

Submission to the Aged Care Bill Exposure Draft, 2023

"By 1 July, 2024, every person receiving aged care who is living with a disability, regardless of when acquired, should receive through the aged care program daily living supports and outcomes (including assistive technologies, aids, and equipment) equivalent to those that would be available under the National Disability Insurance Scheme to a person under the age of 65 years with the same or substantially similar conditions."

The Royal Commission into Aged Care Quality and Safety
(Aged Care Royal Commission)
Recommendation 72:

People living with a disability make up a large proportion of the Australian community. There are 1.9 million Australians aged 65 years and over living with a disability, representing a significant proportion of aged care recipients. One large cohort in Australia today is the estimated 400,000 polio survivors. Up to 40,000 Australians were diagnosed with the most severe form of the disease, paralytic polio. As this group ages, many experience the Late Effects of Polio requiring significant lifestyle changes, equipment purchases, and infrastructure modification.

Yet, support for these essential aids and support is denied to older Australians with a disability who are reliant on Aged Care Home Packages. There is nothing in the exposure draft that demonstrates how this will be addressed under the new Aged Care Act. Importantly, recommendations of the Aged Care Commission and the NDIS Review Final Report are not reflected in the current text.

The bill's ambiguous and minimal approach to addressing the needs of older Australians with a disability is further compounded by the lack of information such as the 'rules' for approved services and purchases, which are not included in the exposure draft released for consultation. Currently, Australians living with a disability, such as those with Late Effects of Polio and aged 65 and over when the NDIS was introduced (the vast majority), are ineligible for NDIS support. They must either self-fund their care; try vainly to pursue their disability needs through the aged care system, a process that is time-consuming, frustrating, and usually unsuccessful; or simply go without. For this group, the 'supportive' words expressed in Part 3 Aged Care Rights and Principles ring very hollow indeed.

The Royal Commission into Aged Care Quality and Safety (Aged Care Royal Commission) found that older people with disabilities receiving aged care do not have access to services and supports at the same level as those provided to people through the NDIS, hence their strong Recommendation 72.

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There is no acknowledgment of this all-important recommendation, nor is there an explicit reference in the bill to meet the needs of older people with disabilities. The only two sections relating to people with a disability are minimal.

These are:

- Section 5a under the Objects of the Act that gives effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Yet the exposure draft provides no information on how these obligations would be met.
- The Note under Section 22(4) listing individuals who may need accessible, culturally safe, culturally appropriate, trauma-aware, and healing-informed care, includes reference to "(j) are an individual with a disability or mental ill-health."

People with disabilities are a significant and substantial group of people accessing aged care, and the act needs to reflect this adequately. Older Australians with disabilities need access to tangible disability supports and services in a timely manner. They need staff and providers who are disability aware. They require disability-inclusive assessments and a complaints and review system that understands disability and all its ramifications. The exposure draft is silent on these issues.

A distinct section must be incorporated into the new Aged Care Act that demonstrates how the needs of older people with disabilities are addressed and how Australia will meet the treaty obligations of the CRPD.

A first step would be to include a definition of 'disability' that aligns with the definition used in the Convention on the Rights of Persons with Disabilities (CRPD):

'Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

References such as those in Sections (j) to (l) of the Note under Section 22(4) should be replaced with 'are a person with a disability.'

Interrelationship between Aged Care Support and the National Disability Insurance Scheme (NDIS)

The exposure draft presents an Aged Care Act that is not fit for purpose as the political and management decisions about the interrelationship between Aged Care support and the NDIS appear not to have been addressed. The Commonwealth government's lack of clarity regarding the interrelationship is likely to be further challenged by the findings of the UN Committee on the Rights of Persons with Disabilities.

Dr. Peter Freckleton, an Australian with severe and permanent disability due to polio, has lodged a complaint with the UN Committee on the Rights of Persons with Disabilities alleging the Australian Government is discriminating against him by denying him access to the National Disability Insurance Scheme (NDIS) because of his age. Dr. Freckleton states this breaches his fundamental right to protection from discrimination under the Convention on the Rights of Persons with Disabilities.

The NDIS Review Final Report stated the Australian Government should implement legislative change to allow NDIS participants once they turn 65 to receive supports in both the NDIS and the aged care system concurrently and clarify when aged care supports are reasonable and necessary (Action 2.11).

They concluded that people aged over 65 should receive most of their supports from the aged care system but should be able to access the supports they need from the most appropriate system, including disability supports from the NDIS and aging supports from the aged care system. This approach should also be inclusive of those who have been excluded from NDIS due to arbitrary age requirements.

It is evident that the interrelationship between these two programs has not been finalised. Nevertheless, the new Aged Care Act needs to address this relationship.

A distinct new section is required in the Bill that would:

- Demonstrate how the needs of older people with disabilities will be addressed and show how the Aged Care Act would fulfil the treaty obligations of the CRPD for older Australians with disabilities reliant on Aged Care support.
- Outline the links between Aged Care support and the NDIS to give clarity and certainty to older Australians who need support from both systems and clarify their respective roles for providers and managers of both programs.
- Provide management guidance that incorporates transparency and flexibility in assessing and providing support to those older people with disabilities reliant on Aged Care support. The rules referred to throughout the exposure draft must be provided for consultation.

Most Importantly, the new Aged Care Act must address the clear discrimination seen in the vast differences in support for older Australians who can access NDIS and those who cannot. If the latter group will not be serviced by the NDIS, then Aged Care allocations for those with disabilities must be substantially increased.

Currently, as presented in the exposure draft, the new Aged Care Act is unhelpful and ambiguous. After the extensive inquiries into Aged Care, Disability, and the NDIS, the draft legislation could be viewed as a betrayal of older Australians with disabilities who are reliant on Aged Care. It fails to acknowledge the significant cohort who require both aged care and disability support; it refers to this group in outmoded language that does not align with the CRPD and provides no assurances that adequate disability support for older Australians will be provided under the new act.

Yours Sincerely,

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Dr Mariann Lloyd-Smith

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