

Department of Health and Aged Care
A New Aged Care Act: Exposure Draft

Occupational Therapy Australia

March 2024

Executive Summary

Occupational Therapy Australia (OTA) welcomes the opportunity to provide a submission on the New Aged Care Act Exposure Draft.

Occupational therapy services are fundamental to aged care as they enable independence, prevent functional decline, increase quality of life, and reduce care needs. Occupational therapy is key to enabling older Australians to remain at home longer and facilitate a full and meaningful ageing experience in residential care settings.

OTA welcomes a number of aspects of the Aged Care Act Exposure Draft and the intent to move from a provider-centric aged care system to a person-centred and rights based one. However, we hold several concerns about the Act in its current form.

OTA has contributed to the submission prepared by Allied Health Professions Australia (AHPA) and we endorse the feedback and issues raised in that submission.

In this submission OTA responds specifically to the following matters:

1. Inclusion of reablement as a key aspect of aged care
2. Enforceability of Statement of Rights and Statement of Principles
3. Definition of Quality Care and High-Quality Care
4. Assessment process
5. Obligation to provide and fund allied health services in aged care
6. Registration
7. Complaints Commissioner

In particular OTA is concerned that the Act fails to:

- embed reablement through the provision of allied health services as recommended by the Royal Commission
- safeguard the rights of the individual
- support choice as defined by the good practice of consumer directed care where the older person, family and their carers would have input into the type and way supports would be provided
- provide needs-based care through an assessment process that supports best practice of assessment by people with appropriate qualifications.

Occupational Therapy and Aged Care

OTA is the professional association and peak representative body for occupational therapists in Australia. There are about 29,000 registered occupational therapists working across the government, non-government, private and community sectors in Australia. Occupational therapists are allied health professionals whose role is to enable their clients to engage in meaningful and productive activities.

Occupational therapy services are fundamental to aged care as they enable independence, prevent functional decline, increase quality of life, and reduce care needs. Occupational therapy is key to enabling older Australians to remain at home longer and facilitate a full and meaningful ageing experience in residential care settings.

Occupational therapists work with older people with age-related conditions such as poor balance and coordination, memory loss and confusion, and vision and hearing loss, which lead to changes in their ability to participate in the meaningful activities of everyday life. Occupational therapists provide services such as physical and mental health therapy, vocational rehabilitation, chronic disease

management, assessments for assistive technology and the assessment of environment and safety risks.

OTA's response to the Aged Care Act Exposure Draft

1. Inclusion of reablement as a key aspect of aged care

In its Final Report, the Royal Commission into Aged Care Quality and Safety ('Royal Commission') concluded that 'reablement' is critical to older people's physical and mental health and wellbeing, and should be a central focus of aged care.¹ It also identified allied health service provision as being essential for reablement, and that Australia's significant under-provision and undervaluing of allied health care produces morbidity, mortality and negative quality of life impacts, including those associated with dementia, mental health, malnutrition and falls.²

The Royal Commission recommended that aged care provided to people at home and in residential care facilities includes a level of allied health appropriate to each person's needs.³ This level of service provision requires needs-based assessment, so the Royal Commission recommendations also emphasise clinically assessing each person, ideally via a multidisciplinary team, against the full range of potentially available allied health services that could help maintain their wellbeing and assist reablement.

OTA believes it is a failing that there is no reference to reablement in the Aged Care Act Exposure Draft, and that this failure extends to an inadequate response to the Royal Commission Recommendations. This absence is despite the strengthened Quality Standards now referring to reablement more extensively. OTA is concerned that this results in uncertainty about how that aspect of the Quality Standards will relate to the new Act.

OTA endorses AHPA's Recommendation 1:

Add to the Objects:

'provide a system of aged care that works to prevent or delay deterioration in a person's capacity to function independently, or to ameliorate the effects of such deterioration, and to enhance the person's ability to live independently as well as possible, for as long as possible'.

Alternatively, an object of the aged care system could be defined as having as a core function:

'To support reablement – rehabilitation and restoring, or at least preserving as much as possible, older people's capacities so that wellbeing is enhanced and/or maintained, including enabling and encouraging participants to remain in their home for as long as they wish and can do so.'

¹ Royal Commission into Aged Care Quality and Safety, *Final Report Volume 3A The new system*, 2021, 176; Royal Commission into Aged Care Quality and Safety, *Final Report Volume 1 Summary and recommendations*, 2021, 101; and Recommendations 35 and 36. See also Exhibit 20-1, Australian Association of Gerontology Position Paper, 'Wellness and Reablement for All Australians', 31 July 2020.

² Royal Commission into Aged Care Quality and Safety, *Final Report Volume 2 The current system*, 2021, 83; and Recommendations 35–37. See also Royal Commission into Aged Care Quality and Safety, 'Hospitalisations in Australian Aged Care: 2014/15-2018/19', 2021.

³ See eg Recommendations 36 and 38.

2. Enforceability of Statement of Rights, and Statement of Principles

• Statement of Rights

OTA is concerned that despite the intentions to create a right-based legislative framework, and for the Act to be underpinned by a Statement of Rights, the Act does not provide a pathway for enforceability of these rights, with the rights only being enforceable when another part of the Act is not complied with. Some rights are not specifically mentioned in the Standards or the Code of Conduct, meaning it is highly unlikely they will be enforceable in a practical way even when there are breaches of these requirements.

In addition, it is concerning that Consultation Paper No 2 states that changes under the new Act for providers include 'actions to be **guided** (our emphasis) by the Statement of Rights' (p.100) adding to the undermining of the importance of the Statement of Rights.

We join with others in calling for a requirement for providers to have a positive duty to uphold the rights of people using aged care services.

OTA recommends that:

Section 92 of the Act be amended to require a positive duty on providers to uphold the rights of older people and deliver rights-based care. The recent changes to the Sex Discrimination Act which require a positive duty on employers to eliminate discriminatory conduct could be used as a model for this amendment.

• Statement of Principles

OTA supports AHPA's assertion that overall the Statement of Principles is weak, as evidenced by:

- section 22(2)(c) simply stating that the Commonwealth aged care system supports the delivery of funded aged care services by registered providers that recognise the rights of individuals under the Statement of Rights
- section 23 simply requiring various entities to 'have regard to' the Principles, and not ensuring that the Statement of Principles is enforceable in its own right, leaving the only possible legal route to be via a costly and arduous administrative law action.

OTA agrees with the AHPA position that it is unclear how non-adherence to the Statement of Principles would be addressed, and what the consequences might be. It is a concern that, as with the Statement of Rights, enforcement relies on the existing regulatory system of incident reports, complaints, and audits.

3. Definition of Quality Care and High-Quality Care

OTA supports AHPA's critique of the proposed approach to high quality care as aspirational only⁴. This runs counter to the Royal Commission's finding that high quality care must be the foundation and hence regulatory benchmark of aged care. The distinction between 'high quality' and 'quality' care is also unconvincing – much of what is listed under section 19 should be expected as part of 'quality', particularly if the Statements of Rights and of Principles are to be meaningful.

In contrast to (aspirational) high quality care, enforceable quality care is not clearly defined in the Exposure Draft but is instead to be interpreted via the Objects, Statement of Rights, Statement of Principles and the Quality Standards. Due to the absence of public consultation material, it is not

⁴ <https://ahpa.com.au/advocacy/submission-consultation-on-a-new-aged-care-act-the-foundations-consultation-paper-no-1/>

possible to comment in detail on how provider obligations and regulatory enforcement under the Quality Standards are intended to relate to the definition of quality care and actual provider performance outcomes. However, in terms of allied health provision, and given the limitations of the proposed Statement of Rights and Statement of Principles (see above), it is highly likely that most providers will only do what is actually required of them by law and hence there will be little in the way of a meaningful minimum standard.

OTA endorses AHPA's Recommendation 11:

The definition of 'high quality care' included in the new Aged Care Act should be consistent with Royal Commission Recommendation 13(2).

OTA endorses AHPA's Recommendation 12:

High quality care, as defined in Recommendation 11, should be embedded in the new Act as the compliance and enforcement standard, aligned with the Statement of Rights and associated recommendations.

4. Assessment process

OTA shares AHPA's concerns that the Objects only refer to 'taking into account' needs, and do not even refer to 'assessed needs', and that this situation is not improved by the Statement of Rights, nor the Statement of Principles.⁵

OTA endorses AHPA's Recommendation 3:

The Statement of Purpose, Objects, Statement of Rights and Statement of Principles in the new Act should all clearly embed the concept of needs-based care. The Act should require use of a nationally consistent, evidence-based, assessment and care planning tool, to identify, plan for and deliver the allied health needs of individual aged care residents and consumers receiving home care.

In addition, OTA recommends that the needs assessment and care planning tool identify, plan for and deliver the full range of services required to meet the assessed needs, including allied health services.

It is worth noting that the findings of the Independent Assessment Tool (IAT) live trial conducted in 2023 identified overwhelming feedback from assessors (who are largely of non-clinical backgrounds) that they

- don't always have the skills/confidence to refer to allied health
- don't want to be responsible for making decisions on the frequency of services required for allied health referrals, asserting that this should be done by the allied health professional themselves upon meeting and assessing the individual
- don't have the skills or confidence to assess for assistive technology or home modifications at the point of assessment (again, they assert this is out of their scope and should be done by the allied health professional upon meeting and assessing the individual).

In light of these issues OTA calls for steps to be taken to support this workforce in making decisions on clinical care referrals like allied health referrals. Specifically, OTA calls for a clinical advisory panel within the assessment workforce that non-clinician assessors can seek advice from when they have

⁵Section 22(4) includes the phrase 'based on the needs' but this only refers to culturally appropriate, trauma informed etc, not clinically assessed needs.

questions about the information they've obtained and to support accurate and timely allied health referrals post assessment.

OTA is also concerned about the inadequate recognition and provisions for the assessment and delivery of assistive technology and home modifications in the Act. While this is anticipated to be largely addressed under future changes to the legislation with the phased introduction of Support at Home, OTA calls for the Act to clearly reference that access to assistive technology is available for communication and cognitive needs, not just physical mobility.

OTA also argues that the assessment process and service plan approval process needs to align with person-centred principles that support choice and control of the older person and should involve the older person and their family or supporter/representative beyond 'discussions' to identify goals/needs, with the older person and their support person/representative agreeing that the report is an accurate reflection of the discussions and goals identified. Currently the Act stipulates that the assessor will write a report identifying recommended services which will be provided to delegate for final decision.

OTA recommends that:

- The needs assessment and care planning tool identifies, plans for and delivers the full range of services required to meet assessed needs, including allied health services.
- The Act clearly references that access to assistive technology is available for communication and cognitive needs, not just physical mobility.
- A summary of the assessment report, and opportunity to endorse the report and proposed services as aligning with the discussions held with the assessor and their preferences, should be provided to the older person and their family/kin/representative.

OTA joins with AHPA in raising concerns about the use of computer programs and algorithms in the finalisation of service plans and we do not support the proposed formalisation of the use of algorithms without more detail and public consultation.

We hold concerns that the exposure draft of the Aged Care Act does not provide security of governance for the safe use of such systems.

To ensure that governance of the use of computer programs and algorithms has a human centred approach, the legislation, or alternative instrument, needs to define an independent panel of experts to review decisions and outcomes, and that this panel include health and disability experts with skill sets in aging.

OTA endorses calls by other allied health professions, including Speech Pathology Australia, for the legislative framework to reflect a process for clinical oversight of delegate decisions.

5. Obligation to provide and fund allied health services in aged care

AHPA and its members, including OTA, have been advocating for better pathways and clarity about future status of Schedule 1 of the Quality Principles. It appears that what was Schedule 1 will now be in the Rules, together with the Quality Standards. As a result, we are concerned about what will happen to the current distinction in Schedule 1 between items that the provider must provide (ie pay for) and items to which they simply must provide access.

There is no indication in Consultation Paper 2 how this will relate to Royal Commission Recommendation 69, which included that allied health care should generally be provided by aged care providers. However, the Commonwealth Government accepted this recommendation and noted 'Careful consideration needs to be given to harmonising funding and quality requirements for allied health, mental health and oral and dental health services.'

OTA notes that advice has been released about the roles and responsibilities in Aged Care, along with a joint statement on these provisions. However, we are unclear about the status of this advice and hold concerns about their enforceability under the Act.

6. Registration

OTA supports AHPA's assertion that it is appropriate that the highest onus should be on the aged care provider, rather than the individual worker. OTA welcomes that at this stage of the reforms at least, individual allied health professionals will not be required to register but will be subject to aged care worker regulation, including via the Code of Conduct and worker screening.

We also welcome the stated intent that reporting requirements for registered providers under the new Act will be streamlined, removing some of the complexities of current arrangements, and that the Rules will prescribe requirements about reporting information relating to various matters.

However, OTA is concerned that under the new regulatory framework aged care providers shift the onus onto the contracted allied health professional to meet the responsibility of demonstrating compliance with the standards. If this does occur allied health professionals need to be adequately remunerated for this. This also creates the risk of providers choosing to opt out of providing services in Category 4 due to the additional administrative burden it may create for them, reducing the number of providers available to deliver allied health services like OT.

7. Complaints Commissioner

OTA supports AHPA's assertion that the best way to achieve robustness and accountability of the complaints system is to ensure that the Complaints Commissioner is independent of the Commission.

We join with others, including COTA and OPAN, who have suggested that the Complaints Commissioner should not report through, or be responsible to the ACQS Commissioner, but be appointed by, and reportable to the minister. They should have the powers to compel information, participation in the complaints process and certify enforceable undertakings. We recommend the use of other existing authorities that have independent commissioners as models for the Complaints Commissioner.

OTA endorses AHPA's Recommendation 14:

- The Complaints Commissioner should be established as a statutory appointment separate to the Aged Care Quality and Safety Commission.

8. Other Issues

• Eligibility criteria

OTA supports the notion that aged care is not the appropriate setting for younger people requiring care, however we hold concerns about the impact on some people for whom aged care would be appropriate but are excluded by the eligibility criteria.

OTA welcomes the recognition of the particular needs of Aboriginal or Torres Strait Islander persons, people who are homeless or at risk of homelessness. However, the Exposure Draft does not yet include 'alternative entry arrangements' that will cover 'emergency situations as well as situations where a needs assessment is likely to be significantly delayed'. Without access to this detail we are unable to determine if people don't meet the eligibility criteria will receive appropriate care in a timely

manner. We hold concerns that some people may continue to remain in hospital when aged care would be more appropriate for them.

- **Deficit focus**

With a deficit focus in the assessment and eligibility process, there is a risk that people who would benefit from preventative services to maintain their function and independence may be unable to receive these through the aged care services. OTA believes the aged care system should be supporting people to access services ahead of significant physical, cognitive or psychological decline through preventative and reablement approaches and that the Aged Care Act should incorporate this.

- **People with disability**

In addition, OTA believes that there should be greater clarity concerning supports for people with disability who are aged over 65 and call for the Act to clearly reference supports for disability under access eligibility.

Conclusion

While OTA welcomes a number of aspects of the Aged Care Act Exposure Draft and the intent to move from a provider-centric aged care system to a person-centred and rights based one. However, we hold a number of concerns about the current Act.

OTA has contributed to the submission prepared by Allied Health Professions Australia (AHPA) and we endorse the feedback and issues they raise in their submission.

In addition to the issues and concerns raised in this submission OTA believes the significant gaps in the Exposure Draft of the Act and the lack of rules accompanying the Act, hampers our ability to understand the full implications, and issues for implementation, of the Exposure Draft.

We urge the Government to ensure there is sufficient time and opportunity to review this missing content once it has been drafted.

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