HammondCare
Champion Life

Exposure Draft
A New Aged Care Act

Submission

March 2024

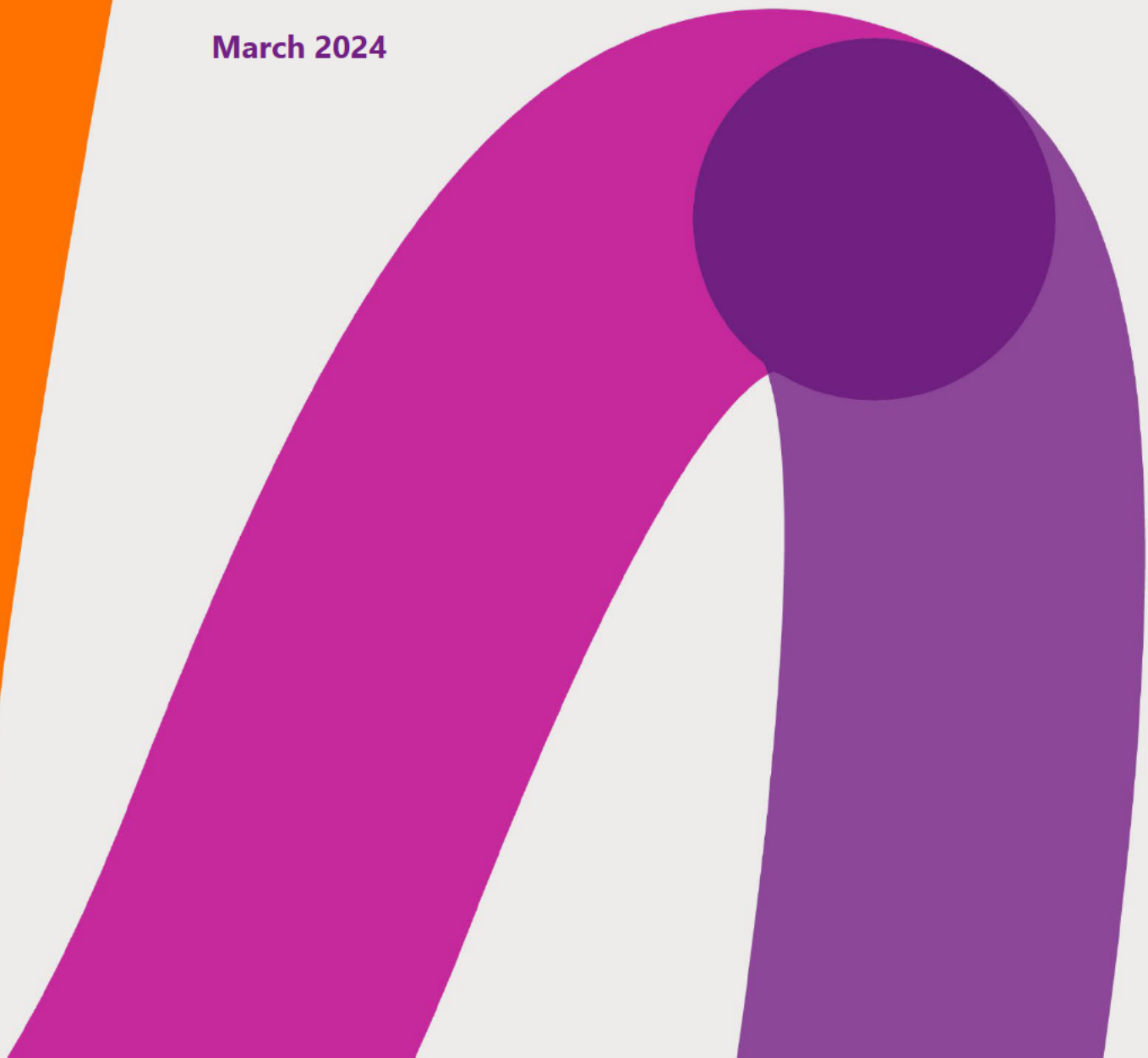

Table of Contents

Executive Summary 3

About HammondCare 3

Contact.....3

Overview of HammondCare's recommendations.....4

Consultation questions 10

Executive Summary

HammondCare acknowledges the importance of the new Aged Care Act, as well as the enormous amount of work that is required in creating legislation of this magnitude. While there is anticipation to implement the new Act, it is critical that time prior to the bill's introduction is factored in to examine the Act in full and ensure it is presented in its best form.

HammondCare's feedback focuses on:

- Enhancing clarity on Restrictive Practices
- Clarifying the meaning of high-quality care
- The meaning of 'Responsible person'
- Clarifying the definition of 'Supporters and Representatives'
- Ensuring time is given to consult and examine the undrafted sections of the Act
- Minor amendments throughout the Act to avoid unintended consequences and ensure the right outcomes when looking through the lens of interpretation and operationalisation.

About HammondCare

HammondCare is a not-for-profit aged care provider specialising in dementia, residential, home, and palliative care. We also deliver mental health and homelessness supports. Since 1932 we have been **committed to supporting people who others can't or won't** and have a mission to improve quality of life for people in need, regardless of their circumstances.

In 2023 we provided care and support for:

- 2,781 people across 12 residential care sites (including one that is homelessness specific)
- 19,278 people accessing specialist care through the Dementia Centre
- 9,940 people living in their own home
- 3,595 people requiring health and palliative care.

HammondCare's services are delivered by over 5,600 dedicated staff and more than 700 committed volunteers across 91 locations. Through our relationship-focused approach and embedded philosophy of care, HammondCare teams are motivated by mission; we strongly believe in the intrinsic value of every person that we care for.

Contact

Mark Peacock
General Manager Strategy, Transformation and Impact
[redacted]

Overview of HammondCare's recommendations

	Aged Care Act – Exposure Draft			HammondCare's recommendations
Chapter 1				
#	**Section**	**Impact**	**Page**	**Recommendation**
1	**Meaning of high-quality care** **Section 19** **(c)** The delivery of a funded aged care service by a registered provider 21 to an individual is high quality care if the service is delivered in a 22 manner that: **(v)** Supporting the improvement of the individual's physical and cognitive capacity, where the individual chooses to, including by keeping the individual mobile and engaged if they are living in an approved residential care home	This implies that all people accessing aged care can improve. This is not feasible for all older people; decline can occur as part of ageing despite best efforts and high-quality care from the provider. 19(c)(v) places an impossible obligation on a Provider to "support the ***improvement*** of the individual's physical and cognitive capacity".	28	Replacing "Supporting the improvement" with "**Optimising** the individual's physical and cognitive capacity **where possible"**. This clarifies that older Australians should have accessed to individualised support at all stages of life that reflects their context, preferences and choices.
2	**Meaning of high-quality care** **Section 19** **(c)** The delivery of a funded aged care service by a registered	This places an unobtainable legislative responsibility on a provider to find a requested person or service, without factoring in: › Location	28	It is important that a person accessing care can request bilingual care workers and interpreters. However, this section of the Act must include the words '**where possible**'. Whilst the onus is on

	provider to an individual is high quality care if the service is delivered in a manner that: **(x)** Bilingual aged care workers and interpreters being made available if requested by the individual	› Availability of workers who speak the requested language › Availability of services in general that can communicate in the requested language.		providers to try to achieve the request, it cannot be mandatory to provide it when not possible.
3	**Supporters and Representatives** **Section 24**	This section seeks to solve a long-standing problem, however there are a couple of unintended consequences in the current draft: › **Multiple Representatives** – this will lead to a similar environment that exists today, where conflicting views amongst representatives can delay actions and compromises a person's care › **Conflicts between a representative and a Guardian or Enduring Power of Attorney** – there is no mechanism or responsibility for the government to support providers in these situations.	38	An individual should only have the option to appoint a **single representative** and (if they choose) a single supporter.
4	**Statement of Principles** **Section 22** **(3)** The Commonwealth aged care system supports individuals to: **(b)** Maintain or improve the individual's physical, mental, cognitive and communication capabilities to the extent possible, **except where** it is the individual's	This implies an individual accessing palliative care or end-of-life care does not access supports to maintain capabilities where possible. Palliative care can be accessed over months or years, depending on an individual's needs. During that time people often prefer to access support that allows them to have the highest functionality possible within their context.	33	As per HammondCare's submission regarding Foundations for the New Aged Care Act in September 2023, we suggest "except where" is changed to "including when".

	choice to access palliative care and end-of-life care			
5	**Restrictive practice in relation to an individual** **Section 16** **(1)** A restrictive practice in relation to an individual is any practice or intervention that has the effect of restricting the rights or freedom of movement of that individual. **(2)** Without limiting subsection (1), the rules may provide that a practice or intervention is a restrictive practice in relation to an individual.	The current legislative wording implies that restrictive practice cannot occur even if (2) is applied by the regulator. This will lead to situations where interpretations can and will be broader than the undrafted rules. HammondCare firmly believe in not applying Restrictive Practice unless as a last resort. A Commonwealth-wide approach to restrictive practice is required to ensure individuals are subject to the same requirements regarding restrictive practices whist in funded aged care services. It is not appropriate that an individual's rights differ depending on where they live and different approaches between states and territories creates unnecessary complexity. This diverts funding from delivering high quality care to unnecessarily compliance with different rules to approach the same issue. HammondCare has assumed the restrictive practices rules are intended to apply to the new service group "permanent residential care" but it is not clear which other service groups might be captured. If the restrictive practices rules apply other than in a residential care setting, such as to CHSP Respite Cottages there could be unintended consequences for which Providers are not prepared given that the detail is in the Rules which have not been released.	25	**Section 16 (1) should be removed** due to doubt on how this can and cannot be applied within the sector. Section 16 (2) in isolation prescribes in what circumstances this should occur with the proper safeguards to ensure older Australians are protected, as this part refers to the 'Rules' as they currently are within the Quality-of-Care Principles.

6	**Supporters and Representatives** **Section 27** **(1)** A representative of an individual may, on behalf of the individual, do anything that may or must be done by the individual under, or for the purposes of, this Act. **(2)** However, subsection (1) does not apply to the doing of a thing, including the giving of consent, in relation to a restrictive practice	Currently the consent arrangements differ in each state creating confusion and issues for families who are supporting loved ones in care. This issue may not be solved given the government is still actively in conversation with state and territory counterparts	40	The government must ensure it clearly outlines the hierarchy of decision-making authority, e.g. Guardian > Enduring Power of Attorney > Supporter. These arrangements need to be aligned at a Commonwealth level to ensure a person in care receives the same standard nationwide. Additionally, there must be safeguards and transition arrangements for the transfer from State/Territory to Commonwealth to avoid situations where those who are under the various current schemes don't suddenly lose their legal authority.
7	**Meaning of responsible person** Section 11 (1) (i) & (ii) Any person who has responsibility for overall management of the nursing services delivered by the registered provider, or overall management of the nursing services delivered at an approved residential care home of the registered provider, and who is a registered nurse	The implication of this definition is that it can be interpreted that Registered Nurses (RN) at operational and site levels could be classified as a Responsible Person. This creates broad-ranging regulatory responsibility and burden on the provider and every RN to report as a Responsible Person. This will lead to a bigger increase on the already onerous reporting for this regulation, while providing no added benefit to the sector or those in care, given RN's already have regulatory oversight specific to their role. Additionally, a requirement such as this could make working in aged care less attractive for the RN workforce.	20	The approach to Responsible Persons should instead focus on hierarchy and attach the responsibility to the head and/or executive of the portfolio with the added requirement that they have or can delegate the clinical responsibility to someone with clinical background if the individual does not have this specific experience.

Chapter 2				
#	**Section**	**Impact**	**Page**	**Recommendation**
8	**Eligibility for entry** **Section 40** **Eligibility determination for an aged care needs assessment**	There is no mention of individuals who are under the age of 65 and living with dementia, meaning they will not have access to aged care services.	51	That the age-based eligibility threshold includes people with dementia (at minimum) as one of the specific cohorts of people under 65 that can access the aged care system.

Chapter 5				
#	**Section**	**Impact**	**Page**	**Recommendation**
9	**Appointment of Advisory Council members** **Section 172** **(4)** A person is not eligible for appointment to the Advisory Council if the person is a registered provider or a responsible person of a registered provider	Currently people working for registered providers are eligible for appointment, but this section specifically disallows providers (and no other representative types) from this advisory council.	168	Delete 172(4) Providers should continue to have a seat at the table on this important advisory group as it enables government to receive valuable insight, feedback and discuss impacts of current and new regulatory reforms. The Act contains sufficient safeguards against unethical conduct: › Section 177 - Disclosure of interests to the Advisory Council › Section 179 - Termination of Appointment (1) (c) fails, without reasonable excuse, to comply with section 176 16 or 177 (which deal with the disclosure of interests).

Chapter 6				
#	**Section**	**Impact**	**Page**	**Recommendation**
10	**Regulatory mechanisms** **Section 184**	Critical Powers remain undrafted, creating the real chance that government may not give the sector time to review and comment prior to the bill entering parliament.	170	It is essential that the sector is given adequate opportunity to comment on the drafted Rules and Critical Failure Powers to ensure important amendments are made **prior to the bill being introduced to Parliament.**
11	**Use of equipment to examine or process things** **Section 224** **(2) A thing found at the premises may be moved to another place for examination or processing**	This section gives the regulator the power (with consent) to remove equipment and further items involved in an investigation off site. This could lead to circumstances where items or equipment used in the delivery and management of care is removed, compromising how a residential care home operates.	197	Amend section 224 (2)(a)(ii)(B) to prevent the removal of a thing where that removal would compromise care for individuals.
Chapter 8				
#	**Section**	**Impact**	**Page**	**Recommendation**
12	**Part 2—Review of decisions** **(undrafted)**	Review of Decisions remain undrafted, creating the real chance that government may not give the sector time to review and comment prior to the bill entering parliament.	289	**Secondary Review Audits must be reinstated**. **Fair and Independent Appeal** outside of needing to go to the tribunal should be included. HammondCare recommends that appeal should be via an independent party such as the Inspector General of Aged Care.

Consultation questions

Consultation questions Chapter 1:

Are the revised Objects, Statement of Rights and/or Statement of Principles clear and do they achieve their intent? If not, what changes are required?

Section 11 Meaning of responsible person

Provides a legal definition that is **too broad**. The unintended consequence of the draft wording is that it can lead to instances where a large portion of staff at various levels are seen as responsible, creating a large reporting burden and a reluctance for clinical workers to join the sector, given the weight of this burden. The approach should instead focus on hierarchy and attach responsibility to the head and/or executive of the portfolio with the added requirement that they have clinical expertise or can delegate the clinical responsibility to someone who does – branching this out to every Registered Nurse also creates duplication within the regulatory system given Australian Health Practitioner Regulation Agency and their state-based counterparts have responsibility in this area.

Are the proposed roles of supporters and representatives clear and distinctive? Please tell us why or why not.

HammondCare welcomes the government's commitment to fix the issues in this area, however there is still more finetuning required in the Act to ensure that this is fixed without further unintended consequences, including:

1. **Transition – arrangements from the old to new arrangements.**
    - Some individuals will already have a Guardian or an Enduring Power of Attorney appointed under state or territory law. The drafted Act provides that a person can't make a decision regarding an individual under the Act unless they are appointed as a representative (even if they are also appointed as a Guardian under a State or Territory Act).
    - If new arrangements are in place after passing the new Act, the government needs to resource and support the transition to ensure there are no gaps or individuals without representation.
2. **Multiple Representatives creates new problems** – Having multiple representatives can lead to decisions not being made to differing opinions. This could leave the older person without proper representation, and the provider in a situation where they are hamstrung.

Are you comfortable that an older person is only able to have representatives or supporters? Are there situations where an older person, or their families and support networks, might want both a representative and a supporter?

There could be circumstances where an individual may wish to have a representative (with decision making power, which presumably also includes financial decision-making power although this is not clear) and also a supporter such as where an individual is geographically remote from the representative (e.g. in a rural or regional area) but receives practical and day to day support from a local friend or neighbour (i.e. the supporter).

It would make sense in this situation that a person in care may want both a supporter and a representative, as they would not be comfortable handing over decision making and care decisions to the supporter. Furthermore, a clear decision-making hierarchy of decision-making and the boundaries of what each role can and cannot do needs to be communicated by the government with specific helplines available upon this responsibility transferring from the states and territories to the Commonwealth.

Consultation questions Chapter 2:

What transitional arrangements would you like to see put in place to ensure there is a smooth transition to the new eligibility arrangements and to manage any impacts on people who do not meet the eligibility criteria?

A rigid age-based threshold will create gaps for people in need of care, particularly individuals with a younger onset dementia diagnosis. Often people with younger onset dementia do not have other options when home or residential care is required, and the expertise of the aged care sector in supporting people living with dementia is a real asset. Dementia care cannot always be provided by the disability sector as some individuals are not eligible for the National Disability Insurance Scheme (NDIS), disability services may not have the expertise, or all regions may not have a local disability service. Often it is a younger cohort that experiences severe behaviours and psychological symptoms of dementia (BPSD). For example, whilst the average age of people in residential care is 88, in Specialist Dementia Care Units it is 74.

The aged care sector currently cares for people aged under 65 with chronic conditions, such as dementia and Huntington's Disease, where there is no other appropriate service. The NDIS has existing eligibility criteria and public health services are largely for acute conditions. Introducing a hard age requirement creates a further gap for people requiring support that will be unable to be met unless alternative services are implemented and funded.

This is a different issue than younger people in residential aged care who can be suitably supported via the NDIS.

Consultation questions Chapter 3:

Do you consider that the proposed draft statutory duties on registered providers and responsible persons achieve the proposed policy intent?

HammondCare would like to see a robust **rationale** for introducing a statutory duty on providers and responsible persons and compensation pathway, including evidence showing that the proposed measures would be effective.

From a legal perspective, HammondCare refers to the joint letter dated 29 February 2024 to Department of Health and Aged Care - New Aged Care Act Consultation from in-house general counsel of 15 leading for-profit and not-for-profit aged care services providers in Australia. HammondCare supports and repeats the content of that letter as part of this submission.

From a practical perspective, the introduction of a Statutory Duty and Compensation Pathway will **create significant risks for the aged care sector**. These risks are disproportionate to the very small number of substandard providers and people. The issues include:

- Creating a **risk of working in aged care** - and reducing the ability of providers to recruit and retain Directors, Responsible Persons and other staff (i.e. Aged Care Workers). The residential care sector is already short 12,500 direct care workers and 5,900 Registered Nurses[1] and the Intergenerational Report 2023 projects the demand for aged care workers to double by 2050.[2]
- Making **sitting on a Provider's board personally risky**, noting that Providers are already dealing with substantial change including 'Strengthening provider governance in aged care' reforms.
- Encouraging a **culture of fear**, which goes against the reporting-positive culture that should be promoted. A culture of fear may **discourage workers from reporting an incident**.

[1] Sutton, N., Ma, N., Yang, J.S., Lewis, R., Woods, M., Ries, N., Parker, D. (2023) Australia's Aged Care Sector: Mid-Year Report 2022–23, UTS Ageing Research Collaborative, link
[2] Australian Government (2023) 'Intergenerational report 2023: Australia's future to 2063', link

- Discouraging providers from allowing individuals to **exercise choice** and make decisions involving personal risk, due to the fear of being held personally liable for the risk materialising.
- Adding **administrative and financial burden** to a sector already under significant strain. This may create an environment where providers offer compensation even in circumstances where there is no case to answer to avoid more costly proceedings.
- **Innovation could be dampened** as providers avoid trials involving risk.
- Pushing the regulatory authority into a space that is more **punitive**, rather than focusing on capacity building and continuous improvement.

Therefore, it is critical that the proposed new system is **carefully justified, designed and communicated**. Providers are already operating in a high-risk environment, particularly when caring for people with severe behaviours and psychological symptoms of dementia. Supporting people exhibiting these symptoms requires a balanced approach to manage risk, rather than seeking to remove all risk for fear of personal liability.

Consultation questions Chapter 6:

Do you consider the expanded powers made available to the Commissioner will ensure they can take a pro-active and risk-proportionate approach to the regulation of the sector?

Critical Powers and Rules – Not drafted

It is essential that the sector is given adequate opportunity to comment on the drafted Rules and Critical Failure Powers, **prior to the Bill being introduced to Parliament**.

Section 224 (2) A thing found at the premises may be moved to another place for examination or processing in order to determine whether the thing may be seized

This power is concerning when it relates to documents, care systems, equipment to manage care which could include, but is not limited to, laptops, computers, mobile devices and software systems (if access is removed by the beforementioned devices being moved offsite).

Onus must be placed on the regulator that these systems cannot be removed offsite, or access impeded, if the provider has informed the regulator of risk to operations and care delivery for residents without those items. Additionally, this **should be seen separately to the provider's consent** and a matter that needs to be rectified before (not after) this power is active.

Consultation questions Chapter 8:

Do you have any concerns about review rights under the current aged care legislative framework that you would like to see addressed under the new Act?

Given the scope of the Aged Care Quality and Safety Commissioner having the power to create regulation, all decisions or recommendations that may be published or influence a further decision by the regulator or system governor should be reviewable.

In addition, HammondCare would suggest the following to improve the effectiveness and confidence in the regulator without compromising the focus upon quality care:

- **Secondary Review Audits:** Under the previous Aged Care Quality Agency, secondary audits were conducted prior to a declaration of non-compliance. This ensured the integrity of the decision and addressed mistakes made by assessors. This was removed by the Aged Care Quality and Safety Commission (ACQSC).
- **Fair and Independent Appeal:** The ACQSC's current processes do not allow review of a non-compliance after it is issued – even if the non-compliance was based on incorrect information. While recognising the necessity of the regulator being able to respond swiftly to risks, there must also be a mechanism for providers to defend against compliance and enforcement action; and for the regulator to overturn the non-compliance if in error. Current processes require appeal of compliance and enforcement decisions to the Administrative Appeals Tribunal, which is expensive and time-consuming. HammondCare recommends that appeal should be via an independent party such as the Inspector General of Aged Care. Their governance role within the Regulatory Framework should be explicit.

Consultation questions Chapter 9:

Are there any particular reform initiatives that you consider must be prioritised for commencement? Alternatively, are there any initiatives that you think would benefit from delayed commencement?

Chapter 4—Fees, payments and subsidies

This section must be given priority given the financial state of the sector, the government has informed the need for change here given the dire outcome for older Australians should more providers have to close.

Do you have any concerns about the sector being ready to transition to the new aged care system from 1 July 2024? How much time do you think the sector realistically needs?

The current Aged Care Quality and Safety Commissioner has stated that should the Act begin on 1 July 2024, then the Commission's job is to regulate against the Act from that day. This is concerning as the regulator appears to have no intent on providing a grace period on the biggest structural change to the sector in 27 years.

There must be an inbuilt grace period of 12 months for the majority of the Act to help the entire sector (providers, older Australians, DoHAC, ACQSC, families) adapt and understand the significant changes. Furthermore, the Commission's approach needs to provide a supportive capacity-building function during this time.