My name is Robin and I'm an older Australian, not yet receiving aged care but accepting that the time is nigh.

I'm very keen to see the development of an Australian aged care system that can deliver world class services to meet my future needs and those of my family, friends and future generations.

Having read the Exposure Draft twice, I have found much to welcome as a genuine reform of the current legislation which enshrines the rights of providers at the expense of consumers. I have also found some aspects of the proposed legislation to be problematic and even potentially harmful.

Thank you for the opportunity to comment on the draft and also for extending the consultation period.

General comments

The release of the Exposure Draft on 14 December 2023 was ill timed. Some may consider it a crafty move on the part of the Department of Health and Aged Care in an endeavour to catch us napping.

The Exposure Draft is not an easy read. It is not coherent or sequential and I fear that Parliamentarians will not have the time or inclination to explore and understand the implications of many of the proposed reforms. I accept that legislation is necessarily complex and long-winded but perhaps DOHAC could have produced a version that through referencing provides a pathway to comprehension.

The report of the Aged Care Taskforce is yet to be released. What terrible news will this report reveal? For all we know the receipt of aged care services will in the future be an exclusive domain of the rich. The report must be released immediately, before the draft legislation progresses further.

The draft is a half baked offering. So many 'to be drafted' sections, some of those being in critical areas. The most glaring examples include the Rules and Review sections. Why would we trust that when these and other 'to be drafted' sections are completed we will be happy with the final version?

Contracting KPMG to deliver face to face consultations during January was a flawed move. This company proudly advertises its services to the aged care industry. Surely a huge conflict of interest. Many of my friends and I refused to register for a KPMG led consultation. I have heard that participation levels were low across the nation.

The statements of Principles and Rights promise much to individuals receiving aged care services except it may prove very difficult to attain them.

No penalties for providers for breaches and the requirement that individuals must make a complaint to initiate investigations.

Significant concerns

1 The Responsible person

This new level of accountability is no doubt causing great angst among aged care providers.

Responsible person is a new term defined in section 11 and replaces the existing concept of key personnel. A responsible person includes a person who has responsibilities associated with managing the operations of a registered provider. It also includes a person responsible for the overall management of nursing services delivered by the registered provider or at an approved

residential care home. A responsible person is not limited to employees of a registered provider and can include subcontractors.

Responsible person duty. A responsible person of a registered provider must exercise due diligence to ensure that the provider complies with the provider's duty under In this section, due diligence includes taking reasonable steps: to acquire and maintain knowledge of requirements applying to registered providers under this Act; and to gain an understanding of the nature of the funded aged care services the registered provider delivers and the potential adverse effects that can result to individuals when delivering those services; and to ensure that the registered provider has available for use, and uses, appropriate resources and processes to manage adverse effects to health and safety of individuals accessing funded aged care services delivered by the provider; and to ensure that the registered provider has appropriate processes for receiving and considering information regarding incidents and risks and responding in a timely way to that information; and the conduct results in the death of, or serious injury to, or illness of, an individual to whom the duty in section is owed by the registered provider. Penalty: 500 penalty units. Fault-based offence—death or serious injury or illness. A responsible person of a registered provider commits an offence the person has a duty under subsection ; and the person engages in conduct; the conduct amounts to a serious failure by the responsible person to comply with the duty. the conduct results in the death of, or serious injury to, or illness of, an individual to whom the duty in section is owed by the registered provider. Penalty: 1000 penalty units or 5 years imprisonment or both.

General defence of reasonable excuse 17 (8) Subsection (4), (6) or (7) does not apply if the responsible person 18 has a reasonable excuse.

Great. So, who is going to put their hand up to be the responsible person?

How could a sub-contractor be reasonably able to take on this role?

This incomprehensible section delivers a lawyers' clambake and an insurance company's dream. I was distressed to see the final clause about having a reasonable excuse (for death?) so explored further in the draft to establish how a reasonable excuse stands up. I'm not any clearer.

In its current form this section of the draft will lead to enormous cost increases and probably the withdrawal of some providers, especially smaller companies, from the sector. This would not be a positive outcome for consumers. I strongly recommend a reconsideration and redrafting of the relevant sub-sections.

2 The use of computer programs

Recommendation 30 of the Royal Commission related to the development and use of computer programs in aged care:

formulate a standard dataset and data collection mechanism for collecting, monitoring, analysing and using data about the diverse backgrounds and life experiences of older people seeking or receiving aged care, including, as considered appropriate, people whose circumstances are not currently included in the 'special needs' provision, such as those living with mental illness, dementia or disability, and

commence collection and analysis of those data for the purpose of identifying variations in and improving equity of access to, and use of, aged care by people of diverse backgrounds and experiences (subject to the operation of the Privacy Act 1988 (Cth)).

There is absolutely no mention of the development or use of computer programs in assessing or classifying individuals.

3 Single comprehensive assessment process

Recommendation 28 of the Royal Commission: A single comprehensive assessment process

- *By 1 July 2023, the Australian Government should replace the Aged Care Assessment Program and the Regional Assessment Services with one assessment process.*

In January 2024 the government advertised for tenders to deliver this service before the draft legislation consultation phase has ended. Surely the legislation must be in place before the terms and conditions of this new service can be set.

Furthermore, for very obvious reasons, the Royal Commission Recommendation 28 stated:

- *That assessment process should:*
  be undertaken by an assessor who is independent from approved providers, so that a person's level of funding should be determined independently of the approved provider

The tender documentation reveals that this recommendation has been diluted to make providers eligible to tender if they can demonstrate sufficient distance between the two components of their business.

Along with representing the privatisation of an existing professional, effective and independent aged care service, the proposed assessment process has raised more alarm and anger among older people than any other aspect of the Exposure Draft.

I have read the tender documentation and consider that most elements of a high quality process will be delivered *if* the company is unable to resort to the oft used alibi of being unable to recruit sufficient or suitably qualified staff etc etc. This will be particularly likely in regional and remote locations and I cannot gauge from the documentation how frequently or intensely the performance of assessment providers will be monitored.

Most frightening is the prospect of the use of AI in the assessment process. Did government learn nothing from the Robodebt scandal? Individuals being assessed for aged care are most likely to be frail, distressed, living with undiagnosed dementia or isolated. I know people with all these disadvantages. Not everyone is able to appoint an assertive, sensible and knowledgeable representative to support them through the process. Given the infinite variations in the circumstances of individuals, how can a computer program accurately identify their needs?

Even more concerning is that the process of disputing the assessment outcome is not yet revealed. The review process is 'yet to be drafted'.

4 The Quality and Safety Commission

The title must be changed to the Safety and Quality Commission as recommended by the Royal Commission.

The Complaints Commissioner must be an independent entity and appointed by the Minister.

The funding of the Commission must be allocated through a separate allocation in the national Budget.

5 Other concerns

5.1 Named visitor

References in the draft to the named visitor must be expanded and strengthened.

The Responsible Person (Section 11) must apply the named visitor regime when absolutely necessary and direct staff accordingly.

Potentially a provider could apply this rule to banish a visitor/s that is deemed a bother.

Individuals cannot be denied access to a religious mentor/minister, priest, imam under section 116 of the Australian Constitution so the rule must reflect this requirement.

A person receiving palliative care must be exempt from this requirement.

5.2 Palliative care

The draft is mostly silent about the provision of high quality palliative care services within residential care homes.

An individual has a right to equitable access to:

palliative care and end-of-life care when required (no mention of high quality).

The current situation is unacceptable with residents receiving end of life care at best, provided by staff with little or no training in the provision of a recognisable standard of palliative care.

Some providers do claim in their glossy brochures that they offer palliative care services but in my direct experience the service turns out to be little more than hand holding in a candle lit setting right at the end of life.

Frequently palliative individuals suffering unmanageable pain are transferred to hospital or a hospice or even worse the transfer is refused.

High quality palliative care entails so much more than the services on offer in most residential care settings.

State funded palliative care providers are overwhelmed and in cost shifting mode will not access residential care settings.

Residential care is ‘home’ to residents and people have a right to die with dignity and pain free in their own home.

The draft must be expanded to provide direction to end this blatant discrimination.

Robin Vote
24/02/2024
[redacted]