23 February 2024

New Aged Care Act – Exp Draft – Submission

Key positives

- Articulation of rights for older people reinforces the importance of quality aged care and will help empower older people and focus the attention of providers and officials.
- Establishing a process for reviewing providers as a whole will allow more thoroughness, and hopefully create additional efficiencies, compared to the outlet-by outlet approach.
- The service list and tiered regulation model lays the foundation for setting agnostic aged care.
- Potential recognition of disability and health sector audits creates scope for increased efficiency.

Key concerns

- A transition timeline of less than a year may force providers to prioritise compliance over more substantive quality improvement activities.
- Rejection of a right to care is disappointing; with the home care queue growing again the decision on whether to provide a right to care should be deferred until Government can evaluate the implementation of the new assessment tool and new Support at Home Program.
- Supporters and representatives regime has admirable intent, but substitute decision making is an incredibly complex and sensitive issue, and more time is needed for dedicated consultation and engagement with states (see **Appendix 1** for feedback from our At Home Support Consumer Advisory Body).
- Tiered regulation has appeal, but the proposed implementation (admittedly a matter for the new Rules rather than the Act) will lead to tens of thousands of micro-providers for services like domestic assistance. This will make oversight very difficult and potentially undermine the key role of entry level services in identifying early signs of deterioration, and open the door to NDIS style fraud.
- Heavy civil and criminal penalties for novel and ambiguously drafted offences are unfair, inconsistent with other sectors, overlap with State offences, and will discourage people from working in aged care (see **Appendix 2** for detailed feedback).
- Regulatory powers to compel should be subject to review and only be exercisable to address non-compliance (see **Appendix 3** for detailed feedback).

We may issue an addendum to this submission if unreleased parts of the Act are subsequently published, noting that the consultation period has been extended to 8 March 2024.

About Bolton Clarke

Bolton Clarke is Australia's largest not-for-profit aged care provider. With a history dating back to 1885, our 15,000 staff help more than 130,000 people at home, in retirement living and in residential care to live a life of fulfillment.

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Appendix 1 – Feedback from Bolton Clarke At Home Support Consumer Advisory Body on Supporters and Representatives

This Appendix reflects feedback from Bolton Clarke's At Home Support Consumer Advisory Body (CAB) only as the timing of the consultation did not allow for feedback from our Residential Aged Care CAB.

CAB members feel that the Supporter/Representative provisions are "overcomplicated' and "overwhelming". Bolton Clarke acknowledges that the provisions may be no more complicated than existing legislation on substitute decision making. However, the long-standing nature of those regimes means that there is some baseline knowledge in the community how the system works and what to expect.

CAB members expressed concern that lack of clarity over the regime may open the door to financial abuse and abuse. They noted that there may not be problems in a family that works well together. However, they feel unclear how the nomination process would "weed out" issues where there is family disfunction and conflict. Bolton Clarke agrees that there is a concerning lack of detail around the process for appointing people, ensuring that people are not inappropriately appointed, and resolving conflicts about who is best placed to hold these positions. This includes not just the process for appointments but also the process for removing people from their role.

Related to the above, CAB members are concerned that the regime will create significant additional red tape for families and friends. It was not clear to CAB members (nor is it clear to Bolton Clarke) how the supporters/representatives regime will interact with guardianship/EPOA laws. Issues include who would hold authority in particular situations if representatives and guardians/EPOAs are not the same person, and whether a person needs to have both.

CAB members noted that the process for accessing aged care is already extremely complicated and frustrating and anticipate that appointing a supporters or representatives will be similarly difficult.

CAB members also:

- would like the Act to clarify whether decisions in relation to matters addressed in a care recipient's Advanced Care Plan are made in accordance with the Plan or by a representative/s if a representative/s has been appointed.
- agreed that care recipients should be able to choose a representative to make decisions on their behalf, even if they still have capacity to make decisions themselves. Even with a representative, care recipients should be kept well informed and not overlooked.
- agreed that criminal penalties should apply to the offence of abuse of position as a supporter or representative.

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Appendix 2 – Concerns with offence provisions

Creating special criminal penalties for people trying to do good work is unjust and will discourage people from working in the sector. There are already general provisions for criminal negligence or neglect in many states that can be relied on where necessary. Explicit aged care offences should be lowered to civil offences, with the consequent removal of jail time and reduction in the quantum of the penalties.

Culpable conduct should be unambiguous, with reasonable mistakes and misjudgements clearly excluded. The concept of significant failure probably achieves this, but the intended interpretation of this concept needs to be much more clearly explained in guidance material and clarified in the explanatory memorandum. The concept of significant failure is also circumvented by separate consideration of a systematic pattern of conduct. This needs to be subject to a materiality threshold or incorporated within the definition of significant failure.

It is confusing and contradictory to apply strict liability to offences that are intrinsically based on assessment of reasonable conduct.

Given the scope for penalties, the definition of responsible person needs to be limited. The duty to undertake due diligence needs to be clarified so that it is clear that it only applies within the extent of a person's role.

Penalties should not apply for breaches of the code of conduct by individuals. Banning orders, loss of employment, standard criminal charges and professional sanctions provide sufficient penalties. Serious failures by responsible persons are sufficiently addressed under the duty for due diligence.

Direct provider liability for third party conduct needs to be replaced with a more reasonable expectation for appropriate oversight of subcontractors, which implicitly prevents practices like the provider fully subcontracting the delivery to another entity.

Table 1 – Comments on specific offences and related provisions

Issue	Comment	Solution
Breach of code of conduct 250 units, civil standard. Applies to aged care workers (s118) and responsible persons (s119)	The code of conduct sets out various broad principles such as behaving respectfully. An action such as swearing at a client would clearly breach the code. While swearing at a client is clearly inappropriate and would be grounds for a reprimand, it would not automatically create grounds for dismissal or lead to a finding of professional misconduct for a registered health professional. There is a better case for civil penalties for more serious breaches of the code of conduct, but in our view the more appropriate response is a banning order plus additional action under relevant professional rules or broader criminal law. The code is too broad and vague to apply penalties and aged care workers and responsible persons lack the resources to defend themselves from prosecution under a civil standard of proof.	Remove s118 and s119. These offences were introduced in 2022. However, they should not be carried over to the new Act.
Criminal breaches for the duty of care and duty to undertake due diligence	There are no equivalent criminal penalties applying to any specific industry other than heavy vehicles. People who are trying to do good work in aged care should not face the fear that they will be end up in jail, face a large fine, or have a criminal record as a result of an act or omission	Change the offences under s120 and s121 to civil offences, remove jail time and reduce the quantum

s120 for providers and s121 responsible persons	that would not expose them to these consequences under any other law. Lowering the standard from criminal to civil makes the offences easier for government to prove. This also requires a consequent reduction in the level of penalties and the removal of jail time.	of the penalties to something that is equivalent with other industries.
Breach of conditions of registration 250 units, civil standard Applies to providers s88(3)	This offence is disproportionate and unnecessary. Notwithstanding that this is a fault-based offence (i.e., requiring recklessness, negligence etc), substantial civil penalties for minor breaches seem unreasonable given conditions or registration are often vague and aspirational. It is hard to see why the regulator would pursue a civil penalty unless there was serious offence given the associated cost and the fact that such a penalty would reduce the providers' resources to deliver care.	Remove s88(3) but retain s88(4) for serious offences.
Meaning of significant failure s18(1) Part of test for more serious offence for breaching conditions of registration (s88(4)), and breach of the duty of care (s120) and related due diligence (s121)	Significant failure is defined as a significant departure from reasonably expected conduct. Significant departure is not explained further, but it is similar to terminology used in rules for professionals (including in law, health and education). In the context of professional misconduct rules, the concept of a significant departure seems to have been interpreted as a high bar, being limited to the sort of conduct that would provide clear grounds for dismissal and not the sort of mistakes that even a minimally competent person might make. If this is the intended interpretation, then we think this is a reasonable threshold for the application of penalties. However, it needs to be clarified so that there can no doubt as to this interpretation.	Retain, but clarify. Add additional clarification in the Act so that it is clear that significant failure is a high bar and would not capture reasonable mistakes and misjudgements.
Meaning systematic pattern of conduct s18(2)	In a professional standards context, when the significance of a failure is considered, attention seems to be inherently given to how frequently the conduct occurred. This allows the nature of the failure and its frequency to be considered together. This seems to be a better approach than considering frequency separately. A minor failure (e.g., misclassifying a set of expenses in reporting) could occur often enough to be considered systematic but still not reasonably regarded as serious. There is no materiality/significance threshold that applies when considering conduct constitutes are systematic pattern. Whereas a moderate failure that occurs less frequently than the minor failure, may be much worse collectively.	Introduce a materiality threshold in determining whether conduct constitutes a systematic pattern of conduct. Alternatively, incorporate the concept of a systematic pattern into the concept of significant failure by stating that a number of different failures can collectively

		constitute a significant failure.
Strict liability applied to duty of care and due diligence s120(3)-(5), s121(4)-(6)	The first and second tier offences against the duty of care and associated due diligence requirement are strict liability offences. This is confusing. These duties are intrinsically based on reasonable behaviour. The test for these offences is also linked to the concept of significant failure which is itself (as we understand it) based on what would be reasonable for a minimally competent person. Fault cannot be disregarded in considering these elements. Stating that these are strict liability offences may confuse insurers, lenders, and directors. Imposing strict liability will also result in loss of talent and higher costs.	The references to strict liability should be removed for the offences under s120(3)-(5) and s121(4)-(6).
Meaning of responsible person s11, linked to s121	The new definition of responsible person is similar to the current definition of key personnel. However, under the current Act the concept is basically a mechanism for government to understand the key people in an organisation. Since the new Act creates significant new duties for these people with associated penalties the definition needs to be confined. Firstly, it needs to be clear that the duty of a responsible person is limited to the scope of their role within the provider . A person in charge of home care operations can not be expected to exercise due diligence over residential care operations. Nor can a person in charge of one home be expected to exercise due diligence over operations at another home operated by the same registered provider. Secondly, the definition of responsible person should be limited to the governing body and senior managers of the provider. Applying it more broadly is unfair and imposes an unprecedented burden on people who do not have the capacity to discharge the duty.	Limit the scope of due diligence required under s121 to the scope of a persons' role. Adjust s11(1) to clarify that "responsible person" only includes the members of the provider's governing body and senior managers as defined under the Corporations Act.
Associated provider s10(6) creates the concept of an "associated provider". This concept extends to any entity in an "arrangement" with a registered provider "relating	Section 96-4 of the Aged Care Act already specifies that a reference to an approved provider providing care includes reference to the provision of that care by another person on the approved provider's behalf, with the note that a provider will still be subject to the responsibilities in respect of care provided by another person. This provision is understood and accepted. The concept of an associated provided seems to go further, creating potential issues without any clear justification. *Approach to liability*	Option 1 Replace the concept of associated provider with: - A condition requiring that providers oversee the delivery of funded services by third parties - A condition prohibiting providers

to the registered provider's delivery of funded aged care services". The conduct of the associated provider under this arrangement is taken to be the conduct of the approved provider for the purposes of the Aged Care Act. *s10(4)* also makes any employee of an associated provider engaging in conduct under the arrangement an aged care worker of the provider.	Providers should be accountable for due diligence and quality assurance for subcontractors and suppliers in general. But if a provider exercises appropriate oversight, they should not face civil or criminal penalties for third party behaviour. There may be some activities that cannot be responsibly delegated to subcontractors. E.g., overall responsibility of management of a service or clinical care. There are some activities that are commonly and reasonably subcontracted that a provider cannot fully oversee because of limited internal expertise (e.g., outsourced allied health and pharmacy). There is also tension with the power of the regulator to require the appointment of an external advisor/manager, with the provider potentially being liable for the actions of a person they were forced by the regulator to appoint. *Scope of third parties* The scope of third parties covered should be limited to those delivering aged care services on behalf of a provider. 'Relating to the registered provider's delivery of funded aged care' could capture anyone the provider works with, including accountants or plumbers. It certainly seems to cover subcontracted catering and cleaning. 'Arrangement' covers non-contractual arrangements such as MOUs with visiting GPs or hospitals. *Employees of associated providers* The test for an aged care worker should mirror that for disability workers – i.e., it should be linked with substantial contact with people in care. So, somebody who is a plumber that occasionally visits the site, or an employee of an offsite catering contractor that has no direct contact with care recipients should not be considered an aged care worker. Requiring anyone working for a subcontractor to have an aged care check – which is slower, more expensive, and less broadly useful than the current police check – will limit the suppliers that are willing and able to work with aged care providers and add to costs.	from fully outsourcing the delivery of funded services to a third party - A definition of aged care worker as a person who delivers commonwealth funded aged care services and has direct contact with care recipients. Option 2 Carry over s96-4 and further specify that a person who provides care on an approved provider's behalf is an aged care worker.

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Appendix 2 – Concerns with powers to compel

The new Act gives the Commissioner and System Governor various powers to compel providers and their staff, with civil penalties for failures to comply.

Our concern is that:

- there are few explicit limits on what providers can be compelled to do using these powers,
- in the case of enforcement powers, some of powers can be exercised without any need to demonstrate non-compliance, and
- in the case of investigatory powers, some powers can be exercised without a reasonable suspicion of non-compliance.

It is also unclear whether these powers will be subject to merit review.

Such broad powers are highly vulnerable to misuse and no case has been made for why they are needed.

Our position is that:

- enforcement powers should only exercisable where there is non-compliance, with required actions limited to those required to assure compliance
- powers to require information should only be exercisable where there is a reasonable suspicion of non-compliance
- the exercise of all powers to compel should be subject to external merit review

Table 2 – Specific comments and amendments on powers to compel

Issue	Comment	Solution
Bespoke registration conditions s76 – Commissioner can impose conditions where considered appropriate, subject to some broad limits under s89	No explanation for why this power is needed or how it will be used. Seems to provide extreme discretion to make rules without parliamentary oversight. At minimum should be limited to provision of information to address elevated risk of non-compliance. But even this seems unnecessary as actions to address non-compliance (including poor processes and internal capability) can instead be imposed through enforceable undertakings and enforcement notices (i.e., required action, non-compliance, and adverse action notices).	Remove, or at least limit to circumstances where additional supervision or reporting is needed to address enhanced non-compliance risks.
Review of regulatory powers Ch8 – Part 2	The part of this Act on review has not so far been shared for consultation. Notwithstanding that it is important to emphasise that all administrative	Powers to compel, or powers with adverse effects should be subject to merit review.

	powers to compel or that have associated adverse consequences must be subject to merit review. In particular there are a number of powers to issue notices where failure to comply automatically attracts a civil penalty. These must be subject to merit review.	
Scope of actions that can be required under a required action notice s265(c) – required action notices can require provider to take or not take certain actions	Currently there is no explicit limit on the actions that can be required under a required action notice. This is inconsistent with compliance notices (s271(c)) and adverse action warning notices (s277(1)(c)) where the power to require actions is clearly constrained. There is no rationale for having a broader discretion to require actions under what is supposed to be a lower tier enforcement power.	The power to require action under a required action notice should be limited to the action that a provider must take to address non-compliance, consistent with s271(c) for compliance notices and s277(1)(c) for adverse action warning notices.
Power to issue enforcement notices for possible non-compliance Required action notices (s264(b)) and non-compliance notices (s269(a)(ii),s270(a)(ii)) can be issued if a provider may not be complying. Required action notices can also be issued if a provider is likely to not comply in the future and certain other circumstances apply (s264(c)).	Issuing enforcement notices without needing to evidence non-compliance is unreasonable to providers. It is also confusing for consumers, who won't know whether a notice is for an actual non-compliance or not. Finally, it is unnecessary because problems with processes that create a high likelihood of current or future non-compliance should be intrinsically non-compliant with the capability and risk management requirements of the Quality Standards.	Limit the power to issue required action or non-compliance notices to actual non-compliance.
Notices only required to contain brief details of non-compliance s265(b), s271(b) and s277(b) allow required action notices, compliance notices, and adverse action warning notices to be issued with only brief details of the non-compliance	Requiring only brief details of a non-compliance restricts the ability of the provider to respond, either to address the concern or dispute the notice.	Delete the word 'brief' in these provisions.
Power to attend to answer questions or give documents	The power to require any person to attend to answer questions or	This power should only be exercisable where

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Ch 6, Part 10 Div 4 lets the Commissioner and System Governor issue notices to attend to answer questions regarding compliance with the Act. Though this does not abrogate the general privilege to refuse to answer a question or give information on the grounds that it might tend to incriminate the person. These notices can be issued to any person not just aged care providers or workers. There is no requirement for reasonable suspicion to issue a notice.	produce information regarding a provider or person's compliance with the Act without reasonable suspicion of non-compliance is excessively broad.	there a reasonable suspicion that a provider or person is not be complying. The power should only be exercisable against aged care workers and responsible persons.
Suitability determination s112 lets the Commissioner make a determination on the suitability of a responsible person.	While the Commissioner is required to consider the suitability matters in determining whether a responsible person is suitable, there is no clear test that needs to be applied. It is therefore unclear if this is a purely negative assessment (i.e. a person can be unsuitable if there are red flags in suitability matters) or the Commissioner may decide, based on the conduct of a person in delivering aged care, that they are not suitable. If the latter, there needs to be greater clarity in the sort of conduct that would lead to a person being considered unsuitable. The obvious test to use would be the same as the test for banning orders (i.e. a serious risk to older people), but considered in light of the responsible person's specific role, rather than employment as an aged care worker more generally.	The intended threshold for the power to consider a person unsuitable needs to be clarified, and potentially more closely defined.