report*, October 2023, Recommendation 2.11: 5.

¹⁷ Commonwealth of Australia, Department of Prime Minister and Cabinet. *Working together to deliver the NDIS – supporting analysis*, October 2023. Accessed on 14 February 2024 at <https://www.ndisreview.gov.au/sites/default/files/resource/download/NDIS-Review-Supporting-Analysis.pdf>

*that could risk real harm for some older participants. We view this as an inappropriate response Government should not consider.*¹⁸

While we are pleased to see this extreme position rejected by the NDIS Review and agree with their conclusions about the negative impacts of the aged versus disability systems for people with disability, we remain concerned that NDIS participants may risk having their NDIS entitlements gradually whittled away if they start mixing their NDIS funding with aged care subsidies. The fact that this was even considered shows that there is concern about Scheme costs for older participants:

*In the current state, incentives appear to reduce the likelihood of NDIS participants aged 65 taking up supports offered by the aged care system, even when the aged care system may provide supports that better meet their needs.*¹⁹

...

*With dual participation, a NDIS participant would be able to use the service coverage of aged care (such as when it is the best option, or where there may be no available NDIS supports) and the aged care system may have a lower funding cost than supports available in the NDIS. This is especially relevant for home and living supports such as SIL.*²⁰

The risk of large numbers of older participants being directed by the NDIA to access RAC would be a bad outcome. The new Aged Care Act must act as gatekeeper to ensure that people only access the aged care system when they genuinely need aged care services as their primary support and not disability supports.

Statutory Duty of Care

The Alliance fully supports the inclusion of the statutory duty of care and the model of operation that has been included in the proposed Bill, and commends DoHAC on establishing this approach and integrating a quality system around it. Having this duty as the cornerstone of the quality and safety regime will result in a positive cultural shift in the provision of aged care services over time.

We strongly recommend that DoHAC engages proactively with the NDIS and the Commonwealth Government more generally on the adoption of a companion statutory duty in the NDIS Act. This will reduce the potential tension between the provision of aged and disability services to those individuals currently residing in permanent RAC.

Given the reliance in the proposed Bill on NDIS standards including worker screening and information sharing, and the fact that many aged care providers are registered NDIS providers, it makes sense for the aged care and NDIS systems to increase their alignment in these areas through improved collaboration.

¹⁸ Ibid: 186.

¹⁹ Ibid: 183.

²⁰ Ibid: 187.

Conclusion

The proposed Aged Care Bill 2023 provides the opportunity to draw a line in the sand and clarify the interface between the disability and aged care systems.

We urge the Commonwealth to act now to avoid undermining its own longstanding policy on YPIRAC by legislating to explicitly permit younger people to live - and die - in residential aged care. Removing access to **all** younger people under 65, will highlight the requirement for government programs other than aged care to step up and act on their legislative responsibility for younger people at risk of admission to RAC – including the NDIS, Aboriginal and Torres Strait Islander programs, and state/territory homelessness and health programs.

We also urge the Commonwealth to support the recommendation of the NDIS Review in relation to older NDIS participants by excluding older NDIS participants from accessing the RAC system. This will ensure that they cannot be inappropriately pressured into RAC and so lose their access to the NDIS and the disability services they need over time. Any older participant who wishes to live in a RAC will do so as an NDIS participant receiving disability supports.

Finally, we ask that the Commonwealth puts temporary limits on access by NDIS participants to respite care in residential aged care before ceasing this practice within 18 months. NDIS participants who need respite care can be funded for short term accommodation (STA) and services which they should be able to purchase from suitable disability providers. Aged care respite beds are in high demand and should be reserved for older people who do not have another funding source.

Governments need to hear the alarm, wake from their bureaucratic sleep and get busy with interim solutions to ensure that people with disability do not bear that brunt of official inertia when the door to RAC finally and quite properly closes.

Further contact

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