

Warrigal

Inspiring communities
for older people

Draft Aged Care Act

Consultation Paper 2 Response

2 Pine Street Albion Park Rail

PO Box 435 Albion Park NSW 2527

T: 02 4257 4257 **F:** 02 4257 4232

Freecall: 1800 626 670 **E:** warrigal@warrigal.com.au

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About Warrigal

Warrigal isn't just an aged care provider; we're an award-winning, not-for-profit organisation and an essential part of our communities. Our mission is to serve older people, their families, and caregivers with a comprehensive range of top-quality services that include home care, respite services, residential aged care, and vibrant retirement living communities throughout the Illawarra, Southern Highlands, Queanbeyan, and Canberra.

Our purpose is to support older people to have extraordinary lives. We do this by creating communities and offering services so that older people can be independent, respected, happy and connected.

For nearly six decades, we've been committed to nurturing communities that inspire, support, and cultivate connections among older people. As a result, we have grown to encompass over 2,000 staff and 300 volunteers across 1643 residential care beds in 13 homes, 591 villas for retirement living, 855 Home Care Package and Commonwealth Home Support customers, as well as Veterans and private fee-for-service customers.

Summary

Overall, Warrigal celebrates the steps that the Draft Age Care Act takes in realising the pivotal reform in the Australian aged care sector, embodying a shift towards a human rights-based approach that places older people at the core of care delivery. From Warrigal's perspective, supporting the draft Aged Care Act is about embracing a future where the rights and dignity of older Australians are at the heart of care. This reform aligns with our commitment to delivering high-quality, person-centred services that respect the autonomy and preferences of each individual. It's a significant step towards ensuring that the care we provide not only meets but exceeds the standards set by international human rights principles, ensuring every older person in our care lives a life of dignity and respect.

As such, we appreciate the opportunity to provide feedback and recommendations on the current Draft Act. However, like others, we express concern with the Draft Act being incomplete and the inability to have oversight on clear issues such as fees, charges, critical powers, and review of decisions. We look forward to a comprehensive consultation with the sector prior to the finalisation of these items to assist with risk mitigation measures and ensure authentic implementation.

In addition, as with any major reform, we recognise that there will be unintended consequences and risk areas arise as the Draft Act comes to life and is implemented across Australia. Therefore, we look forward to the implementation plan and support for the sector. Warrigal recently participated in the trial of the new standards, and this process highlighted the work still to be undertaken from both a provider and assessor perspective to be 'reform ready' for 1st July 2024. We also look forward to continued comprehensive consultation with the sector across the initial three-year implementation review period to ensure that the Act as implemented meets the intended outcomes of the Royal Commission and reform agenda.

Finally, whilst we have provided recommendations on consultation paper 2 specifically, we acknowledge that the Department has determined that they will not take action on previous feedback from the sector to include the responsibilities of older people within the Act. We continue to advocate that a clear understanding of rights and responsibilities supports decision-making and choice, dignity and risk and the provision of person-centred care – all fundamental concepts to the new Aged Care system. The inclusion of responsibilities and rights in the Act will also support the relationship between older Australians and Aged Care Providers as partners in care.

Recommendation Summary

Recommendation 1: The definition of High-Quality Care within the Act should include broad concepts or characteristics of high-quality aged care more in line with Recommendation 13 of the Royal Commission Report into Aged Care Quality and Safety. The detailed examples in the Exposure draft can be included, with many others, in the Standards. This would allow for the definition of High-Quality Care to remain dynamic and reflective of contemporary practice.

Recommendation 2: Develop and distribute complementary professional learning materials to providers and staff about the introduction of Support and Representative roles, including clarifications on these roles, their intersections with Guardians and Advocates, and the process of supported decision-making.

Recommendation 3: Ensure individuals are given the choice and capability to nominate both supporters and representatives to aid in decision-making, aligning with the Aged Care Reforms' objectives.

Recommendation 4: In accordance with the Aged Care Reforms, allow individuals the option to appoint a representative to make decisions on their behalf, even when they retain decision-making capacity.

Recommendation 5: Develop and implement free, accessible training and information sessions for individuals accessing aged care services, current advocates, guardians, potential supporters, and representatives. These sessions should aim to alleviate the burden on providers and include education on the process of supported decision-making.

Recommendation 6: Inclusion of the rights of carers as stipulated in the Royal Commission into the Act.

Recommendation 7: Re-evaluate and consider lowering the eligibility age for Aboriginal and Torres Strait Islander individuals with co-vulnerabilities.

Recommendation 8: Further consultation provided to the sector to assist with identifying unintended consequences and risk mitigation scenarios post the release of '*alternative entry arrangements*'

Recommendation 9: Ensure comprehensive opportunities, beyond merely targeted ones, for consultation and feedback on fees, payments, and subsidies are available to the sector once critical details are disclosed.

Recommendation 10: Establish and include in the Act clear timeframes and criteria for decisions or reviews conducted by the Commissioner.

Recommendation 11: Separate the complaints function, ensuring the Complaints Commissioner has no direct or indirect reporting line to the Commissioner.

Recommendation 12: Establish a robust mechanism for review of the implementation of the Act, in partnership with the sector, including the escalation and resolution of concerns or disputes at all levels.

Recommendation 13: The program assurance framework should include transparent training and monitoring of assessment team members, including reliability and drift training and testing.

Recommendation 14: The program assurance framework should include transparent communication to the sector regarding the use of additional powers (such as entering homes without consent or warrant) and the circumstances that led to the powers being implemented.

Recommendation 15: Develop and implement comprehensive immediate and ongoing viability and transition support plans in consultation with the sector, accounting for the impact of delays on viability and the expanding cohort needing transition.

Chapter 1

Statement of Rights

Warrigal supports the inclusion of a comprehensive Statement of Rights, emphasising the significance of recognising both 'Country' and 'Island Home' to ensure cultural appropriateness. We support ongoing consultation with Aboriginal and Torres Strait Islander communities to refine these concepts, ensuring they accurately reflect the diverse cultures and values of First Nations Australians.

High Quality Care

Warrigal, being a provider that focuses on resident-centred and best-practice models of care, supports the sector striving for high-quality care. Warrigal agrees that the practices identified within the definition demonstrate high-quality care provision. However, we express concerns with the specificity in which 'High Quality Care' is defined and written specifically within the Act. Throughout the consultation process, it has been communicated to the sector that this definition is intended to be aspirational, which we assume is the reasoning behind such a detailed definition within the Act. The detail included raises the following concerns:

- Sections of law within an act generally set out the legal requirements or standards that must be met, acting as the minimum standards or obligations that entities are legally bound to comply with. These standards are designed to ensure safety, fairness, and compliance with established norms. Defining high-quality care so explicitly within the Act as a higher goal defies this norm.
- The specifics within the definition of high-quality care should not be written into the Act; rather, it should be a general definition. For example, the definition may refer to the Standards or rules for details. Instead, general concepts such as kindness, compassion, care, person-centred, and culturally safe may be utilised. The specifics for high quality care then would sit within the Standards, allowing them to ebb and flow as best practice care models emerge.
- There are Sections throughout the Draft New Aged Care Act that can be interpreted as the definition of high-quality care being assessed as minimum requirements and compliance due to the term "quality" being used. See Sections 22 (6+13), 99, 132 and 142.

Whilst we recognise that including the definition of 'quality' into the Act was a recommendation of the Royal Commission (#13), we believe this outcome will be best supported through the inclusion in the Standards into legislation and a broader definition of the characteristics and concepts of quality in the Act. This would allow for the intention of the 'quality' practices being above minimum standards and allow for the definition of quality to remain dynamic through updates to best practice models that can be included in the Quality Standards.

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Safety. The detailed examples in the Exposure draft can be included, with many others, in the Standards. This would allow for the definition of High-Quality Care to remain dynamic and reflective of contemporary practice.

Supporters and Representatives

The distinction between supporters and representatives, as currently defined, may lead to confusion and operational challenges. Whilst we recognise that the publishing of the Rules may alleviate some of this confusion, Warrigal recommends clearer guidelines and definitions to ensure that the roles and responsibilities of each are well understood, enabling providers to engage with and support consumers and residents effectively. The concerns identified include:

- The structure, purpose, and timeframes of the supporter role. In particular, confusion exists surrounding this role once an individual enters a home or commences receiving services.
- Lack of clear definition within the Legislation on the role of the advocate and the intersection between an advocate/supporter/representative.
- The current stipulation that individuals may only have supporters **or** representatives does not recognise nor support the intention behind the roles identified in the consultation paper 2. Specifically the statement that, *“This reflects the feedback that people often want to have more than one person appointed as a representative or supporter. It also recognises the complex reality of support networks and social/family relationships”*. The legislation only allowing one type appointed at one time does not recognise the complex relationships that individuals may have and, in particular, that an individual may want to have nominees of both types based on their relationship and trust boundaries.
- Lack of clarification regarding Section 28 on the inability of persons to make decisions without being appointed as a representative, even if the enduring power of attorney or guardianship is currently applied to the person. Given the administration process related to appointing representatives (Section 376), this process could result in high levels of risk with no one able to make decisions.
- Section 376 (2) indicates that the System Governor may, on initiative, appoint a Representative. The assumption here is where there is a current enduring power of attorney or similar that, they will be appointed directly. This, however, under the current Act, would render the individual unable to appoint supporters. As such, this further reinforces a need to allow individuals to appoint both supporters and representatives to accommodate their freedom and right of choice.
- Administration and system complexity and confusion, particularly surrounding the register of supporters and representatives. Will there be an online register for approvals? Is this the responsibility of the provider or the Systems Governor? How will this be communicated to providers and to individuals?
- What process will be undertaken by the Systems Governor when approving nominees? Will the strength and currency of the relationship with the individual be

assessed, and how will this assessment be undertaken to mitigate the risk of elder abuse?

Once clarifications on the above roles are undertaken, providers will be required to develop processes (with support) prior to implementation. This will include communication with individuals and their potential supports and representatives. Systems support will also be required to enable providers to meet the legislative requirements regarding the tracking of supporters and representatives, the information that has been approved across the range of individuals and the ability to provide this information. Finally, workers, supporters, nominees, and individuals will need to be provided with professional development on supported decision making.

Whilst we recognise that the non-inclusion of carers into the Act was addressed in Consultation Paper 2, we believe that incorporating carers into the Aged Care Act is critical, aligning both with their indispensable role in providing care and the Royal Commission's recommendations. The Royal Commission specifically recommended that for individuals providing informal care, there should be "the right to reasonable access to supports in accordance with needs and to enable reasonable enjoyment of the right to social participation" (Recommendation 2) and "informal carers of older people should have certainty that they will receive timely and high-quality supports in accordance with assessed need" (Recommendation 3). These recommendations highlight the necessity of formally acknowledging and supporting carers rights within the Act. The current inclusions of references to carers in the draft Act fall short of this. By incorporating these stipulations into the Aged Care Act, we would not only adhere to the Commission's guidance but significantly improve the quality of care and outcomes for older people by fostering a more integrated, supportive care environment.

Recommendation 2: Develop and distribute complementary professional learning materials to providers and staff about the introduction of Support and Representative roles, including clarifications on these roles, their intersections with Guardians and Advocates, and the process of supported decision-making.

Recommendation 3: Ensure individuals are given the choice and capability to nominate both supporters and representatives to aid in decision-making, aligning with the Aged Care Reforms' objectives.

Recommendation 4: In accordance with the Aged Care Reforms, allow individuals the option to appoint a representative to make decisions on their behalf, even when they retain decision-making capacity.

Recommendation 5: Develop and implement free, accessible training and information sessions for individuals accessing aged care services, current advocates, guardians, potential supporters, and representatives. These sessions should aim to alleviate the burden on providers and include education on the process of supported decision-making.

Recommendation 6: Inclusion of the rights of carers as stipulated in the Royal Commission into the Act.

Chapter 2 – Entry to the Commonwealth aged care system

Whilst we acknowledge the response to initial requests through Consultation Paper 1, Warrigal will continue to advocate for a further lowering of the age (under 50) for individuals experiencing co-vulnerabilities within the Aboriginal and Torres Strait Islander population (i.e. experiencing homelessness, intensive health needs, early onset dementia).

Further, Warrigal supports the simplification of the entry into the Commonwealth Aged Care system and the intention of the system to address the recommendations within the Royal Commission. However, we recognise there may be unintended consequences of this process that would require strong frameworks to mitigate risk. In particular, a single entry point may unintentionally exclude accessibility for a large cohort of vulnerable members of the community. These concerns may be addressed in the *'alternative entry arrangements'* that have not yet been included in the exposure draft. However, considerations should be given to those with differing language needs, differing learning styles, differing cultural backgrounds, those for whom interactions with government-funded aged care services may be affected by trauma, as well as accessibility concerns (for example social isolation, technology, transport).

Recommendation 7: Re-evaluate and consider lowering the eligibility age for Aboriginal and Torres Strait Islander individuals with co-vulnerabilities.

Recommendation 8: Further consultation provided to the sector to assist with identifying unintended consequences and risk mitigation scenarios post the release of *'alternative entry arrangements'*

Chapter 4 – Fees, payments and subsidies

Warrigal recognises that the detail within this chapter is reliant on the final report by the Aged Care Taskforce and, therefore, is not available for this consultation period. It would be remiss to provide any commentary regarding this section without intricate detail behind the structure, approach, and funding pathways.

Recommendation 9: Ensure comprehensive opportunities, beyond merely targeted ones, for consultation and feedback on Fees, payments, and subsidies are available to the sector once critical details are disclosed.

Chapter 5 – Governance of the aged care system

In relation to the functions missing from the role of the Aged Care Quality and Safety Commissioner (referred to herein as Commissioner), Warrigal identifies that across a range of Sections in the act, no criteria nor timeframes have been detailed in relation to decisions made by the Commissioner. For example;

- Timeframes for deciding on submissions made by providers who were refused registration within Section 70 (3) should be identified. Recommended 60 days.
- Criteria for determining shorter or longer registrations should be identified within Section 74 (2)
- Criteria for appealing a decision made under Section 76, limits appeals to where the decision may have a significant adverse impact. This should be expanded to allow appeals where the impact does not meet the 'significant adverse impact' threshold.

In addition, there are concerns regarding the liquidity and capital adequacy components that will be challenging to enforce within Home Services. These revolve around the potential for increased financial pressure and regulatory requirements that may challenge their operational stability and ability to deliver high-quality care.

Warrigal welcomes the acceptance and inclusion of the Royal Commission's recommendation to separate out the complaints function from the Commissioner role and that a Complaints Commissioner is established as a separate statutory appointment. In fulfilling the purpose behind the recommendation, Warrigal believes that it is imperative that this role is separated and there is no reporting line, formal or informal, to the Aged Care Commissioner.

There are further potential concerns and risk areas, such as the punitive measures against providers influenced by significant impact decisions, that will only become more evident with the Act's implementation. Therefore, it is imperative that continuous engagement with the sector, including critical evaluation and reliability testing, is undertaken post-implementation. Moreover, it's essential to establish a clear and safe mechanism for raising and resolving concerns or disputes at every level. A precedent for this approach can be found in the Early Education and Care Sector, where the Australian Children's Education and Care Quality Authority was created. This national statutory body ensures the consistent application of the National Quality Framework and provides an independent avenue for reviewing disputes or concerns regarding the assessment and application of services.

Recommendation 10: Establish and include in the Act clear timeframes and criteria for decisions or reviews conducted by the Commissioner.

Recommendation 11: Separate the complaints function, ensuring the Complaints Commissioner has no direct or indirect reporting line to the Commissioner.

Recommendation 12: Establish a robust mechanism for review of the implementation of the Act, in partnership with the sector, including the escalation and resolution of concerns or disputes at all levels.

Chapter 6 – Regulatory Mechanisms

Warrigal supports the intention behind implementing a proactive and risk-proportionate approach to regulating the sector. However, there is concern across the sector that the expanded powers can be applied in a way that goes beyond a risk-based approach. Likewise, where there are significant concerns regarding the health, safety and overall well-being of residents, the Commissioner and representatives should be provided with the power to enter a care home without consent or warrant. However, there are concerns that these powers may not be utilised only in these circumstances.

The complexities of humans conducting compliance assessments against regulations and quality standards are primarily rooted in the inherent subjectivity and variability of human judgment. Factors such as individual interpretation, experience, cognitive biases, cultural and organisational influences, emotional considerations, and the complexity of regulations contribute to this challenge. There is always a risk in these approaches that assessors' decisions can be significantly affected by their personal opinions, leading to inconsistencies in the application and enforcement of standards.

As such, transparency around the training and monitoring of the individuals undertaking the assessments that result in the risk rating of homes, services and providers is key in minimising any unintended consequences. This monitoring should include reliability testing and drift testing undertaken across members of the assessment teams in line with other highly regulated sectors, such as Early Education and Care. In addition, transparency surrounding the occasions where these new powers are enforced, for example, the circumstances surrounding the decision, should be undertaken to educate and inform the sector of the thresholds that would trigger this response. This transparency would enable quality improvement reflection across the sector and assist with mitigating ongoing risks.

Recommendation 13: The program assurance framework should include transparent training and monitoring of assessment team members, including reliability and drift training and testing.

Recommendation 14: The program assurance framework should include transparent communication to the sector regarding the use of additional powers (such as entering homes without consent or warrant) and the circumstances that led to the powers being implemented.

Chapter 9 – The reform timeline and readiness support

Whilst Warrigal supports a comprehensive approach to reform, which in part is achieved through a phased approach, there are concerns regarding this. In particular, there are concerns regarding the continued delay in the implementation of the Support at Home Program, being;

- Ongoing viability concerns for large sections of the Commonwealth Home Support Program (CHSP) sector. Larger providers such as Warrigal delivering CHSP services also experience difficulties through the ongoing delays.
- The longer that the reforms continue, the more people will access CHSP, increasing the risk and difficulty in transitioning when reforms are implemented.
- The needs of the sector may be lost with a phased approach. In this, the financial and human capital resourcing may be expended in the early stages of the reform – leading to later reforms being rushed or implemented without significant support frameworks.
- The continued delays to the Support at Home Program threaten to derail a central pillar of the reforms. The risks to many CHSP providers in moving to the new model may require greater innovation and support from the Government.

Recommendation 15: Develop and implement comprehensive immediate and ongoing viability and transition support plans in consultation with the sector, accounting for the impact of delays on viability and the expanding cohort needing transition.