# Submissions in response to the Exposure Draft of the Aged Care Bill 2023

mecwa*care*

8th March 2024

mecwacare appreciates the opportunity for adequate consultation with the aged care sector and is pleased to provide Department of Health and Aged Care (**Department**) with feedback on the Exposure Draft Aged Care Act 2003 (**Draft** or **new Act**). We regard this as a critical junction for the aged care sector and mecwacare welcomes the opportunity to contribute to meaningful change arising out of these reforms.

mecwacare supports the individual (as that term is defined) at the centre of the new Act and the focus on rights-based aged care services. We also support the structure of the new Act as a principal act with a single set of rules for application by the provider. We note that the Aged Care Rules (**Rules**) are yet to be released and that these will provide much of the detail currently missing from the new Act.

However, mecwacare is concerned about the potentially negative impacts and unintended consequences of the new Act and the extent to which it achieves the desired outcomes in its current form. One example is the impact on the attraction and retention of workforce, due to the proposed introduction of statutory duties on *"responsible persons"* and the imbalance across the wider health system. We address these issues in further detail throughout the submission.

Successful implementation requires a considered approach supported by adequate implementation time. The contents and gaps in the Draft make it unlikely that providers across the sector will be able to implement it successfully, and as a result, the intent of the Draft and the opportunity to create meaningful change across the sector, will not be fully realised.

## Table of Contents

**About mecwacare** ........ 3
**Executive summary** ........ 3
**Key issues and gaps** ........ 4
**Issue 1 | Impact on Sector Viability** ........ 4
**Issue 2 | Inability to implement successfully due to lack of appropriate time and completeness of the Draft** ........ 5
**Issue 3 | Lack of information and gaps in the Draft making it difficult to understand full impact and how to effectively engage with the obligations contemplated.** ........ 6
**Issue 4 | Framing of the new Act with *'Ill Health and Sickness'* as the focus** ........ 8
**Opportunities and next steps** ........ 9

## About mecwacare

mecwacare is a highly regarded, not-for-profit, community-based organisation with demonstrated experience and capability delivering client focused services to the Victorian community for over 64 years. Our purpose is to partner with the elderly and people with disability to live fulfilling and purposeful lives.

mecwacare started in 1959, providing volunteer meals on wheels and seniors day programs. We have grown into a large provider of residential aged care, with 1,400 Residential Aged Care beds and delivering over 1,450 Home Care Packages and 70,000 hours of community care per month, including Commonwealth Home Support Program, across Victoria.

mecwacare is committed to providing client-focused services, in an efficient outcome focussed manner, protecting the rights and wellbeing of all stakeholders in line with the Charter of Aged Care Rights, our values and our Care and Services Philosophy.

Our values are at the centre of everything we do:

- Caring
- Accountable
- Respectful
- Ethical

We passionately live these values through:

- Proactive and compassionate care and services
- Responsible and professional conduct
- Empathetic and thoughtful communications
- Honest and fair partnerships

mecwacare’s Model of Care and Services Philosophy Statement underpins all service delivery actions:

> *“mecwacare is an inclusive organisation that respects consumer choices, rights and diversity in the provision of care and services in supportive environments that are responsive to the values important to you. We are committed to safety for all, including children, and your right to make informed decisions and take risks. Living your best life possible is central to care planning and delivery, enabling a flexible and responsive transition through our services. mecwacare is committed to fulfilling all legal and ethical responsibilities, within an Open Disclosure framework, with an overarching philosophy of care that reflects the vision of the organisation in a collaborative, respectful partnership with you and your nominated representatives/ carers.”*

## Executive summary

We note that the sector is currently without much of the required detail missing from the Draft including the Rules and the Aged Care Taskforce's final report. However, based on the current drafting of the new Act and following extensive collaboration across our organisation and

stakeholders, mecwacare considers that the Draft contains four key areas that will very likely affect a successful implementation of the new Act, including:

**Issue 1:** Impact on sector viability due to:

- an imbalance of risk across the wider health and human services system due to the new statutory duties for providers and *“Responsible Persons*”; and
- the significant cost burden of compliance and regulations.

**Issue 2:** Inability to implement the reform agenda successfully due to a lack of appropriate transitional time and completeness of the Draft.

**Issue 3:** Lack of information and gaps in the Draft making it difficult to understand the full impact and how to effectively engage with key obligations contemplated in the drafting.

**Issue 4:** Framing of the new Act as an *'Ill Health and Sickness'* focus.

We address each of these issues, and provide corresponding recommendations, in further detail below.

## Key issues and gaps

### Issue 1 | Impact on Sector Viability

**Imbalance or risk across the wider health system of the new statutory duties for providers and “*Responsible Persons*”.**

The new Act proposes new statutory duties on providers and their responsible persons. A breach of these duties can trigger significant civil and criminal penalties. Similar statutory duties do not exist in the wider health and human services system, i.e. tertiary health, disability sectors. We note in particular that the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) did not recommend criminal penalties for providers or responsible persons. In our view, this will be viewed as unnecessary and punitive, it will significantly impact the ability of providers to attract and retain staff, for example, quality registered nurses (**RN**), executives and board directors.

The transition to a new model requires a skilled and robust workforce that can support the required implementation of the new Act. As the sector is experiencing significant existing workforce shortages, viability is a real concern if residential aged care providers are unable to attract and retain quality RNs to meet the needs of individuals in their care, and meet the statutory requirements of RN care minutes. As a not-for-profit provider, we already struggle to attract high performing executives for both residential and home care, and our Board of Directors are un-paid. The question recruiters are posing is a valid one – *'why would experienced board directors, executives and RNs choose to work in the aged care sector'*? This one addition in the new Act has the potential to have a profound negative impact on how providers operate, the quality of care, and the viability of providers and the sector more broadly.

The implementation of a new Act may also exacerbate these shortages by imposing additional staffing requirements, training mandates, and compliance obligations, further straining an already stretched, and oftentimes under-appreciated workforce.

### The impact of compliance and regulatory changes

In response to regulatory changes and financial pressures, there is a risk of sector consolidation, with smaller providers struggling to compete or comply with the new requirements. This is against the backdrop of continued legislative and policy reform over the past five years. There is a real risk that this could potentially lead to market concentration, reduced competition, and potential monopolistic practices that limit consumer choice and innovation – the very issue that the new Act seeks to overcome.

For example, the proposed worker screening database for all workers working or seeking to work with individuals accessing aged care services increases compliance burden. This is a significant task and there is no information on the associated costs, who incurs the relevant costs, the screening and decision-making process or the process for revocation of decisions.

Further, potential changes to the funding model and subsidy structures under the new Act pose significant financial challenges for aged care providers. We will of course have more visibility of these reforms once the Aged Care Taskforce releases its final report and the financing provisions in the new Act have been drafted. Reduced revenue streams, increased costs, and uncertainties in funding arrangements threaten the financial sustainability and viability of providers, leading to potential closures or service cutbacks. The long term impact of this point as currently drafted should not be underestimated and requires deeper consideration particularly on those unintended consequences.

The new statutory duties and compliance with new responsibilities will severely compromise implementation of the new Act.

**Recommendations:**

1. Remove the statutory duty requirements for the sector, to align with the absence of such duties in the health sector. This will ensure providers can compete in attracting high quality staff, i.e. RNs, executives and board directors across all levels of aged care service provision, thus enabling a supported, motivated workforce to provide better outcomes for older people, in line with the Royal Commission's vision.

2. If the statutory duties and penalties remain in the new Act, the Department should remove the strict liability offence(s) and instead, introduce the concepts of contributory negligence and proportionate liability in-line with civil liability legislation, to ensure fairness for all stakeholders.

3. Look closely at the current worker screening process through the NDIS for learnings. Our experience is that it is cumbersome, especially for those who are not technologically savvy or have identity documentation problems e.g. cultural naming practices that differ from Australian English norms. The Department must ensure this process is fast, streamlined and tested well before implementation to ensure no further impact on worker on-boarding and worker shortages.

## Issue 2 | Inability to implement successfully due to lack of appropriate time and completeness of the Draft

The new Act is due to commence on 1 July 2024 (or as soon as possible thereafter if parliamentary processes cause delays). The ability of providers to transition to new arrangements, being a new aged care regulatory landscape requiring amongst other things,

new policies and procedures, internal training and education, and IT system updates, the timeframe is un-workable, severely hampering successful implementation of the new Act. It is our view that given the significant shift in obligations, appropriate implementation time must be allowed in order to create a sustainable and robust aged care system. Additionally, the lack of clarity related to potential amendments post consultation will place a huge burden on providers.

The new Act is a seismic shift away from how the sector currently operates and providers require time to consider issues or unintended consequences that may arise. mecwacare estimates that 80-100 internal policies and internal procedures will require updating, with corresponding staff training and system changes. Providers need sufficient lead time to review the final legislation and rules for compliance. The current timeframes will significantly impact sector readiness and compliance, and ultimately reduce the benefit intended by the new Act.

Consultation with the sector has been relatively short even with the extension to 8 March 2024, and has been double difficult on an incomplete version of the new Act. Any future amendments need additional time for analysis and response. Providers must have an opportunity to provide feedback to the Department before the legislation is finalised. Further, the sector does not yet have access to the Rules or the report of the Aged Care Task Force and there is a lack of clarity related to the new Support at Home program, which has already been deferred twice, with a currently proposed start date of July 1 2025.

In combination, the above factors make the proposed timing of implementation of the new Act unworkable for providers and will further fracture an already struggling sector. A poor implementation will be more damaging and very difficult to recover from, than a delayed implementation.

**Recommendations:**

1. Incorporate a second consultation period, following the release of the next draft of the new Act, the Rules, the Aged Care Taskforce final report and the Support at Home program. This will ensure providers have the opportunity to properly consider the reforms and provide feedback to Government on the changes and likely impact on the individuals in our care.

2. Extend the commencement date for the new Act and model to allow for sufficient time after the passage of all relevant legislation for the sector to successfully implement the changes. Further consideration should be given to a staged implementation to different parts of the new Act, to allow time for providers to update their systems and processes.

## Issue 3 | Lack of information and gaps in the Draft making it difficult to understand full impact and how to effectively engage with the obligations contemplated.

Providers will undoubtedly be required to adhere to extensive obligations in the Rules (assumedly combining many of the existing legislative principles), however the Rules are yet to be released. These are critical to enable providers to understand how they will discharge the requisite standard of care and statutory obligations under the new legislative framework. The impact of this is the moving of goal posts for providers at unknown intervals.

In particular, providers are yet to have visibility of the proposed fees and charges, payments and subsidies under the new Act. For example, it is not yet clear how specific needs will be prioritised and aged care places allocated. This impacts sector readiness and the ability to conceptualise the impact of the new Act, as well as understanding the operational effects. We await Chapter 4 for information on means testing, subsidies, payments and other fee arrangements.

A definition of "*high quality care*" is drafted as an aspirational goal in the new Act, that includes putting the individual first. Although providers are committed to putting individuals' needs first, this has the potential to impact the rights of other individuals as there are no corresponding responsibilities for them. Further, there is no clear manner for determining if providers are delivering "*high quality care*".

The current meaning of *"high quality care*" provided includes subjective elements that will be open to interpretation e.g. *"prioritising timely and responsive delivery of services"*. Home and community care providers will find it difficult to prioritise where staff availability and rostering are competing with the need to prioritise e.g. *"tailoring time when the service is delivered"*, "*individual preferences*" and "*bilingual aged care workers*". This lack of clarity will make it difficult for providers to set and monitor a requisite standard for care.

Under Chapter 1, Part 2, Division 2, Section 14 (2a) of the new Act, the Aged Care Quality Standards

> *"may prescribe standards about the following matters:*
>
> > *(a) how registered providers must treat, and engage with, individuals* ***seeking to access****, or accessing, funded aged care services".*

Rules should not prescribe that the standards extend to prospective persons who are seeking access to aged care services as no care relationship exists until they enter into a service agreement/ care relationship with a provider. This may result in Home Care closing waiting lists. The pragmatic question will be "why would home care providers maintain lists of individuals they have responsibility for but are unable to service at that time?"

A Statement of Rights for individuals in the new Act, is welcomed by mecwacare. Although these rights are not directly enforceable, they may be indirectly enforceable when another part of the new Act is not complied with. For example, non-compliance under the Aged Care Quality Standards, the Aged Care Code of Conduct (**Code of Conduct**), or where a provider fails to adhere to other aspects of the new Act. It is not yet clear how this will work in practice.

The lack of clarity about the application of different regulations will impose an additional burden on providers to demonstrate compliance against multiple regulatory structures. There is limited information on the Code of Conduct as it is not set out in the new Act. If frequent updates are made to the Code of Conduct, through amendment to the Rules, this will put an additional burden on providers to constantly update their systems and processes. This is just one example of the impact of placing significant portions of regulation in the Rules.

Appointment of Supporters and Representatives is a welcomed addition to the new Act. A person may be appointed by the System Governor in circumstances where there are no other legally appointed decision makers. However the new Act lacks clarity on:

- how providers should respond in circumstances where it receives differing instructions from multiple supporters or representatives;
- a timeline for appointment or removal, often decisions for a resident need to be make quickly; and
- how this will interact with existing State-based Power of Attorney legislation.

**Recommendations:**

1. Release information on the proposed fees and charges, payments and subsidies for providers to understand the impact on their businesses as soon as possible, including information on how individuals with specific needs are to be managed and aged care places allocated.

2. Elevate the Code of Conduct into the new Act under section 13 to ensure the sector can embed the requirements into systems and processes, with fewer ongoing changes.

3. Add a definition for "*high-quality care*" to the new Act for providers and the Aged Care Quality and Safety Commission to be clear on how to meet this expectation under all levels of aged care delivery. The current meaning provided includes subjective elements that will be open to individual interpretation and elements more difficult to implement and demonstrate for Home Care. Build in a review process of the definition to future-proof against changes in community and individual expectations.

4. Clarify where the Aged Care Standards apply and to whom to ensure that individuals "*individuals seeking access to aged care services*" are not within the scope of the prescribed standards relating to the quality of funded aged care services delivered by a registered provider. This will enable providers to manage service waiting lists where Government funded services do not meet community demand, in particular in Home Care.

5. Add corresponding responsibilities to the Statement of Rights of individuals in the new Act. This will ensure that the Act is balancing the rights of all individuals accessing care.

6. Add clarity on how non-compliance of the new Act will flow-on to other regulatory frameworks to ensure providers are not over-burdened with demonstrating compliance against multiple regulatory systems for the same issue.

7. Add details on how systems will be implemented to ensure individuals and providers are clear on Supporters and Representatives provisions and how they will intersect with State-based Power of Attorney legislation.

## Issue 4 | Framing of the new Act with *'Ill Health and Sickness'* as the focus

mecwacare is concerned that the new Act has been structured around providing services to people who have '*ill health'* or '*sickness'*. These terms create and enforce a bio-medical deficit model of care for the older members of our community.

Eligibility for aged care services is consequently predicated on a deficit model, not a reablement and wellness model. Chapter 1, Part 2, Division 2 of the new Act defines the concept of residential aged care as a place of residential care for individuals who by reason of sickness have a continuing need for aged care services.

Responsibility for rehabilitation under section 19(c)(v), related to *"supporting the improvement of the individual's physical and cognitive capacity*", is at odds with an '*ill health'* and '*sickness'* model. It difficult to see how providers can reconcile the delivery of quality aged care services and a requirement to rehabilitate, where the person is defined by eligibility under the new Act to have ill health or sickness.

A deficit model used in the new Act does not set a good benchmark for the aged care system to seek to re-able or rehabilitate older people to improve or maintain function. This has significant impact where providers need to consider how programs are delivered to improve wellness (as opposed to treat illness), maintain or improve quality of life (as opposed to ensure quality of care) and support older people to maintain their independence.

Disability supports are not explicitly identified under the new Act. The new Act does not recognise that older people are not only seeking aged care simply due to frailty, ill health or sickness but also for disability supports. This is not supportive of the needs and dignity of people with disability.

Further, the new Act uses the term "*older persons/ individuals*" which creates an ageism focus and implies a linear ageing process at odds with reablement, wellness and quality of life. Although the new Act notes that older individuals include some persons aged 50-64 years (specifically the homeless and First Nations peoples) this has limited flexibility for others that have age exception needs. For example, individuals who are under 65- years and experiencing early onset chronic illness like dementia, HIV (may not be eligible for NDIS), Forgotten Australians, Veterans, and persons who have experienced war and/or displacement have not been specifically provided for.

mecwacare considers that the framing of the new Act with an *'ill health'* or *'sickness'* focus for the aged is not aligned with the vision of the Royal Commission, which advocated for better outcomes for older people who require care.

**Recommendations:**

1. Add to the definitions and key concepts in Chapter 1 related to ordinary meaning of illness and/or sickness by identifying some consideration related to someone who has a disability regardless of their medical condition.

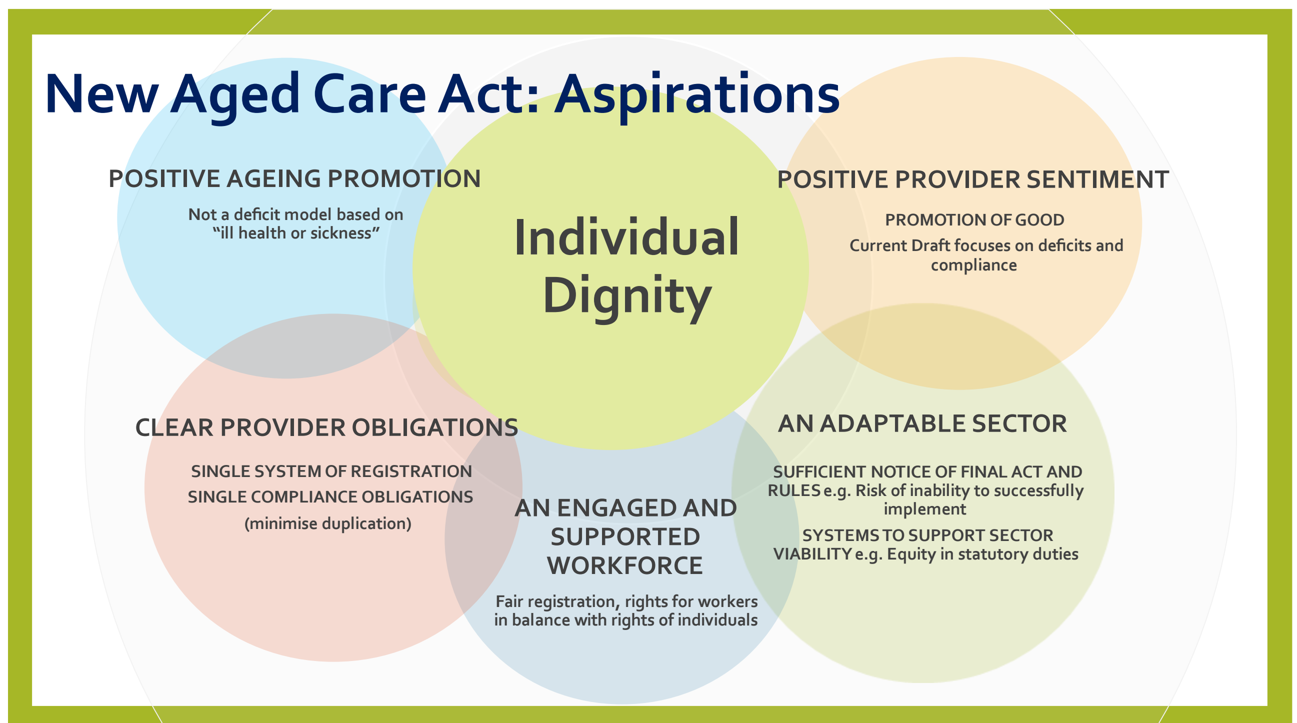
2. Make supports for people with a disability over 65 years of age an explicit reason to access aged care under Chapter 2. Recognition of the reasons why an older person with a disability is seeking services from aged care, rather than force people with disability to label themselves as *'sick'* or *'ill'*, provides basic dignity to this user group.

3. Add approval of conditions and exceptions, outside the arbitrary age rules, to the Eligibility to access aged care services in the new Act.

4. Provide a pathway for the sector to balance the Statement of Rights for individuals, when competing rights of another individuals impacts others with equal rights.

## Opportunities and next steps

A rights-based approach for the new Act is commended and provides opportunities to fulfill the Royal Commission's aim to place people at the centre of the aged care system. This provides an opportunity for the sector to re-think service delivery systems away from compliance to aspirational individual goals. mecwacare is hopeful that the burden of compliance does not stifle this aspiration. We have represented these aspirations in the diagram below:




The opportunities of a single system of registration for all aged care users are profound for a provider of services along the aged care continuum. mecwacare will be able to service an individual from a single aged care service list, from entry level Commonwealth Home Support Program to Home Care Packages, then Residential Aged Care if required. Our current digital transformation project at mecwacare will leverage this single entry to provide our clients with excellent, seamless services.

mecwacare otherwise awaits the publication of the Rules and the Taskforce's final report.

Thank you for the opportunity to respond to the new Act. We would welcome the opportunity to meet with the Department to provide further detail if an opportunity is available.

Yours sincerely

Anne McCormack
CEO, mecwacare