# A new Aged Care Act – Exposure Draft

## Consultation Paper no. 2

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# About Speech Pathology Australia

Speech Pathology Australia (SPA) is the national peak body for speech pathologists in Australia, representing more than 14,000 members. Speech pathologists are university trained allied health professionals with expertise in the diagnosis, assessment, and treatment of communication and swallowing difficulties.

SPA is a member of the National Alliance of Self-Regulating Health Professionals (NASRHP) and speech pathology is a self-regulated health profession through the Certified Practising Speech Pathology (CPSP) credential provided by SPA. Speech pathologists with the CPSP credential have met requirements that mirror the AHPRA registration process, and as such CPSP is the recognised credential by a number of government agencies including Medicare, NDIS and DVA. At present, aged care is one of the few sectors that does not have a consistent requirement for speech pathologists to hold the CPSP credential, hence creating a regulatory risk.

# Summary

Speech pathologists are in integral part of Australia's aged care system, including in the community (via, inter alia, the Commonwealth Home Support Program (CHSP), Home Care Package Program (HCP), Short Term Restorative Care Program (STRC)) and in residential care settings (via the Transition Care Program (TCP), and Residential Aged Care (RAC)).

Aged care reforms highlighted in this Exposure Draft of the new Aged Care Act (henceforth, the Draft Act) will significantly impact both speech pathologists working in aged care, and the older people they support. It is therefore vital that consultation and subsequent guidance material continues to actively include the needs of speech pathology.

Speech Pathology Australia (SPA) provides targeted recommendations on the following key sections of the Exposure Draft:

## Recommendations

1. **An embedded Statement of Rights to drive quality and safe care which delivers reablement services according to assessed need**

1.1 That the Act ensure the rights of older people are enforceable, with explicit statements included regarding the positive duty of the system and providers to uphold the Statement of Rights

1.2 That the Act explicitly include in the definition of quality care:

- support to maintain independence and social connection as part of a **reablement approach**
- support provided on the basis of **regular clinical assessment of the person's health and wellbeing needs**
- **services delivered** according to **assessed need**

1.3 That the Act explicitly include in the area of Supported Decision Making:
- the positive duty for supported decision-making principles to be used by those working across the aged care system when working with older people
- the need for aged care workers to be trained in supported decision-making principles and implementation approaches
- the possibility of the appointment of both a supporter and representative at the one time

2. **Access to the aged care system that is equitable, transparent and inclusive, including disability support needs and urgent care pathways**

2.1 That the Act clearly reference supports for disability under access eligibility

2.2 That the Act clearly reference that access to assistive technology is available for communication and cognitive needs, not just physical mobility

2.3 That the Act reflect that timelines for all approval processes include an expedited pathway for urgent care.

2.4 That the Act reflect that a process for clinical oversight of delegate decisions is developed

## Recommendations contd..

2.5 That the Act reference pathways for review of classification level for allied health to be informed by clinical provider assessment

2.6 That the Act must explicitly state that computerised decision algorithms are required to be transparent in operations, and consistent with the Act's rights-based principles or any other provisions of the Act

2.7 That the Act include **a**lternate monitoring mechanisms for demand for service than place allocation to registered providers

**3. Regulatory approaches that recognise the unique positioning of allied health as 'aged care workers'**

3.1 That definitions and all related workforce initiatives for 'aged care workers' must now recognise the need to be inclusive of allied health professionals

3.2 That digital platform regulation should have a tiered approach consistent and cognisant of the services they link

**9. A reform timeline that commences a new Aged Care Act in 2024 and continues active consultation with the sector including Speech Pathology Australia**

9.1 That the new Aged Care Act commence 1 July 2024 and be subsequently reviewed every 3 years.

9.2 That the new Rules have a suitable consultation period prior to being tabled in Parliament

9.3 That Speech Pathology Australia be included by the Department in work to develop subsequent aged care provider and worker guidance material for the implementation of the new Act

# Discussion

## Chapter 1.

## An embedded Statement of Rights to drive quality and safe care which delivers reablement services according to assessed need.

### Recommendations

1.1 That the Act ensure the rights of older people are enforceable, with explicit statements included within regarding the positive duty of the system and providers to uphold the Statement of Rights

1.2 That the Act explicitly include in the definition of quality care:

- support to maintain independence and social connection as part of a **reablement approach**
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1.3 That the Act explicitly include in the area of Supported Decision Making
- the positive duty for supported decision-making principles to be used by those working across the aged care system when working with older people
- the need for aged care workers to be trained in supported decision-making principles and implementation approaches
- the possibility of the appointment of both a supporter and representative at the one time

Key foundational recommendations of the Final Report of the Royal Commission into Safety and Quality in Aged Care[i] included *"a system of aged care based on a universal right to high quality, safe and timely support", that "provides support and care for people to maintain their independence as they age" and "assist older people to live an active, self-determined and meaningful life"* (Recommendation 1). Furthermore, the Commission urged recognition of reablement and rehabilitation as core to the aged care system, including in their recommended principles a right to "*care and supports, which as far as possible, emphasize restoration and rehabilitation, with the aim of maintaining or improving older people's physical and cognitive capabilities and supporting their self-determination*" (Recommendation 3)

In its current form, the draft act does not adequately incorporate these requirements for high quality care that has reablement and rehabilitation as a core expectation. The draft act does not, therefore, provide a legislative framework for improving the substandard care for older persons that was found by the Royal Commission. Furthermore, amendment to the Act must occur to align with the Commission's recommendation that a new Act must enshrine rights of older people who are 'seeking or receiving aged care'.

The *Objects, Statement of Rights and Statement of Principles* all fail to fully implement this vision of the Royal Commission to embed a rights-based approach to high quality care incorporating reablement. Of key concern is the lack of enforcement processes for the Statement of Rights. Without codification in law, there is no obligation for providers to uphold these rights or ensure mechanisms are available for older people to complain when there is a breach of their rights. The Act should explicitly include the positive duty of the system and providers to uphold the rights of older people outlined in the Statement of Rights.

SPA is also extremely concerned that the Statement of Rights then only refers to "a right to have individual's need for funded aged care services assessed". The right to equitable access to

assessments is not equivalent to the right to be provided with services according to assessed need as recommended by the Royal Commission. The Statement of Principles carry forward the omissions noted above, with the lack of inclusion of the principle: “older people should have certainty that they will receive timely high- quality support and care in accordance with assessed need” as recommended by the Royal Commission.

SPA does acknowledge and commend the revision of the principles to include reference to maintaining or improving the ‘communication capabilities’ of individuals 22, 3 (d). We support and acknowledge the inclusion of a right to access communication aids as required (Statement of Rights, Section 20 (8)) and accessible complaints mechanisms (9)). However, this cannot be achieved without an individualised plan developed from speech pathology assessment – thus the right to services must be enshrined by a rights-based Act. SPA strongly recommends that the new Act should explicitly include the positive duty of the system and providers to uphold the Statement of Rights, and the right for older people to be provided with services according to assessed need.

The current definition of ‘quality and safe funded aged care services’ within the Act is inadequate to combat the neglect and substandard care identified by the Royal Commission. SPA calls for a focus on ‘quality care’ to be built into the Act – rather than focus on a definition of ‘high quality care’ which is only aspirational and not enforceable. The Act must define ‘quality care’ with foundational principles of care that include promotion of independence and social participation through a reablement approach.

Furthermore, there is currently no linkage between the Quality Standards and the Act. The ‘quality care’ definition is silent on any expectation to provide allied health services to meet these needs. This definition needs urgent amendment to include a positive duty of the system and providers to ensure service provision according to assessed need that promotes and maintains independence and social connection.

SPA does not support the revised definition of ‘high-quality care’ as being an appropriate reflection of ‘aspirational’ standards for excellence. This definition of ‘high quality care’ contains basic foundation principles for any service system but not access to reablement and rehabilitation. It remains a significant concern to SPA that there is no expectation or duty to provide high quality care, and that reablement and rehabilitation will be seen as ‘optional extras’ by providers.

There is some limited reference to reablement - “keeping older people mobile and engaged if in a residential care home” – but this does not adequately capture the needs of people with a communication disability to continue social participation, decision making and independence. Reference to regular clinical assessment of a person’s health and wellbeing needs has also been omitted compared despite Recommendation 13 of the Royal Commission.

This foundation of the new Act is clearly not consistent with the intent or recommendations of the Royal Commission. The Act should more clearly define foundational principles and aspects of care as ‘quality care’. This must include statements around access to services to focus on wellbeing, reablement and quality of life.

## Equitable access to services

A single service list for all aged care services is supported in order to achieve the recommendation by the Royal Commission that older people should have equitable access to services regardless of whether they are living in their own home or within a residential care home. Currently, an older person’s access to funded speech pathology and other allied health services is markedly different depending on whether they live at home or in residential care, and where they live geographically.

Initiatives such as a single service list and a single assessment pathway into aged care would move towards the objective of a clear, continuous aged care system. In addition to the single assessment pathway there needs to be equity with regard to consistent care planning. Currently in the community care planning is consistently achieved through a standard assessment (IAT) leading to needs identification. However, at present in residential care this care planning is completed in an ad hoc

manner by aged care providers. This contributes to the inconsistent access to allied health in residential aged care that leads to the substandard care identified by the Royal Commission. The new Act should ensure that the principle of a single aged care system with equity and consistency is upheld so that further work can continue to progress towards this goal.

## Supported decision making

SPA supports a move towards consistent adoption of a 'will and preferences' approach in decision making. Presently, it is very common in practice for older people to be ignored in decision making and for all decisions to be referred to others; particularly if the person has communication changes or difficulties. Whilst older people may have little or no speech due to impacts from conditions such as aphasia after stroke, or language led dementia syndromes such as frontotemporal dementia, speech and language skills do not directly equate to cognitive ability as is often assumed. If provided with the right tailored communication aids and strategies, many people with complex communication needs can still demonstrate decision making capacity. Unfortunately, people with communication difficulties do not currently get access to required communication supports in aged care[ii] affecting their ability to continue to engage in decision making.

Supported Decision Making is not simply defining or appointing 'supporters' and 'representatives'; rather there are processes to be undertaken by providers and supports must be tailored to the individual to scaffold their decision-making skills. The new Act should include a positive duty for providers to uphold the right to access supports to enable Supported Decision Making and adopt a will and preferences approach. Subsequently, detailed guidance and education will need to be developed to show examples of how these supports may be provided. Speech pathologists are integral to decision making supports for many common cohorts in aged care with communication difficulties and SPA would welcome the opportunity to contribute to the development of this guidance.

There remain differences even between the States's approaches to substitute decision making with WA and NSW still using a 'best interests' approach rather than the 'will and preference' approach of the other States / Territories and proposed by the Commonwealth. The proposed pathway allows for potentially both a State / Territory guardian and a guardian under the Commonwealth to be appointed. There are a number of practical issues regarding this process, including creating confusion for providers as to who to speak to when and when there could be different guardians inputting into a shared decision.

SPA calls for urgent decision pathways to be developed that enable expedited decisions where health and safety is an immediate concern. These considerations should include decisions around oral intake for people with swallowing difficulties, where a decision to undertake eating / drinking with acknowledged risk (EDAR) is involved. Restrictive practices should be noted to be used as an absolute last resort (exceptional, short lived and rare) under an authorisation approach. It is recognised that a 'best interests' approach will still need to be able to be implemented in certain, defined circumstances, and the Act should clearly reference this.

The new Act should embed the possibility of appointment of both a supporter and representative at the same time. There will be some defined times when an older person has the need for both a supporter and representative, and the Act should be amended (Chapter 1, Part 4, Division 1) to enable an older person to have both a supporter and representative if they so wish.

# Chapter 2. Access to the aged care system that is equitable, transparent and inclusive; including disability support needs and urgent care pathways.

## Recommendations

2.1 That the Act clearly reference supports for disability under access eligibility

2.2 That the Act clearly reference that access to assistive technology is available for communication and cognitive needs, not just physical mobility

2.3 That the Act reflect that timelines for all approval processes include an expedited pathway for urgent care

2.4 That the Act reflect that a process for clinical oversight of delegate decisions is developed

2.5 That the Act reference pathways for review of classification level for allied health to be informed by clinical provider assessment

2.6 That the Act must explicitly state that computerised decision algorithms are required to be transparent in operations, and consistent with the Act's rights-based principles or any other provisions of the Act

2.7 That the Act include **a**lternate monitoring mechanisms for demand for service than place allocation to registered providers

SPA strongly calls for the Act to explicitly reference supports for disability under access eligibility. Whilst it has been indicated that the Act must reference 'sickness' as the underlying reason for access to aged care for Constitutional reasons, this illness-based perspective does not promote wellbeing, participation and independence. Given the lack of access to NDIS for people acquiring a disability over the age of 65 years, it is imperative that the new Act also clearly reference these needs within access eligibility. Individuals over the age of 65 years (or 50 years for Aboriginal and Torres Strait Islander people) who experience changes in functioning as a result of acquired conditions such as stroke, brain injury, neurodegenerative disease such as MND or dementia must also have equitable access to supports under the aged care system.

Furthermore, guidance around the interpretation of the requirement for an individual to have "a long term physical, mental, sensory of intellectual impairment" must be sensitive to the need to provide early, preventative allied health services at times (e.g. with progressive neurological conditions to avoid other complications) and for short term issues (e.g. recent change in mental health, swallowing difficulty after recent medical event etc). Such guidance should build on the notion that impairment can be episodic, fluctuating or varying in intensity at times.

Additionally, an Act based upon a human rights approach must support the needs of all people with a disability and must clearly reference access to assistive technology for those with communication and / or cognitive needs rather than only physical mobility needs. Section 49 1 b. iii of the draft Bill must be amended to reflect that the System Governor approves assistive technology for communication and cognitive needs to occur after a comprehensive assessment by a qualified speech pathologist to determine individual needs.

## Assessment considerations

The proposed processes of introducing System Governor approval for specific care following on from eligibility assessment, assessment of need and care planning will add an extra delay to the commencement of services. This is unacceptable in cases where health and safety may be at risk, as may be the case for people with swallowing difficulties that need urgent assessment and management by a speech pathologist. The Act must provide safeguards to older people needing urgent services such as speech pathology by stipulating expedited approval pathways across eligibility, needs assessment, classification level and review processes.

Screening assessment undertaken by the IAT with plans moderated by computer algorithms will not accurately identify individual clinical need in terms of speech pathology service provision. There must

be access to specific and appropriate clinical expertise oversight of such delegate decisions, potentially via a Clinical / Disability Review Panel. Concurrently there should be clear statements that the pathways for review of a person's classification level for allied health will be informed by a detailed clinical allied health provider assessment.

Undertaking an IAT 'assessment' is merely a needs identification for allied health services and not assessment of need. It cannot accurately provide information on the range of disciplines needed, type and scope/ duration of intervention needed including assistive technology, and therefore it is not appropriate for a classification decision to be finalised at that point. Comprehensive discipline specific assessment is needed, and interventions provided based on evidence based practice to achieve desired outcomes for the older person.

## Review pathways

SPA welcomes and strongly supports the proposed pathways for flexibility with classification level review outlined in the consultation paper – 'conditional access' and 'reassessment on the papers'. We also welcome the paper's comments that these will be available at times based on information provided, rather than the person having to wait to undertake another face-to-face assessment. The need for assistive technology for communication is typically not known by the person or assessor until speech pathology assessment has occurred and can only be prescribed according to individual needs. Furthermore, the breadth of allied health disciplines needed is frequently only identified once the first discipline has undertaken a full clinical assessment. We thank the department for the acknowledgement of this need.

Nonetheless, whilst these pathways may address some scenarios where additional needs are uncovered or there is rapid decline occurring the current wording of the Act (46,c I, ii) of 'significant change of circumstances' or 'other circumstances' does not make these pathways as clear. Further detailed guidance will need to be provided in the Rules around these pathways. Furthermore, where there are concerns raised about the clinical validity of delegate approval decisions, there should also be pathways established for appropriate clinical review of such decisions.

The consultation paper notes that computer-based algorithms will be employed in decisions relating to aged care access, including decisions around classification levels and therefore service funding. There must be explicit requirements in the new Act that such computer-based decision algorithms are based on upholding the provisions of the Act, including the rights of older people and are transparent to the community and sector. There should be the means for assessors to note individual circumstances to override decisions of the algorithm at times.

## Recommendations

3.1 That definitions and all related workforce initiatives for 'aged care workers' must now recognise the need to be inclusive of allied health professionals

3.2 That digital platform regulation should have a tiered approach consistent and cognisant of the services they link

Allied health is critical to meet the needs of older people and achieve the stated aims and intent of the Act but is overlooked in many components in the Act focussed on the registered aged care provider. For example, whilst the section on place allocation and prioritisation of the Bill is still to be drafted, the consultation paper notes that the new Act will monitor situations where demand meets supply in the aged care system through prioritisation mechanisms and place allocation arrangements. This will clearly only apply to registered aged care providers and not direct service providers including allied health.

It does not act as a mechanism to highlight access issues to direct services, such as the availability of the breadth of allied health disciplines such as speech pathology. It is unclear then how the Act will assist to establish a system that can identify, monitor and respond to shortages and delays being

experienced by older people accessing required allied health services. The Act should include consideration of what additional data regarding service access will be actively reviewed and responded to by government.

In the meantime, SPA continues to call for active steps to be undertaken in this area including the development of a National Allied Health Workforce Strategy.

## Chapter 3. Regulatory approaches that recognise the uniqueness of allied health professionals as 'aged care workers'

SPA notes the intent that the term 'registered aged care providers' will continue to only apply to those providing management of home care packages and residential aged care until the full implementation of the Support at Home Program has been completed. This has several implications for the delivery and access to allied health services.

Firstly, given that allied health providers such as speech pathologists will now be considered to be 'aged care workers' under the Act, then all related references throughout the Act and future aged care workforce plans, must be considerate of how they include allied health. This definition however places university qualified and regulated health professionals in the same category as some workers with minimal qualifications. Therefore, advice regarding 'aged care workers' should be very specific in signposting different expectations for different groups. Conversely, when the introduction of the Support at Home legislation is finalised for full program implementation the Act wording will require review to adequately define and delineate responsibilities of current aged care providers vs allied health professionals.

Category specific registration requirements for aged care providers may lead to unintended consequences for allied health access. Currently many providers of home care do not directly provide allied health services despite the needs of their home care recipients. The Royal Commission noted the low level of use of allied health in home care (at 2% of home care package budgets).

### Access to allied health services

Whilst implementation of a new screening assessment in the IAT may lead to better identification of allied health needs and funding directly attributable to those needs, many providers won't register in the Category 4 Allied Health until there is a service request for one of their clients. This will have implications on the speed of access to category registration, and the guidance and education needs of providers of this new system.

Access to needed allied health services including speech pathology is often time critical to meet clinical care needs, such as when there are swallowing difficulties with risk to nutritional status and physical health. The Act should include reference to development of a plan to expedite category registration for urgent care situations. Further development of guidance in this area for providers should be included in the Rules.

### Digital platforms

SPA calls for the regulation of digital platforms to have a tiered approach consistent and cognisant of the services they link. SPA supports the introduction of regulation and oversight of digital platform's responsibility when linking older people to aged care workers. Further clarity is sought however of what expectations may be required of registered vs nonregistered providers. Additionally, we would like to see a tiered approach to regulation. For example, we would see that a platform's responsibilities to monitor workers with minimal qualifications going into an older person's home would look different than digital platforms such as the 'Find a Speech Pathologist' search engine that links to speech pathologists with the 'Certified Practising Speech Pathologist' credential. Speech Pathology Australia supports the stated intent to not introduce further burden and duplication of effort, and therefore seeks a nuanced approach to digital platform regulation.

## Chapter 9. Reform timeline

### Recommendations

**9. A reform timeline that commences a new Aged Care Act in 2024 and continues active consultation with the sector including Speech Pathology Australia**

9.1 That the new Aged Care Act commence 1 July 2024 and be subsequently reviewed every 3 years.

9.2 That the new Rules have a suitable consultation period prior to being tabled in Parliament

9.3 That Speech Pathology Australia be included by the Department in work to develop subsequent aged care provider and worker guidance material for the implementation of the new Act

SPA calls for the rapid commencement of a new Aged Care Act, incorporating the above recommendations, and with a human-rights focus to support the needs of older people with communication and swallowing to access safe and quality care. Subsequent to the introduction of the Aged Care Act legislation, there will be the need for the Department to develop substantial guidance materials for aged care providers and workers – including speech pathologists.

SPA calls on the Department to ensure that clinical expertise from the Association is used to help develop guidance to the sector on issues pertinent to people living with swallowing and communication needs. Speech Pathology Australia looks forward to working with the Department on this work.

# References


[i] Royal Commission into Aged Care Quality and Safety: Final report 2021

[ii] Speech Pathology Australia's Submission to the Royal Commission into Aged Care Quality and Safety, 2019