

8 March 2024

Department of Health and Aged Care – New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601

Via email address: AgedCareLegislativeReform@health.gov.au

Re: integratedliving Australia submission to exposure draft of the Aged Care Bill 2023 consultation

integratedliving welcomes the opportunity to comment on the exposure draft of the *Aged Care Bill 2023*.

Prelude

In response to the Royal Commission into Aged Care Quality and Safety (Royal Commission) the Australian Government is developing and consulting on a range of reforms, with the most recent being the exposure draft of the new Aged Care Act. Whilst we have included information and feedback on elements of the exposure draft we acknowledge the pressure the Government is under to progress the reforms and have therefore also focused on what could be considered a reasonable approach for a transition plan.

The Royal Commission noted in its findings that the current regulatory framework is no longer fit for purpose:

“Ineffective regulation has been one of the contributing factors to the high levels of substandard care in Australia’s aged care system. Regulation should seek to prevent harm to people receiving aged care services and ensure that instances of substandard care are detected and addressed.”

The Royal Commission into Aged Care Quality and Safety noted:

“An aged care provider’s most important objectives should be to enhance the wellbeing of older people by providing them with safe and high-quality care and to put the older person’s wishes and needs first. This should be the case irrespective of the size of a provider’s ownership and business models. Organisational culture and governance arrangements must be designed around this core purpose”.

We have valued the opportunity to provide feedback, when invited, on the reform journey to date, including the Strengthened Aged Care Quality Standards, changes to the

regulatory framework, star ratings and changes to worker registration conditions. We have been part of several sector reference groups and consultation working parties over the last three years, a participant in the pilot program for the revised standards and provided written feedback on consultation papers.

We recognise that the exposure draft is clear in its intention to enshrine in legislation the rights of older persons. However, with the new Aged Care Act to underpin and give legislative effect to all reform and ensure providers uphold those rights, in its current form we have genuine concerns that it places our industry at significant risk of failure to do so.

In brief, our main concerns are:

- the current draft appears to have disregarded recommendations made by the Royal Commission.
- the rules that are intended to include the practical application of the legislation are not yet available for review.
- The timeline for implementation of the new Act.
- concepts that conflict with existing laws, increasing burden and risk on providers, and so how does this make it easier to protect clients.

We hope the following feedback will contribute to further refinement of the exposure draft of the new Aged Care Act, provide encouragement to draft and release for consultation the necessary Rules and consider appropriate transitional arrangements to support providers to fully understand and implement the legislative change. Whilst we recognise and support the need for the new Aged Care Act to be implemented as soon as possible we consider it equally important that the Act is fully considered and that providers will be clear as to their responsibilities in order to meet its objects.

The reform timeline and readiness support

The exposure draft Consultation Paper 2 recognises that “aged care providers and workers need support, education and training to ensure that the vision for a new aged care system can be realised” and “we [the Department] are also realistic about the time it will take to get the Bill for the new Act right”, whilst still being committed to the new Act taking effect 1 July 2024.

We are concerned that first and foremost the Bill for the new Act is ‘not yet right’ and that, as also outlined in the exposure draft Consultation Paper 2, in the absence of a “companion *Consequential Amendments and Transitional Arrangements Bill* [to] ensure there are arrangements in place to support existing providers to transition to the new system and older people to continue accessing the services they need”, it is simply impossible that there will be an adequate level of support, education and training for providers of aged care services to realistically understand and implement the significant

changes in a meaningful way, and to ensure the continuity of quality and safe care. We consider it of utmost importance that appropriate transitional arrangements, including appropriate in force dates, are legislated at the same time as the new Aged Care Act.

Concerns about sector readiness to transition to the new aged care system from 1 July

As recognised by the Department, the reform of the aged care sector is a once in a generation reform.

Whilst we genuinely support the reform, since the announcement of the Royal Commission into Aged Care Quality and Safety in September 2018, the sector has been subject to significant change, all whilst trying to continue to deliver quality and safe care to older persons, including during the COVID-19 pandemic. It is fair to say that aged care providers and their workforce are fatigued.

By way of example as to the impact of this reform on providers, it has taken three years for integratedliving (a large provider with the support of experienced staff and project teams) to understand, map and prepare for recommendations arising from the Royal Commission and operationalise and educate as to the reforms to date.

Whilst the new Aged Care Act has always been a known change and significant consultation is being facilitated on the exposure draft, the period between release of the draft and consultation has been limited to approximately 3 months.

Given the gaps in the draft and significant changes for older people and providers, any preparation work to ensure compliance with the new Act by the current proposed effective date of 1 July 2024 could, at best, only be in theory and would likely be an inefficient use of resources, where subsequent changes are made. Early awareness of the requirements is beneficial, however, without appropriate transition arrangements following assent by Parliament, it does not afford providers the necessary time to properly consider how to implement changes to its structures, systems and processes. In addition it does not allow adequate time for meaningful and fully informed education for staff and clients of these significant changes.

This is in stark contrast to the consultation and implementation periods of other reform the *Aged Care and Other Legislation Amendment (Royal Commission Response) Bill 2022*, which implemented the first round of significant change to the Aged Care Act and received Royal Assent 5 August 2022. Transitional arrangements were in place for key changes such as the code of conduct and banning orders, extension of incident management and reporting and governance of approved providers, in some cases of 4 months and others over 16 months. These amendments were also supported by extensive implementation guidance that we consider it may be unlikely to receive prior to the proposed effective date of the new Act.

Of significant concern is the amendments to the definition of 'Responsible Persons', the corresponding statutory duties and the imposition of significant civil and criminal penalties. The definition is broad and will cover roles within our organisation that do not have influence and control over their statutory duties.

Factors that impact readiness to transition

In addition to concerns outlined above, we would ask the Government to consider that many providers are still working to implement and/or prepare for other large scale changes.

In the past, singular reforms such as the July 2019 revision to the Quality Standards, have taken many months to implement.

The final strengthened Aged Care Quality Standards are also anticipated to be implemented under the new Act from 1 July 2024. Consultation continues to occur on the Standards, with the latest draft released November 2023 and supporting resources early this year, including as to how compliance will be audited. The strengthened Standards will mean change for all areas of provider operations and there remains a lack of clarity as to who it applies and for what services. This requires extensive work to prepare and implement changes, including:

- analysis of current versus future state compliance with requirements
- action plans to address identified gaps with work to be undertaken coinciding day to day service delivery and business operations within existing resources
- communication, development and delivery of updated or new policy, procedure, systems and tools and corresponding training and development, in integratedliving's case to a workforce of over 1200 employees
- information and communication technology changes to capture new information required, which in some cases may require financial investment, again not funded.

This also requires consideration of, and readying the business for, the amendments to the regulatory framework, including audit methodology and new audit tools that are expected to be in use 1 July 2024.

Concurrently, providers are also now starting to operationalising the changes to provider governance arrangements, including forming their Consumer Advisory Bodies and preparing for, and holding, meetings of the new Quality Care Advisory Bodies.

Whilst we appreciate the importance in continuing to progress the reform, the cumulative impact of these changes on the sector must be considered as it places the aged care workforce at risk of further fatigue and burnout which may see departures from the industry, which would ultimately be further detrimental to older persons having access to the services they need.

Transition Needs

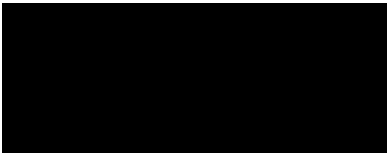
As the governing legislation of funded aged care services, and the significance of the statutory duties and liability on Responsible Persons (as currently drafted), those activities must be designed and implemented to ensure strict legal compliance. Even with experienced staff and/or access to legal support, this is a momentous task, particularly if it is to give comfort to Responsible Persons that they will not face individual penalty.

It is difficult to anticipate if there would be additional impacts of the new Act without the Act, and supporting Rules, being drafted in full and the timeframes providers would need to undertake activities to transition to the new system.

Based on our review of the exposure draft and our experience in implementing reforms to date it is clear that existing providers will require appropriate transitional arrangements to interpret and implement the changes under the new Act, and that it must be considered that many of the changes necessary will be occurring concurrently.

We trust this information is of use.

Yours sincerely



Chief Executive Officer

Encl. Appendix 1 - Concerns and transition needs by Chapter

Appendix 1 Concerns and transition needs by Chapter

Chapter Reference	Concerns	Transition Needs
Chapter 1 Introduction		
Part 1 – Preliminary	Definition of high quality care is aspirational	Reasonable test for ‘high quality care’
Part 2 – Definitions and key concepts	<p>Associated providers: We consider that all providers that would be considered ‘Associated providers’ should be required to register in their own right to safeguard the quality of care provided to older persons.</p> <p><i>Section 11 Meaning of ‘Responsible Persons’</i> definition, when considered in the context of the statutory duties that apply to Responsible Persons (Section 121) including to ensure that ‘the registered provider’ has and implements certain things, and the liability offences and penalties, needs refinement to those persons who can control and influence such matters. Whilst this definition mirrors the previous ‘key personnel’, the imposition of the statutory duties and liability offences and penalties could see an exit from the market of those persons in positions that meet the definition but who cannot control or influence. No other industry exposes individuals, who cannot ultimately control or influence, to this level of duty or liability for penalties.</p>	<p><i>Level of Impact: Low</i></p> <p>*Whilst new definitions and key concept changes could apply from assent date, providers will need time to interpret the changes to identify the impact to/on current business practices (as an underpinning task necessary to support implementation of the new Act)</p>
Part 3 – Aged care rights and principles	The aged care rights and principles need to consider the rights of all people involved in delivering funded aged care services, including those of registered providers and aged care workers, such as respect maintaining a safe work environment for workers, sharing information to help providers provide high quality care and pay fees on time.	<p><i>Level of Impact: Low</i></p> <p>Providers will need time to meaningfully communicate to staff and clients the revised Objects, Statement of Rights and Statement of Principles and what this means in day to day practice, including updating policy, procedure, client agreements, etc</p>

<p>Part 4 – Supporters and representatives</p>	<p>Substitute/supportive decision making and what supportive decision making means is not clearly understood in Australia, unlike in parts of Europe where the concept is well embedded Needs lots of community education for concept to be understood and to have intended positive impact for older people.</p> <p>No issue with introduction of supporters and representatives , concerns is interactions with state laws especially for EG and POA – Why can a person not have both a supporter and a representative as their roles are very different and meet different needs. No details of who is eligible to be a supporter or a representative, should be some guidance similar to NDIS. Who will communicate with existing EGs/POAs to inform of the change? How often will the register of supporters and representatives be updated and by who?</p> <p>How will this be administer in a timely way where the role of guardians, despite appointment by other legally accepted means, have limits under Section 28.</p>	<p><i>Level of Impact: High</i></p> <p>Provider will need to understand what will be necessary to transition, and obtain System Governor approval, of current arrangements, and the impact and process where System Governor approval may be delayed impacting timely service delivery (see <i>Chapter 8 Part 4</i> transition needs)</p> <p>Providers will also need to understand fully the distinction between supporters versus representatives and will require extensive education to staff and clients about what each role can and can't do.</p> <p>System changes will be necessary to evidence and track System Governor approval.</p>
<p>Chapter 2 Entry to the Commonwealth aged care system</p>		
<p>Part 2 – Eligibility for entry</p>	<p>No comment</p>	
<p>Part 3 – Classification</p>	<p>No comment</p>	<p><i>Level of Impact: Low</i></p> <p>Existing providers will need to be supported to understand how changes in classification will be applied to existing clients and modify service delivery accordingly.</p>
<p>Parts 4 and 5 – Prioritisation and place allocation</p>	<p>Not yet drafted</p>	
<p>Chapter 3 – Registered providers, aged care workers and digital platform operators</p>		

<p>Part 2 – Provider registration process</p>	<p>Lack of information about deeming arrangements and final information on registration categories still not available. Equity and additional regulatory burden and cost for providers who register in Category 4 and above who’s whole service will be governed at the highest level.</p>	<p><i>Level of Impact: high</i></p> <p>Even with deeming arrangements, existing providers will be required to amend their systems and processes to align with the proposed registration categories, including identifying current clients who fall within each category for regulatory purposes.</p> <p>Staff will also need to be educated as to registration categories, service types within each category, and how they will subsequently be assessed under the revised regulatory framework.</p>
<p>Part 3 – Variations, suspensions, and revocations</p>	<p>No comment</p>	
<p>Part 4 – Obligations</p>	<p><i>Section 91 Workforce and aged care worker requirements</i> as a condition of registration that a registered provider must comply with the worker screening requirements prescribed by the Rules.</p> <p>Further, Part 4 refers often to the Rules, which have not been drafted or provided.</p>	<p><i>Level of Impact: High</i></p> <p>Details of the aged care worker screening requirements are not yet known, however, expected to be introduced with the 1 July 2024 start date. This coincides with all other reform implementation and will require immediate prioritisation with potential impact on progressing other areas of reform. This could place registered providers and responsible persons at immediate risk of breaching duties and obligations.</p>
<p>Part 5 – Statutory duty and compensation</p>	<p>Responsible Person Duty</p> <p>Section 121 requires that a Responsible Person take reasonable steps: “(c) to ensure accessing funded aged care services delivered by the provider, that the registered provider has available for use, and uses, appropriate resources and processes to manage adverse effects to health and safety of individuals; and (d) to ensure the registered provider has appropriate processes for</p>	<p><i>Level of Impact: High</i></p> <p>Roles may need to be redefined to limit the number of employees who Potentially meet the threshold for being a responsible person. Existing “Key Personnel” will need to be educated on the civil and criminal penalties and their due diligence requirements to meet their new statutory duties.</p>

	<p>receiving and consideration information regarding incidents and risks and responding in a timely way to that information; and (e) to ensure that the registered provider has, and implements, processes for complying with any duty or requirement of the registered provider under this Act.</p> <p>As noted at Chapter 1 – Part 2, the definition of Responsible Persons is too broad as it goes to any individual being able to ‘ensure’ that the ‘registered provider’ in effect, complies with all duties and requirements of the ‘registered provider’. This is an unreasonable expectation that any individual could ever ensure themselves that the ‘registered provider’ (unless operating as a sole trader) meets all such duties and requirements, and yet Section 121 (3) may see a Responsible Person be convicted or found guilty of an offence [<i>strict liability offense – serious failures</i>] under this Act relating to a duty under this section whether or not the registered provider has been convicted or found guilty of an offence under Section 120.</p> <p>Compensation</p> <p>The exposure draft enables an order to be made for compensation against an ‘entity’ which appears to only be available against the registered provider, however this pathway needs to be made clear.</p> <p>Amend statutory duties – including requirement to meet all statements under statement of rights is significant</p> <p>Strict liability offences means liability attaches not on basis of fault but on basis of due diligence. This has implications because definition of responsible person is so broad and will</p>	
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	<p>include staff who have no control in terms of due diligence</p> <p>Definitions not clear and sometimes just the word “penalty” is used without defining if civil or criminal.</p> <p>Civil penalties do not apply in other industries , including healthcare.</p>	
Part 6 – Aged care digital platform operators	<p>Whilst this Part applies certain duties on operators of digital platforms it is no clear what those duties are.</p> <p>Like for ‘associate providers’, aged care digital platform operators should be required to register in their own right to ensure that funded aged care services facilitated through their platform meet, and are subject to, the same obligations as for any other registered provider</p>	Level of Impact: Nil, we are not a digital platform provider
Chapter 4 – Fees, payments, and subsidies		
Part 2 – Means testing	<p>Whilst Consultation Paper No 2 states that the provisions in this chapter are generally expected to mirror the current legislative framework, without the drafting being made available to confirm the intention is as communicated, there remains a risk of unknown implications and/or consequences for providers.</p> <p>We consider it important that the drafting of this Chapter be made publicly available, including whether the ‘significant changes to funding and means testing arrangements’ recommended of the Aged Care Taskforce will form part of the current bill, or be deferred until the introduction of Support at Home.</p>	without drafting, difficult to tell if this may have additional implications that would require transition period to implement.
Part 3 - Subsidies		
Part 4 – Payments and fee arrangements		
Chapter 5 – Governance of the aged care system		
Part 2 – System Governor	No comment	

Part 3 – Aged Care Quality and Safety Commission	<p>Division 7 requires the Commissioner to establish, operate and maintain a database for the purposes of the Act (i.e., aged care worker screening database).</p> <p>If the Act is to apply 1 July 2024, it would be reasonable to expect such database would be available as a requirement of the Commission under the Act, however the detailed requirements are not yet known, and state laws required for worker screening to be implemented.</p>	
Part 4 – Aged Care Quality and Safety Advisory Council	No comment	
Part 5 – Complaints Commissioner	No comment	
Chapter 6 – Regulatory mechanisms		
Parts 2 and 3 – Monitoring and investigation under the Regulatory Powers Act	No comment	
Part 4 – Monitoring and investigation under authorisation by Commissioner	No comment	
Parts 6, 7, 8 and 9 – Enforcement powers under the Regulatory Powers Act	No comment	
Part 10 – Notices requiring action and other notices	No comment	
Part 11 – Critical failures powers	Not drafted, however the Consultation Paper No 2 states this Part will provide both the Commissioner and System Governor with increased flexibility to	

	use existing powers in different scenarios ensuring that they can take a pro-active and risk-proportionate response to emerging risks	
Part 12 – Banning orders	Currently in practice	
Parts 13 and 14 – System Governor functions assurance activities and recoverable amounts	No comment	
Chapter 7 – Information management		
Part 2 – Confidentiality of information	<p>Concerns as to interactions and conflict with existing privacy laws, and therefore adds further complexity, and thus risk, where a provider is subject to many state, territory, and commonwealth laws, including health records related legislation.</p> <p>With many state, territory and commonwealth laws already applying to the protection of information obtained for the purposes of providing funded aged care services, these provisions could be argued as simply unnecessary.</p>	<p><i>Level of Impact: Moderate</i></p> <p>Require consideration and incorporation into existing privacy related policy and procedure and appropriate education.</p>
Part 3 – Record keeping	Not drafted, however the Consultation Paper No 2 states this Part is expected to provide that a registered provider will commit an offence where they fail to keep, or retain a record, as required by conditions of provider registration or where a record is made that is false or misleading.	N/A
Part 4 – Data sharing	Not drafted, however the Consultation Paper No 2 states that this Part is expected to provide for the Rules to outline the information that the System Governor must publish about funded aged care services, registered providers delivery those services and responsible persons of those registered providers.	N/A

	<p>Further clarity as to the information that may be published by the System Governor about Responsible Persons, given the current statutory duties and penalties, is needed as this may be of concern to providers and individuals.</p>	
Part 5 – Whistle-blower protections	<p>The current persons to whom a disclosure of information that qualifies for protection needs refinement, and particularly should not include an ‘aged care worker of a registered provider’, as the definition of an aged care worker is so broad.</p> <p>It cannot be reasonably expected that all aged care workers, including those of associated providers, would be aware of, or appropriately trained in, the handling of such disclosures to ensure protections are maintained, including simply the expectation to protect the identity of a discloser, which is subject to penalties if contravened.</p> <p>Further, the exposure draft provides that the Part does not exclude or limit the operation of a law of a state or territory that is capable of operating concurrently. As for Part 2 Confidentiality of Information, this can result in conflict with other existing and established laws and processes and therefore adds further complexity, and thus risk, to persons receiving disclosures, but much more importantly to disclosers.</p>	<p><i>Level of Impact: High</i></p> <p>If an amendment to whom a disclosure can be made is not redefined to remove an ‘aged care worker’, significant processes and training will need to be developed and provided to the entire workforce, including any ‘associate providers’ not registered in their own right to ensure they understand their and the registered providers’ obligations in relation to disclosers and disclosures.</p>
Chapter 8 - Miscellaneous		
Part 2 – Review of decisions	No comment	
Part 3 – Delegation provisions	No comment	
Part 4 – Appointment of	There are concerns as to how the System Governor will administer the	<i>Level of Impact: High</i>

supporters and representatives	appointment process in a timely way and that this may result in significant confusion as to other legally appointed roles due to the limits under Section 28.	<p>The requirement that the System Governor decide whether to appoint a person for the purposes of an Act to be a ‘Supporter’ or ‘Representative’ of an individual will require government resources and administrative processes to ensure appointment is granted in a timely fashion.</p> <p>Transition arrangements will be required for providers to consider current roles of legally appointed guardianship, appointments, enduring power of attorneys, nominees or other representation arrangements, and whether these will require review by the System Governor, and an appropriate timeframe for the System Governor to facilitate this requirement.</p>
Part 5 – Application of this Act to certain entities	No comment	
Part 6 – Grants	No comment	
Part 7 – Use of computer programs	No comment	
Part 8 – Applications, requests, and notifications	No comment	
Part 9 – Application fees and fees for services provided by System Governor and Commission	No comment	
Part 10 – Reports on and review of the Act	No comment	
Part 11 – Rules	In the entire absence of drafted Rules, it remains fundamentally unclear as to what additionally may be required or permitted by the Act, and what transitional arrangements may be necessary to give effect to the Rules.	

Appendix B Transition requirements and proposed timeframes by activity

Activity	Transition Time	Comments
Re-registration under new arrangements	3 month	Even with deeming arrangements providers still have to set their systems up to align with the new categories including distinguishing clients who fall into each category (for regulatory purposes), revising P&P and training of staff etc
New Aged Care Standards	12-18 month	This change impacts all staff, all clients and all areas of the business. In practice it requires: <ul style="list-style-type: none"> • Analysis of current versus future state compliance with requirements (gap analysis) • Action planning to address gaps • Communication, development and delivery of training, updating processes, development and introduction of new systems, processes and tools where they don't currently exist (and this in itself is a huge amount of work), engaging with clients, ICT changes to capture new information required • All of this requires significant resource that are usually the same staff required to work on all the other coming changes
Regulatory Model	12 months	This change requires revising P&P and training of staff on regulatory practices including audit methodology, conducting a self-assessment using the new Pre-Audit tool as it may be required at audit from day 1, understanding the registration process and the resource required to re-register and what impact that has on workforce etc
New governance requirements	6 months	The requirements are already in place but lots of providers (especially in Home Care) will have made the offer and are only now managing the implementation of a Consumer Advisory Body and possibly at the same time a Quality Care Advisory Body which is a significant amount of work to do well (competing with prep resources)
Change from KP to Responsible Persons	12 months	The change may be simpler to introduce (awareness, notification process change, P&P updates etc) but the consequences of this change could be significant impact on attracting and retaining governing body members and therefore governance across the industry.
Worker screening	Unknown	The details of this aren't released yet and we don't expect it to start when the Act is introduced but when it does occur it is likely providers will still be catching up on implementing other reforms. This type of change will have a hard start date and zero tolerance for not meeting requirements which will likely cause other work to be put on hold. Eventually the replacement of police check for national screen MAY see less or same

		workload but a lot of work will still be requirement to manage the transition process
Supporters and Representatives	6 months	This will require an analysis of how providers currently identify, record and manage these relationships and what system and process changes need to be made