Exposure Draft of the New Aged Care Act – Written Submission

By email to: AgedCareLegislativeReform@health.gov.au

Submitted by: Dr Suzy Goldsmith, 7th March 2024

Thank you for the opportunity to provide written feedback. This submission is limited to those aspects of the Draft Act and consultation that lie closest to my own interests and knowledge. I have read the Exposure Draft and associated consultation documents carefully, and have attended a number of briefings, webinars and workshops hosted by the Department of Health and Aged Care, the Aged Care Quality and Safety Commission, and COTA and OPAN.

My main points are summarised below.

1. The provisions are cumbersome and difficult to understand
    a. Consultation has been inaccessible – for example, distributing a 113-page workbook prior to the diverse communities workshop Melbourne 2nd February
    b. New descriptions of rights and principles should be simplified to a simple list, up to 15 points and their relationship to existing charter and code clarified – rights are valueless if the people to whom they apply cannot understand them
    c. Serious injury definition – why not use the existing and tested terms from the Australian Trauma Registry? Conflicting definitions will create unnecessary difficulty in any follow-up investigation
2. Person-centred is lost along the way
    a. While the document commences with much attention to the terms 'person-centred' and 'individual', many of these intentions are impracticable given the limits of shared service provision and market constraints. Compromise is generally needed to ensure the needs of multiple care recipients can be catered for – so this is an unrealistic and unenforceable commitment
    b. As the document progresses to its enactable parts, the provider is clearly placed at the centre
    c. Workers do not seem to have similar rights to providers to due process in decisions affecting them
3. Participant/consumers should be enabled to have a greater say
    a. Empowering consumers to uphold their rights should be a primary objective of the Act
    b. Unfortunately, the Exposure Draft defaults to a paternalistic interpretation, whereby consumers need to mount a formal challenge (complaint) and avenues for dialogue are at the providers' discretion
    c. Consumer representation (preferably 2-3 members, to allow for turnover, inability to attend) should be *within* the main provider quality care advisory/governing body, not a separate consumer group. This is the approach taken in The Netherlands, with success
    d. The role of independent, free, confidential, skilled consumer advocates should be strengthened and explicitly recognised in the Act, including the provisions for disclosure of protected information, or information sharing
    e. Providers and the ACQSC should be required to inform consumers of their right to free, confidential and independent advocacy at every opportunity

f. According to the Department of Health and Aged Care website, "NACAP services are important for older people who:
    i. do not feel they can negotiate or stand up for their rights
    ii. are not sure how the aged care system works
    iii. need support to resolve issues with their aged care

   NACAP advocates can speak on their behalf and help them to make informed decisions."
g. Trained, independent advocates are best-placed to ensure the consumer's voice is heard, and support their decisions and preferences. They are able to develop the consumer's capacity for self-advocacy. They can also assist supporters and representatives with peer advocacy, while at the same time being alert to issues of conflict. Providers may have concerns that a consumer is not able to exert sufficient influence – maybe they have no one to act as their supporter or representative, or maybe there are evident or suspected conflicts between what the supporter/representative wants and what the consumer wants. Trained advocates understand the practicalities of operating aged care services and may be better placed to find ways to resolve consumer concerns that a provider feels able to accommodate
h. There are many barriers to lodging a formal complaint, and complaints are costly to administer – they should not be the first port of call
i. The goal of 'high quality' care rests on productive dialogue and flexibility if a person's 'right' is to have their preferences respected. While an effective complaints system is needed, it should be a last resort. The Exposure Draft omits the more powerful engine of continuous improvement – empowered consumers, with confidence to share suggestions and find solutions
j. While it may be challenging to make the 'rights' in the Act enforceable, the processes that will enable those rights to be upheld, and effective access to them, should indeed be enforceable

4. The ACQSC continues to be hampered by role conflict
    a. A 'free' market for Commonwealth funded aged care services carries a range of challenges
    b. The ACQSC is charged with commissioning, advising and regulating aged care providers, as well as screening (and providing verification) of their staff. The conflicts arising from a single body providing both advice and regulation were raised and swept aside by the Tune Review into the ACQSC. However, performance-based regulation, referred to by that review, should not be confused with behaviour-based regulation – they are distinct approaches according to agency theory
    c. Performance-based regulation is generally preferred for reasons of reduced monitoring cost incurred by the principal and increased flexibility for the agent to satisfy the principal's objectives. Should consumer influence be strengthened, rather than subsumed by 'instruction' from ACQSC on provider behaviours, then performance monitoring could include consumer involvement mechanisms and outcomes.