8 March 2024

Department of Health and Aged Care - New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601
Australia
E: AgedCareLegislativeReform@health.gov.au

Submission: Aged Care Exposure Draft

Illawarra Retirement Trust, on behalf of an aged care provider consortium is pleased to make a submission of the draft Aged Care Bill 2023 (**the Bill**).

Consortium

Illawarra Retirement Trust: The Illawarra Retirement Trust (IRT) on behalf of an aged care provider consortium is pleased to provide feedback on the draft aged care funding principles (the Principles) prepared by the Aged Care Taskforce. IRT is one of Australia's largest community-owned, not-for-profit retirement living providers, residential aged care, and home care providers. With over 50 years of experience and locations throughout NSW, the ACT and South East Queensland, we employ more than 2500 people and play a significant role in promoting seniors as dynamic, influential, and valuable members of society.

Harbison
As a community-owned organisation we have been providing aged care accommodation and services for over 60 years. Harbison exists entirely for the benefit of the local community, providing services which care for people and help those in need. As a not-for-profit organisation, we always reinvest our revenues into the development of better care services. We continue our mission to support and nurture older people maintain meaning and purpose in their unique lives.

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This submission is wholly supportive of the Bills intent for a rights-based person-centric approach. We submit that the Bill must be concerned with the very real issues of operational and fiscal demand the proposed changes will place upon aged care providers.

This submission makes numerous recommendations to improve clarity, reduce duplication, clarify and limit powers, and consider financial viability and administrative burden on providers.

Key recommendations include:

- Review the Bill to remove repetition of provider obligations
- Have the Bill commence operation 2 years after all subordinate legislation is made
- Remove the definition of 'System Governor' and replace with 'Secretary'
- Remove the 'associated provider' concept
- Remove clause 19 defining 'high-quality care' as it duplicates other requirements
- Revise the Statement of Rights to be more focused
- Allow people holding enduring powers of attorney to continue making decisions relating to the Bill
- Specify re-registration requirements in primary legislation and make re-registration automatic if circumstances are unchanged
- Define 'incident' for the purposes of incident management
- Remove the requirement for a continuous improvement plan and instead require plans against the Aged Care Quality Standards
- Allow a quality care advisory body to serve multiple providers
- Remove the requirement to establish consumer advisory bodies
- Clarify the Minister's power to specify how funded aged care services are provided in rules
- Reduce compliance with laws to only those relevant to safety, health, wellbeing and quality of life of care recipients
- Limit compensation orders to registered providers rather than 'entities'
- Vest responsibility for financial and prudential standards with the Minister rather than Commissioner
- Review worker screening arrangements copied from NDIS

- Amend Aged Care Quality and Safety Advisory Council membership and operations
- Create a separate complaints body rather than vesting function in Commission
- Review circumstances allowing use of monitoring and investigation powers, remove use of force provisions, and limit questioning powers
- Amend confidentiality and protected information provisions
- Amend whistleblower provisions
- Restrict delegations and require notifiable instruments on qualifications for delegated powers
- Appoint representatives jointly not jointly and severally
- Publish algorithms used for automated decision-making
- Remove powers to charge fees for 'services' provided by the Department and Commission
- Require consultation with industry and consideration of impact before making rules
- Include transitional provisions deeming existing approved providers to be registered in the new system

Yours sincerely

Patrick Reid
Illawarra Retirement Trust
Chief Executive Officer

COMMENTS ON THE AGED CARE BILL 2023

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COMMENTS ON THE AGED CARE BILL 2023

SUMMARY OF RECOMMENDATIONS

Generally

1. The Bill should be reviewed to remove any repetition of provider obligations.

2. The Bill should commence operation two years after the last piece of subordinate legislation designed to support the legislation has been made.

Comments on Chapter 1 of the Bill

3. The definition of 'System Governor' should be removed, and subsequent references in the legislation should be replaced by the term 'Secretary'.

4. The associated provider concept should be removed from the Bill.

5. Clause 19 of the Bill should be removed. (See the discussion in paragraph 9 below)

6. That all words commencing after the word 'including' in paragraphs 20(12)(a) and (b) of the Statement of Rights should be removed.

7. Concerning provisions relating to the exercise of a power of attorney:

(a) people holding an enduring power of attorney should be able to continue to exercise decisions as required about matters relating to the Bill;

(b) the legislation should specify an indicative period within which the System Governor has to make decisions appointing supporters and representatives and

(b) the classes of person listed in paragraphs 28(2)(a)-(d) of the Bill should still be able to make decisions about matters relating to the Bill for a person whilst the Systems Governor considers a decision regarding the appointment of a representative.

Comments on Chapter 3 of the Bill

8. Re-registration requirements should be set out in primary legislation, with any requirements requiring the minimum necessary to permit re-registration.

9. In particular, re-registration should be automatic where there is no material change in the circumstances of the re-registrant and the Commission is not conducting investigations against the re-registrant.

10. The term 'incident' should be defined for the purposes of clause 95.

11. The structure of paragraph 96(b) should be reconsidered.

12. With regards to continuous improvement plans:

(a) clause 99 should be removed, and

(b) Any requirement to produce a continuous improvement plan must be prepared against the Aged Care Quality Standards. If necessary, the standards can be modified to consider any objective outcomes contained in the high-quality care definition that are not reflected in them.

This means the definition of high-quality care contained in clause 19 can be removed.

13. The Bill be amended to allow a quality care advisory body to provide services to multiple providers.

14. Concerning consumer advisory bodies;

(a) subclauses 104(4) and (5) should be removed from the Bill; or

(b) If a consumer advisory body is to be established, the Bill should provide only one for each service provider.

15. The Government will need to explain whether it is the intent of clause 105 to give the Minister power to specify in rules how funded aged care services are provided.

16. The ambit of clause 108 should be reduced to only cover those laws relevant to ensuring the safety, health, well-being, and quality of life of individuals receiving funded aged care services.

17. The clause 'entity' in clause 127 should be changed to 'registered provider'.

<u>Comments on Chapter 5 of the Bill</u>

18. Paragraph 141(4)(b) should be revised for clarity.

19. Subclause 141 (4) should be amended to require the Commissioner to consider the financial viability and sustainability of registered providers when exercising functions.

20. The Minister should be vested with responsibility for making financial and prudential standards.

21. Simply reflecting NDIS practices concerning worker screening should be reviewed.

22. Concerning the Aged Care Quality and Safety Advisory Council:

(a) subclause 172(4) should be removed;

(b) two members of the Council should be responsible persons of registered providers;

(c) where a vacancy in the Council occurs, the Minister should advertise the vacancy and seek expressions of interest from interested persons and

(d) the Commissioner should be under a duty to provide information to the Council when requested.

23. A separate body should be created to manage the complaints function rather than vesting it in the Commission, or, at the very least, the Minister rather than the Commissioner should appoint the Complaints Commissioner.

<u>Comments on Chapter 6 of the Bill</u>

24. The circumstances under which monitoring powers can be exercised should be reviewed.

25. Clause 191, which deals with the use of force when exercising a monitoring warrant, should be removed from the Bill.

26. Clause 196, which provides the power to ask 'any person' a question, should be removed from the Bill. Alternatively, the requirement to answer questions should be confined to aged care workers (other than volunteers) or responsible persons.

27. The training and experience necessary to exercise monitoring powers should be set out in a notifiable instrument.

28. Clause 206, relating to the use of force in executing investigation warrants, should be removed from the Bill.

29. Clause 211, relating to asking for answers to questions or the production of documents, should either be removed from the Bill or, at the very least, the requirement should be restricted to the occupier of premises or, if necessary, aged care workers (other than volunteers) or responsible persons.

30. The training and experience necessary to exercise monitoring powers should be set out in a notifiable instrument.

31. For clarity, Division 4 of Part 4 should be relocated and become the first Division of the Part.

32. Part 5 of Chapter 6 of the Bill should:

(a) be removed, or in the alternative

(b) a relevant consideration to be taken into account before exercising power should be the impact the removal of a thing may have on the provision of funded aged care services to residents or the ongoing efficient operation of the approved residential care home.

33. In any case, compensation should be payable for the reasonable costs incurred by the approved residential care home due to moving a 'thing' from the home, and not just where there has been damage to data or equipment.

34. The required action and compliance notice concepts should be combined.

Comments on Chapter 7 of the Bill

35. Subparagraph 322(2)(b)(i) should be replaced with the text of paragraph 86.1(b)(ii) of the 1997 legislation.

36. To remove doubt, clause 324 should be amended so that supporters and representatives do not have a general authorisation to record, use or disclose confidential information as defined by subparagraph 322(2)(b)(i) of the Bill.

37. Subparagraph 355(a)(v) of the Bill should be removed. At the very least, volunteers should be removed from the ambit of the provision.

38. The reference to a special member of the Australian Federal Police in subparagraph 357(2)(d)(i) of the Bill should be removed.

39. The structure of subclause 358(6) be revised for clarity.

Comments on Chapter 8 of the Bill

40. Clause 363 should be removed from the Bill or be redrafted to confine the capacity to delegate to an APS employee in the Department.

41. Clauses 363(2) and (3) (and 370(3) and (4) should be amended to require the Systems Governor and Commissioner (as relevant) to set out the level of seniority an APS employee should possess, and the appropriate qualifications or expertise both an APS employee and a non-APS employee should possess when exercising a power or function under the Bill in a notifiable instrument.

42. The System Governor should be obligated to advise a residential care home operator when a person has been appointed, suspended, or removed from being a supporter or representative.

43. A provision should be added to the Bill permitting a registered provider to file a notice of concern where there are reasonable grounds to believe a supporter or representative is not discharging the duties set out for the roles under Part 3 of Division 1 of Chapter 1 of the Act.

44. If a person can continue to have more than one representative, paragraph 376(3)(b) should be amended so that two or more individuals may be appointed to act jointly as representatives of an individual.

45. The Bill should include a provision requiring the System Governor and the Commissioner (as relevant) to publish business rules and algorithms to develop all pertinent computer programs.

46. The Government should undertake to make any amendments to the Bill consequential to the Government's legislative response to the Robodebt Royal Commission, which may need to be made after the Bill has been passed into law.

47. Clauses 407 and 408 of the Bill, which allow rules to be made permitting the Systems Governor and Commissioner to charge fees for 'services' provided, should be removed from the Bill.

48. Instead, given the Bill refers to 'fees' 29 times in the Bill, primary legislation (and not subordinate legislation) should specify the precise things the government can charge for a fee.

49. At the very least, the meaning of 'service' for the purposes of Part 9 of the Bill should be defined.

50. Clause 413 be amended so that before a rule is made, the Minister is obliged to:

(a) consult with the relevant aged care service provider industry on the proposed contents of the rule and

(b) In imposing a rule, consider the business viability, innovation, productivity, and administrative and compliance costs of service providers.

51. A transitional provision should be included in the aged care legislation package, deeming entities currently operating as residential care homes under the 1997 legislation to be registered in the proposed residential care category as of the commencement of the new legislation.

COMMENTS ON THE AGED CARE 2023

INTRODUCTION

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The Department has released several discussion papers to assist in the development of the new legislation, notably *Concepts for a new framework for regulating aged care* (February 2022) and *A new model for regulating aged care (*September 2022).

More recently, it published a new model for regulating aged care, details of the proposed new model (April 2023), and, most recently, a. (August 2023).

Subsequently, it published an exposure draft of the Aged Care Bill. This accompanying consultation paper effectively served as an explanatory memorandum and a summary report of the department's consultations.

It is recognised that the legislation is designed to create a rights-based legislative framework focussed on the needs of older people, as recommended by the Royal Commission into Aged Care Quality and Safety. As a general proposition, there are no surprises as to how the legislation is presented.

Accordingly, this submission will focus on issues relating to the **operationalisation** of the proposed structure by approved residential aged care homes and make the following observations:

Providing aged care services in Australia

As indicated in the *Draft National Care and Support Economy Strategy 2023* published on 28 May 2023 [1] :

> Good market stewardship is needed to drive quality and maintain an appropriate market stability level. It must ensure all providers are incentivised to innovate to improve quality and reduce costs, which will serve the market overall. These actions lead to a more efficient delivery of services, benefiting consumers and taxpayers. Incentivising providers also enhance the sustainability of the care and support system.
>
> In a market-based model, provider profitability is essential. It stimulates further willingness to invest in more services, renewed facilities, and innovation that could drive quality and more productive services. The presence of market failures in the care and support economy can result in an undersupply of quality care and support services. The absence of long-term financial viability can exacerbate these existing market failures and result in a further lack of investment, potentially leading to a vicious cycle of undersupply of care and support services.[2]

The concept of stewardship was defined in the document *Places to People – Embedding Choice in Residential Aged Care Consultation Outcomes* (2022) as being:

> Efforts made to address market deficiencies, gaps and failures. These often take the form of policy and market interventions. It is typically approached through a design and production focus targeting inputs such as funds, resources and time while measuring outputs such as profits, losses and service or product availability.[3]

However, it necessarily anticipates a corporate sector (either profit or not-for-profit) providing residential services receiving sufficient income to:

- provide a return on investment; and so
- permit the remission of dividends and a source of funds for further aged care investment (for the for-profit sector of the market) or the retention of surplus (for the not-for-profit sector of the market) to incentivise continued participation in the market sector as well as providing a source of funds for further reinvestment in aged care assets.

However, several challenges remain to the continued operation of this model as it has been adapted to the Australian aged care market.

[1] https://www.pmc.gov.au/sites/default/files/resource/download/draft-national-care-and-support-economy-strategy-2023.pdf
[2] Pages 44-45
[3] https://www.health.gov.au/sites/default/files/documents/2022/10/places-to-people-embedding-choice-in-residential-aged-care-consultation-outcomes.pdf: 38

Challenges to the Australian Residential Aged Care Model

The *Quarterly Financial Snapshot* for the Aged Care sector (Quarter 4 2022-23, released December 2023) found that only 51.6% of residential care homes are estimated as being profitable during the quarter[4] and that a net 15 residential aged care homes exited the sector[5] during that quarter.

Moreover, Stewart Brown reported in its Aged Care Financial Performance Survey Sector Report (September 2023) that a marginal operating surplus for approved residential care home providers of a mere 89 cents per bed day [6], with the sector continuing to make significant losses through the delivery of everyday living and accommodation services.[7]

The average-sized approved residential care homes have:

- 83 places;
- annual revenue of $10.5m[8]; and
- provides accommodation services to 77 residents at any one time.[9]

This means that considering the implementation costs of implementing rights-based legislation is essential.

Implementation costs

As the OECD has indicated:

> There are costs associated with performance-based regulations. They can be challenging to develop, as they require measurement or specification of desired outcomes, which are not always apparent where prescriptive regulation is analysed. Moreover, the fact that they allow for a range of different compliance strategies suggests that verifying compliance is likely to be more complex and that administrative and monitoring costs may be increased as a result. Similarly, they require the dissemination of sufficient operational guidance to provide adequate understanding and knowledge of the requirements to ensure compliance. Small businesses, in particular, often do not welcome performance-based regulations since they can impose a greater responsibility to develop appropriate compliance strategies and create uncertainty about what is required for compliance.[10]

In seeking to optimise aged care outcomes for residents, the perfect should not interfere with the good.

Provisions need to be drafted so residential care homes can implement them.

This means provisions must be clear and capable of operationalisation, which implies that obligations imposed on service providers should be as crisp as possible.

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[4] https://www.gen-agedcaredata.gov.au/getmedia/5b901b89-d2db-4069-80af-ea9b8eb2e510/quarterly-financial-snapshot-of-the-aged-care-sector-quarter-4-2022-23-april-to-june-2023: 4
[5] Page 5
[6] https://www.stewartbrown.com.au/images/documents/StewartBrown_-_Aged_Care_Financial_Performance_Survey_Report_September_2023.pdf: 2
[7] Page 5
[8] From all sources of revenue from residents and government – excludes investment revenue
[9] Based on 92.7% occupancy
[10] https://www.oecd.org/gov/regulatory-policy/35260489.pdf

To that extent, it is noted the meaning of high-quality care requires the consideration of 23 different matters, and the Statement of Rights another 29 that are over and above the requirements of the Aged Care Standards.

Failure to do so can mean increased exits from the industry as obligations are difficult to quantify and thus price, and so not produce a return on investment on residential care homes assets.

It also means that, as far as practicable, aspirational language should not form part of the text that establishes rights and obligations.

In this context, some of the Bill's provisions are noted to be vague, could be costly to comply with, or are repetitious.

Example 1 - vagueness

Paragraph 12(b) of the Statement of Rights provides that an individual has a right to **opportunities** *and* **assistance** to stay connected with the individual's community, including by participating in public life and leisure, cultural, spiritual and lifestyle activities.

Paragraph 92(1)(b) of the Bill requires as a condition of registration for a provider to demonstrate it understands the rights of individuals under the Statement of Rights.

Clause 96 prescribes that implementing and maintaining a complaints and feedback management system and managing any criteria prescribed by the rules be a condition of registration.

Clause 183 empowers the Complaints Commissioner created by the legislation to hear and resolve complaints about a registered provider acting in a way that is incompatible with the Statement of Rights.

On a natural reading of paragraph 12, a registered provider appears to be obligated to positively provide relevant opportunities and assistance to participate in the individual's community.

In particular, the term **opportunity,** when used in the phrase 'opportunities and assistance', would appear to suggest that a service provider must proactively identify how a resident can stay connected to the individual's community—a term extended to include participation in 'public life'—an extremely wide term indeed[11].

Whilst it can be argued that the absolute nature of the right of assistance in the participation of community life is tempered by subclause 21(2) of the Bill requiring the 'taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals', the practical reality is that the structure of the legislation is that one that encourages residents and supporters to actively engage and challenge the decisions of service providers – the Bill uses the word 'complaint' on 67 occasions and the accompanying consultation paper uses the term 79 times.

The 'balancing (of) competing or conflicting rights' is a matter of fact and degree, depending on the individual circumstances of each case.

[11] Most dictionary definitions define 'public life' as meaning involvement in politics.

Any rights need to be framed clearly so that a common understanding of what the right connotes can be quickly developed and socialised among law enforcement officers, residents and supporters, and service providers.

Example 2 – vagueness and repetition

Paragraph 19(a) provides that one of the elements of 'high-quality care' is 'put(ting) the individual first'.

Clause 99 imposes as a condition of registration a requirement for a registered service provider to 'demonstrate the capability for, and commitment to, continuous improvement towards the delivery of high-quality care'.

However aspirational the concept of 'putting people first' is, the term is so vague that it has no place in legislation that imposes a statutory obligation on a service provider to show continuous improvement towards achieving the concept or face sanction for breaching a condition of registration.

With regards to repetition in the high-quality care definition:

- requirements to show 'kindness, dignity and respect', respect for personal privacy and providing culturally safe and appropriate care to Aboriginal or Torres Strait Islander persons are already required by the Aged Care Quality Standards and

- The requirement to show that a provider upholds the rights of individuals under the Statement of Rights duplicates clause 92 of the Bill, which imposes conditions on providers to demonstrate an understanding of these rights and that they have in place practices that are not incompatible with the Statement.

A solution to this problem is provided later in this submission.

The Bill should be reviewed to remove any repetition of provider obligations.

Example 3 - Cost

Clause 100 of the Bill requires a majority of members of a governing body to be independent non-executive members and (if required by the rules) have a member with experience in providing clinical care where a provider delivers funded aged care services to 40 or more individuals.[12]

Clause 101 establishes as a condition of registration that a registered provider maintains a quality care advisory body with membership requirements complying with the rules.

[12] Or has a governing body smaller than 5 people.

The advisory body is required to provide a written report at least once every six months about the quality of services delivered by the provider[13].

The governing body must consider a report and provide written advice on how to consider it in a way that complies with any rule made to govern the content of such reports. The governing body must also provide the quality care advisory body with any required information.

Clause 101 also requires registered providers identified in the rules to offer individuals accessing funded aged care services and their supporters in writing 'the opportunity to establish' a consumer advisory body and to provide in writing to the bodies how the governing body considered any such feedback.

There is also a requirement for the advisory body to report to the governing body every six months and for the governing body of the provider to advise the governing body in writing how the governing body considered the report—the governing body is then to 'consider' the report or feedback when making decisions.[14]

Clause 101 also proposes that some registered providers will need to offer, at least once every 12 months, individuals and their supporters to be given the 'opportunity' to establish a consumer advisory body to provide the service providers governing body with 'feedback about the quality of the funded aged care services delivered by the provider and to advise in writing how the governing body considered any feedback provided.

These provisions mean that an in-scope aged care provider must:

1. Compete in the marketplace to attract and remunerate governing body members with the prescribed experience.

2. Compete in the marketplace to attract and remunerate quality care advisory body members.

3. Provide information as required to the advisory body.

4. Make a written report to the advisory body on how they actioned advice provided.

5. 'Offer' the ability to establish one or more consumer advisory bodies once every 12 months. This will invariably mean the aged care provider will have to establish and fund some form of consultation mechanism to interact with the body.

6. Make a written report to the consumer advisory bodies on the feedback required,

As can be seen, these provisions can be highly costly to individual providers with finite financial resources to establish and then fund repeatedly.

Again, a possible solution to this problem is suggested later in this submission.

Considering costs when imposing statutory obligations

[13] And can provide 'feedback' at any given time.
[14] Clause 102 can allow providers to seek exemptions from these provisions.

Paragraph 164(1)(a) requires the Commissioner to have regard to the fact that if a registered provider is to deliver ongoing quality and safe care, the provider must remain financially viable and sustainable.

If aged care is to be provided through a 'quasi-market,' then this consideration is necessary not only when considering issues such as the liquidity and financial adequacy of providers but also by the Minister and his Department[OBJ] acting as 'stewards' of the market as they make the rules that providers will need to comply with

Burdensome or poorly designed rules will mean that providers will exit aged care services provision if it is not possible to receive a predictable rate of return on investments in an aged care business.

The areas where rules can be made are vast.

For example, paragraph 105(a) provides that rules must deliver funded aged care services in accordance with 'any applicable requirements prescribed by the rules'.

This is a provision of the widest amplitude that can impose significant requirements on service providers.

If industry exists are to be avoided, the business viability of registered providers as well as the level of administrative and compliance costs need to be considered when:

- obligations are imposed by regulators;
- fees are charged; or
- provisions establishing determining the amount registered providers are allowed to charge residents

are inserted into the aged care legislative suite.

Significant absences

The Bill is at quite an advanced stage of development.

It is, therefore, disappointing that at the same time, the draft Bill is exposed to public comment, a document similar to a Regulatory Impact Statement attempting to quantify the business and compliance costs the proposed new system would impose on residential aged care facilities, as anticipated by the 2023 *Australian Government Guide to Policy Impact Analysis*, was not published.[15]

It is also disappointing that:

- the Aged Care Taskforce, which was given the remit to, amongst other things, formulate strategies to enhance the sustainability of the aged care sector through changes to how the sector was funded and
- Chapter 4 of the Bill (Fees, Payments and Subsidies)

[15] https://oia.pmc.gov.au/sites/default/files/2023-05/oia-impact-analysis-guide-march-2023_0.pdf. See especially pages 25-29.

has not been published.

In many cases, the consultation paper accompanying the Bill also did not explain the policy reasons for some provisions either well or at all.

Given the significant change to the legislative structure, the industry must have the information to determine how to fund the proposed new requirements.

Draft rules are not available for scrutiny.

The Bill makes over 50 provisions that can either impose additional obligations on service providers or set out what is required to satisfy requirements in the Bill in rules. These include:

1. The capacity to add provider registration conditions.[16]

2. The ability to prescribe requirements on how to manage incidents.[17]

3. Additional requirements for a complaints and feedback system.[18]

4. A capacity to add further prudential requirements.[19]

5. 'Deliver funded aged care services in accordance with any applicable requirements prescribed by the rules.[20]

6. Setting out other prudential matters to be considered when making financial and prudential standards.[21]

It is important to note that these can impose significant costs on providers, so the cumulative effect of the rules and the Bill should be indicated in any regulatory impact statement prepared for the Bill.

It is finally clear that the new system will require a considerable amount of time to bed down.

The Bill should commence operation two years after the last piece of subordinate legislation designed to support the legislation has been made.

Cost shifting from government to industry.

Finally, clause 413 of the Bill permits the Department and the Commission to charge fees prescribed by the rules for 'services prescribed by the rules that are provided in performing functions', with the Consultation Paper accompanying the exposure draft explaining 'the effect (of these provisions)' is to enable cost recovery in relation to the provision of a government service.'

The term 'government service' is not defined.

[16] Clause 88
[17] Paragraph 95(b)
[18] Paragraph 96(b)
[19] Subclause 98(2)
[20] Paragraph 105(a)
[21] Clause 163

It is extremely unusual for a provision of such a wide magnitude and can give rise to the possibility that service providers will be paying fees to pay the general operating costs of either the Commission or the Department.

The concept of what constitutes a ‘government service’ requires closer definition.

A more detailed discussion of the clauses follows.

We are prepared to participate in a focused consultation with you to discuss this submission if desired.

COMMENTS ON CHAPTER 1 OF THE BILL

Definition of System Governor

Clause 7 defines the phrase System Governor as meaning the Secretary of the Department of the Department.

The Government elected to adopt the Government Leadership model suggested by Commissioner Briggs in the Royal Commission into Aged Care Quality and Safety to maintain a strong 'Australian Government system leadership and stewardship role', with the term System Governor used as a convenient shorthand in the Commission's Report to assist with readability, given that it also discussed the Independent Commission model of aged care regulation proposed by Commissioner Pagone.[22]

To enhance accountability, legislation should make who is making decisions as clear as possible.

In many cases, it is the Secretary of the Department or those acting under a delegation made by the Secretary.

If the system is Australian Government system led, that should be plain in the legislation.

Recommendation

The definition of 'System Governor' be removed, with subsequent references in the legislation replaced with 'Secretary'.

Aged care service list and funded aged care services

It is disappointing that the list of services for which funding may be payable under the Act has not been published.

Associated provider

As indicated on page 59 of the discussion paper accompanying the Bill, clause 122 gives effect to the Royal Commission's recommendation 14 to impose a non-delegable statutory duty on people like registered providers to deliver the obligations of the legislation through prohibiting the transfer of a duty to another entity.

The effect of clause 122, when read with the registered provider duty established by clause 120, means there is capacity for regulators to take appropriate action in circumstances where services to residents provided by entities other than the registered provider itself have been deficient.

The associated provider concept established by subclause 10(6) unnecessarily duplicates this legislative scheme.

To avoid this duplication, the associated provider concept should be removed from the Bill.

[22] Royal Commission into Aged Care Quality and Safety final report: 4
https://www.royalcommission.gov.au/system/files/2021-03/final-report-volume-3a.pdf

Recommendation

The associated provider concept should be removed from the Bill.

Meaning of high-quality care

As discussed earlier, clause 19 provides a definition of high-quality care which broadly repeats obligations that are imposed by other provisions in the Bill.

As will be discussed shortly, the advancement of the health and wellbeing of residents may be better served by attaching the requirement of developing a continuous improvement plan against the requirement to adhere to the Aged Care Quality Standards.

Recommendation

Clause 19 of the Bill should be removed.

Statement of Rights

As discussed earlier, it is important that a statement of rights is focused.

Recommendation

All words commencing after the word 'including' in paragraphs 20(12)(a) and (b) should be removed.

Role of guardians/holders of enduring powers of attorney

Clause 28 ousts the capacity of (particularly) people holding an enduring power of attorney to make decisions relating to the provision of funded aged care services (amongst other things) unless appointed a representative under the legislation.

This could give rise to confusion for both residents/clients and aged care providers, as (in particular) the role of a person holding a power of attorney in the exercise of functions and powers is well known.

Recommendation

People holding an enduring power of attorney should be able to continue to exercise decisions as required about matters relating to the Bill.

Division 1 of Part 4 of Division 8 creates a bureaucratic appointment process for those wishing to be a supporter or a representative.

There is no indication of how long it will take for these applications to be processed.

In some circumstances, time will be of the essence when the health or well-being of a resident/client deteriorates to the extent that it is prudent for a representative to be appointed.

Recommendation

The legislation should specify an indicative period within which the System Governor has to make decisions appointing supporters and representatives.

At the very least, the capacity of those possessing an enduring power of attorney should have the capacity to make decisions for the purposes of the Act retained whilst an application for a person to be a representative is being considered by the System Governor.

Recommendation

The classes of person listed in paragraphs 28(2)(a)-(d) of the Bill should still be able to make decisions about matters relating to the Bill for a person whilst the Systems Governor considers an application for a person to be appointed a representative.

COMMENTS ON CHAPTER 3 OF THE BILL

It is extremely disappointing that none of the:

- rules necessary to support the scheme establishing the registration requirements of providers or
- general conditions of registration (clause 88)

have been published.

Registration and registration of providers

Part 2 of Division 1 of Chapter 3 of the Bill sets out a prescriptive registration procedure.

The re-registration process is left to rules.[23]

This is regarded as being unsatisfactory.

Recommendation

Re-registration requirements should be set out in primary legislation, with any requirements required the minimum necessary to permit re-registration to occur.

In particular, re-registration should be automatic where there is no material change in the circumstances of the re-registrant and no investigations against the re-registrant are being conducted by the Commission.

Incident management

Clause 95 requires the maintenance of an incident management system. It is extremely disappointing that the Bill's accompanying consultation paper says that 'the details of these requirements will be consulted on separately'.

It is not possible to cogently comment on how the implementation of an incident management system will operate.

Finally, given that clause 95 is a condition of registration, and it is *assumed* an 'incident' is something less than a reportable incident (as defined in clause 15) it is appropriate that the term 'incident' should be defined in primary legislation.

Recommendation

The term 'incident' can be defined for the purposes of clause 95.

[23] See paragraph (c) to the Note to subclause 69(3)

Complaints and whistleblowers

There is a query as to whether the Department is best placed to develop specific ways to manage complaints and feedback (paragraph 95(b)), as opposed to establishing a broad framework as to what a complaints and feedback system should look like (paragraph 95(a)).

Recommendation

The structure of paragraph 96(b) should be reconsidered.

Continuous improvement

Clause 99 is unhappily drafted.

Subclause 99(1) requires that a registered provider demonstrate capability for and commitment to continuous improvement towards the delivery of high-quality care.

Subclause 99(2) provides it is a condition of registration that a registered provider must have a continuous improvement plan.

It is hard to see why a requirement to keep a continuous improvement plan is necessary given the vast majority of obligations contained in the high-quality care definition are also contained in either the Statement of Rights or in the Aged Care Quality Standards.

Compliance with the Statement and the Standard are registration conditions.

The commitment to continuous improvement identified in the Royal Commission report is recognised.

However, the registration requirements set out above would appear to achieve the desired goal of improving the health and wellbeing of residents.

Recommendation

Clause 99 of the Bill be removed.

To the extent that there is a need to encourage continuous improvement in the industry in the manner anticipated by the Royal Commission and the need to encourage the provision of high-quality aged care, the more appropriate outcome could be to require a provider to have a continuous improvement plan setting out how it proposes to advance the requirements of the Aged Care Quality Standards.

This provides practical value to the provider as it assists in considering how to give effect to the Standards, and so is likely to lead to better health and wellbeing outcomes for residents and is a better solution than require the production of a plan almost for its own sake, which either is vague in nature (for example, requiring people to be ‘put first’).

What this means is that the plan for continuous improvement that approved providers must currently maintain under section 62 of the *Aged Care Quality and Safety Commission Rules 2018* can be redeveloped to reflect any relevant changes to the Aged Care Quality Standards.

This will reduce provider costs and, more likely than not, lead to earlier and better compliance outcomes.

Recommendation

Any requirement to produce a continuous improvement plan is required to be prepared against the implementation of the Aged Care Quality Standards. If necessary, the Standards can be modified to consider any objective outcomes contained in the high-quality care definition not reflected in the Standards.

It is noted that this recommendation is not inconsistent with Recommendation 13 of the Aged Care Quality and Safety Royal Commission.

Advisory body requirements

As discussed earlier, clauses 100 and 101 require the establishment of governing and advisory bodies. These will be costly to establish and maintain.

There also may be challenges for the average sized approved residential care provider to be able to find people with the necessary qualifications to fill the relevant bodies.

A subtle amendment to clause 101 may be appropriate so that a quality care advisory body can provide advice to more than one provider. For example, the phrase 'must always have appointed' could be used in paragraph 101(1)(a).

Recommendation

The Bill should be amended to allow a quality care advisory body to provide services to more than one provider.

With respect to consumer advisory bodies, it is not appropriate to allow the establishment of multiple bodies to provide advice to a registered provider.

There will be times when there could be groups of residents with differing views or wishes, and so it will be time-consuming and costly if each group has to have views considered and to be advised in writing 'how the governing body considered any such feedback', as required in paragraph 101(4)(b).

The Royal Commission did not recommend the creation of consumer advisory bodies.

Clause 96 imposes, as a condition on registration, a need to implement, maintain, and manage complaints and feedback in accordance with a management system in place and any rules.

This is considered the most cost-efficient manner in ensuring that the health and wellbeing of residents /clients are protected, and that resident/client views on how services are provided can be captured and given effect.

Recommendation

Subclauses 104(4) and (5) should be removed from the Bill.

If a consumer advisory body must be established, there should only be one for each service provider.

Delivery of funded aged care services

Clause 105 provides that it is a condition of registration that a registered provider delivers funded aged care services in accordance with any applicable requirements prescribed by the rules.

The clause uses terms that are defined as key concepts in Division 2 of Part 2 of Chapter 1 of the Bill:

- clause 10 provides that funded aged care services are delivered by registered providers and
- clause 8 has the effect of providing that a funded health care service is a service type delivered in a residential care home.

This effectively means a rule made under this clause can, in a 'command/control' manner, prescribe how a service is to be provided to a resident, which must be followed as a condition of registration.

Self-evidently, any particularly prescriptive provision may not be appropriate to advance the safety, health, wellbeing, and quality of life of a particular resident – something that is a registration condition prescribed by subclause 92(2).

The ambit of this clause should be re-examined.

Recommendation

The Government will need to explain whether it is the intent of clause 105 to give the Minister power to specify in detail in rule how funded aged care services are provided.

Given the marginal profitability of the sector, this is another reason why the Minister must consider the financial viability and sustainability of registered providers before making a rule.

Compliance with laws

Clause 108 requires a registered provider to comply with 'all applicable' laws.

This obviously covers other laws and not just the Bill.

Typically, a broad registration condition like this only attempts to capture laws relevant to the activities being regulated by the legislation imposing the registration condition.

This should be made clearer.

Recommendation

The ambit of clause 108 should be reduced to only cover those laws that are relevant to ensuring the safety, health, well-being and quality of life of individuals receiving funded aged care services.

Compensation orders

Clause 127 can require an entity to pay compensation where the entity is found guilty of an offence under Part 5 of Chapter 3.

This would include responsible persons for a registered provider who breaches the duty of due diligence.

This Part of the Bill is heavily influenced by the structure of workplace health and safety (**WHS**) legislation.

Breaching the equivalent duty in WHS legislation[24] does not give rise to a compensation right in that jurisdiction.

Moreover, the relevant provision discussing compensation rights in the Department's Consultation Paper No.1 says on page 32:

> As outlined in the public consultation paper A new model for regulating aged care - Consultation paper 2 - Details of the proposed new model, it is intended that a compensation pathway be available in certain circumstances where a registered provider breaches their statutory duty.
>
> This new pathway would complement, not replace, existing compensation arrangements for personal injury. It is not meant to alter the way in which people seek compensation or otherwise affect any existing rights to compensation under common law or applicable State and Territory legislation.
>
> Subject to further consultation and consideration, the new compensation pathway would be limited to breaches by a registered provider of the criminal offence provisions discussed above, where the actions of the provider result in serious illness or injury to an older person accessing funded aged care services.

This means extending possible exposure to compensation by 'an entity' goes further than suggested in the Consultation Paper.

It should be remembered that many responsible persons are board members drawn from the general community and are not necessarily professional directors.

The imposition of these sorts of conditions may hinder the ability of service providers to participate in the governing bodies of service providers.

Recommendation

The clause 'entity' in clause 127 should be changed to 'registered provider'.

[24] Such as, for example, section 27 of the *Work Health and Safety Act 2011* (NSW)

COMMENTS ON CHAPTER 4 OF THE BILL

The Fees, payments and subsidies chapter has not been published, which is disappointing.

The final structure as to how approved residential care homes receive revenue will determine whether the standard of aged care aspired to by those preparing the Bill can be met in practice.

COMMENTS ON CHAPTER 5 OF THE BILL

Functions of the Commissioner

Clause 141 sets out the functions of the Commissioner.

Subclause 141(4) sets out what the Commissioner must do when performing functions.

Paragraph 141(4)(b) is somewhat ungrammatical and requires to be redrafted for clarity.

For the reasons set out earlier in this submission, a provision similar in nature to paragraph 164(1)(a) should be added to subclause 141(4), which requires consideration of the financial viability and sustainability of registered providers when the Commissioner is exercising functions.

Recommendation

Paragraph 141(4)(b) should be revised for clarity.

A requirement for the Commissioner to consider the financial viability and sustainability of registered providers when exercising functions should be added to subclause 141(4).

Financial and Prudential Standards

It is noted these provisions have yet to be published. This is disappointing.

Clause 163 vests the responsibility for making standards with the Commissioner.

Under the 1997 legislation, it was made by the Minister.

It is considered undesirable that the official responsible for compliance responsibilities should also be responsible for developing financial and prudential standards.

Given the System Governor (the Department) has the responsibilities set out in subclause 297(2), the Minister (through the Department) should have the capacity to develop appropriate standards.

Recommendation

The Minister should be vested with responsibility for making financial and prudential standards.

Worker screening

Division 7 of Part 3 of Chapter 5 effectively mirrors the provisions established for the NDIS.

The concern is that the current NDIS arrangements place the onus on the employee to organise the screening, and the process is cumbersome.

The arrangements regarding workers without evidence of a screening report are less flexible than the current police checks undertaken under the current *Accountability Principles*.

No argument has been made showing that the NDIS system provides greater protection to residents.

The need for administrative alignment with the NDIS for its own sake is insufficient.

It is finally noted that amendments to state and territory legislation will be necessary to facilitate this change.

Recommendation

Simply reflecting NDIS practices in relation to worker screening should be reviewed.

Aged Care Quality and Safety Advisory Council

Subclause 172(4) prevents a registered provider or a responsible person of a registered provider from being appointed to the Council.

This is unusual.

The success of the sector in improving outcomes for consumers is linked to the effectiveness of the Commission, and that requires the active engagement of and input from all stakeholder types. There is a link to the relationship between providers and the regulator. Positions on the Council create a formal channel of input on ACQSC performance and plans and their impact on providers and their staff.

Neither the exclusions clause nor the reason for the exclusion of a person who is a responsible person of a registered provider (the Commission's major client) is articulated in the Bill's accompanying consultation paper.

The role of a responsible person does not mean a person is unable to demonstrate expertise to represent the public interest. As the *Report of the Independent Capability Review of the Aged Care Quality and Safety Commission* said:

> I have heard and agree that the Advisory Council would benefit from more members with provider experience to ensure that its advice is well-informed about the issues that impact providers.[25]

While the legislation exists for the benefit of consumers, it is largely the behaviour of the registered providers and their staff and the effectiveness of the relationship between providers and the regulator/system governor that will determine whether better outcomes are achieved for consumers.

Finally, it is noted there is no statutory obligation on the Commissioner to provide information or documents sought by the Council to inform their monitoring. Nor does the Bill oblige the Commissioner to respond to the Council in writing. The absence of obligations to provide information and respond to communications from the Council creates the potential to limit the effectiveness of the Council.

For much the same reason that a decision has been made to require governing bodies to provide information on request to advisory bodies, it would seem appropriate for the Commissioner to be required to respond to Council requests.

[25] Page 80

Recommendations

Subclause 172(4) should be removed.

Two members of the Council should be responsible persons registered providers.

Where a vacancy in the Council occurs, the Minister should advertise the vacancy and seek expressions of interest from interested persons.

The Commissioner should be under a duty to provide information to the Council when requested.

The Commissioner should be obliged to respond in writing to any decisions of recommendations made by the Council in relation to the performance of the Commissioner's functions.

Appointment of Complaints Commissioner/Complaints functions

Clause 182 permits the Aged Care Quality and Safety Advisory Council Commissioner to appoint the Complaints Commissioner to assist in the performance of the complaints function.

The Royal Commission placed significant importance on creating a clear complaints pathway.

It is an unusual legislative design for an enforcement and regulatory body to also act as a complaints body.

So all parties (including in this case, registered providers) can have confidence how complaints are managed, a separate body should be created to manage this function.

Recommendation

A separate body should be created to manage the complaints function.

At the very least, the Minister, rather than the Commissioner, should appoint the Complaints Commissioner.

COMMENTS ON CHAPTER 6 OF THE BILL

Provisions subject to monitoring

Clause 185 provides that 'any' provision contained in the Bill can be subject to the monitoring powers contained in Part 2 of the *Regulatory Powers Act 2014.* (the **regulatory powers legislation**)

This includes the powers to search anything or any document on the premises and ask questions.[26]

This is far wider than the monitoring powers capable of being exercised under 1997 legislation.

Recommendation

The circumstances under which monitoring powers can be exercised should be reviewed.

Use of force in executing monitoring warrants

Clause 191 proposes to extend the powers contained in the regulatory powers legislation to include the power to use force against things in executing monitoring warrants.

Monitoring warrants are **not** investigatory warrants: their statutory purpose is only to 'monitor' statutory compliance. Other more intrusive powers are available if there are reasonable grounds to believe an offence is occurring or there is a patient welfare issue.

The Attorney-General's Department draws the distinction as follows:

> Regulatory powers are the powers used by government agencies and regulators to ensure individuals and industries comply with legislative requirements and to respond to instances of non-compliance. In the context of the Regulatory Powers Act, these powers are divided into two categories—coercive and enforcement powers – and include:
>
> - monitoring powers, which can be used to monitor compliance with provisions of an Act and to monitor whether information given to the Commonwealth is correct (Part 2);
> - investigation powers, which can be used to gather material that relates to the contravention of an offence or civil penalty provision (Part 3).[27]

Of all the environments imaginable, an aged care residential facility is not one where the use of force is available to an officer of the Department of Health and Aged Care or the Department who is merely checking compliance with **any** requirement of the Bill or any of its subordinate instruments.

There are no reasonable grounds to believe that there is anything about the functions of the Systems Governor or Commissioner that are so unusual relative to other government agencies undertaking the monitoring of regulated entities to permit the use of force, even if 'all other avenues' are exhausted.

[26] Either by consent or under a monitoring warrant

[27] https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers#:~:text=In%20the%20context%20of%20the,is%20correct%20(Part%202)%3B

Recommendation

Clause 191 be removed from the Bill.

Entry with consent – asking for answers to questions or production of documents

Section 24 of the regulatory powers legislation permits an authorised person to enter premises for the purposes of determining whether the Bill is being complied with, whether information subject to monitoring is correct or 'a matter subject to monitoring.'

The provision places a duty on the **occupier of premises** to answer questions or produce documents.

Clause 196 extends this to include 'any person' to comply when entry is made under a monitoring warrant.

Two matters are pertinent here.

Firstly, no case has been made as to why there is anything about the functions of the Systems Governor or Commissioner that are so unusual relative to other government agencies undertaking the monitoring of regulated entities, which means there is a need for officers to have an immediate right to ask questions.

Secondly, 'any person' means anyone. This means that the power in clause 194 must be taken to include residents of an approved residential care home as people who could be asked questions.

This is an open construction of the provision, and experience shows that investigating officers will, over time, use this construction of the law even if that is not the current intention of the government.

Recommendation

Clause 196 be removed from the Bill.

Alternatively, the power to answer questions should be confined to aged care workers (other than volunteers) and responsible persons.

Delegations

Clauses 198 and 199 of the Bill allow the Commissioner and System Governor to delegate decisions relating to monitoring to classes of people with suitable training or experience to properly perform the power or function.

The industry should have some visibility as to what training or experience is suitable for exercising intrusive powers.

Recommendation

The training and experience necessary to exercise monitoring powers should be set out in a notifiable instrument.

Use of force in executing investigation warrants

Clause 206 proposes to extend the powers contained in the regulatory powers legislation to include the power to use force against things in executing investigation warrants.

This ability is not provided as part of the standard regulatory powers legislative package.

Of all the environments imaginable, an aged care residential facility is not one where the use of force is available to an officer of the Department of Health and Aged Care or the Department who is merely checking compliance with **any** requirement of the Bill or any of its subordinate instruments.

As with clause 191, There are no reasonable grounds to believe that there is anything about the functions of the Systems Governor or Commissioner that are so unusual relative to other government agencies undertaking investigations to permit the use of force in these circumstances, even if 'all other avenues' are exhausted.

Recommendation

Clause 206 be removed from the Bill.

Entry with consent – asking for answers to questions or production of documents

Section 54 of the regulatory powers legislation permits an authorised person to search for evidential material.

The provision places a duty on the **occupier of premises** to answer questions or produce documents.

Clause 211 extends this to include 'any person' to comply when entry is made under a monitoring warrant.

As with clauses 191 and 196 (discussed earlier), two matters are pertinent here.

Firstly, no case has been made as to why there is anything about the functions of the Systems Governor or Commissioner that are so unusual relative to other government agencies undertaking the monitoring of regulated entities, which means there is a need for officers to have an immediate right to ask questions.

Secondly, 'any person' means anyone. the power in clause 208 must be taken to include residents of an approved residential care home, who could contingently be asked questions.

This is an open construction of the provision, and experience shows that investigating officers will, over time, use this construction of the law even if that is not the current intention of the government.

Recommendation

Clause 211 be removed from the Bill or at the very least the requirement should be restricted to the occupier of premises or if necessary aged care workers (other than volunteers) or responsible persons.

Delegations

Clauses 213 and 214 of the Bill allow the Commissioner and System Governor to delegate decisions relating to monitoring to classes of people with suitable training or experience to properly perform the power or function.

The industry should have some visibility as to what training or experience is suitable for exercising intrusive powers.

Recommendation

The training and experience necessary to exercise monitoring powers should be set out in a notifiable instrument.

Issue of authorisations

Clauses 220 and 221 set out **when** monitoring and investigation authorisations can be made.

The Bill would be easier to read if the circumstances when the extraordinary powers contained in Part 4 of Chapter 6 could be exercised came first.

Describing what happens after a decision to enter is made follows logically from that.

Recommendation

Division 4 of Part 4 should be relocated and become the first Division of the Part.

Additional Monitoring and investigation powers and compensation

The gist of Part 5 allows for 'things' to be taken away for further investigation for up to 14 days.

One of the 'things' could be electronic equipment.

If, in simple terms, a computer can be taken away for further examination, the capacity to administer and operate an approved residential aged care home is compromised, if not completely frustrated.

This is a highly disproportionate power to be granted, particularly when exercising mere monitoring or evidential gathering powers.

Subparagraph 224(2)(a)(i) anticipates the use of the power where 'it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance'.

What has not been considered is the impact that taking away computer equipment may have on the provision of funded aged-care services to residents.

The regulatory powers legislation already has provisions that can allow computer equipment to be secured on-site for 24 hours[28] , so expert assistance in operating a system can be obtained.

That legislation also anticipates that any expert used to obtain information from a computer system would do so on-site.

There are no reasonable grounds to believe that there is anything about the functions of the Systems Governor or Commissioner that are so unusual relative to other government agencies undertaking investigations to allow computer systems to be taken away for up to a fortnight to identify whether there is any evidential material on the system.

Recommendation

Part 5 of Chapter 6 of the Bill should be removed.

Alternatively, a relevant consideration to be taken into account before exercising power should be the impact the removal may have on the provision of funded aged care services to residents or the ongoing efficient operation of the approved residential care home.

In any event, compensation should be payable for the reasonable costs incurred by the approved residential care home as a result of the moving of a 'thing' from the home, and not just where there has been damage to data or equipment.

Whilst this provision replicates section 73ZG of the *National Disability Insurance Scheme Act 2013*[29], the mere fact something appears in another piece of legislation does not mean that its appropriateness in another piece of legislation cannot be examined.

Compliance and required action notices

Part 10 allows for compliance and required action notices to be made.

Whilst it is accurate to say there has always been an intention to have these two types of notices, there is a very strong similarity between:

- the circumstances in which the notices can be made;
- requirements setting out what a provider must do to comply; and
- the consequences for failing to comply.

There is a contingent concern that over time there will be a practice or culture develop within government as to when it will be appropriate to issue a notice requiring action and when a compliance notice will be issued, particularly if different officers have delegations to issue different notices.

The only provisions where there is no precise overlap between the grounds allowing a required action notice to be issued set out in clause 264 and when the Commissioner may give a compliance notice set out in clause 269 are the provisions relating to where a provider is believed to be

[28] Section 21 and 51 of the regulatory powers legislation
[29] In particular, section 73ZG

conducting its affairs in a way that may cause instability to the aged care system or where a matter affecting the interests of an individual receiving funded aged care is in issue.[30]

More consistent administration would be achieved if there was only one notice, so a culture can be developed that standardises the threshold to issue a notice, through the continuous use of one set or criteria, and not from two very similar, but subtly different grounds to issue a notice.

This will also assist industry, as there is a clear understanding of what a compliance notice means from exposure to the Workplace Health and Safety jurisdiction -an area from which many provisions of the Bill have been modelled.

Recommendation

The required action and compliance notice concepts should be combined.

Critical failures powers

It is noted these provisions have yet to be published. This is disappointing.

[30] Paragraphs 264(h) and (i)

COMMENTS ON CHAPTER 7 OF THE BILL

Record keeping and data sharing

These provisions have yet to be published. This is disappointing.

Protected information

Subparagraph 322(2)(b)(i) includes as 'protected information' information that, if disclosed, could reasonably be expected to prejudice the financial interests of an entity.

This is in contrast with section 86.1 of the 1997 legislation, which defines protected information as including information relating to the affairs of an approved provider.

The proposed subparagraph seems to add an unnecessary gloss to a policy position that anything to do with the financial affairs of a service provider is confidential and can only be used or transferred in a manner permitted by law and not otherwise disclosed.

The structure of the 1997 legislation establishes the policy position far clearer and should be repeated in the Bill.

Recommendation

Subparagraph 322(2)(b)(i) should be replaced with the text of paragraph 86.1(b)(ii) of the 1997 legislation.

General authorisation of people recording, using, or disclosing protected information

For similar reasons, there is no policy reason why a person discharging *any* function or duty under the Bill should have a general right to be able to record, use or disclose the *financial* affairs of registered providers.

For instance, there is no reason why a supporter or representative should have a general authorisation to use and disclose such information.

Recommendation

To remove doubt, clause 324 should be amended so that supporters and representatives do not have a general authorisation to record, use or disclose confidential information as defined by subparagraph 322(2)(b)(i) of the Bill.

Disclosures qualifying for protection

Part 5 of Chapter 7 of the Bill deals with whistleblower protections.

This is a matter considered by the Royal Commission.[31]

It recommended adopting a system to the scheme contained in Division 7 of Part 3A of the *National Disability Insurance Scheme Act 2013* (**the NDIS legislation**).

Subparagraph 355(a)(v) of the Bill provides a discloser of information on the protections offered by the legislation if a disclosure of information is made to an aged care worker of a registered provider.

This goes further than the NDIS legislation.

That legislation protects disclosures to a member of 'the key personnel' of an NDIS service provider (the equivalent of the Bill's responsible person concept) but not its employees.[32]

It would take a considerable amount of training to allow many employees to recognise and then accurately report information to responsible persons.

This is particularly the case with volunteers, who are defined as being aged care workers by subclause 10(4) of the Bill.

As recognised by the NDIS legislation, remedial action is more likely to be undertaken where information is provided directly to a registered person.

Recommendation

Subparagraph 355(a)(v) of the Bill should be removed. At the very least, volunteers should be removed from the ambit of the provision.

Confidentiality of identity of disclosers

Subparagraph 357(2)(d)(i) authorises relevant information to be disclosed to a special member of the Australian Federal Police.

Whilst it is understood that it may be appropriate to authorise a disclosure of information to a 'police officer', a special member is someone appointed to assist the AFP 'in the performance of its functions'[33] and so is not a police officer *per se.*

It is difficult to identify a policy reason why a special member should be someone to whom a disclosure can be made.

[31] Volume 3B. Part 14.4.8: https://www.royalcommission.gov.au/system/files/2021-03/final-report-volume-3b.pdf

[32] Subsection 73ZA(2)

[33] Section 40E, *Australian Federal Police Act 1979*

Recommendation

The reference to a special member of the Australian Federal Police in subparagraph 357(2)(d)(i) of the Bill should be removed.

Victimisation prohibited

Subclause 358(6) creates a defence for an entity who has, or is threatening to cause, detriment to a (whistleblower) where 'administrative action….is reasonable to protect the first individual from detriment'.

Unfortunately, it is unclear what the concept of 'protection from detriment' as used in the subclause is intended to address.

Recommendation

The structure of subclause 358(6) be revised for clarity.

COMMENTS ON CHAPTER 8 OF THE BILL

Review of decisions

The decisions capable of being administratively reviewed have yet to be published.

This is disappointing.

Delegations

The Part permits the Systems Governor and Commissioner wide powers of delegation.

Clause 363 permits the System Governor to delegate to a person engaged, whether as an employee or otherwise, to a Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013*.

That Act defines[34] a Commonwealth entity as being (amongst other things) a Commonwealth Department, a 'listed entity' contained in rules and many companies established by the Commonwealth.

No explanation is given as to why such a wide power of delegation is necessary.

The Part identifies those parts of the Commonwealth to which a delegation can be provided, including Medicare, Centrelink and the Pricing Authority.

It is appropriate for these bodies to receive delegations as they have an identifiable role in the provision of aged care and other forms of support to Australians.

It does not appear appropriate to permit a broad capacity to delegate to any public servant in any Department.

Powers of delegation should only be conferred on clearly defined individual entities in the primary legislation itself.

Recommendation

Clause 363 should be removed from the Bill or be redrafted to confine the capacity to delegate to an APS employee in the Department.

Subclauses 363(2) and (3) and 370(3) and (4) permit the System Governor and Commissioner (respectively) to delegate to non-SES officers with offices or positions with 'sufficient seniority' or non-APS officers with 'appropriate qualifications or expertise' to perform functions and powers under the Act.

It is appropriate that those exercising powers are experienced and/or have sufficient seniority to make decisions in areas as complex as the provision of aged care.

[34] Section 10: https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/pgpaaa2013432/s10.html?context=1;query=%22commonwealth%20entity%22;mask_path=au/legis/cth/consol_act/pgpaaa2013432

However, it is equally appropriate for the community to know what level of expertise the government is relying on when making decisions.

Recommendation

Clauses 363(2) and (3) (and 370(3) and (4) be amended to require the Systems Governor and Commissioner (as relevant) to set out the level of seniority an APS employee should possess, and the appropriate qualifications or expertise both an APS employee and a non-APS employee should possess when exercising a power or function under the Bill in a notifiable instrument.

This will be particularly important if the System Governor can delegate responsibilities to anyone in the Australian Public Service.

Appointment of supporters and representatives

Part 4 establishes a sophisticated system for appointing supporters and representatives.

The consultation document accompanying the Bill anticipates that a resident may have numerous supporters or representatives.

Given the rights conferred on supporters and representatives by the Bill, the System Governor should be under a duty to advise (particularly) the operators of residential aged care homes who are the supporters or representatives of a resident.

This is particularly necessary given the Part anticipates a supporter or representative can be suspended.

This will create a 'source of truth' for the service provider, who will know who have roles to perform on behalf of a resident and so reducing tensions where there is doubt as to whether a person has an appointment.

This will be particularly important if clause 28 of the Bill remains unamended, meaning that people with enduring powers of attorney cannot make decisions in relation to the donor's receipt of funded aged care services.

Recommendation

The System Governor should be under a duty to advise an aged care provider when a person has been appointed, suspended, or removed from being a supporter or representative.

Division 2 of Part 4 sets out a system where a supporter/representative can be suspended or removed.

From time to time, there will be appointees who are not discharging duties in the manner required by Part 4 of Division 1 of Chapter 1.

There should be a clear path that would permit a service provider to inform the System Governor so that relevant action may commence.

Recommendation

A provision should be added to the Bill permitting a registered provider to file a notice of concern where there are reasonable grounds to believe a supporter or representative is not discharging the duties set out for the roles under Part 3 of Division 1 of Chapter 1 of the Act.

Joint and several appointment of representatives

Paragraph 376(3)(b) anticipates the joint and several appointment of 2 or more people as a representative of someone receiving funded aged care services.

'Joint and several' is of course a legal term of art which means appointees can either act individually or together, so therefore one appointee can act without the approval or agreement of the other.

Unfortunately, there may be times when appointees, in the best of good faith, may fundamentally disagree on what constitutes the best interest of the resident/client.

This places service providers in an invidious position given the obligations it has to give effect to the wishes of residents imposed by instruments such as the Aged Care Quality Standards.

Directions could be contradictory.

Moreover, there is a possibility that a provider trying to make the best of contradictory instructions may nevertheless have to deal with a complaint filed by the disappointed representative under the complaint mechanisms required by the Bill.

Resolving any dispute means the time that could be spent providing services to other residents is lost, and costs are incurred.

If it is intended to permit a person to have more than one representative at the same time, the representatives should be required to act jointly.

Recommendation

If a person can continue to have more than one representative, paragraph 376(3)(b) should be amended so that two or more individuals may be appointed to act jointly as representatives of an individual.

Use of computer programs to make decisions

Clause 399 permits the Commissioner to make automated decisions using a computer program under the Commissioner's control.

Disappointingly, the areas where automated decision-making is to be permitted are yet to be drafted.

The Commissioner can make many decisions where merit and discretion should be applied.

On 17 November 2023, the Australian Government responded to the recommendations made by the Robodebt Royal Commission.

Relevant to this submission, this was the Government's response to Recommendation 17.1[35]:

> **Recommendation 17.1: Reform of legislation and implementation of regulation**
>
> The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate. Where automated decision-making is implemented:
>
> - there should be a clear path for those affected by decisions to seek review
> - departmental websites should contain information advising that automated decision-making is used and explaining in plain language how the process works
> - business rules and algorithms should be made available to enable independent expert scrutiny.

The Government **accepts** this recommendation.

The safe and responsible development and deployment of automated decision-making provides important opportunities to deliver timely and efficient services for Australians.

The Government will consider opportunities for legislative reform to introduce a consistent legal framework in which automation in government services can operate ethically, without bias and with appropriate safeguards, which will include consideration of:

- review pathways for those affected by decisions and
- transparency about the use of automated decision-making and how such decision-making processes operate for persons affected by decisions and to enable independent scrutiny.

Recommendation

The Bill should include a provision requiring the System Governor and the Commissioner (as relevant) to publish business rules and algorithms used to develop any relevant computer program.

The Government should undertake to make any amendments to the Bill consequential to the Government's legislative response to the Robodebt Royal Commission. This could be after the Bill has been passed into law.

Application fees and fees for services provided by the System Governor and Commissioner

Clauses 407 and 408 permit the System Governor and Commissioner respectively to be able to charge fees for services prescribed by the rules provided 'in performing the (System Governor's/Commissioner's) functions'.

The term 'services' is quite wide, and it is assumed that the clauses are designed to have that effect.

This can be adduced by the structure of paragraph 408(2)(a), which prevents the Commissioner from charging a fee for 'a service provided by the Commissioner in performing the engagement and education functions'. (emphasis added)

This seems to imply that 'services' could be anything that could be said to include anything done to advance the functions of the Systems Governor and Commissioner[36].

[35] https://www.pmc.gov.au/sites/default/files/resource/download/gov-response-royal-commission-robodebt-scheme.pdf: 21

[36] Unless carved out in clauses 407 and 408

The breadth of this provision can allow an enormous shift in the cost of administering the aged care system to a marginally profitable aged care industry.

The fact that:

- any 'service' identified must be contained in a disallowable instrument[37]
- a fee cannot be a tax[38]; and
- there is a scheme to allow an exemption to pay fees

is insufficient.

The Bill already identifies areas where the government can recover administrative costs generated by individual service providers when processing, for example, applications – as recognised in paragraph 409(1)(a) of the Bill.

It is entirely inappropriate for subordinate legislation to transfer the ordinary administrative costs of government onto industry.

Those should be funded by general taxation.

Finally, the proposal to recover costs in the manner proposed in the Bill seems to exceed what is required to satisfy the Commonwealth's cost recovery policies.

As the *Australian Government Cost Recovery Policy*[39] says:

> The characteristics of a government activity determine the type of cost recovery charge used. There are two types of cost recovery charges:
>
> > **cost recovery fees**—fees charged when a good, service or regulation (in certain circumstances) is provided directly to a specific individual or organisation
> >
> > **cost recovery levies**—charges imposed when a good, service or regulation is provided to a group of individuals or organisations (e.g. an industry sector) rather than to a specific individual or organisation. A cost recovery levy is a tax and is imposed via a separate taxation Act. It differs from general taxation as it is 'earmarked' to fund activities provided to the group that pays the levy.

And:

> It is usually inappropriate to cost recover some government activities, such as general policy development, ministerial support, law enforcement, defence and national security. In certain circumstances, cost recovery may also be contrary to intended policy outcomes, such as the provision of community services or industry support.

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[37] The rules

[38] Which means that it cannot be an exaction of money for public purposes generally and not a payment for services rendered

[39] https://www.finance.gov.au/government/managing-commonwealth-resources/implementing-charging-framework-rmg-302/australian-government-cost-recovery-policy

Section 99YBA of the *National Health Act 1953*, legislation administered by the Health and Aged Care portfolio, restricts the areas where the Minister can impose charges for 'services'.

The provisions of the Bill should, at the very least, be restrained in the same manner as section 99YBA.

Recommendation

Clauses 407 and 408 of the Bill be removed.

Given the Bill refers to 'fees' 29 times in the Bill, the Bill (and not subordinate legislation) should specify the things a fee can be charged for by the government.

At the very least, the meaning of what a 'service' is for the purposes of Part 9 of the Bill should be defined.

Rules

As discussed earlier in this submission, there are over 50 areas in which rules that can be made that impact on approved service providers, many of which can have impose significant requirements that providers will need to operationalise into business systems and then subsequently price.

A table of those areas is set out in **Attachment 1**.

Paragraph 164(1)(a) requires the Commissioner to have regard to the fact that if a registered provider is to deliver ongoing quality and safe care, the provider must remain financially viable and sustainable.

If aged care is to be provided through as 'quasi market', then this is a consideration that is not just necessary when considering issues such as the liquidity and financial adequacy of providers but also by the Minister and his Department[40] acting as 'stewards' of the market as they make the rules that will need to be complied with by providers.

Burdensome or poorly designed rules will mean that providers will exit aged care services provision if it is not possible to receive a predictable rate of return on investments in an aged care business.

As can be seen, the areas where rules can be made are very broad.

For example, paragraph 105(a) provides that rules must deliver funded aged care services in accordance with 'any applicable requirements prescribed by the rules'.

This is a provision of the widest amplitude that can impose significant requirements on service providers.

It is important that the service standard setters are obliged to consider the costs of implementation before any rules are made. In part, this can be achieved by close consultation with the aged care industry.

Paragraph 9(2)(b) of the *Civil Aviation Act 1988* imposes on CASA a duty to promote full and effective consultation and communication with all interested parties on aviation safety issues.

Paragraph 9A(3) of that Act also imposes a duty on CASA to consider the economic and cost impact on individuals, businesses and the 'community of the standards'. This obligation is embraced in part by the Bill, in paragraph 164(1)(a).

This model of consultation should also be contained in the Bill.

It is finally noted that very modern Commonwealth legislation requires consideration of business viability when making rules of standards.

[40] The Minister is empowered to make rules; however it will almost invariably be on the advice of the Department.

For example, section 40D of the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024*, which passed Parliament in February 2024, requires the Fair Work Commission to consider (amongst other things) industry business viability, innovation and productivity and administrative and compliance costs before making standards for the road transport industry.

This Bill should contain similar provisions.

Recommendation

Clause 413 be amended so that before a rule is made, the Minister is obliged to:

(a) consult with the relevant aged care service provider industry on the proposed contents of the rule and

(b) Consider the business viability, innovation productivity, and administrative and compliance costs for service providers when imposing a rule.

Commencement

As discussed earlier in this submission, the industry has no visibility on the entire range of subordinate instruments, ranging from rules to financial and prudential standards.

Seeing these provisions is necessary to allow the industry to gear up for the new rights-based person-centric system of aged care provision.

It must be anticipated that there will need to be significant investments in both personnel (including substantial levels of training) capital investments and business systems to permit aged care services to be provided as anticipated.

However, no one will precisely know until the entire suite of legislation is available.

Recommendation

The Bill commences operation two years after the last piece of subordinate legislation designed to support the legislation has been made.

Transitional provision – registration of entities into the residential care category

Finally, any transition to a new scheme should occur as seamlessly as possible.

Recommendation

A transitional provision should be included in the aged care legislation package deeming entities currently operating as a residential care home under the 1997 legislation to be registered in the proposed residential care category as at the commencement of the new legislation.

March 2024

ATTACHMENT 1- AREAS WHERE RULES CAN BE MADE

Clause 413 of the Bill creates a general power to make rules that are necessary and convenient, as well as specifically in relation to the following areas (**NOTE:** The Rules do not form part of the legislative package currently available for examination):

No	Section	The area where rule can be made
1	Section 7	extension to the meaning of what constitutes a 'serious injury'.
2	Section 7	identifying specialist aged care programs under which funded aged care services may be delivered.
3	Section 8	Prescription of the list of services for which funding is payable as well as extending what can constituted a service group.
4	Section 9	Can extend what cannot be regarded as being a residential care home.
5	Section 10	can extend the registration category of registered providers.
6	Section 12	can extend the suitability matters to be considered in relation to an individual
7	Section 13	can provide that a provision of the Aged Care Code of conduct can apply to registered providers
8	Section 16	can extend what can be regarded as being a restrictive practice.
9	Section 24	can extend the things a supporter may do
10	Section 26	can extend the duties of a supporter.
11	Section 30	can extend a duty of an individual's representative.
12	Section 50	may require someone who will receive funded aged care services of a particular service type information of a kind prescribed by the Rules.
13	Section 50	an individual can only receive funded aged care services in a service type through a provider of a kind prescribed by the rules
14	Section 50	that a person of a kind has confirmed an individual requires access to services of a particular service type.
15	Section 52	working out how long a person can receive time limited services such as transition or short-term restorative care.
16	Section 66	may set an application fee to become a registered provider.
17	Section 66	information required in an application for a residential care home, as well as any other information prescribed by the Rules.
18	Section 66	setting the time when an existing registered provider may reapply for registration.
19	Section 67	how long the Commissioner had to make a registration condition.
20	Section 68	may add to general registration requirements.
21	Section 68 and 69	when an Aged Care Quality Audit can be conducted. This will particularly be when a provider seeks registration.
22	Section 68	may specifically make additional requirements for residential aged care homes.

23	**Section 69**	**Can extend the things to be listed in a certificate of registration.**
24	**Section 75**	**may deem that an entity in a prescribed class of entities is deemed (taken to be) registered as a registered provider (but only in an emergency).**
25	**Section 77**	**may impose fees for a making a registration application.**
26	**Section 82**	**Can extend registration period for pending applications.**
27	**Section 83**	**Matters for Commissioner to consider when suspending registration on own initiative as well as being able to add additional circumstances.**
28	**Section 84**	**matters for Commissioner to consider when revoking a registration, as well as being to add additional circumstances.**
29	**Section 87**	**adding matters to the Provider Register.**
30	**Section 88***	**adding to provider registration conditions.**
31	**Section 91**	**develop worker screening requirements**
32	**Section 93**	**adding record keeping requirements.**
33	**Section 94**	**comply with requirements 'relating to fees to be paid by individuals'.**
34	**Section 95***	**who must implement maintain an incident register and take reasonable steps to prevent incidents occurring**
35	**Section 96***	**implement and maintain a complaint and feedback management system as well as maintaining a whistleblower policy**
36	**Section 99***	**capacity to add any further prudential requirements.**
37	**Section 101***	**who must establish a quality care advisory body and what are the qualifications needed to sit on the body.**
38	**Section 101***	**setting out what needs to be in a report made to an advisory body to a governing body.**
39	**Section 101***	**setting out who must offer the opportunity to establish a consumer advisory body.**
40	**Section 102**	**set out application fee for applications to have section 101 requirements disapplied, as well as setting out additional considerations the Commissioner is to have regard to when considering an application.**
41	**Section 105***	**setting out applicable requirements to deliver funded aged care services.**
42	**Section 105**	**information to be contained in something provided to explain funded aged care services.**
43	**Section 105***	**deliver applicable requirements for residential care homes and provide explanation of services.**
44	**Section 105**	**maintain and manage any residential care homes in accordance with applicable requirements.**
45	**Section 106**	**comply with restrictive practice requirements.**
46	**Section 107***	**requirements relating to ceasing the delivery of a funded aged care service.**
47	**Section 109**	**provide reports to identified officers.**

48	**Section 110**	**provide Commissioner with change in circumstances information.**
49	**Section 111**	**responsible persons of a registered provider to advice of changes of suitability circumstances.**
50	**Section 114**	**matters to be contained in a report in relation to the things that need to be considered in an annual suitability report for a responsible person.**
51	**Section 116**	**– circumstances where the System Governor (why Governor?) grants a registered notice an exemption from having at least one registered nurse on site and on duty in an approved residential care home.**
52	**Section 163***	**setting out other prudential matters to be considered when making financial and prudential standards.**
53	**Section 183***	**How:** **1. complaints may be made about a registered provider acting in a way incompatible with the Statement of Rights,** **2. how complaints may be dealt with and resolved,** **3. the considerations relevant to dealing with complaints and the processes for resolving complaints, including early resolution and restorative justice processes,** **4. the actions necessary to address complaints (including requiring a registered provider to do something and** **5. how the Commissioner may evaluate the effectiveness of actions taken to address complaints.**
54	**Section 276**	**adding to actions regarded as having a significant and adverse impact on the providers' delivery of funded aged care services for the purposes of issuing an adverse action warning notice.**
55	**Section 392**	**adding further purposes for which a grant of financial assistance may be provided.**
56	**Section 407**	**setting fees for services provided by Systems Governor.**
57	**Section 408**	**setting fees for services provided by the Commissioner.**
58	**Section 410**	**setting out when exemptions waivers and refunds of section 407 and 408 fees can be charged.**